Federal Court of Australia

EXT20 v Minister for Home Affairs [2022] FCAFC 72

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| Appeal from: | *EXT20 v Minister for Home Affairs* [2021] FCA 629 |
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| File number(s): | VID 370 of 2021 |
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| Judgment of: | **MORTIMER, WIGNEY AND SNADEN JJ** |
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| Date of judgment: | 5 May 2022 |
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| Catchwords: | **MIGRATION** – appeal – refusal to revoke mandatory cancellation of appellant’s visa under s 501CA(4) of the *Migration Act 1958* (Cth) – where appellant made representations about risk of harm if returned to country of nationality – representations made within the prescribed period but after receipt of a notice under s 501CA(3) that misrepresented the prescribed period – where Minister concluded that he was unable to make a finding about the appellant’s claim to fear harm due to a lack of detail and supporting evidence – whether primary judge erred in not finding that failure to consider the appellant’s claims was a breach of procedural fairness – whether primary judge erred in not finding that failure to notify appellant of the lack of detail and supporting evidence was a breach of procedural fairness – whether erroneous invitation for representations meant that Minister lacked power to refuse to revoke the mandatory cancellation decision – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth), ss 501, 501CA(3), 501CA(4)*Migration Regulations 1994* (Cth), reg 2.52(2)(b) |
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| Cases cited: | *Abebe v The Commonwealth* [1999] HCA 14; 197 CLR 510*Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195; 395 ALR 57*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 *BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 124*BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91; 285 FCR 43*CAR15 v Minister for Immigration and Border Protection* [2019] FCAFC 155; 272 FCR 131*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352*CHVS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 34*Commissioner of ACT Revenue v Alphaone Pty Ltd* [1994] FCA 293; 49 FCR 576*Downes v Minister for Home Affairs* [2020] FCA 54; 168 ALD 498*EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173; 395 ALR 36*EVK18 v Minister for Home Affairs* [2020] FCAFC 49; 274 FCR 598*Guclukol v Minister for Home Affairs* [2020] FCAFC 148; 279 FCR 611*Kioa v West* [1985] HCA 81; 159 CLR 550*Minister for Home Affairs v Omar* [2019] FCAFC 188; 272 FCR 589*Minister for Home Affairs v Smith* [2019] FCAFC 137*Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 338 ALR 351*Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216; 267 FCR 643*Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123*Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323*Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1*Minister for Immigration v Maioha* [2018] FCAFC 216; 267 FCR 643*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166; 280 FCR 178*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Jokic* [2020] FCA 1434*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EPL20; Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Sillars* [2022] HCASL 9*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46; 284 FCR 62*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 395 ALR 403*Muin v Refugee Review Tribunal* [2002] HCA 30 76 ALJR 966*Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1169*Navoto v Minister for Home Affairs* [2019] FCAFC 135 *Paerau v Minister for Immigration and Border Protection* [2014] FCAFC 28; 219 FCR 504*Pennie v Minister for Home Affairs* [2019] FCAFC 129*Perera v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 403*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56; 216 CLR 212*Renton v Minister for Home Affairs* [2021] FCA 931*RRFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 27*Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128 *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174*Snedden v Minister for Justice for the Commonwealth of Australia* [2014] FCAFC 156; 230 FCR 82*STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 251 *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578*Stowers v Minister for Immigration and Border Protection* [2018] FCAFC 174; 265 FCR 177*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 235 ALR 609*Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 |
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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: | 189 |
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| Date of hearing: | 11 November 2021  |
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| Counsel for the Appellant: | Ms L De Ferrari SC with Mr A Aleksov |
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| Solicitor for the Appellant: | Carina Ford Immigration Lawyers |
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| Counsel for the Respondent: | Mr G Hill SC |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | VID 370 of 2021 |
|   |
| BETWEEN: | EXT20Appellant |
| AND: | MINISTER FOR HOME AFFAIRSRespondent |

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| order made by: | MORTIMER, WIGNEY AND SNADEN JJ |
| DATE OF ORDER: | 5 May 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs of the appeal, to be assessed in default of agreement in accordance with the court’s Costs Practice Note (GPN-COSTS).

