IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S10 of 2011

BETWEEN: **PLAINTIFF S10/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S43 of 2011

BETWEEN: **JASVIR KAUR**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

No. S49 of 2011

BETWEEN: **PLAINTIFF S49/2011**
Plaintiff

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First defendant

SECRETARY FOR THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Second defendant

Filed on behalf of the plaintiffs on 28 October 2011:

Parish Patience Immigration Lawyers
Level 1
338 Pitt Street
SYDNEY NSW 2000

Ref: 31810525
Contact: Howard Murdoch
Phone: (02) 9286 8700
Fax: (02) 9283 3323

PLAINTIFFS' OUTLINE OF SUBMISSIONS

Part I Certification

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

Part II Issues

2. These matters concern the process by which departmental officers apply ministerial guidelines to requests made to the Minister for the exercise of powers conferred by ss 48B, 195A, 351 and 417 of the *Migration Act 1958* (Cth) (the **Migration Act**).

3. There are four principal issues:

   a) were the assessment processes pursued in respect of each plaintiff taken under and for the purposes of the *Migration Act*, or were they undertaken in the exercise of non-statutory executive power under s 61 of the Constitution?

   b) were the officers who made the inquiries as part of the assessment processes bound to afford procedural fairness to the plaintiffs?

   c) were the inquiries made according to law and were they procedurally fair?

   d) what is the appropriate relief?

Part III *Judiciary Act 1903*

4. The plaintiffs will give notice to the Attorneys-General of the Commonwealth and of the States in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV Citations

5. These applications for orders to show cause are brought in the original jurisdiction.

6. On 13 September 2011, Gummow J ordered that the applications be referred for final hearing in the first instance by the Full Court.

Part V Facts

7. The plaintiffs are non-citizens. Plaintiffs S10 and S49 have claimed to be refugees. Ms Kaur (S43) made claims relating to the expiry of her student visa.

8. The circumstances of their arrivals are as follows:

	S10	Kaur	S49
National	Pakistan	India	Stateless
Date of arrival	24 Aug 2007	21 Jul 2005	17 Jun 1998
Visa on arrival	Maritime Crew	Higher Education Sector	Short Stay
Applied for protection visa	6 Sep 2007	N/A	17 Jun 1998
Immigration detention	N/A	N/A	16 Jun 2003 – 3 Nov 2005

9. The history of the plaintiffs' requests under the Act is summarised below.

Plaintiff S10

10. Plaintiff S10's procedural history was as follows:

a) On 24 August 2007, the plaintiff arrived in Australia.[1]

b) On 6 September 2007, he applied for a protection visa.[2]

10 c) On 6 November 2007, a delegate of the Minister refused the visa application.[3] He applied for merits review on 26 November 2007.[4]

d) On 22 February 2008, the refugee Review Tribunal affirmed the delegate's decision.[5]

e) On 28 March 2008, the plaintiff sought judicial review in the Federal Magistrates Court.[6] His application was dismissed on 28 July 2008. His appeal to the Federal Court was dismissed on 15 April 2009. His special leave application was dismissed on 4 September 2009.[7]

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1 S10 168E
2 S10 168F
3 S10 168G
4 S10 168I
5 S10 167M
6 S10 388L
7 S10 388M

f) On 30 October 2009, the plaintiff made a request that sought to engage ss 48B and 417 of the Act.[8]

g) On 9 November 2009, an officer advised that requests will be acted upon only if made by persons authorised by the subject of the request but that the extensive material provided would be taken into in any future request by the plaintiff.[9] An authorisation of the requester was then provided by the plaintiff activating the earlier request.[10]

h) On 6 August 2010, a decision was made in respect of s 48B, not to refer the matter to the Minister.[11]

i) On 8 October 2010, a submission by way of schedule was sent to the Minister concerning s 417.[12] The Minister made a decision on 21 October 2010[13] and a letter notifying the plaintiff was sent on or about 26 October 2010.[14]

Kaur (S43/2011)

11. Ms Kaur's procedural history is as follows:

a) On 21 July 2005, Ms Kaur arrived in Australia on a subclass 573 visa valid until 26 September 2005.[15]

b) On 26 September 2005, Ms Kaur was granted a further student visa expiring on 31 August 2008.[16] This was endorsed in her passport.[17]

c) On 19 April 2006, Ms Kaur applied for a student visa that would allow her to change her enrolment.[18]

d) On 28 June 2006, Ms Kaur was granted a further student visa that expired on 6 June 2008.[19]

e) In February 2008, Ms Kaur consulted a lawyer and migration agent and was advised that her visa expired on 31 August 2008.[20]

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8 S10 193-310
9 S10 311Q
10 S10 313-315
11 S10 364-369
12 S10 387-389
13 S10 390-391
14 S10 393-394
15 S43 109I
16 S43 109J-K
17 S43 89-90
18 S43 109P
19 S43 1-4

f) On 1 September 2008, Ms Kaur applied for a further student visa (within 28 days of what she understood was the expiry of her last substantive visa).[21]

g) On 26 September 2008, a delegate refused this visa application (on the basis that it was lodged more than 28 days after her last substantive visa expired).[22]

h) On 18 September 2009, the Migration Review Tribunal affirmed the decision of the delegate.[23]

i) On 16 October 2009, an initial request was made under s 351.[24]

j) On 16 December 2009, the schedule with the department's assessment was sent to the Minister.[25]

k) The Minister considered the schedule on 14 January 2010.[26]

l) A letter was sent advising of the adverse decision on 22 January 2010.[27]

m) On 26 November 2010, the decision of Jacobson J on appeal from decision of Federal Magistrates Court was handed down, which concerned the validity of the MRT's decision.[28]

n) On 20 December 2010, Ms Kaur lodged her second request under s 351.[29]

o) On 6 January 2011, an adverse email sent by the assistant manager to the case officer was sent.[30]

p) On 10 January 2011, a decision was made by an officer of the department not to refer the second request to the Minister and a letter notifying this decision was sent to the plaintiff.[31]

Plaintiff S49/2011

12. The procedural history of Plaintiff S49 is as follows:

	s 48B	s 417

20 S43 40-42
21 S43 6-27
22 S43 28-33
23 S43 34-44
24 S43 47-53, which followed by material in support S43 58-98
25 S43 96-100
26 S43 101
27 S43 102-103
28 S43 105-114
29 S43 115-120
30 S43 131
31 S43 141, 143-144

16 Jun 2003	*Detained at Villawood*	
6 Sep 2004	Initial request[32]	Initial request[33]
12 Oct 2004		Request for information[34]
21 Oct 2004		Schedule referred[35]
9 Nov 2004		Minister decided not to consider[36]
3 Nov 2005	*Released from Villawood*	
22 Dec 2005	Dismissed as guidelines not met	
15 Jun 2009	Repeat request	Repeat request
8 Oct 2009	Dismissed as guidelines not met[37]	
3 Feb 2010		Request for information[38]
2 Nov 2010		Submission referred[39]
25 Nov 2010		Minister decided not to exercise power
1 Feb 2011	*Application for order to show cause filed*	

The defendants

13. The first defendant (the **Minister**) is an officer appointed by the Governor-General to administer a department of State of the Commonwealth under s 64 of the Constitution.

