Federal Court of Australia

CPJ16 v Minister for Home Affairs [2020] FCAFC 212

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| Appeal from: | *CPJ16 v Minister for Home Affairs* [2020] FCA 1408 |
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| File number: | NSD 1109 of 2020 |
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| Judgment of: | **JAGOT, GRIFFITHS AND SC DERRINGTON JJ** |
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| Date of judgment: | 27 November 2020 |
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| Catchwords: | **MIGRATION** – appeal from dismissal of judicial review application in respect of decision by the Minister to refuse the appellant’s protection visa under s 501A(3) of the *Migration Act 1958* (Cth) (***Act***) – whether the primary judge erred in rejecting the appellant’s claim that the Minister was precluded from relying on s 501A(3) of the Act as a result of Australia’s international *non-refoulement* obligations – whether the primary judge erred in rejecting the appellant’s claim that the Minister was precluded from refusing to grant the appellant a protection visa under s 501A(3) because the appellant met the complementary protection criterion in s 36(2)(aa) of the *Act* – whether the primary judged erred in rejecting the appellant’s claim that her detention was unlawful under Art 9 of the *International Covenant on Civil and Political Rights* – whether the primary judge erred in rejecting the appellant’s contention that the Minister had not taken into account the issue of indefinite detention **–** appeal dismissed with costs**PRACTICE AND PROCEDURE** – application for disqualification of judge on the basis of apprehended bias – whether hypothetical lay observer might apprehend that judge might not bring an impartial mind to the resolution of the question to be decided – whether logical connection between factor said to give rise to the apprehension of bias and the issues to be determined on appeal – application for disqualification dismissed  |
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| Legislation: |  *Federal Court of Australia Act 1976 (Cth)*, s 27*Migration Act 1958 (Cth*), ss 36, 501, 501A, 501F*Migration and Maritime Powers of Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth)*Federal Court Rules 2011 (Cth*), r 36.57*International Covenant on Civil and Political Rights*, Art 9  |
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| Cases cited: |  *BAL19 v Minister for Home Affairs* [2019] FCA 2189; 168 ALD 276*BBFD v Minister for Home Affairs* [2019] AATA 3907*Bienstein v Bienstein* [2003] HCA 7; (2003) 195 ALR 225*British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283*CPJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 980*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337*KDSP**v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108*McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20*[2020] FCAFC 121*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273*Minister for Immigration and Multicultural and Indigenous Affairs v Godley*[2005] FCAFC 10; 141 FCR 552*Moana v Minister for Immigration and Border Protection* [2015] FCAFC 54; 230 FCR 367*NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR *Polites v Commonwealth* [1945] HCA 3; 70 CLR 60*R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; 158 CLR 327*R v Watson; ex parte Armstrong* (1976) 136 CLR 248  |
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| Division: |  |
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| National Practice Area:  | Administrative and Constitutional Law and Human Rights |
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| Registry: |  |
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| Number of paragraphs: | 85 |
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| Date of last submissions: | 23 November 2020 |
|  |  |
| Date of hearing: | Determined on the papers  |
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| Counsel for the Appellant: | The appellant was self-represented |
|  |  |
| Counsel for the Respondent: | Mr G Kennett SC with Mr B Kaplan |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | NSD 1109 of 2020 |
|   |
| BETWEEN: | CPJ16Appellant |
| AND: | MINISTER FOR HOME AFFAIRSRespondent |

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| orders made by: | JAGOT, GRIFFITHS AND SC DERRINGTON JJ |
| DATE OF ORDERs: | 27 NOVEMBER 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

JAGOT AND GRIFFITHS JJ:

1. This appeal is from orders made by the Court on 2 October 2020 in which the now appellant’s amended originating application was dismissed (apart from allegations of bad faith and misfeasance in office, which were later disposed of by the filing of a notice of discontinuance on 16 October 2020). The primary judge’s reasons for judgment are reported as *CPJ16 v Minister for Home Affairs* [2020] FCA 1408 (**Judgment Below**). The central focus of the appellant’s concern is the refusal to grant her a protection visa. She claims to fear serious or significant harm at the hands of her ex-partner if she is returned to her country of origin, because the partner has gang affiliations and has put out a contract to have her killed.
2. It might be noted that the appellant, who is not legally qualified, represented herself both below (after she declined the primary judge’s offer to make a referral for *pro bono* legal assistance) and in the appeal. It should also be noted that the parties were agreed that the appeal should be heard on the papers and without an oral hearing. Both parties provided detailed written outlines of submissions in support of their respective positions.
3. The matter has a notably long history, the details of which are set out at [2] to [17] of the Judgment Below. That history includes the fact that the appellant’s case has been considered by the Administrative Appeals Tribunal (**AAT**) on four separate occasions, several of which were occasioned by orders made by either the Federal Circuit Court of Australia (**FCCA**) or this Court which set aside previous AAT decisions and remitted the matter for rehearing. The fourth AAT decision, which is dated 18 September 2019, resulted in a finding that the AAT was not satisfied that there was a risk that the appellant would engage in criminal conduct if she were allowed to remain in Australia, primarily because she had compelling reasons not to engage in such conduct and had not committed any offences since 2010 (see *BBFD v Minister for Home Affairs* [2019] AATA 3907).
4. After the AAT’s fourth decision, the Minister intervened and exercised his personal power under s 501A(2) of the *Migration Act 1958* (Cth) (***Act***). The Minister found that the appellant did not pass a character test because she was not of good character for the purposes of s 501(6)(c) of the *Act*. The Minister further found that it was in the national interest to refuse the appellant’s protection visa application on account of her criminal and other serious conduct. The Minister’s s 501A(2) decision supplanted the AAT’s fourth decision which was in favour of the appellant.
5. The appellant sought judicial review of the Minister’s s 501A(2) decision. This was the fourth judicial review proceeding in relation to the appellant’s protection visa application. In *CPJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 980 (**Rares J’s Judgment**), Justice Rares upheld the appellant’s contentions that the Minister’s s 501A(2) decision was invalid because:
6. in deciding whether to exercise his discretion to refuse her protection visa application the Minister failed properly to engage with the consequences of him refusing the application; and
7. in considering the national interest criterion, the Minister had taken into account either or both of two irrelevant considerations, being the importance of preserving a positive relationship with New Zealand (the appellant’s country of origin) and the potential exploitation of Australia’s visa system by individuals seeking to evade the New Zealand justice system.
8. Accordingly, on 9 July 2020, the Minister’s s 501A(2) decision was set aside and the Minister was ordered to determine the appellant’s protection visa application according to law on or before 23 July 2020.
9. On 23 July 2020, the Minister again exercised his personal power to set aside the AAT’s decision of 18 September 2019 and refused to grant the appellant a protection visa. Instead of relying upon s 501A(2) as had occurred previously, the Minister on this occasion exercised his power under s 501A(3). The significant difference between the two powers is that, unlike s 501A(2), the latter power is not subject to natural justice requirements.
10. It is convenient now to summarise the Judgment Below, which rejected the appellant’s judicial review application in respect of the Minister’s s 501A(3) decision in the manner described above.

## Judgment Below summarised

1. The Minister gave statements of reasons in respect of both his ss 501A(2) and 501A(3) decisions. The primary judge noted that large passages of the second statement of reasons had been copied from the first statement of reasons. In summarising the Judgment Below, it is sufficient to focus on those parts which are relevant to the appellant’s grounds of appeal.
2. The primary judge’s summary of the s 501A(3) statement of reasons included the basis for the Minister’s conclusion that the appellant did not pass the character test (see [22]-[29] of the Judgment Below).
3. At [26], the primary judge summarised the Minister’s consideration of the appellant’s relationship with her children, being an eight-year-old son in Australia and an adult son in New Zealand. This consideration included the fact that the Australian son had been removed from the appellant’s care in circumstances where the Children’s Court of New South Wales obtained an undertaking from the child’s father that he would not return the child to the appellant’s care. Although the Minister noted the appellant’s claim that she was a loving mother to her Australian son, the Minister concluded that her actions in respect of her children, including actions relating to the appellant’s drug use, reflected negatively on her character.
4. At [30] ff, the primary judge summarised the Minister’s assessment of the national interest, which included the appellant’s criminal and other serious conduct, as well as the Minister’s assessment of the risk that the appellant would reoffend or engage in other serious conduct if granted a visa.
5. Her Honour noted at [35] that the Minister stated that he had taken into account Australia’s international *non-refoulement* obligations and that he accepted that the appellant is a person in respect of whom Australia has protection obligations. Nevertheless, after stating that the government took its international obligations seriously, the Minister concluded that it was in the national interest to refuse the protection visa application.
6. Finally, the primary judge summarised the Minister’s reasons as to why he exercised his residual discretion to refuse the protection visa application (see [36]-[44] of the Judgment Below). Her Honour noted that, under this heading, the Minister considered the best interests of the appellant’s eight-year-old son, the expectations of the Australian community and, again, Australia’s *non-refoulement* obligations. Her Honour noted that the text of this part of the Minister’s s 501A(3) statement of reasons expanded upon the reasons relating to the previous s 501A(2) statement of reasons. At [40], with reference to Rares J’s Judgment and Australia’s *non-refoulement* obligations, the primary judge said:

Next, the Minister considered Australia’s international non-refoulement obligations. The text of this part of the reasons has been expanded, at least in part I infer to address one of the errors identified by this Court. The Minister stated that he accepted the applicant would face significant harm if returned to New Zealand (at [158]), that there was no prospect of sending her to any other country, and that if Australia sent her back to New Zealand it would breach its international non-refoulement obligations (at [160]). In a passage taken without modification from the first decision, the Minister stated (at [162]):