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

REASONS FOR JUDGMENT

MORTIMER J:

1. This appeal concerns a decision of the Minister of Home Affairs not to revoke the mandatory cancellation of the appellant’s visa. The appellant made representations about, amongst other matters, the harm he feared if he were to return to his country of nationality. These representations were made within the time prescribed by the ***Migration Act*** *1958* (Cth) and the *Migration* ***Regulations*** *1994* (Cth), despite the appellant receiving a notice from the Minister’s department that miscalculated how much time the appellant had.
2. The primary judge dismissed the appellant’s judicial review application in respect of the non-revocation decision. On appeal, the appellant submitted the primary judge should have found the Minister did not afford him procedural fairness, by not considering the appellant’s claim to be a refugee, alternatively by not notifying the appellant that his representations on this issue lacked detail and supporting information, could result in his revocation request being refused. The appellant also submitted that the defective cancellation and revocation notice meant the Minister did not have the power to refuse to revoke the mandatory cancellation decision, and the Court should order the Minister to issue a new invitation for representations.
3. For the reasons that follow, in my opinion the appeal should be allowed, on the basis of one of the three grounds of appeal before the Court.

# Background

1. The appellant was born in the Democratic Republic of Congo (**DRC**) in 1987. He was 23 years old when he arrived in Australia. Almost two years later, on 3 August 2012, he was granted a Class BC subclass 100 Partner visa.
2. On 18 January 2019, the appellant’s visa was cancelled under s 501(3A) of the Migration Act, on the basis that the appellant had a “substantial criminal record” within the meaning of s 501(6)(a) and (7)(a)-(c) of the Migration Act. In 2018, the appellant had been convicted on two counts of rape, and was sentenced to five and a half years’ imprisonment.
3. On 31 January 2019, the appellant requested revocation of the cancellation decision. In that request, the appellant stated that he feared significant harm or persecution if he returned to the DRC, because of his ethnicity, and because of the ongoing civil war in that country. He explained that his mother was a member of the Banyamulenge tribe, an ethnic minority in the DRC, and that his father was from a different caste and so he was considered “half-caste”. He claimed his parents were killed by rebels on suspicion of colluding with his mother’s brothers. He stated that his mother was raped, beaten and tortured by a group of military on the night of her killing, and that his father was beaten and tortured to death. He also stated that descendants of people from the Banyamulenge tribe are discriminated against in the DRC and not accepted as Congolese; rather, they are seen as being Tutsis from Rwanda but are not recognised as Rwandan by that country either. The appellant claimed his younger brother and first-born son were assaulted in the DRC and their carer killed when their ethnicity was revealed. The appellant stated that he fled the DRC because of the discrimination and torture he faced there, and emphasised that the DRC remains an unsafe place due to the ongoing civil war.
4. On 27 October 2020, the Minister for Home Affairs decided not to revoke the cancellation decision. Relevantly to the grounds of appeal, in the **reasons** for his decision, the Minister summarised the appellant’s claims about his ethnicity, the discrimination faced by Banyamulenge in the DRC, the killings and assaults he described, and the safety of the DRC in light of the ongoing conflict in that country. Although the Minister was not bound by the then applicable Ministerial direction providing guidance and a decision-making structure for the exercise of the revocation power, the Minister’s reasons followed the guidance and structure contained in the applicable Direction. Direction 65 applied at the time the appellant’s visa was cancelled and at the time he applied for revocation; therefore, the initial notices and information provided to the appellant refer to Direction 65.
5. On 28 February 2019, Direction 65 was revoked and replaced by Direction 79. The Department informed the appellant of this change in April 2020 and advised him that from that time onwards he should refer to Direction 79.
6. At the time of decision, Direction 79 applied, and the Minister considered a range of factors set out in that Direction in deciding whether to revoke the visa cancellation. One factor was headed “international non-refoulement obligations”. The Minister’s reasoning on this factor was what was put in issue before the primary judge and on the appeal.
7. At [70] of the reasons, the Minister stated:

I note that [the appellant] has not provided specific detail in relation to where in the DRC he and his family lived, and dates and places of events, or names and ages of any of his siblings who may also have faced risk of persecution, and by whom. [The appellant] has not described the detail as to the ‘persecution’ his family faced, and it is not clear as to whether this persecution risk due to ethnicity relates to his account below of his description of the death of his parents at the hands of rebels.

