Federal Court of Australia

HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs[2022] FCAFC 133

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| Appeal from: | *HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1431 |
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| File number(s): | VID 773 of 2021 |
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| Judgment of: | **YATES, ABRAHAM AND MCELWAINE JJ** |
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| Date of judgment: | 9 August 2022 |
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| Catchwords: | **MIGRATION** – appeal from the decision of the Federal Court of Australia – where the Federal Court dismissed the application for review of the decision of the Administrative Appeals Tribunal – where the Administrative Appeals Tribunal affirmed the delegate’s decision not to revoke cancellation of visa – whether representation was clearly articulated or clearly emerged from the materials – whether Administrative Appeals Tribunal’s misunderstanding of Australia’s unenacted international refoulement obligations amounted to jurisdictional error – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 499, 501, 501CA  |
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| Cases cited: | *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53; [2007] FCA 910*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71*Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225; [1997] HCA 4*Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387; [2004] HCA 25*Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34*HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1431 *Minister for Home Affairs v Omar* (2019) 272 FCR 589; [2019] FCAFC 188*Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1; [2002] HCA 55*MQGT v Minister for Immigration, Citizenship, Migrant services and Multicultural Affairs* (2020) 282 FCR 285; [2020] FCAFC 215*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1; [2004] FCAFC 263*Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417; [2022] HCA 17*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4*R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 2*Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22*Snedden v Minister for Justice* (2014) 230 FCR 82; [2014] FCAFC 156*Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 75 |
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| Date of hearing: | 21 June 2022 |
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| Counsel for the Appellant: | Mr J R Murphy |
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| Counsel for the First Respondent: | Mr S Lloyd SC with Mr M Hosking |
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| Solicitor for the First Respondent: | Sparke Helmore |

ORDERS

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|  | VID 773 of 2021 |
|   |
| BETWEEN: | HRZNAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | YATES, ABRAHAM AND MCELWAINE JJ |
| DATE OF ORDER: | 9 August 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay the first respondent’s costs to be agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. This is an appeal from a decision of a single judge of this Court, dismissing the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) with costs: *HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1431 (**PJ**). In its decision, the Tribunal affirmed the decision of a delegate of the first respondent (the **Minister**) not to revoke the cancellation of the appellant’s Class BB Subclass 155 Five Year Resident Return (Permanent) visa under s 501(3A) of the *Migration Act 1958* (Cth) (**Migration Act**).
2. The appellant seeks orders that the decision of the primary judge be set aside and in lieu thereof, an order be made that the decision of the Tribunal be quashed and a writ of mandamus be issued requiring the Tribunal to determine his application according to law.
3. By an amended notice of appeal filed 26 April 2022, the appellant relies on the following grounds of appeal:

1. The learned primary judge erred by failing to uphold ground 2 of the amended originating application on the basis that the Administrative Appeals Tribunal (Tribunal) erred jurisdictionally by failing to consider a substantial or significant and clearly articulated claim raised by the representations, or apparent on the face of the material before the Tribunal, that the Appellant may be owed non-refoulement obligations other than under the *Convention Relating to the Status of Refugees* by reason of his inability to access anti-viral medication or other treatment in Vietnam for his Hepatitis B and D conditions.

Particulars

(i) Ground 2 of the amended originating application before the primary judge asserted that the Tribunal’s decision was vitiated by unreasonableness as a result of the Tribunal accepting, on the one hand, that because of his inability to access anti-viral medication or other treatment for Hepatitis in Vietnam the Appellant would face significant adverse consequences but finding, on the other hand, that the Appellant was not owed non-refoulement obligations.

(ii) At the oral hearing before the primary judge, it became apparent that this ground ‘was to be (beneficially) understood as alleging that the Tribunal overlooked that complementary protection obligations … may have been owed to’ to the Appellant as a result of his inability to obtain Hepatitis medication or other treatment in Vietnam.

(iii) The primary judge rejected ground 2 of the amended application, as understood in the terms described above at (ii), on the basis that the claim said to have been overlooked was not sufficiently ‘advanced’, nor the facts of the case sufficiently ‘congruent’ with non-refoulement obligations, as to require the Tribunal to consider the claim.

(iv) The primary judge erred in reaching the conclusions in (iii) because the claim said to have been overlooked was clearly articulated and/or was apparent on the face of the material before the Tribunal.

2. The learned primary judge erred by failing to find that the Tribunal erred jurisdictionally in asking itself the wrong question, and thereby constructively failing to exercise jurisdiction, in respect of the Appellant’s claim to be owed non-refoulement obligations by reason of his being a drug user or imputed drug user (i.e. being a lifelong drug addict at risk of relapse and associated mistreatment by Vietnamese authorities).

Particulars

(i) Before the Tribunal, the Appellant claimed to be owed non-refoulement obligations by reason of his being a drug user or imputed drug user (i.e. being a lifelong drug addict at risk of relapse and associated mistreatment by Vietnamese authorities). In particular, the Appellant alleged that he was at risk of ‘beatings, forced labour … and prolonged arbitrary detention’ in a compulsory drug treatment centre.