14. An administrative arrangements order made by the Governor-General on 14 October 2010 and currently in force provides for the administration of the *Migration Act* by the Minister.[40]

15. The second defendant (the **Secretary**), as the "Agency Head" of the Minister's department, is responsible for managing the department and must advise the Minister in matters relating to the department.[41]

16. In these submissions, references to officers of the Secretary are references to persons employed under s 22 of the *Public Service Act 1999* (Cth), such persons being officers

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32 S49 at 103-104.
33 S49 at 103-104.
34 S49 at 122-123.
35 S49 at 127.
36 S49 at 130.
37 S49 at 272.
38 S49 at 277-279.
39 S49 at 246-253.
40 Commonwealth of Australia Gazette, GN 41, 20 October 2010, 2372.
41 *Public Service Act 1999* (Cth), s 57.

of the Executive Government of the Commonwealth within the meaning of s 67 of the Constitution.

Part VI Argument

Summary of argument

17. The applications must be allowed for two reasons:

    a) the Secretary and his officers were required, in assessing the plaintiffs' requests, to afford procedural fairness to the plaintiffs because;

        i) the inquiries undertaken in assessing the plaintiffs' requests were made under and for the purposes of the *Migration Act*;

        ii) in the alternative, the inquiries were made pursuant to non-statutory executive power under s 61 of the Constitution; or

        iii) in any event, they were exercising public functions;

    b) the plaintiffs were denied procedural fairness.

18. The plaintiffs seek mandamus, certiorari, injunctions and declaratory relief as set out later in these submissions.

Jurisdiction

19. The court has jurisdiction pursuant to ss 75(iii) and 75(v) of the Constitution. The first and second defendants are parties being sued on behalf of the Commonwealth and the plaintiffs seek mandamus and injunctions directed to the Secretary, an officer of the Commonwealth.

The statutory scheme

20. The relevant statutory provisions have a similar structure and may be summarised as follows (references to numbers are to subsections):

	s 48B	s 195A	s 351	s 417
Nature of power	Permit further application for protection visa	Grant any visa to detainee	Substitute any decision (MRT)	Substitute any decision (RRT)
Persons affected	Non-citizens	Detainees	Applicants	Applicants

Grant of power	(1)	(2)	(1)	(1)
Personal power	(2)	(5)	(3)	(3)
No duty to consider	(6)	(4)	(7)	(7)

21. Similar provisions exist elsewhere in the Act,[42] although not all of the powers conferred by those provisions need to be exercised personally.[43]

Sections 195A,[44] 351 and 417

22. Sections 351 and 417 were introduced into the Act by the *Migration Legislation Amendment Act 1989* (Cth), and were amended so as to confer non-compellable personal powers by the *Migration Legislation Amendment Act (No 2) 1989* (Cth). They were renumbered to the present sections by the *Migration Legislation Amendment Act 1994* (Cth).

23. The statute contemplates that a person in respect of whom a decision has been made by the MRT or RRT under ss 349 or 415 may prepare and make a "request" to the Minister to exercise his or her power to substitute a decision under ss 351 and 417.[45]

24. Similarly, the statute contemplates that a person in immigration detention under s 189 may prepare and make a "request" to the Minister to exercise his or her power to grant a visa of a particular class to that person under s 195A.[46] That section was considered by this court in *Plaintiff M61/2010E v Commonwealth.*[47]

25. Where a person has made or proposes to make a "*request*" under any of those sections, the statute also contemplates that another person may, on their behalf, "make[] representations to, or otherwise communicate[] with, the Minister, a member of the Minister's staff or the Department" about the "request".[48]

26. Subsections 195A(4), 351(7) and 417(7) provide that the Minister does not in any circumstances have a duty to consider the exercise of the relevant powers, including where the Minister is requested to do so. Necessarily, however, these subsections envisage that the Minister may be requested to consider the exercise of the powers.

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42 See, for example, ss 37A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 195A, 197AA-197AG, 261K, 351, 391, 417, 454, 495B, 501A, 501J and 503A.

43 See, for example, ss 37A, 495B and 503A.

44 The construction and significance of s 195A does not arise in any of the three matters addressed in these submissions. However, it is currently anticipated that a fourth matter which involves s 195A is to be referred and it is convenient to address this provision in this context so that submissions on the fourth matter can be limited to identifying the errors of law and denial of procedural fairness that are said to arise in the facts of that case.

45 Sections 276(2A)(a) and 277(4).

46 Sections 276(2A)(b) and 277(5).

47 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 (**M61**)

48 Section 282(4)(e)-(f).

27. The consequences of a decision of the Minister to exercise the power under ss 351 and 417 must be favourable to the non-citizen, detainee or applicant concerned[49] and may involve releasing the person from immigration detention.

Section 48B

28. Although there is not the same express contemplation of the preparation and making of requests in the Act in relation to s 48B, subsection (4) similarly adverts to the possibility that the Minister may be "requested" to exercise his or her power.

29. Section 48B is in materially similar terms to s 46A. Each section confers a non-compellable personal power to 'lift the bar' under s 48A and s 46A(1) respectively, permitting the non-citizen or offshore entry person to make a valid visa application.

Bridging visas

30. There is a further statutory significance for the assessments carried out by departmental officers under ss 48B, 351 and 417 of the Act.

31. With the exception of detainees, those who make an initial request to the Minister to exercise his or her powers are eligible for a bridging visa.[50]

32. Clause 050.2 of Sch 2 to the *Migration Regulations 1994* (Cth) prescribes the primary criteria for the grant of a Subclass 050 (Bridging (General)) visa.

33. Subclause 050.212(6) sets out a requirement which expressly refers to requests made to the Minister under ss 351 and 417. An applicant satisfies the subclause upon making an initial request but is not eligible in respect of subsequent requests made under those sections.

34. Subclause 050.212(5B) provides for the equivalent in relation to requests under s 48B.

35. The effect of a bridging visa is to permit the non-citizen to remain in Australia in the general community.[51]

36. As the making of an initial request to the Minister carries in many instances eligibility for a bridging visa, decisions and conduct undertaken purportedly but not lawfully under the guidelines in respect of initial requests has the capacity adversely to affect a person's status and liberty.

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49 Sections 351(1) and 417(1).

50 See, for example, S10 at 331: *"Our records indicate you have an ongoing S.417 request. You have been granted a Bridging Visa E to keep you lawful in Australia pending a Ministerial outcome."*

51 Section 73.

Common provisions

37. Section 474(7)(a) indicates that, in addition to a decision by the Minister to exercise his power, the possible responses to a "request" under any of the four sections in issue include:

(a) a decision by the Minister not to exercise his power; and

(b) a decision by the Minister not to consider the exercise of his power.[52]

38. The latter will be referred to as being made in the exercise of a power 'not to consider'.

Conclusion

10 39. It follows that the statutory scheme contemplates a process which, typically:

a) begins with the preparation and making of a "request" to the Minister to exercise his or her power;

b) may involve representations to, and communication with, the Minister, members of the Minister's staff, or the department, about the request; and

c) ends with a "decision of the Minister" either to consider or not to consider further the exercise of the power, and in the case of the former, a further decision of the Minister either to exercise or not to exercise the power.

40. The Minister may, of course, in the absence of a request, exercise the power at any time if the Minister thinks that it is in the public interest to do so.

20 41. Together, these provisions provide a framework to enable the Minister to decide whether, in a particular case, the public interest favours permitting a non-citizen to make a further valid application for a protection visa, granting a visa to a detainee, or substituting for a decision of a review tribunal a more favourable decision.

42. The framework also makes accommodation for the status and liberty of those who make requests to the Minister while their requests are under consideration.

