IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S10 OF 2011**

BETWEEN:

PLAINTIFF S10
Plaintiff
MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR
Defendants

NO S43 OF 2011

BETWEEN:

JASVIR KAUR
Plaintiff
MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR
Defendants

NO S49 OF 2010

10 BETWEEN:

PLAINTIFF S49 OF 2011
Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR
Defendants

NO S51 OF 2010

BETWEEN:

PLAINTIFF S51 OF 2011
Plaintiff
MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR
Defendants

SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

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PART I PUBLICATION OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. Each Plaintiff challenges action taken by the First Defendant (**Minister**), or by officers of the Department of Immigration and Citizenship (**Department**), in connection with requests that the Minister exercise one or more "non-compellable" powers under the *Migration Act 1958* (Cth) (**Act**) and Plaintiff S51 also challenges action taken by officers of the Department independently of any such request. They seek to impugn the action taken on the basis of failure to accord procedural fairness.

3. The proceedings raise the following key issues:

   (i) What is the nature of the power exercised by officers of the Department when assessing a request made by a non-citizen for the Minister to exercise a non-compellable power under the Act, or when considering the case of a non-citizen independently of such a request being made? What are the legal conditions, if any, of its exercise? In particular, is an officer bound to accord procedural fairness to a non-citizen who makes a request, or a non-citizen who is the subject of independent Departmental consideration?

   (ii) Is the Minister obliged to accord procedural fairness in personally exercising, or considering the exercise of, one of the non-compellable powers under the Act?

   (iii) Have any of the Plaintiffs established that he or she was denied procedural fairness and, if so, what is the relief, if any, to which he or she is entitled?

4. Ms Kaur and Plaintiff S51 also allege that the Second Defendant (**Secretary**), by his officers, failed to apply Guidelines issued by the Minister in assessing their respective requests. In the case of Ms Kaur, the Further Amended Application at [8] characterises this failure as a manifestation of a denial of procedural fairness, although the Principal Submissions characterise it at [128]-[132] as an independent error. The Defendants will address the issue on that basis although the Further Amended Application should be further amended to reflect the actual ground of challenge.

PART III SECTION 78B NOTICE

5. Notices have been given under s 78B of the *Judiciary Act 1903* (Cth) by the Plaintiff in each proceeding. The Defendants do not consider that any further notices are required.

PART IV MATERIAL FACTS

6. The Defendants generally accept the Plaintiffs' account of the procedural history for each of the four matters set out in the Principal Submissions at [7]-[16] and

in the Plaintiff S51 Submissions at [9], but provide a more complete and detailed account in addressing the alleged failures to accord procedural fairness in Part VI below.

7. They note at the outset, however, that each Plaintiff: entered the migration zone other than at the excised offshore place and only Plaintiff S51 was not immigration cleared; was able to apply, and did apply, for a substantive visa; had his or her visa application considered on its merits and refused; unsuccessfully sought merits review before either the Migration Review Tribunal (**MRT**) or the Refugee Review Tribunal (**RRT**); unsuccessfully sought judicial review; submitted at least one request that the Minister exercise one or more of non-compellable powers; and had his or her case considered at least once by the Minister personally under either s 351 (in the case of Ms Kaur) or s 417 (in the case of Plaintiffs S10, S49 and S51).

PART V APPLICABLE LEGISLATIVE PROVISIONS

8. The Defendants agree that the relevant constitutional, statutory and regulatory provisions will be agreed with the Plaintiffs and provided to the Court (see Principal Submissions at [156]).

PART VI STATEMENT OF ARGUMENT

INTRODUCTION

9. The Plaintiffs contend that the present cases are analogous to *Plaintiff M61/2010E v Commonwealth*.[1] Far from providing an analogy, *Plaintiff M61* emphasises the need for close analysis of the particular power said to be enlivened and of the particular circumstances in which that is said to have occurred.

10. The conclusion in *Plaintiff M61* that the then Minister had expressly engaged the powers in ss 46A and 195A of the Act by reason of an announcement made in July 2008 about strengthening the processes for refugee status assessment (**RSA**) and independent merits review (**IMR**) was drawn in circumstances where, in the absence of any exercise of the power in s 198A, the RSA and IMR procedures were the means of meeting Australia's obligations under the Refugees Convention and Refugees Protocol and where ss 46A and 195A were the only remaining statutory powers that could be engaged to avoid breaching those obligations.[2] More critically, characterising the July 2008 announcement as a decision to consider the exercise of the relevant powers, reconciled an "irreducible tension" between the exercise of a statutory power to detain in a way that prolonged detention, because inquiries are being made, and those inquiries having no statutory foundation.[3] As was explained:[4]

> [T]he effect of the Minister's announcement was that, instead of removing offshore entry persons from Australia to a declared country under the powers given under s 198A, consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations. The outcome of that consideration in any individual case

1 (2010) 272 ALR 14.
2 (2010) 272 ALR 14 at [40].
3 (2010) 272 ALR 14 at [66], [71].
4 (2010) 272 ALR 14 at [70]-[71].

> would depend upon the result of the processes established by the Department in response to the ministerial announcement. But in order that Australia *not* breach the international obligations it had undertaken in the Refugees Convention and Refugees Protocol, consideration would be given, in every case, to the exercise of the only statutory powers available when the Pacific Strategy was no longer to be pursued: the powers given by ss 46A and 195A. Having decided that he should consider the exercise of power under ss 46A and 195A in respect to every offshore entry person who thereafter claimed that Australia owed that person protection obligations, the Minister required his department to undertake the inquiries necessary to make an assessment and, if needs be, review the conclusion reached.
>
> There having been a decision to consider exercise of the relevant powers in the present and other similar cases, the unchallenged assumption made in these matters, that detention during the conduct of the assessment and review processes was lawful, is seen to be soundly based. ...

11. With the exception of s 195A, the non-compellable powers at issue here arise for possible exercise only after a non-citizen has had the opportunity to seek merits review of a decision made by the Minister not to grant a visa, in either the MRT or the RRT. Both s 48B and s 417 of the Act apply only to non-citizens who have invoked the protection visa provisions in Pt 2 of the Act and had their claims for protection assessed and determined. To engage s 417 of the Act, the non-citizen must also have applied to, and been the subject of a decision by, the RRT. Section 351 of the Act similarly applies only to non-citizens who have availed themselves of the visa application procedures in Pt 2 of the Act and the review provisions in Pt 5: s 351(1). Section 195A applies to all unlawful non-citizens detained under s 189. With the exception of non-citizens who meet the definition of an "offshore entry person" (such as the plaintiffs in *Plaintiff M61*), the only non-citizens in detention under s 189 who may not apply at least for a protection visa[5] are those who have already done so (and are therefore caught by s 48A) and those who are precluded from making a valid application by Subdivs AJ and AK of Div 3 of Pt 2.

12. In so far as the powers in ss 48B, 351 and 417 of the Act are concerned, there has been no announcement of the nature found to have been made in *Plaintiff M61*, of a decision positively to consider the exercise of those powers in every case. Nor has there been any equivalent announcement in respect of the power in s 195A of the Act in so far as it applies to persons other than offshore entry persons. The absence of such an announcement is hardly surprising. By contrast with the situation in *Plaintiff M61*, by the time non-citizens like the Plaintiffs submit a request to the Minister under s 48B, s 351 or s 417 they have had the opportunity to invoke Australia's international obligations under the Refugees Convention and Refugees Protocol by applying for a protection visa, and in most cases also the opportunity to apply for another class of visa. That application has, in turn, been assessed and determined and, at least in the case of non-citizens requesting the exercise of power under ss 351 or 417 (if not s 48B), reviewed on the merits and possibly also (as in the present cases) for legal error. In so far as the application of s 195A is concerned, the possibility, in

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5 Subject to certain exceptions (s 193), one of which applied in the case of Plaintiff S51, unlawful non-citizens who are detained under s 189 of the Act may apply for any type of visa within a specified period (s 195(1)) and, after the expiration of that period, may still make an application for a protection visa or a bridging visa (s 195(2)).

s 198(2)(c) of the Act, of non-citizens like Plaintiff S51 making a valid visa application has been accommodated.[6]

13. In the absence of a positive decision accompanying the issue of the Guidelines, the Plaintiffs are left to rely upon the terms of the Guidelines alone. For the reasons outlined under the next heading, it cannot be inferred from the Guidelines that the Minister has taken the first step that the Court found the Minister had taken in *Plaintiff M61*. It follows that the actions of Departmental officers in administering the Guidelines cannot be characterised as actions "under and for the purpose of" the Act.