1. Similar findings were made at [72] and [74] of the reasons:

[The appellant] has not provided details as to where his parents’ house was located in the DRC at that time, or the dates the deaths occurred, or where he and his siblings were at that time, nor any detail of the Mai Mai rebels or country information of any past and on-going threat they would pose to him. It is not clear as to how long after the stated events it was when [the appellant] left the DRC and no details of his plight [sic] from there, are submitted.

….

As stated above, it is not clear as to the source of his fears, whether it be rebels or government or other forces, and whether, given the passage of time any such source remains to be a threat to him in the DRC.

1. There were similar findings about other aspects of the appellant’s claims at [76], [80] and [81]. These findings led to the ultimate finding by the Minister at [82]-[84]:

Accordingly, in relation to [the appellant’s] claims that he fears being harmed in the nature of discrimination, torture, persecution or other significant harm due to ethnic discrimination, I am unable to make a finding, given the lack of specific detail in relation to the claims or the source of the fears stated, as well as not having any supporting evidence such as credible country or other information or evidence in support of the claimed past fear of harm or harm that was said to have eventuated.

Although there is currently insufficient information for me to determine whether [the appellant] faces a risk of harm upon return to the DRC, I take into account that he is able to make a valid application for a Protection visa. A Protection visa application is the key mechanism provided for by the Act to enable Australia to meet its international non-refoulement obligations. In making such an application, [the appellant] will be able to substantiate his claims in relation to any such obligations, and the duty to remove him under s198 of the Act will not apply while his visa application is being determined.

In saying the above, I am mindful that consideration of whether [the appellant] satisfies a Protection visa criterion under s36(2), should he apply for such a visa at a later time, cannot be regarded as a substitute for consideration of his non-refoulement claims in the present context. In this regard, I accept that case law indicates that the issue to be determined under s501CA(4) (that is, whether there is ‘another reason’ why a cancellation decision should be revoked) is less categorical than the issue of whether a person satisfies a relevant criterion under s36(2), and that the material or representations advanced in support of a claim in the context of s501CA are not required to meet predetermined benchmarks. Furthermore, I am mindful that Australia’s international non-refoulement obligations may not be fully encompassed by the visa criteria in s36(2). Nevertheless, [the appellant’s] claims, once substantiated, will be conclusively assessed in the context of any application for a Protection visa to the extent that those claims are relevant to the criteria for visa grant.

1. The appellant applied to this Court for judicial review of the Minister’s decision on 27 November 2020. Three grounds of review were actively advanced, all of which focussed, as the grounds of appeal do, on how the Minister dealt with the appellant’s claims to fear harm in the DRC.
2. By orders made on 11 June 2021, the primary judge rejected all three grounds of review. At [42], his Honour referred to his previous decision in *Perera v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 403 at [55]-[56], where his Honour had observed that a conclusion by the Minister that he is “unable to make a finding about” an applicant’s claim to fear harm is “an unfortunate choice of words”. His Honour continued:

If the Minister is not so satisfied, the Minister must make a negative finding. It is not permissible for the Minister to avoid making a finding using phraseology such as “unable to make a finding”. It is therefore necessary to consider what the Minister meant when he said that he was “unable to make a finding”, and whether the Minister’s reasons indicate that he performed the statutory task by giving due consideration to the applicant’s representations.

1. Relying on the Full Court’s decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166; 280 FCR 178, the primary judge held at [44] that:

it may be that a decision-maker cannot make a definitive finding on claims made by reason of inadequacy of information and evidence provided, but the decision-maker is nevertheless required to give the claims due consideration (at [36]).