43. In that statutory context, the plaintiffs make three principal submissions:

a) The requests to the Minister, the representations and communications in relation thereto, and the consideration of those requests by officers of the Secretary, occurred under and for the purposes of the *Migration Act*, and

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52 *Ozmanian v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 137 ALR 103, Merkel J at 118.

thereby attracted a requirement to afford procedural fairness (see discussion below at paragraphs 45-51).

b) In addition, the nature of the Minister's jurisdiction under ss 48B, 195A, 351 and 417 not only supports the first submission but also separately compels a construction of the Minister's guidelines which includes an implied requirement of procedural fairness according to law (see discussion below at paragraphs 52-73).

c) In any event, where officers have decided not to refer repeat requests to the Minister, those decisions cannot be regarded as decisions "*of the Minister*" and were made without jurisdiction (see discussion at paragraphs 74-90).

44. In the event that the relevant steps were taken outside that statutory context:

a) The consideration of the plaintiffs' requests could only have occurred pursuant to an exercise of non-statutory executive power under s 61 of the Constitution, and that power is also constrained by a requirement to afford procedural fairness (see discussion below at paragraphs 91-99).

b) In any event, the officers were exercising public functions, which this court should hold is attended by a requirement to afford procedural fairness (see discussion below at paragraphs 100-108).

Under and for the purposes of the Act

45. The plaintiffs' primary submission is that all material steps taken in relation to the requests made by the plaintiffs were taken under and for the purposes of the Act.

46. This submission proceeds by analogy with *M61*.[53] In *M61*, this court unanimously held that the decision to establish and implement the RSA and IMR procedures, announced by the Minister in July 2008, was to be understood in two ways:[54]

a) *first*, as a direction to provide the Minister with advice about whether his personal non-compellable powers under s 46A or s 195A can or should be exercised;

b) *secondly*, as a decision by the Minister to consider whether to exercise either of those powers in respect of any offshore entry person who makes a claim that Australia owes the claimant protection obligations.

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53 (2010) 272 ALR 14.

54 M61 at [66]

47. There were three principal matters which showed that the Minster had begun that task:[55]

a) *first*, the powers under ss 46A and 195A may *only* be exercised by the Minister *personally*;

b) *secondly*, the assessment and review were made in consequence of a ministerial direction;

c) *thirdly*, in the circumstances of those cases, the continued detention of an offshore entry person, while an assessment and review were conducted, was lawful only because the relevant assessment and review were directed to whether powers under either s 46A or s 195A could or should be exercised.

48. The first and second of those matters also exist in each of the present cases.

49. The third matter, which compelled the conclusion that the assessment and review were carried out under the Act, is also present in the case of Plaintiff S51 (to be addressed further in separate submissions if referred to the Full Court).

50. Two reasons why that conclusion should also be reached in respect of the remaining cases are:

a) the suggestion that the same procedures might be carried out under the Act for detainees but pursuant to non-statutory executive power for others is unpersuasive;

b) the Act expressly contemplates and permits the making of "requests" to the Minister, the making of "representations" to and "communication" with not only the Minister but also members of the Minister's staff and the department, and the making of a "decision of the Minister". Those are the matters upon which the plaintiffs base their claims and there is nothing about those matters that is non-statutory.

51. For these reasons, the assessment processes pursued by the Secretary and his officers were carried out under and for the purposes of the Act. There being no plain words of necessary intendment such as might exclude an obligation to afford procedural fairness, the Secretary and his officers were required to comply with that obligation.

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55 M61 at [62] and [67]

The Minister's jurisdiction

52. The following submissions provide additional support to the former as well as providing an independent basis for making the accordance of procedural fairness obligatory.

53. Sections 48B, 195A, 351 and 417 confer various powers on the Minister to intervene in cases where the Minister thinks that it is in the public interest to do so.

54. It is now settled that the Minister does not determine the limits of those powers and, if one of those powers is exercised, s 75(v) can be engaged to enforce its limits.[56] Section 474 has the effect that there can be no relief unless there is jurisdictional error.

10 55. In order to establish jurisdictional error, it is first necessary to establish the nature and limits of the Minister's jurisdiction. The statutory scheme which contemplates the making of requests to the Minister and, at the discretion of the Minister, the consideration of those requests by the Minister, has already been outlined.

56. For five reasons, the words "[i]f the Minister thinks that it is in the public interest to do so, the Minister may ..." appearing in each section require that the Minister be **able** to consider exercising the power thereby granted to him when he is requested to do so:

a) The public interest criterion in ss 48B, 195A, 351 and 417 is a jurisdictional fact upon which the exercise of each of the relevant powers is conditioned.[57]

b) The existence of that jurisdictional fact depends wholly on the Minister's
20 opinion concerning the public interest.

c) The Minister's opinion concerning the public interest must be an opinion formed according to law,[58] including by affording procedural fairness.[59]

d) The Minister need not, *but must be able to if he wishes to do so*, form that opinion in respect of a particular non-citizen, detainee or applicant who has requested the exercise of the Minister's power.

e) A submission or schedule in the preparation of which procedural fairness has been denied does not enable the Minister to form that opinion.

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56 *M61* at 28 [59].

57 *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341, Gleeson CJ at 344 [14], 347 [35].

58 *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320, French CJ, Gummow and Bell JJ at 328 [12]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, Gummow J at 652-654 [133]-[137]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, Brennan CJ, Toohey, McHugh and Gummow JJ at 275-6.

59 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, the Court at 32 [74], citing *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 598.

57. It is, of course, not relevant to this submission that the Minister need not consider whether to exercise the power. What is required by the Act is that the Minister be able to form a view about the public interest and thus be able to exercise the power if he or she thinks that it is in the public interest to do so.[60]

58. It is lawful for departmental officers to place such requests as are received unassessed on the Minister's desk. It is lawful for departmental officers to summarise requests in accordance with the guidelines, according to law and by affording procedural fairness. It is not lawful for departmental officers to prevent the Minister from considering a request according to law should he wish to do so.

10 59. For these reasons, to be valid, the guidelines issued by the Minister must be construed as impliedly requiring the officers who apply them to afford procedural fairness. Any other conclusion is inconsistent with the Act.

The terms of the guidelines

60. On 14 September 2009, the Minister issued a policy instruction titled "Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)" (the **guidelines**).

61. The principal instructions by the Minister were:

a) "This policy instruction [is] to provide guidance on applying ministerial intervention requests received on or after 14 September 2009."[61]

20 b) "The purpose of these guidelines is to ... 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."[62]

c) "The procedures set out" in the guidelines "are to be followed, in order to ensure the efficient administration of my public interest powers".[63]

62. It has been held by the Full Federal Court and at least two justices of this court that the formulation and issue of guidelines by the Minister "was tantamount to an expression by him of a willingness to consider the exercise of the power conferred upon him by

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60 *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341 Gleeson CJ at 347 [35].

61 S10 at 437.

62 S10 at 438.

63 S10 at 444.

s 48(1)(b) under certain defined circumstances even though he was under no duty to consider the exercise of that power".[64]

63. The guidelines also distinguish between "initial requests" and "repeat requests".

64. While initial requests are required to be considered *de novo* by the case officer according to the guidelines, repeat requests are not to be referred to the Minister unless new information is presented or there has been change of circumstances since the prior request.