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GUIDELINES

14. The fact that the Guidelines set out procedures to be followed "in order to ensure the efficient administration of [the Minister's] public interest powers" is not indicative of a decision actively to consider (or not consider) the exercise of his non-compellable powers in every case (or in every case within a particular class).[7]

15. The absence of any decision on the part of the Minister to embark on the task of personally considering the exercise of the relevant powers in any identified class of cases is apparent from the stated purpose of each of the Guidelines:

20 (i) The stated purpose of the "Minister's Guidelines on ministerial powers (s 345, s 351, s 391, s 417, s 454 and s 501J)" (**s 351/417 Guidelines**) is to:[8]

- *explain the circumstances in which I may wish to consider exercising my public interest powers under s 345, s 351, s 391, s 417, s 454 or s 501J of the Act to substitute for a decision of a review tribunal a more decision which is more favourable to the visa applicant(s)*
- *explain how a person may request my consideration of the exercise of my public interest powers*

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- *inform departmental officers when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.*

(ii) The "Minster's Guidelines – S48A Cases and Requests for S48B Ministerial Intervention" (**s 48B Guidelines**) are for use "when considering whether to forward to the Minister cases that the Minister may wish to consider using the ministerial non-compellable and non-delegable power to allow a person to make a further PV application".[9]

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6 See *Plaintiff M61* at [71].
7 Cf Principal submissions at [45]-[51]; Plaintiff S51 Submissions at [19]-[24].
8 See Section 1 of the s 351/417 Guidelines: PS51, AB 717-718. Substantially the same form of these Guidelines was in force at the time of each of the various requests the subject of challenge in these cases. As it includes all three sets of Guidelines, these Submissions will provide page references to the Plaintiff S51 Application Book.
9 Section 171.1, PS51, AB 618.

(iii) The stated purpose of the "Guidelines on Minister's Detention Intervention Power (Section 195A of the *Migration Act 1958*)" (**s 195A Guidelines**) is to:[10]

- *explain the circumstances in which I may wish to consider exercising my public interest power under s 195A of [the Act] to grant a visa to a person in immigration detention under s 189 of the Act*
- *inform officers of [the Department] when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.*

16. As the statements of their purposes indicate, application of the Guidelines by Departmental officers may *lead* to the Minister considering the exercise of the power available under the various provisions in question. However, the Minister promulgating them had not personally given any consideration to that possibility in relation to particular non-citizens. This is reflected in the structure of the assessment process under the Guidelines.

17. The s 351/417 Guidelines delineate a number of classes of request, one of the functions of Departmental officers being to assess into which class a particular request falls:

(i) Initial requests which prima facie warrant consideration, and in relation to which the Minister wishes to have a full briefing. Requests of that nature, which must fall within the ambit of sections 9, 10 and 11 of the Guidelines, are to be brought to the Minister's attention in a submission, so that he may consider exercising the power: see section 16.[11]

(ii) Initial requests which the Minister wishes to be told about only in outline. Those requests, which will have been assessed as falling outside the ambit of section 9, or outside the ambit of both sections 10 and 11, are to be brought to the Minister through a short summary of the issues, in a schedule format, so that he may indicate whether he wishes to consider exercising the power: see section 16.

(iii) Initial requests which, generally, should not be brought to the Minister's attention. Section 7 identifies a range of such requests: for example, where a decision to refuse a visa has been set aside and a subsequent decision has not been made; where it may be open to a person to make a valid application for a Partner visa (or such a visa has been refused); or where there is an ongoing visa application, or review application, concerning the person.[12]

(iv) Requests by persons in relation to whom the Minister "has previously considered the exercise of the public interest powers (whether in a schedule or as a submission)", which are referred to in the Guidelines as "repeat requests". In substance, these are requests by persons

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10 PS51, AB 746.
11 PS51, AB 725.
12 PS51, AB 719-720.

whose cases have previously been brought to the Minister's attention in some way. The Minister indicated that requests of that nature would generally not be considered. However, where the Department is satisfied that there has been a significant change in circumstances which raise new, substantive issues not previously provided or considered and which, in the opinions of the Department, fall within the ambit of Sections 9, 10 and 11 of the Guidelines, such requests may be referred.[13]

(v) Requests in respect of which the public interest power is not available. Section 6 of the Guidelines identifies requests of that nature, which include if the primary decision was not reviewable by the relevant tribunal, if no review decision has been made, or if the Minister has already intervened (his power at that point being understood to be exhausted unless it is enlivened by another review tribunal decision).[14]

18. There is no indication that the Minister will consider exercising the relevant power in any given case.[15] That is consistent with the structure of the statutory powers, which do not compel the Minister to consider their exercise, and which repose entirely in the Minister the task of considering what the public interest requires. Sections 10 and 11 of the Guidelines respectively address referrals from the Tribunal, and what constitutes "unique and exceptional circumstances",[16] but the content of the public interest, being the ultimate statutory criterion, is left entirely to the Minister.[17]

19. In so far as application of the s 351/417 Guidelines may result in the Minister never coming to consider the exercise of the powers to which the Guidelines apply in a particular case, that possibility is consistent with the nature of those powers. As the Full Court of the Federal Court observed in *Bedlington v Chong* of the power in s 48B of the Act, the language of provisions such as ss 351(7) and 417(7) is indicative of a legislative intention to excuse the Minister from any obligation to consider exercising the powers respectively conferred by those sections.[18] If it is open to the Minister not to consider the exercise of the power at all, it must also be open to him to delineate, in advance, subclasses of requests which he is not minded to consider, including subclasses which rely to some extent upon assessment of requests by Departmental officers.

20. The s 48B Guidelines are similarly structured to the s 351/417 Guidelines. The Guidelines distinguish between requests which will not be referred to the Minister and requests which may be referred to the Minister for him to consider whether he wishes to consider exercising the power. Section 178.2 provides that if a purported further protection visa application or request for ministerial intervention under s 48B is considered not to meet the Guidelines, "it should not be referred to the Minister".[19] Section 173.4 states that purported further protection visa applications containing additional information that meets the

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13 See section 17 of the Guidelines.
14 PS51, AB 719.
15 Section 18 of those Guidelines, which deals with the outcome of the process, is similarly framed by reference to what the Minister may "choose" to do: PS51, AB 726.
16 PS51, AB 720 (Section 9), 721 (Section 10,) 721-723 (Section 11).
17 PS51, AB 720.
18 (1998) 87 FCR 75 at 78.
19 PS51, AB 624.

criteria in that sub-clause (as further expanded in the subsequent clauses),[20] including changes in country circumstances, are to be referred in accordance with the agreed format to the Minister.[21]

21. In the s 195A Guidelines, the Minister has directed that consideration of possible exercise of the power is generally not to be triggered by a "request" by or on behalf of a detainee (see section 6.3.2). Rather, section 4.1 sets out circumstances in which cases are to be referred to the Minister, and section 6.3.1 provides that requests for the exercise of the power "may only be made and referred by my Department as set out above". Section 6.2.1 provides that a detainee's circumstances are to be assessed by the officers of the Department on an ongoing basis. If it is determined that a detainee's circumstances fall within the ambit of the Guidelines, the case is to be brought to the Minister's attention so that he may consider exercising the detention intervention power; if he chooses to consider a case under that power, he may choose to grant or not to grant a visa.[22] Section 6.4 sets out the approach where the Minister has previously considered the exercise of his detention intervention power in respect of a particular person "within the last two months". In every case the Department is to assess the request but only bring it to the Minister's attention if the case meets the Guidelines and new information is available. If no new information is available, or the case remains outside the Guidelines, the Minister indicated that he did not wish to consider exercising the power.[23]

22. Properly understood, each set of Guidelines does no more than facilitate the provision of advice to the Minister in particular cases, and otherwise act as a screening mechanism in relation to applications which the Minister has directed are not to be brought to his attention at all. The directives in the Guidelines do not constitute a positive decision on the part of the Minister to consider the exercise of his power, nor was the issue of the Guidelines accompanied by a decision to that effect. At most, the Minister has determined, in advance, the circumstances in which he or she wishes to be put in a position to consider exercising the power.[24]

GUIDELINES ADMINISTERED IN EXERCISE OF EXECUTIVE POWER

23. Once it is accepted that the Minister has not in the Guidelines manifested any decision to consider the exercise of any non-compellable power, it follows that the actions of Departmental officers in administering Guidelines cannot be characterised as actions "under and for the purpose of" the Act, in the sense in which that characterisation assumed importance in *Plaintiff M61*. Action taken to inform the possible exercise of a statutory power is not thereby itself an

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20 See sections 174, 175 and 176 of the Guidelines, PS51, AB 621-623.

21 PS51, AB 620-621. For the applicable format see cl 168.6, AB 615.

22 PS51, AB 750 (for the applicable criteria see section 4.1.1 AB 748-749;); Section 7.1.1: PS51, AB 752.

23 PS51, AB 751.

24 *Bedlington v Chong* (1998) 87 FCR 75 at 80 per Black CJ, Kiefel and Emmett JJ; Savouts *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1059 at [31] per Katz J, *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 523 [65] per Lindgren J (referred to with approval in *SZLJM v Minister for Immigration and Citizenship* [2008] FCA 300 at [7] per Flick J), *VYFT v Minister for Immigration and Citizenship* [2009] FCA 937 at [8] per Ryan J.

exercise of statutory power.[25]

24. By reason of their employment under the *Public Service Act 1999* (Cth), officers of the Department are employees of the Executive Government,[26] to whom duties are assigned by the Secretary pursuant to s 25 in the exercise of the ordinary power of an employer,[27] and who exercise in the performance of those duties the executive power of the Commonwealth.