(ii) The Tribunal accepted that the conditions of compulsory drug treatment centres in Vietnam were ‘harsh and degrading’ and that they involved ‘forced labour’.

(iii) However, the Tribunal failed to determine whether there was a relevant risk of the Appellant being exposed to the conditions in (ii), instead concluding that non-refoulement obligations could not be ‘triggered due to a risk of the applicant choosing of *his own volition* to engage in conduct which is *illegal’*, (emphasis added).

(iv) The Tribunal thus understood there to be two limits to the scope of Australia’s non-refoulement obligations, namely, that they could not be engaged by the consequences of a person’s *voluntary* acts; nor by harm that results from potential future *illegal* conduct. Neither of those limits was a true reflection of the law.

(v) By reasoning in the way described at (iii)–(iv), the Tribunal thus asked itself the wrong question and thereby constructively failed to exercise jurisdiction.

(vi) While the error asserted by this ground was not raised before the primary judge, the Appellant seeks leave to raise it in this Court.

(Citations omitted. Original emphasis.)

1. The appeal was first listed before the Full Court on 10 May 2022, but was adjourned to enable counsel to consider and provide supplementary submissions regarding the implications of the High Court decision in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417; [2022] HCA 17 (***Plaintiff M1***), which was listed for judgment on 11 May 2022. Having received those submissions, the hearing of the appeal resumed on 21 June 2022. We are indebted to counsel for their considered and helpful submissions.

# background

1. The appellant is a citizen of Vietnam. He was born in 1973 and arrived in Australia in 1980 when he was 7 years old. He travelled to Australia with his uncle and brother as part of the large exodus of people at the end of the Vietnam War. His parents and sisters remained in Vietnam, although one sister has since relocated to Australia.
2. Shortly after his arrival, the appellant was granted a visa allowing him to remain in Australia. He has remained in Australia since then, leaving once for a family holiday in 2013. The appellant has two adult children. Both hold Australian citizenship.
3. The appellant has an extensive criminal history dating back to 1994, with his most recent offences committed in 2018. At the Tribunal, the appellant’s counsel conceded that his criminal history includes serious offending. The appellant contends that his criminal offending was substantially connected to his drug abuse. He accepts that he has been a substantial user of drugs for much of his adult life, including a very significant addiction to heroin.
4. The appellant is presently in immigration detention at Melbourne Immigration Transit Accommodation in Broadmeadows, Victoria.
5. On 7 December 2017, the appellant’s visa was cancelled under s 501(3A) of the Migration Act (**cancellation decision**). The Minister was satisfied that the appellant did not pass the character test because he had a substantial criminal record within the meaning of s 501(6)(a), on the basis of s 501(7)(c) of the Migration Act, and was serving a term of imprisonment of 12 months or more.
6. Upon cancellation, the appellant was invited to make representations to the Minister regarding revocation of the cancellation decision. However, by letter dated 15 November 2019, he was notified that a delegate of the Minister had decided, pursuant to s 501CA(4) of the Migration Act, not to revoke the cancellation decision (**non-revocation decision**).
7. Section 501CA(4) of the Migration Act provides:

**501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

1. The appellant applied to the Tribunal, which affirmed the non-revocation decision on 14 April 2021.
2. The appellant’s application for judicial review was filed on 13 May 2021 and heard on 23 September 2021. The application was dismissed by the primary judge on 22 November 2021.
3. The appellant filed his notice of appeal from the decision of the primary judge on 20 December 2021. He was granted leave to amend his appeal grounds on 22 April 2022 and further leave to argue ground 2 on 10 May 2022. Leave was required to argue ground 2 because it was not advanced at first instance.

# the decision OF THE TRIBUNAL

1. The central issue before the Tribunal was whether it was satisfied, pursuant to s 501CA(4)(b)(ii) of the Migration Act, that there was another reason the decision to cancel the visa should be revoked. The appellant accepted that he did not pass the character test referred to in s 501CA(4)(b)(i).
2. The Tribunal considered the criteria in *Direction No. 79 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* as required by s 499 of the Migration Act. Having undertaken that exercise, the Tribunal affirmed the non-revocationdecision and concluded at [140]-[145]:

140. The Tribunal is also satisfied that in light of the extent and seriousness of the applicant’s offending, the expectations of the Australian community consideration weighs heavily against the applicant notwithstanding some mitigating considerations.

141. For the reasons set out above, the Tribunal is satisfied that the expectations of minor children and international non-refoulement considerations weigh neutrally in this matter.

142. The Tribunal recognises the significant ties the applicant has developed to Australia by virtue of the length of time he has lived in Australia and also through his family and broader social connections. The Tribunal recognises in particular the significant adverse impact a decision not to revoke the cancellation of the applicant’s visa would have for his two adult children. The effect of such a decision will be to deny them the opportunity to have their father’s presence in their lives in Australia. This consideration has been particularly significant in the Tribunal’s overall weighing of this matter.