65. It has been held that the assessment of a repeat request against the guidelines "require[s] a view to be formed, a subjective assessment as to whether the case ha[s] moved closer towards fulfilling the Convention definition" or the guidelines and is thus "of sufficient strength to warrant reference to the Minister".[65]

66. The guidelines expressly contemplate procedures that are consistent with a requirement to afford procedural fairness (emphases added):

a) "Case officers should provide all relevant information to allow the Minister to make this decision."[66]

b) "The MIU case officer is to provide the Minister with an analysis of all information relevant to the Minister's consideration of this matter."[67]

c) "In assessing individual cases, the MIU case officer should determine whether ... there are explanations for any deficiency or inconsistency in the evidence."[68]

d) "The submission [to the Minister] should indicate whether claims are supported by documentation, and if not, reasons why not."[69]

e) "The department should generally not put to the Minister any unsubstantiated allegations made by third parties or allegations that have been investigated by the department and dismissed. If the department feels that allegations are serious and should be placed before the Minister for consideration, the information should generally be put to the person to give them an opportunity to comment, unless there are reasons why this may not be appropriate, for

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64 *Bedlington v Chong* (1998) 87 FCR 75, Black CJ, Kiefel and Emmett JJ at 80; *Ordonez v Minister for Immigration & Multicultural Affairs* [2000] FCA 736, Kiefel J at [13]; *Minister for Immigration & Multicultural Affairs; Ex parte Ordonez* (unreported, High Court of Australia, Callinan J, 22 March 2001).

65 *Ordonez v Minister for Immigration & Multicultural Affairs* [2000] FCA 736, Kiefel J at [16].

66 S10 at 407.

67 S10 at 414.

68 S10 at 416.

69 S10 at 422.

example, where it may result in potential harm to another person or there is an ongoing investigation into the matter."[70]

f) "[T]he department may also ask persons to provide additional information, to undergo additional checks to support claims or to attend an interview".[71]

67. The proper construction of the Act requires the conclusion that, where a failure by the Secretary or his officers to act in accordance with the guidelines is inconsistent with the lawful exercise by the Minister of his powers (should he think it in the public interest to do so), the Secretary or his officers have exceeded their jurisdiction.

68. This is consistent with the stated purpose of the submission to be prepared for the Minister: "The purpose of the submission is to provide the Minister with sufficient analysis of information about the subject of the request to enable the Minister to consider whether to exercise a public interest power in the case."[72]

69. In other words, the Secretary and his officers must not act in a manner that is repugnant to the Minister's jurisdiction under ss 48B, 195A, 351 or 417.

70. On this approach, the critical circumstance in which the Secretary or his officers might lawfully decide not to refer a request to the Minister is where the Secretary or officer has acted strictly in accordance with the Minister's guidelines, including the implied obligation to afford procedural fairness.

71. In this regard, it is useful to recall the careful words of the Full Federal Court in *Bedlington v Chong*:

> *So long as the Secretary was acting in accordance with the guidelines, she had no duty to refer Ms Chong's application to the Minister. In reaching that conclusion, of course, we should not be understood as saying that, if the Secretary was not acting in accordance with the guidelines, Ms Chong was entitled to any relief. That is not a matter before us.*[73]

72. For these reasons, the guidelines must be construed as incorporating an implied obligation that non-citizens, detainees and applicants be afforded procedural fairness in the application of the guidelines.

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70 S10 at 423.
71 S10 at 421.
72 S10 at 422
73 *Bedlington v Chong* (1998) 87 FCR 75, Black CJ, Kiefel and Emmett JJ at 80-81. Ms Chong's complaints about procedural fairness were to be heard by this court, but the proceeding was discontinued before the hearing. See the history outlined in *Re Minister for Immigration, Multicultural & Indigenous Affairs; Ex parte Applicant S190 of 2002* [2002] HCATrans 403 (19 August 2002) per Kirby J.

73. In the absence of plain statutory words of necessary intendment, the Minister could not validly direct the use of guidelines which excluded a duty to afford procedural fairness.[74]

Decisions "of the Minister"

74. It is apparent from s 474(7) that a decision not to consider the exercise of the power must also answer the description of being a decision "*of the Minister*".

75. In the ordinary case, where a request is assessed without error, in a manner consistent with procedural fairness, and is ultimately finalised by the Minister through the use of a submission or schedule, there is no difficulty in concluding that the decision is a decision "*of the Minister*".

76. A decision will not be a decision "*of the Minister*" in the following circumstances:

a) where an officer purports to decide that the Minister will or will not exercise the power;

b) where an officer, in the absence of a delegation under s 496, or contrary to guidelines issued by the Minister, purports to decide that the Minister will not consider the exercise of the power; or

c) where an officer to whom the power to not consider has been delegated under ss 496 exceeds the terms of the delegation or does not comply with written directions given under s 499.

77. In those circumstances, the officer has no jurisdiction to make the purported decision.

78. In the first case, the Minister's power must be exercised personally.

79. In the second case, as the *Carltona*[75] principle does not apply, the power must be exercised personally if the power is not delegated. Alternatively, if the *Carltona* principle applies, a decision contrary to the guidelines and therefore in excess of the authority exercised by the officer cannot be a decision "*of the Minister*".

80. In the third case, the officer has exceeded his or her authority.

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74 Section 499(2). Even if the guidelines were ministerial directions under s 499, that section does not empower the Minister to give directions that would be inconsistent with the Act.

75 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

The first case: personal exercise of the power

81. In providing that each power may only be exercised by the Minister personally, the legislature effected an implied partial repeal of the delegation provision in s 496.[76]

82. Additionally, as two members of this court have held in relation to a similar power, the public interest powers are not administrative functions which may be exercised by the Minister through a duly authorised officer of the department.[77]

83. This does not mean that each step or element in the exercise of the power must be undertaken by the Minister.[78] It does mean, however, that each of the powers is non-delegable and cannot be exercised by an officer.

10 84. There is no suggestion that either has occurred in any of the present cases.

The second case: agency and guidelines

85. As those subsections which require the public interest power to be exercised by the Minister personally[79] do not expressly apply to a decision not to consider the exercise of that power, the power to make the latter decision might be able to be delegated under s 496 and, if so, thereupon may be the subject of written directions under s 499. It has been suggested by a single judge of the Federal Court that the power not to consider a request is delegable.[80] However, the correctness of this conclusion depends upon whether the power to decide whether or not to consider is divisible from the substantive power.[81] In the present case, there is no suggestion that any power was
20 ever delegated making this question currently immaterial.

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76 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, Gummow and Hayne JJ at 448-449 [175], citing *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 353-354 [9], 375-376 [67]-[69].

77 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, Gummow and Hayne JJ at 449 [176], referring to *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, Gibbs CJ at 11-12, Mason J at 18-20, and Wilson J at 30-32; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, Mason J at 37-38; *Re Reference under s 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86, Brennan J at 93-95. See also *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, Lord Greene MR with whom Goddard and Du Parcq LJJ agreed at 563.

78 *Tickner v Chapman* (1995) 57 FCR 451, Kiefel J at 493-494.

79 Sections 48B(2), 195A(5), 351(3) and 417(3).

80 *Ozmanian v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 137 ALR 103, Merkel J at 120.

81 See *Singh v MILGEA* (1989) 90 ALR 397, Keely J at 402; *Singh v Castello* (1990) (unreported, Federal Court, Spender J, 16 July 1990) at [32]-[33]; and *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171.

86. It is clear that, in the absence of a valid delegation, unless the *Carltona* principle applies, the power to not consider must be exercised by the Minister personally.[82] The plaintiffs contend that the *Carltona* principle does not apply.

87. There is nothing in the scope, nature or purpose of the power not to consider which requires or warrants a presumed intent that, if not delegated, it need not be exercised by the Minister personally.[83] Exercise of the power not to consider has important consequences for the person who made the request and in many cases will result in their removal from Australia possibly after detention. The purpose of the public interest powers is to provide, as a last resort, access to personal ministerial discretion.

10 88. Alternatively, even if the *Carltona* principle does apply, the authority of the officers to decide that the Minister will not consider the exercise of the public interest power is limited to such decisions as are authorised by the guidelines.