25. In *Davis v The Commonwealth*, Brennan J explained that an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of power or capacities:[28]

> ...a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity.

26. Whilst a "prerogative power" is one that is enjoyed by the Crown alone, "a capacity which is neither a statutory nor a prerogative capacity" is one that the Executive has in common with any natural person.[29] The capacity to inquire falls into the latter category.[30] As Griffith CJ explained in *Clough v Leahy*:[31]

> [T]he power of inquiry is not a prerogative right. The power of inquiry, of asking questions, is a power which every individual citizen possesses ... Every person is free to make any enquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it desirable in the public interest to get information on any topic.

The administration of the Guidelines by officers of the Department involves an executive inquiry of that nature.

27. Where the executive power in question is of a non-statutory, non-prerogative character, the source of any relevant limits on the power will not lie in any constitutional principle particular to the activities of government. Rather, such a power is limited by the common law, to which it is subject in the same manner as the equivalent capacities of a natural person.[32]

28. It is conceivable that the same common law principle that informs the interpretation of statutes might, depending on the circumstances, be capable of application to an exercise of non-statutory executive power so as to impose an obligation to observe the principles of natural justice in the taking of non-statutory executive action. However, consistently with the operation of the common law principle in a statutory context, the pre-condition for the imposition

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25 *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 8 ALR 691 at 695. See also *Minister for Arts, Heritage & Environment v Peko-Wallsend* (1987) 15 FCR 274 at 303, 306.

26 The enactment of the *Public Service Act* constitutes legislative activity on the part of the Commonwealth Parliament to "otherwise provide", as contemplated by s 67 of the Constitution.

27 Clause 25 of the Explanatory Memorandum to the *Public Service Bill 1999* expressly described the power as "one of the ordinary powers of an employer and is expressly included in the Bill to emphasise that all the ordinary 'rights, duties and powers' of an employer have been given to Agency Heads."

28 (1988) 166 CLR 79 at 108.

29 Zines, "The inherent executive power of the Commonwealth" (2005) 16 *PLR* 279 at 280.

30 A power to require questions to be answered or documents to be provided exists only if conferred by legislation: *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182; *McGuiness v Attorney-General (Vic)* (1940) 83 CLR 73.

31 (1904) 2 CLR 139 at 156-157.

32 *Clough v Leahy* (1904) 2 CLR 139 at 156-157 per Griffith CJ; *A v Hayden* (1984) 156 CLR 532 at 580-581; *Commonwealth v Mewett* (1997) 191 CLR 471 at 546-551 per Gummow J.

of that obligation must be that the non-statutory action has the potential directly to affect legal rights or interests.[33] An obligation to observe procedural fairness cannot exist in the abstract, but only as a legal condition of what might properly be called a "power". The point was well made by Brennan J in *Ainsworth v Criminal Justice Commission*:[34]

> In a majority of cases in which an act or decision is judicially reviewed, an exercise of statutory power affects the applicant's rights adversely or there is a failure to exercise a statutory power which, if exercised, would or might affect the applicant's rights beneficially. In such cases, where a person's rights or liabilities will or might be affected by the exercise or non-exercise of a statutory power following upon an inquiry, that person is prima facie entitled to be accorded natural justice in the conduct of the inquiry. Failure to accord that person natural justice ordinarily results in the setting aside of an adverse exercise of the power or in an order to exercise the power, as the case may be. The order made in such cases does not operate on the failure to observe the rules of natural justice or on the findings made on the inquiry but on the consequential exercise or non-exercise of the power.

Along with the other members of the Court in that case, his Honour went on to find a sufficient exercise of "power" in the exercise of a statutory authority to publish information affecting reputation in circumstances where reputation was not otherwise protected by the law of defamation. Consistently with the need to find some affectation of legal rights or legally protected interests for natural justice to apply, his Honour added that "conduct of a person or body of persons acting without colour of statutory authority is not amenable to judicial review"[35] "unless, perhaps, they are purportedly acting with the authority derived from the prerogative"[36] or "a Royal Charter, franchise or custom".[37] As Allsop P explained in *Stewart v Ronalds* it would be "a potentially significant development of the principles of natural justice for them to be imposed on any activity which has the capacity to affect reputation".[38] In the same case, Handley AJA expressed "serious doubts" as to whether procedural fairness was owed "where a person has been given the task of investigation and report under a bilateral retainer without any authority in statute, prerogative, or consensual compact and without any legally recognised power".[39]

29. The structure of reasoning in *Plaintiff M61* is consistent with that approach. While the Court rejected, as "too narrow a conception of the circumstances in which an obligation to afford procedural fairness might arise", the need to find the destruction, defeat or prejudice of a legal right,[40] the Court went on to assess whether what it had already held to be an exercise of statutory power

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33 *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576; *Jarrett v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [24]-[26], [51], [138]; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 at 208 [11].

34 (1992) 175 CLR 564 at 583.

35 (1992) 175 CLR 564 at 585.

36 (1992) 175 CLR 564 at 585 footnote (48): his Honour instanced *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407.

37 (1992) 175 CLR 564, 585 footnote (48): his Honour instanced *Reg v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 884.

38 (2009) 259 ALR 86 at [71].

39 *Stewart v Ronalds* (2009) 259 ALR 86 at [137]. To similar effect, in *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231 at [36] Wheeler and Newnes JJA held that experts appointed under a statutory power to investigate and report to a Minister owed no duty of procedural fairness in the preparation and presentation of the report to the Minister as no right or interest was thereby affected.

40 (2010) 272 ALR 14 at [75].

under ss 46A and 195A "directly affected the rights and interests of those who were the subject of assessment or review".[41] The answer was "yes" because the exercise of power "had the consequence of depriving them of their liberty for longer than would otherwise be the case".[42] By contrast, the Plaintiffs in the present cases have not identified any legal right or interest that is destroyed, defeated or prejudiced or otherwise directly affected as a consequence of Departmental officers making inquiries pursuant to the Guidelines for the purposes of advising the Minister about the possible exercise of one or more of the non-compellable powers.

30. Inquiries made pursuant to the s 195A Guidelines in respect of other non-citizens who are in detention do not have the same consequence as they had for the offshore entry persons in *Plaintiff M61*. They do not operate to prolong the non-citizen's detention in the same way as the RSA and IMR process. That is because a detainee other than an offshore entry person, such as Plaintiff S51, is entitled to access the protection visa application processes of the Act and remains in detention after those processes are exhausted pending removal, not pending an evaluation of refugee status that is undertaken against the statutory assumption "that Australia has protection obligations to individuals".[43] Section 195A does not in such a case provide "power to respond to Australia's international obligations by granting a protection visa in an appropriate case".[44] The s 195A evaluation is wholly supplementary to and independent of other procedures under the Act to which the non-citizen has access.

31. The only legal right or interest that Plaintiffs S10, S49 and Ms Kaur articulate in this context is their eligibility for bridging visas (Principal Submissions at [36]). The argument is an attempt at self-levitation. Although there is provision under the *Migration Regulations 1994* (Cth) for a non-citizen making an initial request under ss 48B, 351 or 417 to be eligible for a Bridging Visa, the cessation of any visa so granted is not linked as a matter of law to the determination of that request.[45] That is so for the obvious reason that the Minister does not have to exercise the power at all. In other words, there is lacking any direct link between action taken in respect of a request and the cessation of the bridging visa to which a person seeking ministerial intervention might be entitled, such as to give rise to an obligation to accord procedural fairness in considering the request.

OBLIGATIONS OF THE MINISTER

32. Where the Minister decides to consider exercising one of the non-compellable powers in issue in these proceedings, he is exercising a statutory function under the Act. However, consistently with *Plaintiff M61* the imposition of a limit on the exercise of a power of that nature, such as an obligation to accord procedural fairness, depends upon its exercise having a sufficient direct effect on some relevant right, interest or privilege.

33. For the reasons identified above, the Plaintiffs have not identified any legal right or interest that is affected, directly or at all, by the Minister exercising, or

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41 (2010) 272 ALR 14 at [76].
42 (2010) 272 ALR 14 at [76].
43 (2010) 272 ALR 14 at [27].
44 (2010) 272 ALR 14 at [27].
45 *Migration Regulations 1994* (Cth), Schedule 2, cl 050.517.

declining to exercise, the powers prescribed in s 48B, s 195A, s 351, or s 417, such as to give rise to an obligation on the part of the Minister to accord them procedural fairness. The nature of those rights or interests is not altered, let alone improved, by the change in identity of the assessor from Departmental officer to Minister.

ALLEGED FAILURES TO ACCORD PROCEDURAL FAIRNESS

34. The Defendants' primary contention is that neither the Departmental officers nor the Minister were obliged to accord procedural fairness. The following submissions are advanced in the event that the Defendants' primary contention is not accepted.