143. The Tribunal also recognises the significant impediments the applicant is likely to face on a return to Vietnam. The Tribunal accepts that the applicant’s family in Vietnam are not in a position to provide meaningful assistance to the applicant in any transition. He has been out of the country for a very significant period of time and, at least in the short term, will have some level of language barrier in Vietnam. The Tribunal accepts that he will find securing employment challenging in the short term although it considers his medium to long term employment prospects to be reasonable given his relative intelligence, English skills, other positive personal characteristics and the Tribunal’s view that the broader outlook for the Vietnamese economy remains positive. The Tribunal is satisfied that in the medium to longer term the applicant will be able to maintain basic living standards that are comparable to the general population of Vietnam. In the short term he will have the benefit of programs of support for the reintegration of returnees. The Tribunal is satisfied that the applicant is unlikely to be able to access the anti-viral and other medical treatment he currently has access to in Australia in the ongoing management of his hepatitis B and D conditions, nor is he likely to be able to undertake follow up treatment for his post carpal tunnel surgery complications, nor the counselling and mental health services he currently has access to in the ongoing management of his rehabilitation from drug use. The Tribunal acknowledges that as a consequence the applicant is at a real risk of suffering significant adverse consequences from his lack of access to such treatments in Vietnam as outlined earlier. These considerations have been very significant in the Tribunal’s overall weighing of this matter.

144. Notwithstanding these considerations, in the Tribunal’s view, given the very serious consequences that could flow to members of the Australian community if the applicant were to reoffend again in the same or similar manner and the unacceptable risk of that occurring, the protection of the Australian community consideration is the determinative consideration in the circumstances of this case.

145. For these reasons, the Tribunal is satisfied that the decision under review should be affirmed.

1. The Tribunal’s consideration of the appellant’s representation that he is owed international non-refoulement obligations is significant in this appeal. Those representations were summarised by the Tribunal at [78] and [97]:

78. It was submitted on behalf of the applicant that the applicant is owed international non-refoulement obligations due to the risk the applicant would likely face on his return to Vietnam. The applicant has claimed a fear of persecution or other serious harm including arbitrary detention, torture or other cruel, inhuman or degrading treatment as a consequence of the applicant being an imputed drug user or person recovering from drug addiction. Non-refoulement obligations in respect of such fears may be owed under the *International Covenant on Civil and Political Rights and its Second Optional Protocol* (the “ICCPR”); the *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol* (the “Refugees Convention”); and the *Convention against Torture and Other Cruel, Inhumane Degrading Treatment or Punishment* (the “CAT”). Australia has also incorporated obligations of that kind into Australian domestic law through the provisions of the Act.

…

97. The applicant’s written submissions also made reference to the applicant fearing serious harm as a consequence of him being denied access to treatment for his Hepatitis B and D conditions. Again, these claims were not substantively pressed in the hearing on the basis of any convention-based harm but rather were more substantively dealt with by counsel for the applicant in impediments on return. Based on the evidence before it the Tribunal is satisfied that there is no convention-based harm in the form of denial of access to health care that the applicant is likely to suffer on his return to Vietnam. The Tribunal does however accept that the applicant is likely to face some difficulty in accessing treatment for his health conditions generally and including his Hepatitis B and D conditions. These issues have been considered in more detail in the section dealing with impediments on return.

1. The Tribunal correctly understood that non-refoulement obligations may be owed under the *International Covenant on Civil and Political Rights* and its *Second Operational Protocol* (the **ICCPPR**), the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol* (the **Refugee Convention**) and the *Convention Against Torture and Other Cruel, Inhumane Degrading Treatment or Punishment* (the **CAT**).
2. On the evidence before it, the Tribunal accepted that “the conditions in some dedicated drug treatment centres in Vietnam are harsh and involve, at some level, forced labour for little or no monetary compensation”: at [81]. The Tribunal had regard to the *DFAT Country Information Report for Vietnam* dated 13 December 2019 and relevantly reasoned as follows at [85] and [92]:

85. While the Tribunal accepts the compulsory drug centres continue to operate in Vietnam and in some instances involve harsh and degrading conditions, in assessing the applicant’s claims in this respect the immediate question to be determined is whether the Tribunal is satisfied that there is a real chance or risk of the applicant personally being detained in such a centre and being subjected to such treatment.

…

92. Further, while the Tribunal accepts that if the applicant were to engage in illegal drug use in Vietnam at some point in the future then he would be at some genuine risk of being detained in a drug treatment centre, they are not his present circumstances, and the Tribunal is not satisfied that Australia’s international non-refoulement obligations can be said to be presently triggered due to a risk of the applicant choosing of his own volition to engage in conduct which is illegal both in Vietnam and Australia at some point in the future.

1. Before us, it was common ground that the Tribunal misunderstood the scope of Australia’s unenacted international non-refoulement obligations in each of these paragraphs. Counsel for the appellant summarised the errors in his written submissions as follows:

The Tribunal thus understood there to be two limits to the scope of Australia’s non-refoulement obligations, namely, that they could not be engaged by the consequences of a person’s *voluntary* acts; nor by harm that results from potential future *illegal* conduct. Neither of those limits was a true reflection of the law.