89. This is one reason for the conclusion that, in the cases of Kaur and S49, the decisions of the officers not to refer requests to the Minister were unlawful.

The third case

90. This example does not require any further exposition.

Executive power and procedural fairness

91. If the inquiries made in the course of the assessment processes were made pursuant to executive power under s 61 of the Constitution, and not under any authority conferred
20 by statute, those making the inquires were still obliged to act with procedural fairness.

92. In *Re Refugee Review Tribunal; Ex parte Aala*,[84] Gaudron and Gummow JJ noted that:

> *...where the officer of the Commonwealth executes an executive power, not a power conferred by statute, a question will arise whether that element of the executive power of the Commonwealth found in Ch II of the Constitution includes a requirement of procedural fairness. It is unnecessary to pursue that question further in the present case, but if that requirement is included then prohibition will lie to enforce observance of the Constitution itself.*

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82 *Ozmanian v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 137 ALR 103, Merkel J at 120-121.

83 *Ozmanian v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 137 ALR 103, Merkel J at 121.

84 *Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ at 101 [42], citing *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, Bowen CJ at 278, Sheppard J at 280-281, Wilcox J at 302-303; *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

93. It is settled that, when a statute confers executive power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power.[85] Procedural fairness is also an indispensable incident of the judicial power of the Commonwealth under Ch III.[86]

94. There is no reason to doubt that the non-statutory executive power, including that vested in the Commonwealth Government under s 61 of the Constitution, is subject to a similar duty to afford procedural fairness, at least where the exercise of the power prejudices rights, interests or legitimate expectations.[87]

95. It is established that the duty to afford procedural fairness extends to the exercise of prerogative powers[88] which, in Australia, must be found in s 61 of the Constitution. Moreover, procedural fairness is an aspect of the principle of legality and the rule of law,[89] which are assumed by the Constitution.[90]

96. In other words, there is no reason to suppose that the power vested under s 61 extends to a power to act unfairly or unreasonably in all cases in which the power could otherwise be exercised.

97. The practical content of the obligation to afford procedural fairness depends on the circumstances of each particular case and cannot be fully stated "[w]ithout the aid to be found in the sharp stimulus of a particular controversy".[91]

98. In those circumstances, an exercise of non-statutory executive power is as much an "exercise of public power"[92] as an exercise of statutory executive power. Coherence in the law requires that every exercise of public power be subject to the same requirements.

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85 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, the Court at 32 [74], citing *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 598.

86 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, French CJ at 354 [54], Gummow and Bell JJ at 363-364 [88], Heydon J at 379-380 [141].

87 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, Brennan J at 407-413; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, Bowen CJ at 278, Sheppard J at 280-281, Wilcox J at 302-303; *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, Tadgell J at 138-139, Ormiston J at 148, Eames J at 157-160.

88 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock at 409; *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, Tadgell J at 133-139, Ormiston J at 147-149 and Eames J at 154-159.

89 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, French CJ, Gummow, Hayne, Crennan and Kiefel JJ at 259 [15].

90 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 Dixon J at 193.

91 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, Heydon J at 273 [63](g).

92 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, McHugh J at 93.

99. It always remains open to Parliament to enact legislation which authorises, by plain words of necessary intendment, the use of executive power without affording procedural fairness.[93] That has not occurred in any of these cases.

Public functions and procedural fairness

100. Although the plaintiffs' principal submission is that, to be lawful, the officers involved must have been exercising either statutory executive power under the *Migration Act* or non-statutory executive power pursuant to s 61 of the Constitution, there is a further reason why an obligation of procedural fairness was owed in any event.

101. In *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815, the panel was an industry body lacking legal recognition, but its determinations were of commercial and public significance in the operation of the London Stock Exchange and involved the enforcement of the non-statutory City Code on Take-overs and Mergers. The Court of Appeal held that it was amenable to judicial review although a private body, because it was exercising "regulatory functions of government".[94]

102. The decision of this court in *Forbes v New South Wales Trotting Club Ltd*[95] has been described[96] in terms which resemble the *Datafin* principle:

> *In* Forbes v New South Wales Trotting Club Ltd, *the respondent was a private club with "no statutory power or recognition" but which "controlled trotting in New South Wales by the consent of the government and all of the trotting clubs of that State".*[97] *Yet for the purposes of its decisions in exercise of a power to warn off persons from courses under its control, it was held that the club was required to observe the rules of natural justice. This was because trotting was a "public activity in which... large numbers of people take part" and "[m]embers of the public have the legitimate expectation" to be admitted upon paying the stated charge.*[98] *Gibbs J thought that it was relevant that, at least in some situations, "the person warned off might thereby be prevented from carrying on his occupation or performing the duties of his employment".*[99] *Accordingly, a private club owner implementing the rules of trotting, such as the respondent in that case, could not exclude members of the public "arbitrarily and capriciously".*[100]

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93 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, the Court at 32 [74], citing *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 598.

94 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at [74].

95 (1979) 143 CLR 242.

96 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, Kirby J at 312-313 [110].

97 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Gibbs J at 262.

98 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Gibbs J at 264.

99 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Gibbs J at 264.

100 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Gibbs J at 269.

103. Justice Murphy said expressly that the nature of the power exercised can be public, even if the decision-maker is a private body:[101]

> *There is a difference between public and private power but ... one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious. ... [A] body ... which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee, is exercising public power.*

10 104. The most recent consideration of *Datafin* by an intermediate appellate court concluded that "there is an absence of authority in Australia addressing the question of whether or not *Datafin* applies" and "statements of general principle in [the High Court] might be thought to adopt a more limited scope for the operation of public law remedies".[102]

105. That decision did not explain *Forbes* if public law remedies are to be of such limited availability. A majority of the Court of Appeal including the Chief Justice had previously cited *Forbes* and *Datafin* with apparent approval.[103]

106. There are no other Australian decisions which cast doubt on the applicability of *Datafin* in Australia.[104] It has been applied in Victoria[105] and New South Wales.[106]

107. In light of modern government practices, adoption of the *Datafin* principle is not only
20 a natural development but also a necessary development, because it is essential to the continued preservation of the constitutional jurisdiction to review executive action.[107]

108. The departmental officers who assessed the plaintiffs' requests against the ministerial guidelines were exercising public or governmental functions and, in the exercise of those functions, owed an obligation to afford procedural fairness.

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101 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Murphy J at 275.

102 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 272 ALR 750, Basten JA at 767 [81] with whom Spigelman CJ agreed at [2].

103 *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381, Spigelman CJ at 385 [7] with whom Ipp A-JA agreed at 445 [297].

104 *Ceca Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552, Kyrou J at [97].

105 *Ceca Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552, Kyrou J at [77]-[100].

106 *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* [2004] NSWSC 829, Shaw J at [5].

107 *Ceca Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552, Kyrou J at [99].

Content of obligation

109. Although the content of the obligation to afford procedural fairness varies with the circumstances, in the present matters, its content included at least the following:

a) acting in good faith;

b) avoiding bias and the reasonable apprehension of bias;

c) providing an opportunity to be heard in relation to adverse material;

d) providing an opportunity to be heard on adverse conclusions that are not obviously open on the known material;

e) not failing to consider clearly articulated claims supported by evidence;

f) providing an opportunity to be heard in relation to any proposed departure from the published guidelines.