Plaintiff S10

35. Plaintiff S10 is a citizen of Pakistan.[46] On 24 August 2007, he arrived in Australia on a cargo vessel, for which he was a crew member. On 26 August 2007, he went on shore leave with other members of the ship's crew, but he did not return to the ship at the appointed hour.[47] On 6 September 2007, he lodged an application for a Protection (Class XA) visa.[48] He claimed to fear persecution upon return to Pakistan from an unidentified fundamentalist group, which he subsequently claimed to be the TNSM.[49] On his last visit to Pakistan, in January 2007, this group had forced him to do "gehad" and grow a beard, and they destroyed his music and home entertainment system. Plaintiff S10 claimed to have been attacked three times by a member of the group.[50]

36. By letter dated 6 November 2007, a delegate of the Minister notified Plaintiff S10 that his protection visa application had been refused.[51] He sought review of this decision,[52] and on 22 February 2008 the RRT decided to affirm the decision of the Minister's delegate.[53] In its decision record, the RRT noted that Plaintiff S10 advanced additional claims at the hearing before it, including that he was a member of a political party that was opposed to the TNSM and, in 2007, had spoken out against that group in his village, which led to the issues he outlined in his original application.[54] The RRT did not accept the Plaintiff's claims, describing them as lacking credibility.[55] It further concluded that even if the Plaintiff's claims were accepted, he would not be at risk of serious harm if he were to relocate within Pakistan, which he and his family could reasonably do.[56]

37. Plaintiff S10 applied to the Federal Magistrates Court for judicial review of the RRT's decision. When that application was dismissed, he appealed to the Federal Court and, from there, sought special leave to appeal to the High Court,

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46 See PS10, AB 6 for a copy of his passport.
47 See the Immigration Inspector's Report, 30 August 2007, AB 1.
48 PS10, AB 51.
49 Tehreek Nafaz-e-Shariat Muhummadi – Movement for the Enforcement of Islamic Laws.
50 PS10, AB 70.
51 PS10, AB 123.
52 PS10, AB 157.
53 PS10, AB 167.
54 See the Tribunal's summary of Plaintiff S10's evidence at the hearing before it, AB 171-174.
55 PS10, AB 180-181.
56 PS10, AB 182.

which was refused on 4 September 2009.[57]

38. On 30 October 2009, Plaintiff S10, by his agent, wrote to the then Minister requesting that he exercise the discretion in s 417 of the Act to grant him a permanent visa to remain in Australia or, alternatively, that he exercise the power in s 48B to permit him to lodge a fresh visa application.[58]

39. On 6 August 2010, the Manager of NSW International Obligations & Interventions, within the Department, found that the request for ministerial intervention under s 48B did not meet the s 48B Guidelines.[59] The assessing officer, with whose assessment the determining officer agreed, considered that there was no credible new information that would enhance the Plaintiff's chances of making a successful protection visa application.[60] Consistently with the Guidelines, the request was not referred to the Minister.

40. On 8 October 2010, Plaintiff S10's s 417 request was referred to the Minister on a Schedule, which summarised the requests of a number of non-citizens.[61] The manner of referral was consistent with section 16 of the s 351/417 Guidelines, which provided that initial requests were to be referred to the Minister for personal consideration either on a Schedule or by way of a Submission, depending on the extent to which the requests met specified sections of the Guidelines.

41. On 21 October 2010, the Minister signed a record titled "Consideration Under Section 417 of the *Migration Act 1958*", stating that he had read the attached schedule concerning the request by the named persons for him to exercise his power under s 417 and that "Unless otherwise indicated above, I do not wish to consider the exercise of that power". The "indication" above comprised a box which the Minister could tick if he required a Submission in relation to a particular non-citizen; there was no tick next to Plaintiff S10's name.[62] The Plaintiff was notified of the outcome of his requests on 26 October 2010.[63]

42. Plaintiff S10 alleges the following denials of procedural fairness on the part of a Departmental officer in assessing his s 48B application:

    (i) The officer mis-described what the RRT said about the availability of state protection, which resulted in the officer drawing an adverse conclusion without giving the Plaintiff an opportunity to comment on it (at [112(a)-(b)], [114]).

    (ii) The officer summarised a letter that the Plaintiff submitted with his request as stating that three of his close relatives had been killed by the Taliban and that should he return he would most certainly be killed, when the letter actually said that three of his close relatives had been killed by the Taliban and that the Taliban were searching for him and would kill him when they found him. This amounted to a failure on the

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57 *SZMCD v Minister for Immigration and Citizenship* [2008] FMCA 1039; *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46, (2009) 174 FCR 415; *SZMCD v Minister for Immigration and Citizenship* [2009] HCATrans 211.
58 PS10, AB 193.
59 PS10, AB 364.
60 See the Departmental Minute dated 6 August 2010, PS10, AB 365-369.
61 PS10, AB 387.
62 PS10, AB 391.
63 PS10, AB 393.

part of the officer to address his "clearly articulated case and new evidence" (at [112(c)-(e)], [114]).

(iii) The officer considered country information that was adverse to the Plaintiff without informing him or providing him an opportunity to comment on it (at [112(f)], [114]).

43. The first allegation is itself premised upon a mischaracterisation of the relevant part of the Minute as an adverse conclusion, on which the officer relied. The reference to the RRT's conclusion on state protection is contained in a summary, at the beginning of the Minute, of the claims that Plaintiff S10 made in his previous visa application and the RRT's findings.[64] There is nothing to suggest that the officer relied on the RRT's findings about state protection, or a particular understanding of those findings, in assessing his request. Indeed, in the section of the Minute titled "Reasons Why Request is Assessed as Not Falling within the Section 48B Guidelines", the officer clearly identified the part of the RRT's reasons that was critical to her conclusions, stating:[65]

> - [Plaintiff S10] claims while in Pakistan, he voiced his opinion against the Taliban, resulting in him being targeted by the TNSM. He claims that he was pressurized to join the jihad and accept fundamentalist values that he was profoundly opposed to.
>
> - The RRT found [Plaintiff S10] not to be a credible witness. The RRT was satisfied that [Plaintiff S10] does not have a well founded fear of persecution on the grounds of religion or political opinion or any other Convention-related reason.
>
> - There is no new information or evidence before the department to contradict the RRT's findings.

44. The RRT's central finding (that the Plaintiff was not credible), while it stood, meant that questions of state protection did not arise. The officer was satisfied that there was no new material which put that central finding in question; and she did not mention the question of state protection other than in the course of summarising the RRT's findings.

45. The second alleged denial of procedural fairness is entirely without foundation, relying as it does on fine distinctions of language employed in summarising evidence to which the officer clearly had regard. The Plaintiff's complaint is directed, in essence, towards the outcome of the officer's consideration, following the officer's assessment of the material before her. Observance of procedural fairness did not require the officer to provide the Plaintiff with a running commentary on what she thought of the supporting evidence that he provided.[66] Contrary to the Plaintiff's contention, the conclusion she reached

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64 PS10, AB 365.

65 PS10, AB 366-367. (Emphasis added.)

66 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29]-[32] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] per Gleeson CJ, Gummow and Heydon JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte MIAH* (2001) 206 CLR 57 at 117-118 [194] per Kirby J; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9] per French CJ and Kiefel J.

was obviously open on the known material.[67]

46. The third allegation needs to considered in its proper context. The country information characterised by Plaintiff S10 as adverse to him appears in a section of the Minute titled "Long absence from Pakistan", in which the officer considered whether the Plaintiff may face any difficulties on his return after living in a westernised society like Australia. This section is towards the conclusion of the Minute, after the officer has concluded that there is no new information or evidence before the Department to contradict the findings of the RRT and after the officer has considered the current situation in Pakistan, and concluded that whilst there are security problems, and the human rights situation is poor, that was a generalised phenomenon which affected many citizens and residents of Pakistan and which would not place Plaintiff S10 in a disadvantaged position. In that context, the officer referred to country information, including the US Department of State Country Report on Human Rights Practices in Pakistan, which indicated that whilst civil and political rights protections had improved, the human rights situation remained poor, with major problems including extrajudicial killings, torture and disappearances, and instances in which local police acted independently of government authority.[68] The information on which the officer relied in this context was consistent with country information provided by the Plaintiff in support of his request.[69]

47. The assessor's reference to the qualified material in the US Department of State Report about the existence of functioning police, security and political establishments cannot properly be characterised as "adverse" to Plaintiff S10's interests. It can be contrasted in this respect with the information relied on by the officer who conducted the RSA process in *Plaintiff M61* which directly contradicted the claims that the Plaintiff had advanced.[70] Plaintiff S10's real complaint therefore appears to be, not that the officer had regard to additional country information without seeking his comment, but rather that the officer reached a conclusion from that material which the Plaintiff might have wished to argue against. However, as noted above, the officer was not obliged to expose her thought processes for comment by the Plaintiff.