1. At [45]-[46], the primary judge found that the Minister’s reasons suggested he had given no weight to the appellant’s claims and had instead relied on the existence of the protection visa application process. Despite what the primary judge described as an “accommodation” of decisions of this Court in some largely pro forma passages in the reasons of the Minister, the primary judge found (at [47]) that the:

formulation of the Minister’s reasons carries a suggestion that the Minister may not have felt obligated to give due consideration to the applicant’s claims in this case because of the availability of the protection visa process.

1. At [49], the primary judge found the Minister had not fully appreciated “the legal duty to consider the representations made by the applicant” and described himself (at [49]) as having “considerable unease” about this aspect of the Minister’s reasoning.
2. Ultimately in this paragraph (and again at [51]), the primary judge concluded that the “unable to make a finding about” passage in the Minister’s reasons should be understood as “a statement that the Minister was not satisfied, on the material before him, that the applicant faced a risk of harm if returned to the DRC”. The primary judge concluded that the Minister therefore had given “due consideration” to the appellant’s claims and rejected the first ground of review.
3. For similar reasons his Honour also rejected the fourth ground of review. As to the third ground of review (the second ground not being pressed), the primary judge did not accept the Minister had denied the appellant procedural fairness by failing to notify him about the lack of detail attaching to his claims and giving the appellant an opportunity to respond to those issues.
4. The primary judge held (at [59]) this was not a case where the decision-maker had failed to inform the person affected about consideration of adverse information from another source, and that these circumstances could not be described as a “failure to make an obvious inquiry about a critical fact”, referring to *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 at [25]. The primary judge then considered whether what had occurred could be described as unfair, and held that within the particular statutory framework of a decision made by the Minister personally under s 501(3A), it was not procedurally unfair for the Minister not to have sought “elaboration and substantiation of the applicant’s representations” before rejecting them (at [71]-[72]). Nor was it legally unreasonable or a constructive failure to exercise jurisdiction. His Honour concluded (at [72]):

The requirements of procedural fairness were discharged by the statutory procedure by which the applicant was invited to make representations and did so.

1. Accordingly, the primary judge dismissed the judicial review application, with costs.
2. On 8 July 2021, the appellant filed a notice of appeal from the primary judge’s orders. The grounds in this notice mirrored the grounds of review before the primary judge.
3. On 26 October 2021, in his outline of submissions in support of the appeal, the appellant foreshadowed an application for leave to rely on a proposed amended notice of appeal. He foreshadowed that only the “third complaint” before the primary judge (ground 3 in the application for judicial review) was pressed, and no contentions based on legal unreasonableness were pressed. Ground 3 in the original notice of appeal was abandoned.
4. However, the appellant sought leave to raise a new ground of appeal, which he contended relied on a recent Full Court decision in ***Sillars*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174. The contention said by the appellant to arise from *Sillars* was that:

the notification wrongly told the [appellant] that the deadline was for the Department to have 28 days after he was taken to have received the notice, rather than for the appellant to despatch his representations within 28 days of having received the notice.

1. The Full Court in *Sillars* was said to have held that the giving of an accurate notice which complied with the statute was a precondition to the revocation power in s 501CA(4), and the giving of an inaccurate notice operated to preclude the occasion for the exercise of power arising, even though the appellant did in fact make representations. The appellant contended:

The situation, then, is that, at present, the appellant has not lawfully been invited to make representations to revoke the mandatory decision to cancel his visa. All the paperwork and intellectual work on this matter does not have the legal effect that it purports to have, because of the in limine error to start the process lawfully.

1. Therefore, the grounds of appeal as presented in the amended notice of appeal were:

1. The primary judge erred by failing to find that the respondent failed to afford procedural fairness to the applicant, in that he failed to resolve a substantial and clearly articulated claim that the applicant is a refugee.

2. The primary judge erred by failing to find that the respondent ~~acted unreasonably in failing to seek out further information from the applicant and~~ failed to afford procedural fairness in not notifying the applicant of the issues set out at paragraphs 70[,] 72, 7 4, 76, 80 and 81 of the statement of reasons for the decision.