110. It is the last four aspects of that obligation that are principally relied on in these cases.

Denials of procedural fairness

Plaintiff S10/2011

111. This application concerns initial requests under ss 48B and 417 of the Act.

112. When considering Plaintiff S10's initial request under s 48B:

a) The case officer referred to the RRT's findings and recorded that "[t]he RRT was satisfied that [Plaintiff S10] would be able to obtain effective State protection, if he lives in the North West Frontier Province (NWFP) of Pakistan".[108]

b) The RRT had in fact said: "The Tribunal therefore cannot be satisfied that the applicant would be able to obtain effective State protection if he lives in the North West Frontier Province."[109] (Emphasis added.)

c) The case officer noted the supporting documents relied on by Plaintiff S10, including a new letter,[110] which the case officer recorded as advising that

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108 S10 365Q
109 S10 182C
110 S10 237

"three of [Plaintiff S10's] close relatives have been killed by the Taliban and should [Plaintiff S10] return to Pakistan, he will most certainly be killed".[111]

d) The new letter in fact said: "[Plaintiff S10] when found his life in danger, he left Pakistan and went to Australia. During this period Talibans killed his three close relatives and still the Talibans are in search of [Plaintiff S10]. So God forbid when the Talibans find [Plaintiff S10], they will kill him and hence his arrival to Pakistan is full of danger."[112] (Emphasis added.)

e) The case officer proceeded to find that "[t]here is no new information or evidence before the department to contradict the RRT's findings"[113] and "there is no information to indicate that [Plaintiff S10] will be differentially treated by the authorities in Pakistan, or that he will not continue to have the same level of State protection as other citizens of Pakistan".[114]

f) The case officer considered country information adverse to Plaintiff S10 without informing him or providing an opportunity to be heard in relation to it. The information included a US Department of State report which "indicates that Pakistan has a functioning police, security and judicial establishments"[115] and a UK Home Office report on Pakistan dated 18 January 2010.[116]

113. Having made those errors, and without inviting Plaintiff S10 to make any comment on the adverse material proposed to be relied on, the case officer found that Plaintiff S10's request did not meet the guidelines, and her team manager agreed.[117]

114. The request was not referred to the Minister. That decision involved a denial of procedural fairness. The adverse conclusion as to the Refugee Review Tribunal's finding on the lack of availability of state protection in the plaintiff's home province was one that was "not obviously ... open on the known material" and should have been advised to Plaintiff S10.[118] The case officer had failed to address Plaintiff S10's clearly articulated case and new evidence to the effect that he, as an individual, was being sought by a fundamentalist group. A failure to address such a claim, especially as established by the inadequate summary of the material and assertion that there was

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111 S10 366Q
112 S10 237
113 S10 367C
114 S10 368Q
115 S10 368K
116 S10 367F
117 S10 364Q
118 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; and see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [29].

no new evidence of differential treatment, is also a denial of procedural fairness.[119] The adverse country information should have been provided to Plaintiff S10 for comment.[120]

115. Subsequently, a different officer considered Plaintiff S10's initial request under s 417:

a) The department informed Plaintiff S10 that "[t]he information you provided ... has been noted and will be taken into account in any future request by [Plaintiff S10] for Ministerial intervention".[121] The information provided included the letter adverting to the risk of death.[122]

b) The authorising officer under s 417 referred to that letter and, in reliance on the flawed finding of the s 48B case officer, recorded that "the Department considered that he did not meet the guidelines under s48B as he provided no new evidence in his Ministerial intervention request that would enhance his chance of making a successful [protection visa] application".[123] This reveals that the analysis of the s 48B case officer, which had not been provided to Plaintiff S10, was being used adversely to him.

116. Insofar as the officer adopted the findings that were made in respect of the s 48B request, the officer failed to consider properly the merits of Plaintiff S10's case. More critically, there was no opportunity for Plaintiff S10 to be heard in relation to the officer's reliance on the earlier adverse findings and material.

117. The denials of procedural fairness by the s 48B case officer infected and exacerbated denials of procedural fairness by the s 417 case officer. These cumulatively infected the Minister's decision in respect of the s 417 request.

Kaur (S43/2011)

118. This application concerns a repeat request under s 351.

119. The genesis of the requests was Ms Kaur's reliance on incorrect advice given to her by her migration agent which resulted in her lodging her visa application out of time.[124]

120. The advice was based on a confusing *departmental letter*. The letter stated an expiry date for Ms Kaur's visa of 6 June 2008, but then invited attention to a later expiry date

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119 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24].
120 Re MIMA; ex parte Miah (2001) 206 CLR 57, Gaudron J at [99], McHugh J at [147], Kirby J at [196].
121 S10 311Q
122 S10 237
123 S10 389I-J
124 S43 at 113 [63].

of 31 August 2008 which appeared on the visa label endorsed on Ms Kaur's passport.[125]

121. Ms Kaur had lodged her visa application at a time consistent and appropriate with the second of those dates, in accordance with advice from her lawyer.

122. Albeit unbeknownst to Ms Kaur at the time, when her initial request under s 351 was considered by a case officer, the officer noted that "[the visa grant] letter **clearly** stated the new expiry date for her new visa"[126] (emphasis added). This was such an important element that it bore repeating in the space of the case officer's very short assessment: "her visa grant letter did clearly indicate the new visa expiry date".[127] While this characterisation was conveyed to the Minister, it was not relayed to Ms Kaur in any correspondence by the Minister or otherwise.

123. Subsequently, when Ms Kaur sought review of the delegate's decision to refuse to grant her a visa because her application had been lodged out of time:

a) Barnes FM held that the departmental letter was "somewhat confusing".[128]

b) Justice Jacobson, in resolving an appeal concerning the effect of that letter, agreed with the description given by Barnes FM, adding that the letter was "to say the least confusing" and that the incorrect advice given by Ms Kaur's migration agent was "not unreasonable in light of the confusing terms of the letter".[129]

c) His Honour concluded: "In those circumstances 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."[130]

124. In this way, the case officer's characterisation of the letter as having been clear was implicitly rejected by both judicial officers (it is not suggested that the judicial officers were aware of the terms of the case officer's decision under s 351).

125. The findings by Jacobson J prompted Ms Kaur to make a second request to the Minister, in respect of which the following matters occurred:

a) The repeat request stated: "[T]he Court has also recommended in paragraph 65 of the judgement order that in the circumstances of the applicant it may be a

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125 S43 1S-U at 112M-51
126 S43 96W
127 S43 97L
128 S43 113P
129 S43 113S
130 S43 113T

matter in which the Minister would be prepared to revisit the question of whether to substitute a more favourable decision pursuant to Section 351 of the Act (see FCA File No: NSD 1197 of 2010 and a copy of Judgement enclosed)."[131]

b) An assistant manager emailed the following statement to the case officer considering the request: "The new request is based almost primarily on a comment the Federal Court made in its judgement, suggesting it might be a case the Minister would consider looking at a second time. Apart from that there appears to be no new information."[132]

c) The case officer found: "The only new information in regard to this request is that the Federal Court stated in its judgment 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 s351 of the Act'. However, no other compelling information that has not previously been considered has been provided that would bring her case within the Minister's guidelines for repeat referral to him."[133] (Original emphasis.)

126. It is apparent that no one within the department had any regard to the judicial criticism directed against the "confusing" departmental letter upon which both Ms Kaur and her migration agent had (erroneously) relied when Ms Kaur lodged her application out of time. Those judicial comments were irreconcilable with the view previously taken by the department that the letter "clearly stated the new expiry date".

127. The assessment in the original submission and the email from the assistant manager separately and cumulatively contained material adverse to Ms Kaur's request. If that material had have been provided by the ultimate case officer to Ms Kaur she would have had an opportunity to address the initial mischaracterisation of the letter and to have referred to the judicial statements about its confusing nature, which was the precise reason for the troubles she was experiencing and was obviously relevant to any assessment. The judicial characterisation of the letter as confusing, given its centrality, could have been seen as new information if it had been identified and considered. The failure to provide to Ms Kaur this adverse material constituted a denial of procedural fairness.