I am aware that the statutory consequence of a decision to set aside the original decision and refuse to grant [the applicant’s] Protection visa is that, as an unlawful noncitizen, [the applicant] would become liable to removal from Australia under s198 of the Act as soon as reasonably practicable, and in the meantime, detention under s189. I am also aware that s197C of the Act provides that for the purposes of s198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1. Her Honour observed at [41] that this part of the Minister’s reasoning should be read as stating that, unless the Minister’s decision was disturbed, the appellant would be sent back to New Zealand even though the Minister accepted that this would be in breach of Australia’s international *non-refoulement* obligations.
2. Other matters referred to by the Minister in considering whether or not to exercise his discretion included that, unless the appellant was granted a visa, she would remain in detention until she was returned to New Zealand, as well as the strength, nature and duration of the appellant’s ties to Australia.
3. Her Honour noted at [44] that although the Minister found that some of these factors weighed in favour of non-refusal of the appellant’s protection visa application, he reasoned that these factors were outweighed by the risk of the appellant engaging in further criminal or other serious conduct and the expectations of the Australian community.
4. Noting that the appellant’s complaints of false imprisonment and misfeasance in public office were to be dealt with separately, the primary judge focussed on grounds 2 and 5 of the amended originating application, which her Honour considered also subsumed grounds 3, 4 and 7. Accordingly, her Honour stated that her conclusions about grounds 2 and 5 also applied to grounds 3, 4 and 7. Grounds 2 and 5 were as follows (without alteration):

2. The Minister’s decision in the National Interest is invalid, non-compliance with the previous Federal Court orders of Rares J, on the 9th of July, that set aside the National Interest decision. The Minister’s non-compliance/contempt of the recent Federal Court orders that required the Minister to make a decision on the Applicant’s Protection visa application according to law, is causing the Applicant’s continued unlawful detention, that is not a legitimate purpose as required by the Migration.

…

5. The factual criterion has not been attained, where the Applicant has not been assessed as a person who has been convicted by final judgement of a particularly serious crime, and is not therefore assessed to be a danger to the community. This being the decision making threshold for Protection visa refusal/exclusion under Character grounds inter alia, section 501, for the stating satisfaction that must be attained reasonably, for the Minister to exercise his personal power, and refuse to grant a Protection visa application, in the National Interest.

1. The primary judge explained why she rejected the appellant’s contention that the Minister’s s 501A(3) decision was affected by jurisdictional error because he relied on s 501(6)(c) in concluding that the appellant did not pass the character test. Her Honour referred to and applied the Full Court’s decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Godley*[2005] FCAFC 10; 141 FCR 552 at [34]-[35] per Madgwick, Lander and Crennan JJ in support of her finding that the concept of “good character” in s 501(6) is a broad one and permits consideration of a person’s past and present criminal conduct and/or past and present general conduct. Her Honour noted that a similar approach had been applied by Rangiah J in *Moana v Minister for Immigration and Border Protection* [2015] FCAFC 54; 230 FCR 367 at [54].
2. As to the appellant’s contention that, because the AAT had found that Australia’s *non-refoulement* obligations were engaged in respect of her case and that she met the criterion for a protection visa in s 36(2)(aa), the Minister was obliged to grant her a protection visa, the primary judge rejected that contention relying upon *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***BFW20*** [2020] FCAFC 121 at [131] and ***KDSP*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108, which overruled ***BAL19*** *v Minister for Home Affairs* [2019] FCA 2189; 168 ALD 276. Her Honour stated that the appellant had misunderstood the relevant passages from *BFW2O* and *KDSP*, which her Honour stated did not support the appellant’s claims.
3. Her Honour said at [82] (emphasis in original):

Therefore, to the extent that the applicant contends these circumstances *required* the Minister to grant her a protection visa, she is incorrect. The effect of *BFW20* and *KDSP* is that the suite of powers in ss 501, 501A, 501B, 501BA and 501F (and for that matter, s 501C and s 501CA, which are beneficial provisions) are available in respect of protection visas. That necessarily renders the “character test” in s 501(6) applicable to the exercise of those powers. The Minister is able to (and indeed must, as a necessary component of exercising any of these powers) consider whether she or he is satisfied the person does not pass the character test, by reason of any of the matters set out in s 501(6), not only whether a person has a “substantial criminal record” as defined in s 501(7).

1. Her Honour emphasised, however, that the Minister was obliged to take into account (i.e. “actively engage with”) the fact that there was a finding by the AAT that the appellant met the core criterion for a protection visa and fell outside the mandatory “character” refusal terms of s 36(1C). Her Honour added that, given the object and purposes of a protection visa, these matters are likely to be “a fundamental element” in the exercise of the discretion to refuse a protection visa, citing *R v Toohey; Ex parte Meneling Station**Pty Ltd* [1982] HCA 69; 158 CLR 327 at 333.
2. Her Honour then proceeded to explain why, after “careful reflection”, she accepted the Minister’s contention that he had engaged with these matters, as reflected in his s 501A(3) statement of reasons. Her Honour’s essential reasoning is reflected at [91]:

Recalling that what must be confronted is the “risk” of harm, and at least on the findings in this case not necessarily the occurrence of harm as a matter of certainty, I accept the Minister did confront this matter. In substance, the Minister accepted there was a “real risk” (the language of s 36(2)(aa)) the applicant may be tortured, beaten, or the victim of “violent retribution”. His findings appeared to include, as senior counsel accepted, a finding there was a “real risk” the applicant would be killed. To repeat, the Minister accepted there was a real risk the applicant would lose her life if returned to New Zealand. He accepted this risk weighed in favour of not refusing a protection visa but simply was not moved to allow that risk (or the other considerations which two Tribunals had accepted) to guide the exercise of his discretion.