~~3. The Primary judge erred by failing to find that the respondent failed to consider the applicant's claims to fear harm upon any return to the Democratic Republic of Congo, independent of the context of any legal obligation of non refoulment.~~

4. The appellant was not correctly invited to make the revocation representations as required by ss 501CA(3)(b) and 501CA(4)(a) of the Migration Act 1958 and reg 2.52(2)(b) of the Migration Regulations 1994.

1. The Minister opposed the grant of leave to raise a new ground, principally on the basis that the contention had no merit.

# Resolution

1. In my opinion ground 1 and the new ground 4 of the amended notice of appeal should be rejected. Ground 2 should be accepted.

## Failure to resolve claim that the appellant is a refugee (Ground 1)

1. The appellant contends the Minister “failed to resolve a substantial and clearly articulated claim” that the appellant is a refugee. Senior counsel for the appellant submitted the appellant put forward “a reason” the visa cancellation should be revoked, and evidence in support of that reason. Consistently with the Full Court’s decision in *Minister for Home Affairs v* ***Omar***[2019] FCAFC 188; 272 FCR 589 at [36]-[41], that reason had to be considered and decided, and it was not. This submission took issue with the primary judge’s characterisation of the Minister’s reasons as having considered and decided this reason.
2. There is no doubt *Omar* stands for the proposition senior counsel for the appellant submitted it stood for, and the primary judge accepted this: see [40]-[41] and [46] of the primary judge’s reasons, which with respect are correct.
3. In *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195; 395 ALR 57 at [130], Besanko J said (Allsop CJ, Kenny, Kerr and Charlesworth JJ agreeing):

The cases are legion in which the Courts have said that it is not appropriate, or ordinarily appropriate, to infer that the decision-maker has made findings or drawn conclusions not referred to in the written reasons of the decision-maker (see, for example, *SZMDS* at [36] per Gummow ACJ and Kiefel J; *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26; (2014) 88 ALJR 754 at [67] per Crennan and Bell JJ; *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 272 FCR 589 at [34(a)]; *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108; (2010) 187 FCR 362 at [55] per Kenny J).

1. That principle or approach is not engaged on the appellant’s first ground. There are many references to the appellant’s claims of harm. The real question on this appeal is how to understand the Minister’s reasons, read fairly and in context, and especially those passages where the Minister states that he is “unable to make a finding”.
2. I respectfully agree with the primary judge that the Minister’s expression in his reasons at [82] that he was “unable to make a finding” is an unfortunate one. In my opinion, the primary judge was correct in his conclusion that the Minister did, in fact, make findings, in that he rejected the appellant’s fear of harm if returned to the DRC as a “reason” weighing in favour of revocation of the visa cancellation. Indeed, the Minister found he could give that “reason” no weight at all.
3. While [83]-[87] of the Minister’s reasons do appear to stray, irrelevantly, into some speculation about what might or might not happen during any decision-making process after a then non-existent application for a protection visa by the appellant as if that potential process was the location for any decision making about this aspect of the appellant’s revocation request, in my opinion a fair reading of the reasons as a whole makes it clear the Minister considered but rejected at a preliminary level the appellant’s claims to fear harm if he were to be compelled to return to the DRC.
4. At [12], the Minister stated:

In the representations/documents submitted by or on his behalf, [the appellant] has articulated reasons why the original decision should be revoked, which include:

* The best interests of his eight biological children and two ‘step children’ require that he remain in Australia where he can continue to support them financially, physically and emotionally
* The best interests of the two mothers of his children, who need his assistance in providing for and raising the children
* His community ties to Australia for the past nine years, including being very active in the church and local African community
* His contribution to the community through employment before being incarcerated
* The mitigating circumstances regarding his offending, and his strong remorse and rehabilitation.
1. Conspicuously absent from this list of “reasons” are the matters the Minister sets out later under “International non-refoulement”, and which were clearly advanced by the appellant.
2. Yet later, over a considerable number of paragraphs (at [68]-[87]), the Minister does discuss the claims the appellant had made in his respect. Despite concerns expressed during the appeal hearing that this omission in [12] might be significant, on reflection I do not consider it is. Reading the reasons fairly, there has been an omission from [12] which should be understood as no more than that. Indeed, taking into account the pro forma drafting in these kinds of reasons, to which the Full Court referred in *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; 279 FCR 611 at [27] and which was noted also by the primary judge at [38], I infer it is likely a drafting error by officers assisting the Minister, especially given it appears in an introductory section of the reasons.
3. A more important passage is at [141], in the conclusion section of the Minister’s reasons. This is the section where the Minister’s reasons draw together the various factors he has considered, and summarises which way those factors tend – either for or against revocation. The Minister states:

I am cognisant that where such harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the original decision to cancel the visa. **I have also considered his claims** that he will face harm including persecution if he returns to DRC, but as set out above, I am unable to make any finding in this regard without further substantiation of those claims.

(Emphasis added.)

1. This passage should be understood as meaning that the Minister rejected the claims at the level they were advanced and therefore did not consider the claim of harm in the DRC (and why the appellant feared harm) could or did weigh in favour of revocation of the visa cancellation. Compare, for example, the conclusion at [137] in relation to the best interests of the appellant’s children, where the Minister found:

their best interests would be served by the revocation of the original decision.

1. In my opinion this passage at [141], together with the fact that over almost 20 paragraphs the Minister sets out the appellant’s claims to fear harm and explains their deficiencies because of an absence of detail or supporting material, lead to the conclusion that the Minister performed the task described by the Full Court in *Omar*.
2. The primary judge’s conclusions were correct. Ground 1 of the notice of appeal should be rejected.

## Denial of procedural fairness (Ground 2)

1. The Minister did not cavil with the premise of this ground; namely that he was obliged to afford procedural fairness to the appellant in the exercise of the power under s 501CA(4) and that the content of that obligation could be described by reference to ordinary principles. Indeed, correctly, the Minister’s written submission was:

In general terms, procedural fairness required the Minister:

to inform the Appellant of the case against him and give him a reasonable opportunity to address it; and

to inform the Appellant of, and provide him with an opportunity to address, the critical issues or factors on which the decision was likely to turn, as well as any adverse information that was credible, relevant and significant to the decision.

A decision-maker is required to advise an affected person of any adverse conclusion which has been arrived at which would not obviously be open on the known material, **but there is no obligation for the decision-maker to expose mental processes or provisional views**.

(Emphasis added, citations omitted.)

1. As authority for these propositions, the Minister referred to ***Stowers*** *v Minister for Immigration and Border Protection* [2018] FCAFC 174; 265 FCR 177 at [38], quoting ***Snedden*** *v Minister for Justice for the Commonwealth of Australia* [2014] FCAFC 156; 230 FCR 82 at [175] and [176], *Renton v Minister for Home Affairs* [2021] FCA 931 at [35]-[36] and *Commissioner of ACT Revenue v* ***Alphaone*** *Pty Ltd* [1994] FCA 293; 49 FCR 576 at 592.
2. The Minister submitted the appellant’s argument fell within the proposition in bold in the extract above, namely: that procedural fairness does not require decision-makers to give a “running commentary” of their reasons or reasoning: see ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [48]; *Minister for Home Affairs v* ***Smith*** [2019] FCAFC 137 at [17]. That qualification has been applied to circumstances where no hearing is given as part of the decision-making process: see *Snedden* at [234]; *Smith* at [17].
3. The Minister contended that a finding that a representation did not have sufficient detail was an “entirely obvious” treatment of the material and outside *Alphaone* principles. He also submitted that the appellant was wrong to invite the Court to embark on some “freestanding” evaluation of whether there was a “practical injustice” (being the well-cited phrase from *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [37]).
4. The Minister’s submissions should be rejected in their application to this particular decision-making process, although the principles to which the Minister referred are well established and must be accepted.
5. In determining the content of procedural fairness, both the statutory context and the factual context are important. Beginning with the statutory context, as the appellant submitted, the operation of s 501CA(3) and (4) imposes a “reverse onus” on a person affected by a mandatory cancellation. The visa had been cancelled by operation of law, and it is up to the person affected to persuade the Minister, by the methods of persuasion for which Div 2 of Pt 9 allows, that the cancellation should be revoked. The only permitted method is the making of representations within a relatively confined period of time, namely 28 days from when the affected person has received, or is deemed to have received, notice of the cancellation and the invitation to make representations. Almost inevitably, the person affected will be in prison, and access to materials will be difficult and restricted, as the Full Court observed in ***Stewart*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578 at [34]-[36]. No hearing is contemplated by the scheme. The revocation power can be exercised by either the Minister personally, or a delegate, and the person affected does not know, and is not informed, which decision-making pathway is chosen. The Regulations impose some detailed prescriptions about what information must accompany a request: see generally reg 2.52(3)-(6).
6. In terms of the factual context, at the time he made his representations in response to the invitation, the appellant was unrepresented and in prison. The invitation to request revocation occurred by presenting the appellant with a notice of visa cancellation and a form to fill out if he wished to seek revocation, along with instructions and information about the revocation request process. He filled the form out, and he did so, as his counsel submitted, in a way that was “appropriately responsive to the form that he was asked to complete”. In the handwritten answers on the form itself there were several paragraphs about his fears if he was forced to return to the DRC.
7. In a handwritten letter accompanying the form, addressed (as he was instructed to do) to the “National Character Consideration Centre” the appellant stated:

Due to [lack] of space of the envelloppe [sic] I couldn’t be able to send a detailing response and support document with this form in response to my visa cancellation.

I will be sending a Detailing response with some of my support document separately to this form. If you need more information, please do not hesitate to contact me.

1. The appellant had been told in the cancellation notice and invitation that either a delegate *or* the Minister might consider his case, and – in substance – that in either case the appellant might “wish to address” Direction 65, which set out factors that either must or might be considered.
2. The appellant sent with the form a handwritten attachment. This attachment set out – over six pages – a chronology of the appellant’s life and what happened to him, and then over a substantial number of pages addressed factors listed in Direction 65, concentrating on factors such as the best interests of his children and risk to the Australian community. In this handwritten document, the appellant did spend two pages addressing “Risks of significant harm if removed from Australia”.
3. The appellant submitted some supporting documents, such as the citizenship certificates of two of his children, the birth certificates of three of his children, other documentation relating to another of his children, the school reports of his children and documentation relating to the appellant’s visa and qualifications that he obtained in Australia.
4. By a letter dated 22 April 2020, the appellant was notified of further information which “may be taken into account when making the decision”, being his national criminal history check, sentencing remarks of the District Court of Queensland at Ipswich on 18 September 2018, and an incoming passenger card dated 14 January 2016 on which the appellant did not declare his criminal convictions. Nothing was said to the appellant in this communication about the need for any further information about his claims concerning the DRC. The appellant responded in a handwritten letter dated 3 May 2020 extending over 14 pages. In this letter he also repeated his claims about fearing harm in the DRC, including an account of how his mother was killed. This was the eighth personal communication from the appellant. In total, the evidence discloses he sent eleven personal communications, with various documents attached, to the Department of Home Affairs’ “National Character Consideration Centre”. The appellant was, I find, highly responsive, and concerned to advance all relevant material before the decision maker when given the opportunity to do so.
5. The appellant had not been through any visa process which engaged with issues of protection obligations or non-refoulement criteria – he had held a partner visa. Unrepresented and unadvised, it is difficult to see how he could reasonably have been expected to realise he should provide what is commonly called “country information” or even further details about his narrative of what occurred to him and his family in the DRC. As senior counsel submitted, some of the events are notorious, such as the Rwandan genocide and the deep ethnic divisions in central African nations.
6. The evidence reveals the following chronology:
7. A brief to the Minister from his Department was settled on 5 October 2020 (Appeal Book at page 58)).
8. There were nine paragraphs in the brief setting out what the appellant said about his claims to fear harm in the DRC and why.
9. The brief was received in the Minister’s office on 7 October 2020 (Appeal Book at page 42).
10. The Minister elected to exercise the revocation power personally after receiving the brief.
11. The Minister decided the revocation request on 27 October 2020.
12. Therefore, the revocation request was with the Minister for approximately 20 days.
13. I also accept the Court can infer that, prior to the brief to the Minister being settled on 5 October 2020, drafts of the brief were prepared and those drafts are more likely than not to have included a section on the appellant’s claims to fear harm if he were forced to return to the DRC, just as the final brief did. The proportion of the final reasons devoted to this issue means, as I have found on ground 1, that it had some prominence in the consideration of this revocation request. Therefore, those advising the Minister (being those responsible in a substantive way for the making of inquiries of, or communication with, the appellant) were aware of how the appellant put his claims to fear harm for a considerable period of time prior to the exercise of power on the revocation request.