(Original emphasis.)

# THE DECISION OF THE PRIMARY JUDGE

1. The appellant sought judicial review of the Tribunal’s decision in this Court. He relied on an amended originating application in which he raised four grounds of review concerned with: illogical or irrational reasoning; legal unreasonableness in outcome; a failure to consider an integer of his claims; and failure to take into account a mandatory consideration. The primary judge dismissed each ground. It is not necessary to set those grounds out given the manner in which the appeal was developed before us, save for ground 2 which provided:

2. The Tribunal’s decision is affected by legal unreasonableness.

Particulars

a) At [98], the Tribunal concluded that the Applicant did not engage Australia’s non-refoulement obligations.

b) At [137], the Tribunal found that the “extent of impediments if removed” consideration weighed “heavily in favour of revocation of the cancellation of the Applicant’s visa”.

c) The Tribunal accepted at [132] that the Applicant would likely not have access to anti-viral medication or other treatment for his chronic hepatitis on his return to Vietnam, such that “there is a real risk of the Applicant suffering significant adverse consequences”.

d) The Tribunal had evidence before it that the Applicant’s health condition would deteriorate if not treated, a contention accepted by the Tribunal. A consequence of such deterioration would include the Applicant’s death (at [116]).

e) The findings by the Tribunal that:

(i) the Applicant was not owed non-refoulement obligations; and

(ii) the decision of the Minister should nonetheless be affirmed (at [144] & [145]), when the Tribunal was on notice of (and indeed accepted) evidence that the Applicant would not have access to health care if returned to Vietnam, are therefore both unreasonable.

1. In dismissing this ground, the primary judge summarised the appellant’s core contention at PJ[46]:

… Ground 2 was to be (beneficially) understood as alleging that the Tribunal had overlooked that complementary protection obligations which might give rise to non refoulement obligations may have been owed to the Applicant pursuant to other international instruments Australia was party to.

1. The primary judge accepted the first respondent’s submissions that the appellant’s claims were “expressed at a high level of abstraction” and “[n]o substantial submissions were made explaining how the postulated ‘limited’ access to medical treatment for hepatitis meant that Australia owed non-refoulement obligations in relation to him, including under what treaty and on what basis”: at PJ[50]-[51].
2. His Honour stated at PJ[51]-[52]:

51. Not without some hesitation, I accept the Respondent’s submissions. If arguably, the Applicant’s incapacity to afford anti-viral drugs, attendant with the potential serious consequences that the Tribunal acknowledged, might potentially have required the Tribunal to consider a complimentary [sic] protection claim had it been advanced; such a claim was not advanced either in writing or orally before the Tribunal.

52. Moreover, in the specific facts before the Court a submission that the facts before the Tribunal should have been understood by it to be obviously congruent with Australia’s international obligations involves a strained reading of the conclusions of the Tribunal.

1. Then concluded, at PJ[64]-[65]:

64. In the actual circumstances applying in which the applicant was represented by competent counsel, the Respondent’s submission that it does not bespeak legal error for the Tribunal not to have perceived a non-refoulement claim that was neither articulated nor on its face self-evidently congruent with Australia’s international obligations is compelling.

65. I reject that the Tribunal’s decision is vitiated by legal unreasonableness. There was nothing legally unreasonable in the Tribunal not addressing a claim that neither had been articulated by the Applicant nor was obviously and self-evidently inherent in the facts it found to apply.