128. Moreover, the guidelines stated at all material times:

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131 S43 115P-R
132 S43 131H
133 S43 141N-O

a) "[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 10 – Referral by a review tribunal ... of the Minister's guidelines". (**272**)

b) "Cases referred to the department by a review tribunal should be referred to the Minister in the form of a submission. Case officers should attach a copy of the decision record to the submission. Where the department has nevertheless assessed the case as not having unique or exceptional circumstances, this should be brought to the Minister's attention." (**273**)

129. Ms Kaur was never invited to be heard in relation to the officer's departure from those guidelines. It cannot reasonably be supposed that the above guidelines were not intended to encompass pointed remarks made by federal judicial officers, or that federal judicial officers should be expected to go further than what was said here.

130. The observations made by Jacobson J during this review of decisions of the Federal Magistrates Court and the Minister's delegate are an obvious example of the kind of case intended by the above guidelines to be brought to the Minister's attention.

131. In *Tuuhoko v Minister for Immigration and Multicultural and Indigenous Affairs*,[134] the Full Federal Court commented on the nature of this ministerial discretion:

> *It is clear that s 351 is intended to cover cases where the technical application of barriers to an entitlement to remain in Australia should not be permitted to override the public interest in a contrary conclusion. If in fact persons with considerable meritorious grounds for remaining in Australia are unable to have those grounds considered because of a technical bar created by the Act or regulations, and consequently are refused the grant of a visa, Australia is the poorer.*

132. The decision was, *first*, unlawful because the officers had no jurisdiction to exercise the power not to consider in the circumstances outlined above (see discussion at paragraphs 85-89), and, *secondly*, flawed by reason of the failure to have regard to relevant considerations and the denials of procedural fairness.

Plaintiff S49/2011

133. This application concerns initial requests and repeat requests under ss 48B and 417.

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134 [2002] FCAFC 410, Wilcox, Spender and Ryan JJ at [6].

134. Plaintiff S49 was being held in Villawood Immigration Detention Centre for the whole time his initial request under s 417 was being considered and for part of the time in which his initial request under s 48B was being considered. He was released prior to making the subsequent requests.

135. In his initial request, Plaintiff S49 revealed that, in his application for a protection visa, he had falsely claimed to be a national of India (**Mr S**). He proceeded to claim that he is in fact a national of Bangladesh (**Mr K**), but is not recognised as such by Bangladesh. On that basis, he claimed to be stateless.[135]

136. The department dealt with his initial request under s 417 in the following way:

a) On 12 October 2004, a departmental officer wrote to Plaintiff S49, noting that "you have not provided any documentation to substantiate your claim that you are a national of Bangladesh". The officer requested any available supporting documentation, or an explanation of efforts taken to obtain documentation, and any additional information which might support the claim. The officer stated: "The requested information should reach this office before close of business on Wednesday 27 October 2004. On that date your request will be actioned on the basis of the information held at that time."[136] (Emphasis added.)

b) On 19 October 2004, a departmental officer finalised a summary of Plaintiff S49's request for reference to the Minister in a schedule. The officer found that "neither the Indian nor Bangladeshi Consulates are prepared to issue him with a travel document".[137]

c) On 21 October 2004, the summary schedule was referred to the Minister with a notation that Plaintiff S49's case did not fall within the guidelines,[138] even before the plaintiff's allotted time for providing material had ended.

d) On 21 October 2004, the department received a response from Plaintiff S49 to the officer's request for information. His response included a statement of his inability to obtain certain documents and the efforts he had taken to obtain them, including cooperation with the department to apply for a Bangladeshi passport and visit to the consulate with a named departmental officer.[139]

e) No further or amended summary schedule was referred to the Minister.

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135 S49 103-104
136 S49 122-123
137 S49 128-129
138 S49 127
139 S49 124

f) On 9 November 2004, the Minister decided not to consider the exercise of her power.[140]

137. Insofar as the department failed to consider information which it had invited Plaintiff S49 to provide and which it appeared would be the basis upon which his case was to be decided, Plaintiff S49 was denied procedural fairness.

138. In relation to Plaintiff S49's repeat request under s 417:

a) His claim was that "I am not an Indian" and "I am a Bangladeshi".[141]

b) Internally, the case officer was advised: "If you think it appropriate, you may wish to inform [Plaintiff S49] that the Department is satisfied that he is [Mr S from India] and the onus is on him to provide evidence in support of his claim to be [Mr K from Bangladesh]."[142]

c) The case officer replied: "Seems like there is a lot of evidence to suggest he is an Indian national called [Mr S]. We will see what he provides as you mentioned and go from there. When I have contact with him next I will advise as you noted about DIAC satisfied he is [Mr S] and he should obtain evidence to prove he is [Mr K]."[143]

d) No such advice was ever provided to Plaintiff S49.

e) The case officer subsequently sought information from another section of the department in relation to whether the previous issue of a travel document to Plaintiff S49 by the Indian authorities meant that they recognised him as an Indian citizen with a right to remain in India indefinitely. The response was: "I would say yes they do."[144] This advice also contended that a travel document from India could be issued within two weeks "but there are no guarantees".

f) In her final submission, the case officer found that "the Department remains satisfied that he is an Indian national by the name of [Mr S]".[145] It also advanced the two week timetable for obtaining a travel document from Indian authorities.[146]

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140 S49 130
141 S49 159
142 S49 281
143 S49 280
144 S49 290
145 S49 247
146 S49 251

139. The failure to provide Plaintiff S49 with an opportunity to be heard in relation to the department's 'satisfaction' as to his citizenship (and the correspondence advising it to the case officer) and the ability to obtain a travel document within two weeks involved a denial of procedural fairness.

140. When Plaintiff S49 made a repeat request under s 48B:

a) He claimed to fear persecution in Bangladesh because he is a Hindu,[147] being a claim that had not previously been advanced.

b) He relied on country information provided with his request, which he described in the following terms: "I am enclosing a printout of a Hindu Human Rights Report date 18 July 2005 and the Amnesty International Report dated 1 March 2008 ... concerning Hindus in Bangladesh ... This Human Rights Report is the latest I can find about Human Rights in Bangladesh. Even though it is dated 2005, I am quite sure that the conditions for Hindus in Bangladesh have changed very little or not at all since that time."[148]

c) The case officer addressed that claim by referring to her own more recent country information: "The latest country information from numerous reports such as the United States Country Reports on Human Rights Practices 2008 for Bangladesh, the United States International Religious Freedom Report 2008 for Bangladesh, and the 2008 UK Country of Origin Information Report for Bangladesh does not support his claims. For example, information from these sources indicates that the Bangladesh Constitution respects that every religious community or denomination has the right to establish, maintain, and manage its religious institutions."[149]

d) The case officer used that country information as the basis of the decision: "Based on the above country information, it does not appear that [Plaintiff S49] will face persecution, intimidation for reasons of being a Hindu."[150]

141. Insofar as none of the information relied on by the case officer was put to Plaintiff S49, he was denied procedural fairness.

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147 S49 at 268.
148 S49 154
149 S49 269
150 S49 269

Mandamus against the Minister

142. Single justices of this court have held in relation to ss 48B(6),[151] s 351(7)[152] and s 417(7)[153] that the words of those subsections are clear and were included in the Act "in order to relieve the Minister of the duty which would occasion applications by the constitutional process of Mandamus to require the Minister to exercise a duty".