48. In any event, procedural fairness in the present context would not extend to the full panoply of adversarial procedures and would not require every item of evidence (even "adverse" evidence) to be made known to the Plaintiff. At least so far as the formation of evaluative judgments about circumstances in Pakistan was concerned, fairness required merely that the Plaintiff be aware of the relevant issues; that he be permitted to submit evidence and argument on those issues; and that what he did submit would be considered. Those requirements were clearly met. The question whether Plaintiff S10 could obtain an appropriate degree of protection from the authorities had been canvassed in the Tribunal, and was clearly a point that would need to be considered in forming a view about whether he might be able to make a successful claim for protection.[71]

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67 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 476 at 592.

68 PS10, AB 367-368.

69 See, for example, PS10, AB 254-262.

70 (2010) 272 ALR 14 at [85].

71 Cf the issue posed by the Guidelines, quoted in the letter from the Plaintiff's solicitor at PS10, AB 198.

49. The Plaintiff's allegation that he was denied procedural fairness in relation to the manner in which his s 417 request was considered rests on the reference in the Schedule, under the heading "Other Information", to the Department's consideration that his request did not meet the Guidelines under s 48B as he had provided no new evidence that would enhance his chances of making a successful protection visa application (at [116]).[72] It follows, the Plaintiff submits, that the same denials of procedural fairness that infected the s 48B decision "cumulatively infected" the Minister's decision (at [117]).

50. For the reasons identified above, the assessment of the Plaintiff's s 48B request does not demonstrate any denial of procedural fairness. Further, and in any event, it cannot be said that the officer who assessed the s 417 request did not give independent consideration to the supporting information that the Plaintiff provided. The s 351/417 Guidelines, after all, require consideration of matters which are not on all fours with the matters which must be considered when assessing requests for intervention under s 48B. Further, there is no suggestion in the Schedule that in assessing those matters, the officer relied on the Department's conclusions in relation to the s 48B request to the exclusion of any independent consideration. Indeed, the officer's summary of the supporting information that the Plaintiff provided with his request indicates that the officer did not blindly adopt material in the s 48B Minute; her summary of the letter from the Nazim Union Council was not in the same terms, and her description of the country information that the Plaintiff provided was more detailed.

51. The alleged denials of procedural fairness in relation to the consideration of the Plaintiff's s 48B request must be rejected, as must the further allegation that the Minister's decision on his s 417 request was "cumulatively infected" by those errors.

Ms Kaur (S43)

52. Ms Kaur is a citizen of India. On 21 July 2005, she arrived in Australia on a Subclass 573 (Higher Education Sector) visa to study for a Bachelor's degree in Accounting at Central Queensland University (CQU). On 28 June 2006, having changed to a Diploma course at a different institution, she was granted a further student visa, which expired on 6 June 2008. She completed her Diploma of Accounting in February 2008.

53. On 1 September 2008, Ms Kaur lodged an application for a further student visa.[73] By this time she was enrolled in a Certificate course in commercial cookery, which was due to finish in December 2008.[74]

54. By letter dated 26 September 2008, a delegate of the Minister notified Ms Kaur that her application had been refused.[75] A time of application criterion for the class of visa for which she had applied was that the application be lodged within 28 days of the last substantive visa ceasing to be in effect.[76] Ms Kaur's previous student visa had expired more than 28 days before her application.

55. Ms Kaur applied to the MRT for review of the delegate's decision. In its Decision Record, the MRT noted Ms Kaur's claim that after she came to

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72 PS10, AB 389.
73 Kaur, AB 6.
74 Kaur, AB 10.
75 Kaur, AB 28.
76 See Schedule 2 to the *Migration Regulations 1994* (Cth), cl 573.211(3).

Australia she changed her course, and the Department had issued her with a new visa without her knowledge. In April 2008, she consulted a lawyer as to which of her visas was valid, and he told her it was the one in her passport. When she applied for an extension of that visa in August 2008, she discovered it had been cancelled; she applied in September 2008 to renew the other visa but by then it was too late.[77]

56. On 18 September 2009, the MRT notified Ms Kaur of its decision to affirm the delegate's refusal of her visa application.[78] By this time she had apparently completed her commercial cookery course.[79] The MRT noted that Ms Kaur's record as a student had been a satisfactory one. It was also prepared to accept that there may have been some degree of confusion over her visa status and the date on which her visa was to cease, but it had no discretion to make any other finding on the information before it.[80]

57. On 16 October 2009, Ms Kaur, by her agent, requested that the then Minister exercise his power under s 351 of the Act to substitute a more favourable decision for the decision of the MRT. Her agent provided further information in support of her request by letter dated 23 November 2009. She had been offered admission (again) to the Bachelor of Accounting course at CQU and, it was said, had a "serious desire to complete her studies in Australia".[81]

58. On 21 December 2009, Ms Kaur's request was referred to the Minister on a Schedule, which summarised the requests of a number of non-citizens for him to exercise his s 351 power.[82] On 14 January 2010, the Minister signed a record titled "Consideration Under Section 351 of the *Migration Act 1958*", stating that he had read the attached schedule concerning the request by the named persons for him to exercise his power under s 351 and that "Unless otherwise indicated above, I do not wish to consider the exercise of that power". The box next to Ms Kaur's name was not ticked.[83] The decision record further stated:

> I do not wish further requests for the exercise of my public interest powers in these cases brought to my attention, unless such further requests raise new substantive issues which, in opinion of assessing officer, when considered in combination with information known previously, brings the case within my Guidelines for the identification of cases where I may consider it to be in the public interest to intervene to substitute a more favourable decision.

59. On 5 February 2010, Ms Kaur applied to the Federal Magistrates Court for review of the MRT's decision.[84] When the Court dismissed her application, Ms Kaur appealed to the Federal Court. On 26 November 2010, the Federal Court dismissed her appeal.[85] In so doing, Jacobson J referred to the Federal Magistrate's acceptance that Ms Kaur had sought and relied on the advice of her migration agent as to the expiry date of her visa, and in following his advice she had lodged her visa application out of time. His Honour considered that the

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77 Kaur, AB 40-41.
78 Kaur, AB 35.
79 Kaur, AB 41 [18].
80 Kaur, AB 41-42.
81 Kaur, AB 47, 58.
82 Kaur, AB 99; the Schedule is at AB 96-98.
83 Kaur, AB 101.
84 See *Kaur v Minister for Immigration and Citizenship* [2010] FMCA 634 at [23] per Barnes FM.
85 *Kaur v Minister for Immigration and Citizenship* [2010] FCA 1319, Kaur, AB 105.

advice which was given and acted upon was not unreasonable in light of the confusing terms of the Department's correspondence, and observed that it "may be a matter in which the Minister would be prepared to revisit the question of whether to substitute a more favourable decision pursuant to s 351 of the Act".[86]

60. On 20 December 2010, Ms Kaur's agent submitted a further request to the Minister for him to exercise his power under s 351 of the Act, relying on the observations of Jacobson J.[87] On 10 January 2011, a Minute was prepared for the Branch Manager of the Ministerial Intervention Unit in relation to this further request. The Branch Manager agreed with the assessment of the assessing officer that, notwithstanding his Honour's comments, no compelling information had been provided that had not previously been considered which, consistently with the direction the Minister had previously given, would warrant the request being referred back to the Minister for personal consideration.[88]

61. When the Minister made a decision on the first request that Ms Kaur lodged under s 351 of the Act, he directed that he did not wish to consider any further requests that she made "unless such further requests raise new substantive issues which, in opinion of assessing officer, when considered in combination with information known previously, brings the case within my Guidelines" (emphasis added).

62. The assessing officer did not consider the observations of Jacobson J, in his reasons dismissing Ms Kaur's appeal, to meet that description. It was open to her so to find. His Honour had done no more than express an alternative view about material that the Department had previously considered in the context of Ms Kaur's first request, and describe the matter as one in which the Minister might be prepared to revisit the question whether to intervene pursuant to s 351. Although the Minute that the officer prepared on the repeat request referred only to this description by Jacobson J, there is no room for an inference that the officer somehow failed to have regard to other aspects of his Honour's reasons.[89] His Honour's description of the letter as "confusing" appeared in the paragraphs immediately preceding his Honour's comment about s 351.[90]

63. The contention that the conclusions reached by the Department on Ms Kaur's first request, which were obviously open on the known material, became "adverse information" by reason of her having made a second request, which procedural fairness required to be put to her, need only be stated to be rejected. Acceptance of that proposition would require every non-citizen making a repeat request to be provided with the Departmental information on which the Minister relied in making his initial decision either not to consider exercising the power, or not to exercise the power.

64. Ms Kaur's further claim that the Guidelines were not complied with must be rejected. For the purposes of this ground, the Defendants will assume that the premise on which it proceeds is correct, although, for the reasons outlined above, their primary position is that compliance by Departmental officers with administrative guidelines is not susceptible to enforcement action taken by third

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86 [2010] FCA 1319 at [63]-[65], Kaur, AB 113.
87 Kaur, AB 115.
88 Kaur, AB 141.
89 Cf *Minister for Immigration and Citizenship v SZGUR* (2010) 241 CLR 594, 606 [33], 618 [73].
90 [2010] FCA 1319 at [62]-[64], with the reference to s 351 appearing in paragraph [65]; see Kaur, AB 113.

parties.