1. Her Honour then explained why she rejected the appellant’s claim that her detention was unlawful under Art 9 of the International Covenant on Civil and Political Rights (**ICCPR**) because her detention was not authorised by law. At [101], the primary judge said:

The law is well established and clear, as the Minister submits. The applicant’s contentions about the ICCPR must be rejected as a matter of Australian domestic law. Although it is understandable that a lay person in the position of the applicant might look to the terms of the ICCPR, and the Guidelines issued under it, to ascertain how Australia, as a signatory to the ICCPR, might establish and maintain any system of executive detention, the fact is that Parliament has made different, and harsher, choices in s 189 and s 196 of the Act.

1. Finally, the primary judge addressed the appellant’s contention (which her Honour noted may not have fallen squarely within grounds 2 and 5) that the Minister had not taken into account that she would be indefinitely detained in circumstances where the Minister accepted that returning her to New Zealand would be in breach of Australia’s international *non-refoulement* obligations. The primary judge rejected this contention on the basis that the Minister’s reasons made plain “that as a matter of fact there was no basis for him to consider that she might be indefinitely detained because he assumed there was no real difficulty in removing the applicant to New Zealand in accordance with s 198 of the Act” (at [106]).

## Notice of appeal

1. The appellant filed two notices of appeal, the first dated 2 October 2020 and the second dated 7 October 2020. The initial notice of appeal took a narrative form, whereas the later notice of appeal adopted a more orthodox approach in identifying grounds of appeal. There was a substantial overlap between the two documents. We have focussed upon the later notice of appeal, which it is reasonable to assume amended and refined the initial notice of appeal. We have treated the contents of the initial notice of appeal as submissions. The later notice of appeal is referred to as the “notice of appeal”. The notice of appeal contained the following four grounds of appeal (without alteration):

1. The primary Judge erred by failing to apply Australia’s International Protection obligations and non-refoulement obligations when determining the judicial review of the Minister’s decision to refuse to grant the Applicant’s Protection visa in the National Interest under section 501A (3) of the Migration Act.

2. The primary Judge erred by making the determination that s501A (3) of the Migration Act, applies to Protection visa applications, in accordance with the clear intention in the text at s501F of the Migration Act.

3. The primary Judge erred by making the determination that Article 9 of the International Covenant on Civil and Political Rights, and other International law that Australia is signatory to, that applies to fundamental human rights, and has been codified into Australia’s legislation, is not available in Australia.

4. Allegiance of bad faith, conflict of interest caused primary Judge to be prejudiced against the Federal Court application, resulting in bias judgement. In the interest of justice and to uphold the integrity of the Federal Court of Australia, the Hon Chief Justice Allsop to please consider the allocation of this appeal be docketed for an urgent hearing in the Federal Court, to make an objective determination, as the Applicant is in Immigration Detention.

1. The first two grounds of appeal broadly reflect issues 1 to 3 in the appellant’s amended originating application below. Ground 3 repeats the fourth issue run below. Ground 4 is new and claims that the primary judge was biased.
2. The notice of appeal did not in its terms seek to raise another contention made below (issue 5 in the appeal) which was rejected by the primary judge. That contention was that the Minister fell into jurisdictional error by not having regard to the prospect of the appellant being kept in immigration detention indefinitely. The appellant did, however, agitate this issue in her written submissions in the appeal. The Minister took no objection and responded to that claim.

## Appellant’s affidavits dated 5 October 2020 and 9 November 2020

1. The appellant filed two affidavits. The first is dated 5 October 2020. The affidavit attached copies of various judgments and decisions relating to the appellant. We have taken that material into account.
2. Virtually all of the body of the affidavit was objected to by the Minister. The appellant required leave under s 27 of the *Federal Court of Australia Act 1976* (Cth) to rely in the appeal on material which had not been filed below. She also needed to comply with r 36.57 of the *Federal Court Rules 2011* (Cth). The Minister submitted that these requirements had not been met and there was no basis for the Court to receive this fresh evidence. Objections were also taken on grounds of relevance and the material being argumentative. A hearsay objection was raised in respect of the first sentence of [9] of the affidavit.
3. The Minister’s objection should be upheld on the grounds advanced by him.
4. The following part of [9] attracts different considerations because *prima facie* it is relevant to the appellant’s complaint of apprehended bias against the primary judge:

I believe my Federal Court application was prejudiced against by being allocated to a Judge who was a former Minister’s solicitor and it would be a conflict of interest for her Honour to make an adverse judgement against the Minister’s legal counsel even though they have ill-advised the Minister’s to make decisions that are non-compliant with the Migration Act, and the Minister’s decision falls into the same jurisdictional error as the previous Minister’s decision, that was set aside in Federal Court orders on the 9th of July. …