# The Appeal to this Court

1. We commence by summarising the submissions of the parties.

## Ground 1

1. The appellant submitted that the Tribunal was required to consider all “‘substantial or significant and clearly articulated claim[s] raised by the representations’ that were capable of providing ‘another reason’ to revoke the mandatory cancellation decision”: *Minister for Home Affairs v Omar* (2019) 272 FCR 589; [2019] FCAFC 188 (***Omar***), Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ at [41], [45]. It was submitted that obligation included material that was “apparent on the face of the material before the Tribunal”: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1; [2004] FCAFC 263 (***NABE***), at [58], Black CJ, French and Selway JJ.
2. Based on these principles, the appellant submitted that the primary judge erred in failing to discern error in the Tribunal’s assessment of the claimed non-refoulement obligations arising by reason of his Hepatitis B and D because, according to the appellant: (1) the claim was either clearly articulated or clearly emerged (or was squarely raised) on the materials; and (2) the claim was not considered.
3. *First*, in relation to the submission that the claim was clearly articulated, counsel for the appellant referred to the *Statement of Facts, Issues and Contentions* (**SOFIC**) filed with the Tribunal. It was submitted in the SOFIC under the heading: “International non-refoulement obligations”, that the appellant feared return to Vietnam for several reasons, including his status as a sufferer of Hepatitis B and D and access to treatment. The appellant acknowledged that he did not explicitly nominate *which* international obligation he relied upon, but argued in his written case that “he could not reasonably be understood to have limited himself to the [*Refugee Convention*]”.
4. Further, it was submitted that, during oral submissions before the Tribunal, the appellant framed his case relating to hepatitis through the prism of the “extent of impediments if removed”. It was also submitted that the appellant did not make any positive concession before the Tribunal that the likely inability to access medical treatment in Vietnam was incapable of engaging non-refoulement obligations outside of the Refugee Convention. Further, and in any event, it was submitted that any concession by the appellant ought not be considered to have absolved the Tribunal of considering this claim because it related to the correct *legal* characterisation of the potential harm, rather than being a concession that the underlying *factual* basis for the claim was not made out.
5. In relation to the submission that the claim clearly emerged on the materials, the facts were said to be “sufficiently congruent” with Australia’s non-refoulement obligations such that the claim should have been considered even if it was not expressly advanced. It was therefore submitted that the primary judge was wrong to conclude that “no non-refoulement obligations were capable of being engaged” because “a claim to be unable to access medical treatment can engage non-refoulement obligations under Arts 6 and 7 of the [ICCPR] if the deprivation of medical treatment might cause the arbitrary deprivation of life; torture; or cruel, inhuman or degrading treatment or punishment”.
6. *Secondly,* in relation to the submission that the claim was not considered, the Tribunal was said to have proceeded on the basis that the appellant’s hepatitis was not “substantively pressed” as relevant to non-refoulement obligations in oral submissions, but was “more substantively dealt with by counsel for the applicant in impediments on return”.
7. In response, counsel for the Minister emphasised the principles relevant to the making of a decision under s 501CA(4) of the Migration Act, as set out in the plurality reasons in *Plaintiff M1* at [24]-[27]. The Minister submitted that the primary judge was correct in finding that the Tribunal did not fail to consider a claim to the effect that the appellant was owed non-refoulement obligations under the ICCPR or the CAT because of his medical conditions and claimed limited access to treatment in Vietnam.
8. In doing so, counsel for the Minister drew our attention to [62]-[70] of the SOFIC, which expressed the appellant’s fear that if returned to Vietnam he was unlikely to have ready access to anti-viral medication. It was then submitted:

To the extent that the appellant claimed to be a person in respect of whom Australia owed non-refoulement obligations by reason of the limited medical treatment he may be able to access in Vietnam, that claim was expressed at a high level of abstraction. No representations were made explaining how limited access to medical treatment might engage Australia’s non-refoulement obligations under the ICCPR or the CAT.

1. The Minister also relied on the Tribunal’s finding that the claims “were more substantively dealt with by counsel for the applicant as impediments on return” to submit that the primary judge was correct finding that the appellant had not clearly articulated a substantial or significant claim that Australia had non-refoulement obligations to him.
2. The Minister further submitted that such a claim did not emerge clearly from the materials, noting that:

….in order for an unarticulated claim to emerge clearly from the materials, it must be based on “established facts”. In determining whether a claim clearly emerged from the materials, it is therefore necessary to have regard — as the primary judge did — to the relevant findings of fact made by the Tribunal.

1. In this regard, the Minister relied on the Tribunal’s finding, at [124] of its reasons, that the appellant was not likely to have access to anti-viral medication because he would be unable to afford it. It was therefore submitted that this finding was not “directly congruent” with the “integers that appear in Art 3 of the CAT or Arts 6 or 7 of the ICCPR, which refer to arbitrary deprivation of life, torture, and cruel, inhuman or degrading treatment or punishment”.
2. In short, and by application of the principles in *Plaintiff M1*, the Minister submitted that the Tribunal sufficiently engaged with the representations. It was also submitted that, when considered as a whole, the representations were read, identified, understood and evaluated as required: *Plaintiff M1* at [9].

## Ground 2

1. The crux of the appellant’s argument, as summarised in his written case, is:

…the primary judge erred in failing to identify the Tribunal’s erroneous treatment of non-refoulement obligations arising by reason of the Appellant being a lifelong drug addict at risk of relapse and associated mistreatment by Vietnamese authorities.