65. The passages on which Ms Kaur relies (at [128]) appear in the Procedures Advice Manual, which is a Departmental document providing guidance to officers as to the administration of a range of powers under the Act. It is clear from the first passage, as it is set out in the Manual, that in order for a repeat request to be referred to the Minister, it must satisfy three, cumulative requirements:[91]

> Where the Minister or a previous Minister has declined to intervene in a case, the Minister generally expects that the subject(s) of the request will leave Australia. In limited circumstances, a repeat request may be referred where the department is satisfied:
>
> - there has been a significant change in circumstances and
> - that change in circumstances raises new, substantive issues not previously provided or considered in a previous request and
> - in the opinion of the department, the new circumstances/issues fall within the ambit of section 9 – Public interest, section 10 – Referral by a review tribunal and section 11 – Unique or exceptional circumstances of the Minister's guidelines.

66. This description in the Manual is consistent with the content of section 17 of the s 351/417 Guidelines. In circumstances where the officer's assessment of Ms Kaur's repeat request was that there had not been a significant change in circumstances which raised new, substantive issues not previously provided or considered in her previous request, it was not necessary for the officer to go on to consider whether, in her opinion, the new circumstances or issues fell within sections 9, 10 or 11 of the s 351/417 Guidelines. Contrary to Ms Kaur's submissions, the officer's assessment was entirely consistent with the Guidelines.

Plaintiff S49

67. Plaintiff S49 arrived in Australia on a visitor visa in June 1998. He applied for a Protection (Class AZ) visa on 21 July 1998.[92] In his application, he claimed to be a citizen of India, and to have escaped because he feared persecution on political grounds.[93]

68. By letter dated 17 August 1998, a delegate of the Minister notified Plaintiff S49 that his protection visa application had been refused.[94] The Plaintiff applied to the RRT for review of this decision. He provided a number of documents which expanded on the nature of his claims, including a detailed statutory declaration in which he claimed to be a prominent political activist and member of the Trinumul Congress Party, which brought him to the adverse attention of the CPIM Party. The Plaintiff said that he and other colleagues were wrongly charged with murder, after a procession which he led resulted in violent clashes with the CIPM. The Plaintiff claimed that he went into hiding and ultimately had to leave India, as the CIPM continued to pursue him.[95]

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91 Kaur, AB 272. (Emphasis added).
92 PS49, AB 1.
93 PS49, AB 17.
94 PS49, AB 27.
95 PS49, AB 32-68.

69. On 5 April 2001, the RRT affirmed the decision of the delegate not to grant Plaintiff S49 a protection visa. The RRT did not find the Plaintiff to be an impressive witness, and it did not accept his claims. Further, and in any event, the RRT found that the Plaintiff would be provided with a level of state protection that was sufficient to remove a real chance of his being persecuted on his return to India.[96]

70. Plaintiff S49 sought judicial review of the RRT's decision. He withdrew that application,[97] but then commenced proceedings in this Court after he was located and detained as an unlawful non-citizen in June 2003. The matter was remitted to the Federal Court where, in discharging the order nisi in August 2004, Emmett J observed that the Plaintiff now claimed that he was, in fact, a citizen of Bangladesh.[98]

71. On 6 September 2004, Plaintiff S49 wrote to the Minister under a different name, claiming that he could not return either to India or Bangladesh, and requesting that the Minster exercise his power under s 417 of the Act. By this time, the Plaintiff had been taken to the Indian Consulate to facilitate the issue of a new travel document, but the Consulate believed that he might be a Bangladeshi national, and not an Indian national.[99] In his s 417 request, the Plaintiff advanced a series of new claims as to why he feared persecution if he was returned to Bangladesh.[100]

72. Consistently with the s 351/417 Guidelines, on 21 October 2004, the Department referred the Plaintiff's request to the then Minister on a Schedule. On 9 November 2004, the then Minister signed a record titled "Consideration Under Section 417 of the *Migration Act 1958*", indicating that she did not propose to consider the exercise of her power. The document further stated that the Minister did not want further requests for the exercise of her public interest power in this case to be brought to her attention, subject to a qualification in the same terms as that set out in paragraph [58] above in relation to Ms Kaur.[101]

73. According to a summary of his compliance history prepared by the Department,[102] in 2004 and 2005 the Department made a number of attempts to verify the Plaintiff's new claims. On 15 April 2005, however, the Plaintiff advised the Department that his true identity was as he had first recorded it and that he wished to return to India.

74. On 3 November 2005, pursuant to s 195A of the Act, the Minister released the Plaintiff from immigration detention on a Removal Pending Bridging Visa (**RPBV**). The Indian Consulate issued a travel document on 3 March 2006, and arrangements were made for him to depart Australia on 30 August 2006. Notwithstanding that this action was taken at his request, on 29 August 2006 Plaintiff S49 sought judicial review of the Minister's decision to cancel his RPBV on the basis that he had been denied procedural fairness. He obtained an

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96 PS49, AB 87-92.
97 PS49, AB 330.
98 *S372 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1785 at [1].
99 See the summary of the issues regarding the Plaintiff's nationality in the Submission to the Minister dated 2 November 2010, PS49, AB 246.
100 PS49, AB 103.
101 PS49, AB 127-130.
102 PS49, AB 246-247.

injunction restraining his removal from Australia, pending the outcome of that review, and between 29 August 2006 and 21 May 2009 he pursued the matter in the Federal Magistrates Court and the Federal Court. In those proceedings,[103] he again claimed that he was a Bangladeshi national.

75. On 15 June 2009, the Plaintiff (again claiming to be from Bangladesh, and using the same name as his earlier request) submitted a further request to the Minister for him to exercise "his discretion under section 417/48B".[104] The request was treated as a combined request for the Minister to exercise the power under s 417 or, alternatively, s 48B.[105]

76. On 8 October 2009, the Manager of the International Obligations & Interventions Unit within the Department signed a Minute prepared by an assessing officer, agreeing with her assessment of Plaintiff S49's request against the s 48B Guidelines. Both officers agreed that the request did not fall within the Guidelines so as to warrant referral to the Minister for the purpose of a possible exercise of s 48B.[106] Plaintiff S49 was notified of this outcome, and that his s 417 request was still being considered, by a letter dated 13 October 2009.[107]

77. The Department's Ministerial Intervention Unit sought and obtained information about the Plaintiff's medical condition,[108] and requested further information from the Plaintiff himself on several issues.[109] The Plaintiff responded in writing and provided copies of letters of support.[110]

78. On 2 November 2010, the Department prepared a Submission to the Minister in relation to Plaintiff S49's further s 417 request. The Submission acknowledged that there were arguments both ways as to whether intervention was appropriate, but came to the view that "[the Plaintiff's] circumstances are neither unique nor exceptional, so as to warrant your intervention".[111] The Recommendation put to the Minister[112] was in terms that he either:

> *Begin considering the exercise of your power under section 417 of the Act to grant a subclass 151 Former Resident visa subject to health and character checks and the provision of a signed Australian Values Statement.* [Option to be circled stated "Begin considering".]
>
> *Or*
>
> *Not exercise your power under section 417.* [Option to be circled stated "Not intervene".]

79. On 25 November 2010, the Minister circled "Not intervene" and signed and dated the document.[113] Plaintiff S49 was notified of the outcome of his request by letter dated 1 December 2010.[114]

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103 *Kumar v Minister for Immigration and Citizenship* [2008] FMCA 1099; *Kumar v Minister for Immigration and Citizenship* (2009) 176 FCR 401.
104 PS49, AB 154.
105 PS49, AB 266.
106 PS49, AB 267-272.
107 PS49, AB 273.
108 PS49, AB 276, 289.
109 PS49, AB 277.
110 PS49, AB 296-303.
111 PS49, AB 310.
112 PS49, AB 312.
113 PS49, AB 246-253.
114 PS49, AB 258.

80. The first part of the submissions relating to Plaintiff S49 addresses alleged denials of procedural fairness in respect of his initial request under s 417 (Principal Submissions at [136]-[137]). The Further Amended Application filed on 1 September 2011 does not seek any relief in relation to that request, and the references to that decision in the previous versions of the pleading have been deleted. In any event, the complaint has become irrelevant; the Plaintiff made a subsequent request to the Minister pursuant to s 417, in support of which he had the opportunity to submit whatever materials he wanted.

81. In relation to his repeat s 417 request, Plaintiff S49 alleges that he was denied procedural fairness because of a failure on the part of the assessing officer to give him an opportunity to be heard in relation to the Department's satisfaction as to his citizenship and the obtaining of a further Indian travel document within two weeks of a decision to remove him (at [139]). That allegation is without foundation.