1. This material is not, however, in an admissible form, involves hearsay and is argumentative. It will be taken into account, however, as a submission relating to ground 4 of the notice of appeal.
2. The second affidavit is dated 9 November 2020. The date may be significant, because orders were made on 5 November 2020 which required the appellant to file and serve any further written outline of submissions by that date. The affidavit annexed a copy of the appellant’s complaint dated 7 November 2020 to the United Nations Human Rights Commission. It contained serious allegations against the Australian government and various individuals, none of which is relevant to the four grounds in the notice of appeal.
3. The Minister objected to the entirety of this affidavit, relying upon similar grounds to those taken in respect of the first affidavit.
4. To the extent that the document is treated as an affidavit, it is inadmissible, having regard again to the appellant’s non-compliance with r 36.57, but also because the material it contains is scandalous and irrelevant. To the extent that the document is to be regarded as the appellant’s further submissions, the submissions are likewise scandalous and irrelevant to the appeal, save for the limited parts which repeat the appellant’s submission that the Minister erred in proceeding under s 501A(3) of the *Act*.

## Appellant’s submissions summarised

1. The appellant’s submissions in support of grounds 1 and 2 of the notice of appeal may be summarised as follows (while noting that, perhaps unsurprisingly given the appellant’s status as a litigant in person, the submissions were at times difficult to follow and also overlapped).
2. In substance, ground 1 of the notice of appeal raises the contention below that the Minister’s s 501A(3) decision is invalid because it is the same as that which Rares J quashed on 9 July 2020.
3. On ground 2, the appellant substantially repeated her submissions below. At the heart of her complaint is her claim that by refusing her protection visa application under s 501A(3), the Minister repeated the same jurisdictional error as identified in Rares J’s Judgment relating to s 501A(2), namely a failure to consider Australia’s *non-refoulement* obligations. The appellant claimed that the primary judge had misconstrued ss 501A(2) and 501A(3) in holding that these powers were available in respect of protection visa applications. Her submission was as follows (without alteration):

**… The correct interpretation of 501F of Act, is that s 501A(2) and ((3) of the Act is not to be applied to the Protection visa applications. (s 502 is the correct section of the Act is to be applied to a Protection visa application). The Minister’s decision in the National Interest is invalid. \*(Part of my Ground 2)**

1. The appellant repeated several times that the primary judge erred in not addressing her submission that, in accordance with s 501F, neither ss 501A(2) nor (3) applied to protection visa applications. She said that because a visa applicant can only have one protection visa application, “it’s axiomatic that s 501F is not to be misconstrued to be applied to protection visa applications” and that the primary judge erred in misinterpreting s 501F as permitting the Minister to make a decision under s 501A(3) in respect of a protection visa application in circumstances where “any other protection visa applications that the Applicant has, are taken not to have been effected by the National Interest decision”. At [35] of her outline of written submissions, the appellant made the following submission:

Another reason why the Minister’s Decision in the National Interest under section 501A (3), is invalid is because of the clear intention in the text of s 501F of Act. s501F, which implies that a decision made under s501A is not to be applied to protection visa’s nor protection visa applications. It is not possible to have more than one Protection visa application, so the logical interpretation is that 501 A does not actually apply to PVxa’s. S501 A applies to other visa’s other than a Protection visa application.