1. In the Tribunal, the appellant claimed that he was owed non-refoulement obligations on the basis that, as a drug user he risked: punishment; “mistreatment, ostracisation and harm from the authorities in Vietnam”; and, in particular, “beatings, forced labour … and prolonged arbitrary detention in a compulsory drug treatment centre”.
2. The Tribunal accepted that conditions in compulsory drug treatment centres were “harsh and degrading” and that they involved “forced labour”: at [81] and [85]. The appellant submitted in his written case that the Tribunal correctly understood this claim as an attempt to engage Australia’s non-refoulement obligations relating to physical violence or other cruel or degrading treatment. The “immediate question” was said to be whether the Tribunal was satisfied that there was “a real chance or risk of the applicant personally being detained in such a centre and being subjected to such treatment”: at [85].
3. However, it was also submitted that the Tribunal erred at [85] and [92] of its decision by misunderstanding that Australia may owe non-refoulement obligations arising from unenacted treaties if there is a real risk or chance that a person will engage in conduct in the receiving country of his or her own choosing, even where such conduct is unlawful under the laws of that country: see generally *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 at [83], Gummow and Hayne JJ; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1; [2002] HCA 55 at [29], Gaudron J; *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225; [1997] HCA 4 at 258, McHugh J; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387; [2004] HCA 25 at [43], Gleeson CJ, Gummow and Kirby JJ.
4. In supplementary submissions, the appellant contended that the present case is distinguishable from *Plaintiff M1* because the Tribunal positively considered and made findings about the non-refoulement claims, a course it was not required to take. The appellant submitted that once the Tribunal had done so, it “could not misunderstand the law of non-refoulement”. It was submitted that the Tribunal committed a jurisdictional error on this basis. The appellant placed primary reliance on *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 285; [2020] FCAFC 215 (***MQGT***) at [21]- [28], Jagot, Kerr and Anastassiou JJ for this proposition.
5. The appellant also submitted that the Tribunal committed a jurisdictional error by limiting its consideration to the Refugee Convention and failing to consider claims under the ICCPR and the CAT, therefore failing to consider a clearly articulated claim that was raised in the representations.
6. The Minister accepted that the Tribunal misunderstood the scope of Australia’s unenacted international non-refoulement obligations. In developing that submission, the Minister emphasised [29] of the plurality reasons of Kiefel CJ, Keane, Gordon and Steward JJ in *Plaintiff M1*: unenacted international non-refoulement obligations “cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error — they are not part of Australia’s domestic law.”
7. Accordingly, the Minister submitted that the reasons of the Tribunal demonstrate that it had read, understood and evaluated the non-refoulement claims but, in proceeding in that way, those obligations did not become mandatory relevant considerations. The Tribunal’s erroneous understanding of the content or effect of those obligations was therefore submitted not to be a jurisdictional error.

# consideration

## Ground 1

1. Whether there is “another reason” to revoke the cancellation decision pursuant to s 501CA(4)(b)(ii) must be analysed in accordance with the plurality reasons of Kiefel CJ, Keane, Gordon and Steward JJ in *Plaintiff M1*. Although lengthy, we set out the relevant paragraphs (omitting footnotes) at [24]-[29]:

24. Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman*, the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder.

25. It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.

26. Labels like "active intellectual process" and "proper, genuine and realistic consideration" must be understood in their proper context. These formulas have the danger of creating "a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision maker's] decision can be scrutinised". That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, "[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind". The court does not substitute its decision for that of an administrative decision-maker.

27. None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, if review of a decision maker's reasons discloses that the decision maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error.

28. Where the representations do *not* include, or the circumstances do *not* suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa.

29. Where the representations *do* include, or the circumstances *do* suggest, a non refoulement claim by reference to *unenacted international non refoulement obligations*, that claim may be considered by the decision-maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error – they are not part of Australia's domestic law.

(Original Emphasis.)

1. As set out above at [33], the Minister submitted that, to the extent that the appellant’s representations in this case did articulate a claim that Australia owed non-refoulement obligations to him by reason of the limited medical treatment he may be able to access in Vietnam, the claim was expressed “at a high level of abstraction”. The division between the parties is whether that claim was clearly articulated or clearly arose on the materials before the Tribunal: *Plaintiff M1* at [25].
2. Counsel for the appellant carefully took us to the following material in order to make good his submission that the representations either clearly articulated or raised squarely: the appellant’s hepatitis conditions; his claimed inability to access anti-viral medication in Vietnam; and the Tribunal’s failure to consider these matters. *First,* the appellant took us to the SOFIC from [62] under the heading “International non-refoulement obligations”, where it was said that the appellant feared return to Vietnam due to, inter alia, “his status as a sufferer of Hepatitis B and D and his access to treatment for this condition”. By way of elaboration, at [67]-[70] of the SOFIC the appellant contended that access to effective treatment in Vietnam for his condition was limited and that it was “unlikely” that he would be able to access the anti-viral medication he requires, with the consequence that his health would likely be adversely affected.
3. *Secondly*, the appellant took us to [36]-[37] of his personal statement addressed to the Tribunal, where he described his condition as “chronic hepatitis”, and stated that if he did not receive his medication then his hepatitis would rapidly spread with “dire consequences for [his] liver”. The appellant also stated that medication for his condition “is very hard to find” in Vietnam.
4. *Thirdly,* and despite [97] of the Tribunal’s reasons (set out above at [17]), the appellant submitted that he had not abandoned his non-refoulement claim before the Tribunal. This submission was also put to the primary judge in written supplementary submissions.
5. The primary judge addressed this issue in some detail at PJ[51]-[66]. We have already referred to some paragraphs of his Honour’s reasons. We discern no error in those reasons or the conclusion that the primary judge reached. In particular, we endorse and adopt what his Honour said at PJ[60]: :

60. Non-refoulement obligations are not things in the abstract. They do not arise simply because a person will suffer hardship. They arise having regard to the precise terms of the obligations which are engaged by the ratification of a particular convention. I make that observation because even in the supplementary submissions that have been filed on the applicant’s behalf there is no identification of the terms of any complementary protection obligations so entered into Australia [*sic*], which the Tribunal should have, having regard to the findings it made, recognised.