82. First, Plaintiff S49 could have been in no doubt that his identity and nationality were critical issues in the Department's assessment of any request he made, and that it was likely to hold to the view that his identity and nationality were as he had originally claimed them to be. So much is clear from:

(i) the protracted litigation which followed the Minister's cancellation of his RBPV (cancellation having occurred for the purpose of sending him back to India);

(ii) correspondence that the Department sent to him in the context of his initial s 417 request (by which time he was claiming to have a different identity and be a national of Bangladesh), in which it noted that he had not provided any documentation to substantiate his claim to be a national of Bangladesh and requested that he provide information to substantiate that claim.[115] No such information was provided in support of either that request or the repeat request.

(iii) the travel document with which he was issued for the purposes of being removed from Australia to India, which was valid for six months and stated that he was an Indian national. According to an officer of the Department, the document further stated:

> The holder earlier travelled on Indian Passport No Q944404 Dated 08.06.1971 issued by P.O. Calcutta which has been expired. This emergency certificate has been issued to enable the holder to travel to India. There is otherwise nothing adverse against him.

83. In these circumstances, there is no basis on which the Plaintiff can seriously contend that he was not on notice as to the importance to the Department of the issues of his identity and nationality, or the Department's views on those issues, so as to have been denied an opportunity to be heard in respect of those issues in the context of his repeat request.

84. The Plaintiff further complains that he was denied procedural fairness because he had no opportunity to respond to information about the possibility of the

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[115] PS49, AB 122.

Department obtaining a further travel document for India within two weeks. The section of the Submission to the Minister in which reference was made to that possibility was titled "Removal/Departure arrangements", which identified the procedures which would be adopted should the Minister decline to intervene.[116] The timing of the issue of a travel document had no bearing in itself on the issue of whether the Minister thought it in the public interest to intervene under s 417 (section 9 of the s 351/417 Guidelines), or whether the circumstances of his case were unique or exceptional (section 11 of the s 351/417 Guidelines).

85. Next, the Plaintiff complains that he was not provided with the country information upon which the assessing officer based her conclusions as to the position of Hindus in Bangladesh. As noted above in relation to Plaintiff S10, procedural fairness in the context of assessing a request for ministerial intervention would not extend to the full range of procedures appropriate in adversarial litigation. For that reason, failure to disclose country information to a person who has requested intervention under s 48B does not, without more, entail a denial of procedural fairness. (The position in relation to information which related specifically to the person concerned may be different, but that question does not need to be addressed.) It would need to be shown that the inability to respond to that particular information led to some real unfairness by depriving the person of the ability properly to address a material issue. No such unfairness arose in the present case, from the failure to disclose the particular country reports upon which the officer relied for her conclusions about the position of Hindus in Bangladesh. The Plaintiff had addressed that very issue in his request[117] and plainly understood that it was an important one. It must have been clear to him that the Department would do its own research on the subject and come to its own view; and that it was therefore in his interests to provide (as he did, to some extent)[118] evidence to support his claims in this respect.

Plaintiff S51

86. Plaintiff S51 is a citizen of Nigeria. On 29 August 2009, he arrived in Australia. Upon his arrival at Sydney airport, an officer of the Department cancelled the Plaintiff's Business (Short Stay) visa on the basis that he was not a genuine business entrant.[119] The Plaintiff was refused immigration clearance and detained pursuant to s 189(1) of the Act.[120] Plaintiff S51 has remained in detention since that time, although on 13 October 2011 he was moved into community detention, following a decision of the Minister pursuant to s 197AB of the Act.

87. On 25 September 2009, Plaintiff S51 lodged an application for a Protection (Class XA) visa.[121] The Plaintiff claimed he was a practising Catholic from the Jos region, and that he feared persecution from the Muslim Taliban.[122]

88. On 3 November 2009, a delegate of the Minister refused to grant the Plaintiff a protection visa, on the basis that he would be able to relocate to a safer area to

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116 PS49, AB 251.
117 PS49, AB 154-155.
118 PS49, AB 164-171.
119 PS51, AB 27.
120 PS51, AB 8.
121 PS51, AB 60.
122 PS51, AB 95.

escape any risk of religious persecution.[123] Plaintiff S51 applied to the RRT for review of the Minister's decision.

89. On 1 December 2009, the Director of Case Escalation and Liaison section of the Department approved an assessment of the Plaintiff prepared by a case officer against the s 195A Guidelines. The assessment considered that Plaintiff S51 met the s 195A Guidelines, and that s 195A was the only avenue available to grant him a Bridging Visa while his protection visa process was ongoing. The officer expressed a concern that the Plaintiff, who had been diagnosed as having Post Traumatic Stress Disorder, was at risk of deteriorating further if he remained in detention for an indefinite period.[124]

90. On 10 February 2010, the RRT affirmed the decision of the Minister's delegate.[125] The RRT did not accept that the Plaintiff was a witness of truth, discerning a number of variances between his claims and the independent country information. Nor did the RRT consider that the Plaintiff would be targeted by Muslims on his return.

91. Plaintiff S51 applied to the Federal Magistrates Court for judicial review of the RRT's decision. On 5 July 2010, the Court dismissed the application. On 3 September 2010, the Federal Court dismissed his appeal from the decision of the Federal Magistrates Court.[126]

92. On 5 October 2010, Plaintiff S51 wrote to the Minister, indicating that he wanted to present new evidence from Nigeria that was not available to the RRT, and foreshadowed submitting a detailed request under s 417 and s 48B.[127] That submission was received by the Department on 3 November 2010.[128] At the time that this request was submitted, the recommendation that the Minister be approached to consider granting a Bridging Visa to the Plaintiff under s 195A, had not been progressed, following the RRT's affirmation of the delegate's decision and the Plaintiff's pursuit of that adverse decision in the courts. Upon receipt of the Plaintiff's request under s 417 and s 48B of the Act, the Department did not further progress the recommendation.[129]

93. On 11 November 2010, the Manager of the Ministerial Intervention, Compliance and Case Resolution Section of the Department signed a Minute agreeing with the assessment of another officer that Plaintiff S51's request did not fall within the s 48B Guidelines so as to warrant referral to the Minister.[130] On the same day, the Department referred the Plaintiff's s 417 request to the Minister on a Schedule. On 16 November 2010, the Minister commented that there was "enough evidence to warrant further consideration". On the page marked "Consideration Under Section 417 of the *Migration Act 1958*", the Minister ticked the box requiring a submission in relation to the Plaintiff.[131]

94. A detailed Submission was provided to the Minister on 10 December 2010. The Department considered that intervention under s 417 of the Act was not

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123 PS51, AB 128
124 PS51, AB 218-219.
125 PS51, AB 236.
126 *SZOET v Minister for Immigration and Citizenship* [2010] FMCA 483; *SZOET v Minister for Immigration and Citizenship* [2010] FCA 968.
127 PS51, AB 343.
128 PS51, AB 377.
129 PS51, AB 357.
130 PS51, AB 439-443.
131 PS51, AB 479-483 (pages missing between AB 480 and 481 appear at PS51, AB 355-356).

appropriate in the circumstances. The Minister agreed, circling the option "Not Intervene" on 16 December 2010.[132] Plaintiff S51 was notified of the Minister's decision by letter dated 20 December 2010.[133]

95. Following the commencement of these proceedings by the Plaintiff, the plans to remove him were cancelled. On 18 August 2011, the Department provided a Submission to the Minister that he consider exercising his power under s 195A of the Act to grant Plaintiff S51 a Bridging Visa for a period of six months or, alternatively, indicate whether he was inclined to consider placing the Plaintiff in community detention pursuant to s 197AB. On 29 August 2011, the Minister declined to intervene under s 195A but indicated that he would consider the option of community detention.[134] It is common ground that the Plaintiff is now in community detention.

96. The Plaintiff alleges that he was denied procedural fairness in respect of the Department's assessment of his circumstances pursuant to the s 195A Guidelines, and in respect of the assessment of the request that he made seeking the exercise of either s 48B or s 417 of the Act.

Section 195A

97. It is necessary to place the alleged denials of procedural fairness in so far as s 195A of the Act is concerned in their proper context.

98. In November 2009, an officer of the Department examined Plaintiff S51's circumstances against the s 195A Guidelines and recommended that a submission be prepared for the Minister to consider whether he wished to exercise the power in s 195A to grant him a bridging visa while his protection visa process was ongoing.[135] At the time that assessment was prepared, s 417 of the Act was not available, the Tribunal not having yet made a decision on his review application.[136]

99. Upon conclusion of the Tribunal process, in February 2010, Plaintiff S51 was entitled to make a request to the Minister that he exercise his power under s 417 of the Act to substitute a more favourable decision. Accordingly, the criterion in section 4.1.1 of the s 195A Guidelines that had been considered, in November 2009, to present a basis for referral was no longer met:[137]

> There are unique and exceptional circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person. (Emphasis added.)