1. In submitting that the Minister was prevented from exercising the power under s 501A(3) to refuse to grant her a protection visa because it had previously been found that she met the complementary protection criterion in s 36(2)(aa), the appellant appeared to rely upon Rares J’s judgment in *BAL19*.
2. The appellant also claimed that there were “a number of factual errors in the Minister’s decision, including the false allegations that are documented under the title, “Conduct in relation to her children”, at paragraphs [65]-[74]” of the Minister’s s 501A(3) statement of reasons. It is difficult to see how these claims fall within the notice of appeal. Moreover, even if the appellant obtained leave to raise these matters it is difficult to see how such errors of fact could give rise to jurisdictional error, noting the limited scope of judicial review of findings of fact.
3. The appellant “vehemently” denied the allegations implicit in the Minister’s findings concerning her conduct in relation to her children. She further alleged that the Minister’s findings were based upon “unsubstantiated case notes” in circumstances where “there is plenty of evidence to prove the case notes are unfounded and misleading”. The appellant did not particularise that evidence and it is difficult to see how these claims fall within the terms of her notice of appeal.
4. As to ground 3 of the notice of appeal, the appellant contended that the ICCPR rendered her detention unlawful and she substantially repeated the submissions she made below on this matter.
5. Ground 4 of the notice of appeal involves a claim that the primary judge was biased. The appellant contended that her Honour had a conflict of interest because she had previously represented the Minister as a solicitor.
6. As to issue 5, which relates to indefinite detention, the appellant cited *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; 220 FCR 1 in support of her contention that the Minister had failed to take into account the legal consequences of his s 501A(3) decision, namely the appellant’s indefinite detention.
7. For completeness, in summarising the appellant’s case, mention should also be made of three emails sent by her to the Registry. The first email, which is dated 10 November 2020, was sent after the Court made orders on 9 November 2020 requiring the respondent to file and serve a list of grounds of objection to the appellant’s affidavit filed on 8 October 2020, as well as providing the appellant with an opportunity to provide written submissions in reply to the Minister’s written outline of submissions and any objections to evidence. In this email, the appellant also challenged SC Derrington J sitting on the appeal.
8. The appellant complained that she had not been provided with reasons for the making of the orders dated 9 November 2020, nor did she have an opportunity to comment before they were made. She said that the orders were to be “seen merely as a way of dragging this appeal out when my circumstances inside Immigration Detention require an expedited outcome”.
9. There is no basis for the appellant’s complaint of procedural unfairness, simply because the orders, which were of a procedural nature, did not adversely affect the appellant’s interests. Indeed, they were designed to protect her interests. It is normal procedure for the parties to be given an opportunity to raise and respond to objections to evidence. Moreover, providing the appellant with an opportunity to file written submissions in reply to those of the Minister simply reflected the fact that, by the orders dated 5 November 2020, the Minister was to provide his written outline of submissions by 23 November 2020 and fairness required that the appellant be given an opportunity to reply to those submissions. She was given one week to do so. The need to provide the appellant with such an opportunity was particularly important in a case such as this, where the parties agreed it should be heard and determined on the papers and without an oral hearing.
10. As to the request that SC Derrington J recuse herself, we have had the opportunity to read her Honour’s reasons in draft for declining to do so. We agree with those reasons.
11. The appellant’s second email is dated 23 November 2020. With reference to the orders dated 9 November 2020, the appellant stated that she had not filed an affidavit on 8 October 2020 and that this occurred on 12 October 2020. This indicates a misunderstanding on the appellant’s part concerning the lodgment of electronic material with the Court. The affidavit is stamped as having been filed on 8 October 2020.
12. In her second email, the appellant also asked the Court to have regard to the transcript of the hearing before Mortimer J. Presumably, this request was made in support of the appellant’s complaint of bias. She pointed, however, to nothing in that transcript which provided any such support. Nothing in that 24 page transcript suggests that the appellant received anything other than a fair hearing. Her Honour listened patiently to the appellant’s oral submissions and provided helpful guidance to her in recognition of her status as a litigant in person. At the end of the hearing her Honour made a point of thanking the appellant personally “for your submissions this morning and your submissions in writing; they’re intelligible and intelligent”.
13. In her second email, the appellant also asked the Court to determine her appeal expeditiously and not wait until 30 November 2020 as contemplated by the orders dated 9 November 2020.
14. In the third email, which was sent on 24 November 2020, the appellant complained that she was not safe in detention and that she was on a hunger strike until she was given a protection visa.

## Minister’s submissions summarised

1. It is unnecessary to summarise the Minister’s submissions because they are substantially reflected in the reasons for dismissing the appeal.

## Consideration and determination

## (a) Relevant legislative provisions

1. It is convenient to set out the following relevant provisions from the *Act*.
2. Sub-sections 36(1C) and (2C) which relate to the criteria for the grant of a protection visa provide:

**Protection visas – criteria provided for by this Act**

…

(1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

(a) is a danger to Australia’s security; or

(b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

Note: For paragraph (b), see section 5M.

…

*Ineligibility for grant of a protection visa*

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia’s security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

…

1. Another criterion for the grant of a protection visa is specified in s 36(2)(aa), which provides:

(2) A criterion for a protection visa is that the applicant for the visa is:

…

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

…

1. Sub-sections 501(6)(c) and (d) are relevant to the concept of “good character”. They provide:

**501 Refusal or cancellation of visa on character grounds**

…

*Character test*

(6) For the purposes of this section, a person does not pass the ***character test*** if:

…

(c) having regard to either or both of the following:

(i) the person’s past and present criminal conduct;

(ii) the person’s past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

…

1. It is also relevant to note the terms of s 501A(3) which provide the source for the Minister’s latest decision to refuse the appellant a protection visa:

**501A Refusal or cancellation of visa—setting aside and substitution of non adverse decision under subsection 501(1) or (2)**

…

(3) The Minister may set aside the original decision and:

(a) refuse to grant a visa to the person; or

(b) cancel a visa that has been granted to the person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

…

1. Finally, s 501F provides as follows:

**501F Refusal or cancellation of visa—refusal of other visa applications and cancellation of other visas**

(1) This section applies if the Minister makes a decision under section 501, 501A, 501B or 501BA to refuse to grant a visa to a person or to cancel a visa that has been granted to a person.

(2) If:

(a) the person has made another visa application that has neither been granted nor refused; and

(b) the visa applied for is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;

the Minister is taken to have decided to refuse that other application.

(3) If:

(a) the person holds another visa; and

(b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;

the Minister is taken to have decided to cancel that other visa.

(4) If the decision referred to in subsection (1) is set aside or revoked, the decision that the Minister is taken to have made under subsection (2) or (3) is also set aside or revoked, as the case may be.

(5) A decision that the Minister is taken to have made under subsection (2) or (3) is not reviewable under Part 5 or 7.