143. This court has also confirmed that, in relation to ss 46A and 195A, mandamus will not issue to compel the Minister to consider the exercise of the powers conferred by those sections even where the Minister has previously decided to consider exercising those powers.[154]

144. None of the present plaintiffs seek mandamus directed to the Minister.

Certiorari

145. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, the majority observed, in relation to s 417, that a prosecutor who seeks mandamus or certiorari directed to the Minister faces "a fatal conundrum".[155] In the absence of a duty to consider whether to exercise the power, mandamus would not issue to the Minister, and in the absence of mandamus, there would be no utility in granting certiorari.[156]

146. In *M61*, this court further held that "the unavailability of mandamus entails that there is no utility in granting certiorari to quash the recommendation which the reviewer made in each of these matters".[157]

147. In the present cases, accepting that mandamus is unavailable against the Minister, there nevertheless remains utility in granting certiorari to quash the decisions of the Minister and the recommendations or decisions made by officers of the NSW Ministerial Intervention Unit:

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151 *Re Minister for Immigration & Multicultural Affairs; Ex parte Ordonez* (unreported, High Court of Australia, Callinan J, 22 March 2001); *Re Hutchinson; Ex parte Applicant P66 of 2003* (unreported, High Court of Australia, Heydon J, 21 October 2003).

152 *Re Nicholls; Ex parte Trinh* (unreported, High Court of Australia, Hayne J, 15 March 2004); *Re Minister for Immigration, Multicultural & Indigenous Affairs; Ex parte Gogna* (Uunreported, High Court of Australia, Gaudron J, 17 October 2002).

153 *Re Ruddock; Ex parte Gomez-Rios* (unreported, High Court of Australia, Kirby J, 28 March 2000).

154 *M61* at [99].

155 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, Gleeson CJ, McHugh, Gummow and Hayne JJ at 461 [48].

156 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, Gleeson CJ, McHugh, Gummow and Hayne JJ at 461 [46]-[48], Gaudron and Kirby JJ at 474 [100].

157 *M61* at [100].

a) the making of an "initial request" can affect the legal entitlement of the plaintiffs to a bridging visa as previously set out in these submissions;

b) although the Minister does not have a duty to consider the exercise of the relevant powers, by reason of the distinction drawn between "initial requests" and "repeat requests" in the Ministerial guidelines, the Secretary and his officers have been directed by the Minister to treat requests differently;

c) the setting aside of decisions on prior requests (and in particular initial requests) will mean that the pending requests are liable to be assessed differently by case officers.

10 148. For those reasons certiorari should be granted.

Injunctions and mandamus

149. The plaintiffs seek mandatory injunctions (or writs of mandamus) directed to the Secretary requiring him by his officers, agents or otherwise to consider the requests lawfully against the guidelines and restraining them from assessing the plaintiffs' requests:

a) other than in accordance with the Minister's guidelines; and

b) other than in accordance with the requirements of procedural fairness.

Declaratory relief

150. Further and in the alternative to the above, the plaintiffs seek declaratory relief.

20 151. This court has recently emphasised that "[t]he reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the rule of law under the Constitution".[158]

152. In circumstances where Parliament has reduced the availability of other relief, the constitutional function assigned to this court requires that declarations be made concerning the lawfulness of the executive action challenged by the plaintiffs.

153. Moreover, these are not cases in which a declaratory order by the court will produce no foreseeable consequences for the parties.[159]

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158 *M61* at [87], *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [158].

159 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180, Mason J at 188, Aickin J at 189.

154. The foremost consideration is "the significance that the Minister could be expected to attach to the declaration in the exercise of the special power conferred on the Minister".[160]

155. Finally, there is a considerable public interest in the observance of the requirements of procedural fairness in the exercise of the relevant powers.[161]

Part VII Legislation

156. The applicable constitutional, statutory and regulatory provisions as they existed at all material times are to be provided in a bundle to be agreed with the defendants.

Part VIII Orders sought

157. In Plaintiff S10/2011:

a) Orders absolute for writs of certiorari:

i) directed to the second defendant quashing the decision made on 6 August 2010 not to refer the plaintiff's request under s 48B to the Minister;

ii) directed to the second defendant quashing the recommendation to the first defendant dated 8 October 2010 insofar as it concerns the plaintiff;

iii) directed to the first defendant quashing the subsequent decision of the first defendant of 21 October 2010.

b) Declare that, in making the decisions of 6 August 2010 and 21 October 2010 and the recommendation to the first defendant under s 417 of 8 October 2010 the defendants or their officers failed to observe the requirements of procedural fairness.

c) Issue a writ of mandamus or an injunction directing the second defendant by his officers and agents to make assessments of the plaintiff's request for the exercise of the Minister's powers under ss 48B or 417 of the Act under the Ministerial Guidelines and not otherwise than in accordance with the requirements of procedural fairness.

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160 *Ahmed v Minister for Immigration and Citizenship* (unreported, High Court of Australia, Gummow J, 14 February 2011); *Minister for Immigration and Citizenship v Ahmed* (unreported, High Court of Australia, Hayne and Crennan JJ, 6 October 2011).

161 *M61* at 39 [103], referring to *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at 134 [25].

158. In Kaur:

a) Declare that, in deciding not to refer the plaintiff's request under s 351 to the Minister, the second defendant made an error of law, in that the second defendant failed to observe the requirements of procedural fairness.

b) Order absolute for a writ of certiorari directed to the second defendant quashing the decision of Stuart Robertson dated 10 January 2011 not to refer the plaintiff's request to the Minister.

c) Issue a writ of mandamus or an injunction directing the second defendant by his officers and agents to make an assessment of the plaintiff's request of 16 October 2009 for the exercise of the Minister's power under s 351 of the Act under the Ministerial Guidelines and not otherwise than in accordance with the requirements of procedural fairness.

159. In Plaintiff S49/2011:

a) Declare that, in relation to the making of the recommendation to the first defendant that intervention under s 417 might not be appropriate in the plaintiff's case and in the first defendant's making of a decision under s 417 of the Act, the plaintiff was denied procedural fairness.

b) Declare that, in relation to the making of the a decision not to refer the plaintiff's request under s 48B to the Minister, the plaintiff was denied procedural fairness.

c) Order absolute for writs of certiorari directed to the second defendant quashing the recommendation of Rocio Trapaga-Saul dated 2 November 2010 and directed to the first defendant quashing the decision not to exercise his power under s 417.

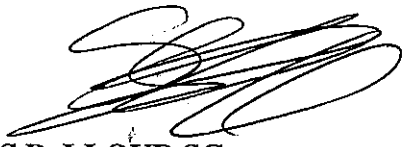
d) Order absolute for a writ of certiorari directed to the second defendant quashing the decision of Pete Davids dated 8 October 2009 not to refer the request under s 48B to the Minister.

e) Issue a writ of mandamus or an injunction directing the second defendant by his officers and agents to make an assessment of the plaintiff's request of 15 June 2009 for the exercise of the Minister's power under ss 48B and 417 of the Act under the Ministerial Guidelines and not otherwise than in accordance with the requirements of procedural fairness.

160. In all matters, order that the defendants pay the plaintiff's costs.

Dated: 28 October 2011

Counsel for the plaintiffs



S.B. LLOYD SC
Sixth Floor Selborne/Wentworth Chambers
T (02) 9235 3753
F (02) 9221 5604
stephen.lloyd@sixthfloor.com.au

S.E.J. PRINCE
State Chambers
T (02) 9223 1522
F (02) 9223 7646
prince@statechambers.net

J.B.KING
Sixth Floor Selborne/Wentworth Chambers
T (02) 8067 6913
F (02) 9232 1069
jking@sixthfloor.com.au