100. Plaintiff S51 contends that compliance with the s 195A Guidelines nonetheless required that a referral to the Minister be completed (PS51 at [41]). Leaving aside the criticism of the Departmental processes which led, ultimately, to a formal decision in November 2010 not to pursue the referral, the underlying contention that the Plaintiff's case should have been referred to the Minister, should not be accepted. Its acceptance would entail preparing a referral in the

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132 PS51, AB 514-520.
133 PS51, AB 525.
134 PS51, AB 591.
135 PS51, AB 219.
136 PS51, AB 219.
137 PS51 218, AB 748-749.

absence of any circumstances which, according to the Guidelines, would incline the Minister to consider intervention. That proposition needs only be stated to be rejected. There is no warrant for construing section 6.2.1 of the Guidelines so strictly as to lead to so plainly absurd a result.[138] The Guidelines are not a statutory instrument and they have no statutory force.

101. The Plaintiff's further contention that he had a right to be heard generally in respect of the applicability of the criteria in section 4.1.1 of the Guidelines (PS51 at [46]), and in particular in relation to criteria that the officers did not consider to be met (PS51 at [48]) should also be rejected. The fact that officers of the Department have been directed by the Minister to assess a detainee's circumstances on an ongoing basis against the s 195A Guidelines did not confer on the Plaintiff any entitlement to be heard on the merits of that assessment, which he was not permitted to initiate and of which he was unaware before the commencement of the present proceedings. His coming to possess documents relating to that review by reason of these proceedings did not operate to generate such an entitlement (cf S51 Submissions at [47]).

102. It is not entirely clear whether the submissions in paragraph [47] are directed to the first occasion on which Departmental officers considered whether the Plaintiff's case should be referred, or to the occasion which led to the Minister personally considering his circumstances and determining that he did not wish to intervene under s 195A. Whichever of the two processes the submissions relate to, the assertion that the Plaintiff was entitled to know "the case he had to meet" wrongly assumes that the process of Departmental assessment pursuant to the Guidelines involved any "case" being put against him, for the reasons outlined above.

Section 48B

103. In so far as the Plaintiff contends that he was denied procedural fairness in respect of the assessment of his s 48B request, that contention depends upon characterising the country information on which it relies as both adverse to his interests and unknown to him as a matter of substance (PS51 Submissions at [49]-[50]). Even if the information in the US State Department Report is characterised as adverse (as the Plaintiff himself points out, the material in the report was balanced), the Plaintiff had long been on notice of the significance to his claims of country information about the State supporting religious tolerance. Similar information had been referred to, put to him, and relied upon, by both the Minister's delegate and the Tribunal.[139] The updated information upon which the officer relied was consistent, as a matter of substance, with earlier reports of which the Plaintiff was aware; the officer's reliance upon that information did not give rise to a requirement that the Plaintiff be told of its existence or its content.

Section 417

104. In relation to the assessment of the Plaintiff's circumstances for the purposes of the Minister considering the exercise of power under s 417, his first complaint is directed at information referred to in the Submission to the Minister that the Department obtained from his treating specialist, and other sources, in relation

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138 See also the Plaintiff's submissions at [48], where he contends that he was denied the opportunity of having his STARRTS report considered in a joint submission with his first s 417 request.

139 PS 51, AB 139-140, 247 [49]-[51], 248 [53].

to his eye condition.

105. The requirement to accord procedural fairness arises only in relation to any critical issue that is not apparent from the nature of the decision. The Schedule that was submitted to the Minister referred to the Plaintiff's eye condition, included information from International Health and Medical Services that he had no physical issues that would be a barrier to his removal, and referred to country information as to the availability of treatment in Nigeria for a range of eye diseases and conditions.[140] In the face of this information, the Minister nonetheless expressed the view that there was enough in what had been provided to him to warrant further consideration of the Plaintiff's case. The direction for a Submission to be prepared strongly suggests that the Minister did not consider the information as to the Plaintiff's fitness to travel and the availability of medical assistance in Nigeria to be a critical issue that was materially adverse to the Plaintiff in terms of what the public interest required in his case.[141] It cannot be inferred that the repetition or elaboration of that information in the Submission converted it from material that, in the Schedule, was, at worst, neutral (given the Minister's response), into material that the Minister considered positively adverse to the Plaintiff's case so as to enliven an obligation to put it to the Plaintiff for comment.

106. The further alleged denials of procedural fairness upon which Plaintiff S51 relies are without substance. The first, which relates to the material in his report about his marital status, contends, in effect, that the Plaintiff should have been given an opportunity to comment on inconsistent information that he provided to the Department at different times (PS 51 at [52(b)]).[142] Procedural fairness does not require that a person be put on notice of how information that they have supplied may be used in assessing their situation.

107. The second is that Plaintiff S51 was not provided with an opportunity to comment on whether his inability to provide evidence of integration due to his detention was a matter which should bear upon the Minister's discretion (PS51 at [54]). This contention relies upon characterising the absence of evidence of the Plaintiff's integration into the community as "the principal reason for recommending that intervention under s 417 was not appropriate" (PS51 at [53]). That is not an accurate description of the reasoning of the assessing officer, relying as it does upon the concluding remarks of the officer without also looking at what was said earlier in the Submission.

108. Under the heading "Integration", the officer had remarked that although the Plaintiff had remained in immigration detention since his arrival, and had spent no time in the community, "he has nevertheless provided evidence of strong support from various Christian groups and acquaintances". The officer then detailed the material that had been forwarded to the Department on the Plaintiff's behalf, the Department having written to the Plaintiff's representative asking for information regarding community integration.[143] The content of the officer's remarks at the end of the submission cannot be divorced from this earlier material, which indicates an appreciation of the fact that the Plaintiff's immigration detention since arrival constrained his ability to provide evidence of

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140 PS51, AB 481-482.
141 PS 51, AB 481
142 See PS51, AB 3 and AB 500-501.
143 PS51, AB 515,

community integration. Further, and in any event, the Plaintiff was on notice that community integration was an issue that the Department would consider in assessing his s 417 request.

RELIEF

109. For the reasons outlined above, the Defendants contend that none of the Plaintiffs has established any right, duty or interest to be vindicated by the grant of relief. The following submissions are made in the event that contention is not accepted.

Mandamus

110. In order for a writ of mandamus to issue, there must be some legal duty of a public nature which remains unperformed, the fulfilment of which the writ commands.[144] The Plaintiffs accept that mandamus will not issue against the Minister, consistently with the reasoning in *Plaintiff M61* (Principal Submissions at [142]-[144]).

111. Although the Plaintiffs contend that mandamus should issue to the Secretary by requiring him by his officers, agents or otherwise to consider the requests lawfully against the Guidelines and restraining them from assessing their requests other than in accordance with the Guidelines and the requirements of procedural fairness (Principal Submissions at [149]), that contention must fail. The exercise set in train by the Minister's promulgation of guidelines to provide him with advice in the exercise of his non-compellable powers is administrative in nature and does not, of its own force, lead to any exercise of statutory power. The duties of Departmental officers to assess and report on individual cases are owed to and enforceable by the Secretary, as their employer. Accordingly, it cannot be said that administration of the Guidelines gives rise to a legal duty which mandamus can enforce.[145]

Certiorari

112. The unavailability of mandamus necessarily entails that there is no utility in granting certiorari to quash the decisions of the Minister, or the recommendations which a Departmental officer made.[146] Further, the Act does not attribute any legal effect to a decision not to exercise, or consider the exercise, of a non-compellable power. By contrast with a decision to refuse a visa, a decision not to exercise the power in ss 48B, 195A, 351 or 417 does not limit future action by the Minister in respect of those powers. If he so chose, the Minister could have changed his mind about the Plaintiffs and decided to exercise the discretion. Nor does a determination not to exercise the power preclude further requests being made. A decision not to exercise, or not to consider exercising, one of the non-compellable powers is therefore not something capable of being quashed.

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144 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Plaintiff M61* at [99].

145 *Ex-Christmas Islanders Association Inc v Attorney General* (2005) 149 CLR 170 at 191.

146 *Plaintiff M61* at [100], citing with approval *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [48].

113. In support of that relief being granted, the Plaintiffs rely upon the distinction made in the Guidelines between the making of an initial request and a repeat request, and the possibility of obtaining a bridging visa on the making of an initial request but not a repeat request. Although these contentions are advanced on behalf of all of the Plaintiffs, the Defendants note that the only initial requests that are challenged are those of Plaintiff S51 (who was not immigration cleared and hence was never entitled to a bridging visa), and Plaintiff S10. Plaintiff S49 and Ms Kaur challenge decisions and recommendations made following "repeat requests"; the quashing of those decisions or recommendations will not disturb the action taken on their initial requests. The differences between initial and repeat requests do not improve the utility of certiorari. The Guidelines remain administrative instruments which have no statutory force and compliance with which does not compel the Minister to make any decision.

Declarations

114. The present cases fall within the ordinary class of case where the factors leading to the conclusion that mandamus and certiorari do not lie ought lead to the further conclusion that no declaration of right should issue.[147] The extraordinary factors leading to the grant of declaratory relief in *Plaintiff M61* are absent.

Date of filing: 9 December 2011

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147 Cf *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 at 32-33.