Note: For notification of decisions under this section, see section 501G.

## (b) Ground 1 of the notice of appeal – *non-refoulement*

1. This ground appears to have two parts. The first relates to the appellant’s complaint that the Minister’s s 501A(3) decision is the same as the previous decision made under s 501A(2) which was set aside by Rares J on 9 July 2020. The second part relates to the appellant’s complaint that it was unlawful of the Minister to take a different view to that of the AAT in relation to the question whether she passed the character test.
2. The first of those arguments cannot be accepted. The Minister was not precluded by anything in Rares J’s reasons for judgment or associated orders from exercising his power under s 501A(3) in the manner which he did, which is a different source of power than s 501A(2).
3. The appellant’s second primary argument under ground 1 of the notice of appeal should also be rejected. In essence she complains that the primary judge erred in rejecting her argument that the Minister’s s 501A(3) was invalid because it was inconsistent with the AAT’s earlier determination that she did pass the character test. The central difficulty with the appellant’s argument is that it fails to recognise that the question whether or not a person passes the character test falls to be determined by various different paths which are set out in s 501(6). Merely because the AAT found that the appellant passed the character test under s 501(6)(d) on the basis that it assessed that there was no risk that the appellant would engage in criminal conduct in Australia did not preclude the Minister, in determining whether or not to exercise the power under s 501A(3), from coming to a different view of the appellant’s character by reference to s 501(6)(c).
4. Even though the appellant has failed to demonstrate any appealable error on the part of the primary judge in rejecting her claim that the Minister was precluded from relying on s 501A(3) in her circumstances, it is not difficult to understand her sense of grievance arising from the Minister’s decision to refuse the grant of a protection visa (which would have the consequence of returning the appellant to her country of origin) in circumstances where the Minister acknowledged that she faced a real risk of suffering harm (indeed, that she might be killed) if that were to occur and that her removal would be in breach of Australia’s *non-refoulement* obligations. The Minister candidly acknowledged that while those *non-refoulement* obligations weighed in favour of non-refusal of the appellant’s protection visa application, this was outweighed by other matters relied upon by the Minister in concluding that it was in the national interest to refuse to grant the appellant a protection visa. Neither below nor in the appeal did the appellant challenge the Minister’s assessment on the ground of legal unreasonableness.
5. It might be added, however, that the current Minister’s approach seems to be inconsistent with a statement made by the then Minister for Immigration and Border Protection (Scott Morrison MP) in his second reading speech to the *Migration and Maritime Powers of Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth). With reference to Sch 5 of the Bill, which the Minister said made clear that “the removal power is available independent of assessments of Australia’s non-refoulement obligations”, the Minister said (emphasis added):

**Asylum seekers will not be removed in breach of any non-refoulement obligations identified in any earlier processes. The government is not seeking to avoid those obligations** and will not avoid these obligations, rather it seeks to be able to effect removals in a timely manner once the assessment of the applicant’s protection claims has been concluded.

The current Minister apparently took a different view. The appellant did not raise a complaint of procedural unfairness in this regard.

## (c) Ground 2 of the notice of appeal – *BAL19*

1. As to ground 2 of the notice of appeal, as mentioned the appellant appears to rely upon *BAL19* in support of her claim that, because she met the complementary criterion in s 36(2)(aa), the Minister was precluded from refusing to grant her a protection visa under s 501A(3).
2. This argument is untenable in circumstances where the Full Court has overruled this aspect of *BAL19* in two separate cases (see *KDSP* and *BFW20*). In addition, the appellant’s reliance on s 501F of the *Act* is misconceived. That provision performs a different function in relation to other applications and does not prevent the Minister from relying on s 501A(3).

## (d) Ground 3 of the notice of appeal - ICCPR

1. As to ground 3 of the notice of appeal, which relies upon the ICCPR in claiming that the appellant’s detention is unlawful, this claim fails to recognise that Australia’s ratification of the ICCPR does not make that instrument part of Australia’s domestic law or a direct source of individual rights and obligations. It is plain that the text of relevant provisions of the *Act*, in particular ss 189 and 196, are paramount and prevail over Australia’s international obligations in respect of the ICCPR (see, for example, *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273 at 286-287 per Mason CJ and Deane J and *Polites v Commonwealth* [1945] HCA 3; 70 CLR 60).

## (e) Ground 4 of notice of appeal - bias

1. As to ground 4 of the notice of appeal, which alleges bias on the part of the primary judge, this ground must also be rejected. To the extent that the appellant alleges actual bias, she carries a heavy burden of demonstrating that the primary judge had a closed mind to the issues raised and could not be persuaded in the appellant’s favour. The appellant has fallen far short of meeting this standard. She points to no material to indicate that the primary judge had a closed mind and was not open to persuasion. Indeed, the evidence is strongly to the contrary, as is reflected in the opportunities given by the primary judge below for the applicant to file lengthy written submissions, leave being granted to amend her application and leave also being granted for her to run new arguments (see also [52] above).
2. If the appellant intended to raise a claim of apprehended bias, it is well settled that the relevant question is whether a fair-minded and reasonably informed lay observer might reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of her case (see *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337). There is simply no evidentiary basis to satisfy this test. Indeed, the material is to the contrary (see [52] and [70] above).