We also endorse and adopt his Honour’s observation at PJ[64], that it does not “bespeak of legal error” for the Tribunal not to have addressed this claim.

1. As counsel for the Minister correctly submitted, to the extent that the appellant claimed he was owed non-refoulement obligations by reason of the limited medical treatment he may be able to access in Vietnam, his claim was expressed “at a very high level of abstraction”. Nowhere in the material before the Tribunal did the appellant identify any specific obligation pursuant to the CAT or the ICCPR engaged by that inability.
2. An examination of the material before us reflects that no error has been established in the primary judge’s conclusion at PJ[65] that “(t)here was nothing legally unreasonable in the Tribunal not addressing a claim that neither had been articulated by the [appellant] nor was obviously and self-evidently inherent in the facts it found to apply”. We are not persuaded that, before the Tribunal, the appellant clearly articulated a substantial or significant claim that Australia had non-refoulement obligations under the ICCPR or CAT by reason of the limited medical treatment that he might be able to access in Vietnam, or that such a claim clearly emerged (or was squarely raised) on the materials before the Tribunal. The reasoning of the Tribunal accorded with the level of engagement that was required in this case, as stated by the plurality in *Plaintiff M1* at [25].
3. For these reasons we dismiss ground 1.

## Ground 2

1. In relation to this ground of appeal, the issue is whether the error which the Minister accepts the Tribunal made at [92] of its reasons, in misunderstanding the scope of Australia’s unenacted international non-refoulement obligations, is a jurisdictional error.
2. As the Minister submitted, in considering whether Australia has unenacted international non-refoulement obligations in respect of the appellant, the Tribunal was not considering a mandatory relevant consideration under s 501CA(4). The consideration therefore did not attract judicial review for jurisdictional error, because such obligations cannot be, and are not, considerations of that kind: *Plaintiff M1* at [29].
3. However, the appellant submitted that this ground does not entail any contention that these non-refoulement obligations were a mandatory relevant consideration. On that basis, the appellant submitted that *Plaintiff M1* is distinguishable. In developing that submission, counsel emphasised [27] of the plurality reasons, in which their Honours stated that if a Tribunal were to misunderstand relevant facts or materials or misunderstand the applicable law, “that may give rise to jurisdictional error”. The appellant placed particular reliance on *MQGT* at [22]-[28] in support of his submission that because the Tribunal considered and made findings on the claimed non-refoulement obligations, its misunderstanding of the law of non-refoulement amounted to jurisdictional error.
4. In *MQGT* the appellant claimed that he would be killed if returned to South Sudan because of the war in that country and the circumstances which led to him seeking refuge in Australia. The Minister’s delegate did not disbelieve that claim, nor did the Minister expressly contest it before the Tribunal. The Tribunal considered international non-refoulement obligations by reference to the appellant’s claim and determined that it would only give slight weight to the claim because it found it unconvincing. In this Court, leave was granted to advance a ground of appeal that was not put to the primary judge. That ground of appeal was to the effect that the Tribunal committed a jurisdictional error by denying the appellant procedural fairness in its failure to ask him about the claim, or to put him on notice that it was open to doubt, before finding the claim to be unconvincing. That contention was upheld.
5. It is on this basis that the Court reasoned at [27]-[28] and [37] of *MQGT* that the Tribunal had also erred because, although not bound to make findings on the non-refoulement claims, it did so on the erroneous premise it would only give “some or slight weight” to them. These findings were based on the representations being “unconvincing” when, correctly understood, “[h]ad it found the representations convincing it is possible that international non-refoulement obligations could have been determinative’: at [37]. We note that the appellant accepted there was a tension between *MQGT* and *Snedden v Minister for Justice* (2014) 230 FCR 82; [2014] FCAFC 156 (***Snedden***) (which cites *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53; [2007] FCA 910 (***AB v Minister***)), a decision which does not appear to have been referred to the Court in *MQGT*. The appellant submitted that *MQGT* is to be preferred. Those authorities reflect, consistently with *Plaintiff M1*, that unenacted international obligations are not mandatory relevant considerations in making the relevant decision. See also *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [101].
6. We do not find the analysis in *MQGT* to be of assistance in resolving this appeal. The appellant does not contend that the Tribunal committed jurisdictional error by denying him procedural fairness in the way it considered the non-refoulement claim. In any event, this ground of appeal must be resolved in accordance with the plurality reasoning in *Plaintiff M1*.
7. It should also be noted that each of the cases footnoted to the relevant aspect of [27] in *Plaintiff M1* that were emphasised by counsel for the appellant, are examples of various failures to comply with a precondition to the lawful exercise of statutory power, or a failure to observe prescriptive controls upon its exercise.
8. *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 2 concerned whether a Local Industrial Authority was satisfied in accordance with a particular regulation as to a state of affairs, which satisfaction could only be reached upon a correct understanding of the provision in question. Where that is so, the decision-maker must “correctly [understand] the meaning of the law under which he acts” per Latham CJ at 430.
9. *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22 was concerned, in part, with a contended constructive failure to exercise jurisdiction in circumstances where it was said the delegate misunderstood what was involved in the definition of refugee under the Refugee Convention. The consequence of that misunderstanding was said to be that the delegate failed to consider the substance of the application for the protection visa. The delegate was required to consider whether the appellant had a well-founded fear of persecution. The application of a wrong test in determining whether protection obligations were owed was capable of amounting to jurisdictional error. However, on the facts, and by majority, that contention failed: Gleeson CJ, Kirby and Hayne JJ; Gaudron dissenting.
10. In *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51, the delegate cancelled a student visa on the ground that a condition of it, enrolment as a student at a university, had not been met. That finding was incorrect in that the university had failed to record the fact of enrolment as required by the *Education Services for Overseas Students Act 2000* (Cth). It was held that the delegate’s decision was tainted by that failure. The error was jurisdictional in that the state of satisfaction required by s 116(1)(b) of the Migration Act was purportedly formed upon the material breach of the university’s obligation which was “an express or implied condition of the valid exercise” of the power: per Gageler and Keane JJ at [33].
11. Finally, the primary case that is footnoted as an example of error where a decision-maker misunderstands relevant facts or materials is *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 (***Craig***) at 179. This reference is to the well-known passage in the judgment of the Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) that:

If such an administrative Tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the Tribunal which reflects it.

1. In our view, the general statement of principle in *Plaintiff M1* at [27] does not require the conclusion that the Tribunal committed jurisdictional error in this case. It is clear from the plurality reasons in *Plaintiff M1* that the consideration by the Tribunal of the non-refoulement claim, based on unenacted international obligations (which was not a mandatory consideration) cannot give rise to jurisdictional error, even though the Tribunal misunderstood the legal content of those obligations. That conclusion follows from the plurality reasons at [20] and [29]: “such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error” with the necessary consequence that the misunderstanding of the Tribunal in this case, whilst an error of law, was not a jurisdictional error. Rather, it was an error within jurisdiction.
2. That conclusion is clarified by an understanding of what is meant by jurisdictional error in the context of statutory decision-making. Jurisdictional error was analysed in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [23] and [24] where, in part, Kiefel CJ, Gageler and Keane JJ said:

23. Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have "such force and effect as is given to it by the law pursuant to which it was made".

24. Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.

(Citations omitted.)

1. In this case, the Tribunal did not fail to comply with a statutory precondition to the conduct of its review function, nor did it fail to notice or comply with a condition regulating the manner of the review. Tracey J adopted similar reasoning in *AB v Minister.* In that case the Minister had refused an application for a visa under the Migration Act. In doing so, the Minister had regard to the CAT and the ICCPR, but it was said that he had misunderstood the relevant content of each. In rejecting the challenge on jurisdictional error grounds, his Honour said at [27]:

Australia’s unenacted international treaty obligations relating to refoulment of persons within the jurisdiction are matters to which decision-makers are entitled to have regard when exercising powers under s 501 of the Act. In the absence of legislative requirement they are not, however, bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will occur. If they choose to have regard to treaty obligations but, in some way, misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. It has been held that misconstruction of a ministerial policy, by a minister who is free to depart from it, cannot amount to reviewable error: see *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65 at 77–8; 92 ALR 167 at 178–80; 16 ALD 611 at 620–2. Where the instrument concerned is an unincorporated international treaty which is subject to interpretation by a potentially wide range of international bodies it will be harder to make good an allegation of error much less jurisdictional error.

1. Counsel for the appellant invited us to find that *AB v Minister* was wrongly decided, but did not elaborate as to why. We reject the invitation. In our view, Tracey J was plainly correct. Middleton and Wigney JJ (with whom Pagone J agreed) also endorsed Tracey J’s decision in *Snedden* at [154]-[156], where the Court rejected the like invitation.
2. Acceptance of the appellant’s submission would also be contrary to the distinction that must be maintained in Australia between jurisdictional and non-jurisdictional errors of law: *Craig* at 178-179; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [81]-[83], Gageler J.
3. The Tribunal did consider whether Australia had unenacted international non-refoulement obligations in respect of the appellant by reason of the real and significant risk that he would relapse into serious drug use in Vietnam and be subject to “harsh and degrading conditions” in a drug rehabilitation centre: at [67] and [92]. The reasons reflect that the Tribunal read, understood, identified and evaluated the representations by the appellant: see *Plaintiff M1* at [24]. In doing so, the Tribunal was not considering a mandatory relevant consideration: *Plaintiff M1* at [29], and as such its misunderstanding of Australia’s unenacted international non-refoulement obligations was not a jurisdictional error, but one within jurisdiction: *AB v Minister* at [27]; *Snedden* at [164].
4. For these reasons we dismiss ground 2.

# Conclusion

1. The appeal must be dismissed. It was not submitted that costs should not follow the event.
2. We make the following orders:
3. The appeal is dismissed.
4. The appellant is to pay the first respondent’s costs to be agreed or assessed.

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| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Yates, Abraham and McElwaine. |

Associate:

Dated: 9 August 2022