## (f) Issue 5 – indefinite detention

1. As noted, the Minister did not raise any objection to the Court considering and determining the appellant’s submissions which challenged the primary judge’s rejection of issue 5, even though it was not squarely raised in the notice of appeal.
2. No appealable error has been demonstrated in respect of the primary judge’s determination of this issue (see [25] above). Having regard to the Minister’s statement of reasons for his s 501A(3) decision, it is evident that he proceeded on the basis that the appellant would not be indefinitely detained because he assumed that there would be no difficulty in returning her to her country of origin in accordance with s 198 of the *Act*. The primary judge was correct to conclude that it was open to the Minister to proceed in this fashion.

## Conclusion

1. For these reasons, the appeal should be dismissed, with costs.

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| I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot and Griffiths. |

Associate:

Dated: 27 November 2020

REASONS FOR JUDGMENT

SC DERRINGTON J:

1. I have read in draft the reasons to be published by Jagot and Griffiths JJ. I agree with the orders proposed by their Honours and with their Honours’ reasons.

## Application for disqualification

1. There is one additional matter with which I must deal separately. As recorded at [47] of the joint reasons, by email to the Registrar of the Court dated 10 November 2020, the appellant has asserted that I have a conflict of interest in respect of this matter and should “not be docketed as a Judge for the determination of this Appeal”.
2. Although no formal application has been made, I have treated that email communication as an application for me to disqualify myself on the ground of apprehended bias. The basis of the apprehension is the appellant’s assertion that Professor Rosalind Croucher is a “close colleague”. Professor Croucher was the President of the Australian Law Reform Commission from December 2009 until July 2017, the position to which I was appointed in January 2018. Professor Croucher and I have never worked together.
3. In her application for judicial review before the primary judge, the appellant included allegations of misfeasance in public office and false imprisonment. On 2 October 2020, the primary judge ordered that the appellant’s application for relief in relation to those allegations be listed for case management, if necessary, at a date to be fixed. Subsequently, on an application for a mandatory injunction requiring the Minister to release her from immigration detention, the appellant indicated to Wigney J that she intended to discontinue that aspect of her case and has signed a notice of discontinuance (*CPJ16 v Minister for Home Affairs* [2020] FCA 1553 at [6]). A Notice of Discontinuance in respect of those matters was filed on 16 October 2020.
4. Nevertheless, ground 2 of the initial Notice of Appeal filed on 2 October 2020 asserts that one of the “compelling circumstances that are requiring of an expedited hearing” is that there is “malfeasance occurring” in the appellant’s immigration case. In her affidavit filed on 8 October 2020, the appellant makes certain allegations against Professor Croucher that are said to be relevant to her claims for relief against others for misfeasance in public office and false imprisonment.

## Relevant Principles

1. The usual starting point for considering the principled approach to disqualification applications is ***Ebner*** *v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ), where it was held that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.
2. As was observed by Lee J in *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 at [18], there is often arid debate in applications of this kind as to whether the *Ebner* test is undemanding or creates a “low hurdle”. However, irrespective of whether one characterises the test as undemanding, balanced against it is the well-established proposition that a judge should not disqualify himself or herself on the ground of bias or reasonable apprehension of bias unless “substantial grounds” are established: *Bienstein v Bienstein* [2003] HCA 7; (2003) 195 ALR 225 at [36] (McHugh, Kirby and Callinan JJ); *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 at 262; *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283 at [45] (French CJ) and [71] (Gummow J).
3. In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ noted, at [8], that the principled approach involves both the identification of what might lead a judge to decide a case other than on its legal and factual merits and then the articulation of the logical connection between that factor and the feared deviation from the course of deciding a case on its merits.
4. In the present case, this Court is not called upon to determine any issue of malfeasance in public office or false imprisonment – those issues have been abandoned by the appellant. There is no ground of appeal, nor anything contained in the appellant’s submissions dated 7 October 2020, which touches upon the allegations against Professor Croucher described in the appellant’s affidavit. The primary judge was not asked to, and did not, make any findings in relation to Professor Croucher, nor is this Court invited to do so. To the extent that the appellant has raised issues of malfeasance as a factor going to the question of an expedited appeal, the appeal has already been expedited. Her initial Notice of Appeal was filed on 2 October 2020 and the appeal was listed before this Court on 2 November 2020 to be determined on the papers, at the appellant’s request.
5. It should be clear from the issues that arise on the appeal, or more particularly from those issues that are not the subject of this appeal, that there is no logical connection between the factor that the appellant suggests might lead me to decide the appeal other than on its legal and factual merits and her fear that I might deviate from so doing. I do not believe that there is a sound basis upon which any apprehension might be held by a reasonable fair-minded observer that the present appeal might not be determined on the merits.

## Conclusion

1. I am satisfied that I ought not disqualify myself.

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| I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice SC Derrington. |

Associate:

Dated: 27 November 2020