14. I also accept that the evidence supports the inference that the Minister made no changes to the draft statement of reasons prepared for him by his advisers, and adopted in whole what had been drafted for him. There is no evidence the Minister sought any further material or made any further inquiries, including of his officers and those advising him.
15. While the appellant invited the Court to consider whether the absence of an interview with him to resolve the issues noted in the reasons was designed to avoid the ‘inconvenience’ of having to conduct such an interview, I do not consider the real question is whether there should or should not have been an interview. Interview processes are not prohibited, but they are also not a process expressly contemplated by this part of the statutory scheme, not even as an optional aspect: cf *Migration Act* Pt 7AA.
16. Rather, the real question is whether the appellant should have been informed of the Minister’s preliminary view (through those advising and assisting him) that there was insufficient detail about his claims to fear harm in the DRC for any credence to be given to those claims, and therefore for them to be capable of being a “reason” to revoke the visa cancellation.
17. Unlike *SZBEL*, this was not a situation where a decision was reached swiftly after a hearing at which the person affected had appeared. The references to “running commentary” must, I accept, be understood in light of the decision-maker in *SZBEL* having conducted an oral hearing, and the High Court placing some limits around the nature and details of what must be raised with a person during such a hearing. That is not this situation. Here, the appellant has no direct personal opportunity to persuade the Minister, no opportunity to gauge how the person making a decision about his whole future in Australia is reacting to what he has said. No direct opportunity to be responsive at all to matters the decision-maker has indicated are troubling them. Rather, the appellant sends representations and responsive written communications into a void – to the “National Character Consideration Centre” – without any idea of who might make a decision on his revocation request, not even whether it will be the Minister personally, or a delegate. This is a circumstance far removed from circumstances in which the High Court made the “running commentary” observations in *SZBEL*.
18. In my opinion, the circumstances of this case are to be resolved by an application of the principles in *Alphaone*, which were extracted and endorsed in *SZBEL* at [29]. See also *Stowers* at [38], citing *Snedden*. In *Alphaone*, the Full Court said (at 591-592):

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. **It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made.** The decision-maker **is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material**. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

(Emphasis added.)

1. It is the part in bold which in my opinion is applicable here. That ‘requirement’ is squarely imposed on the person whose exercise of power attracts the obligation to afford procedural fairness. As the Full Court said in *Stowers* at [41], the *content* of the obligation varies according to the circumstances:

The Court [in *SZBEL*] drew attention to the critical importance of the statutory framework within which a decision-maker exercises statutory power and that “the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case”, citing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504.

1. Applying those principles here:
2. The repository of the power was the Minister. Whether personally or through delegates, the duty to afford procedural fairness is imposed on the Minister. The evidence discloses that the decision to exercise the power personally was made on the same day as the decision itself: namely 27 October 2020. The coincidence of those two events on the one day does not affect the need to afford procedural fairness. The Minister and any delegate may act with the assistance of Departmental officers, and that assistance includes assistance to comply with procedural fairness obligations. The particular method by which compliance was to be achieved was a matter for the Minister and his officers.
3. An issue critical to the decision whether or not to revoke the visa cancellation was that on one of the core reasons put forward by the appellant, the lack of detail and evidentiary support provided by the appellant led the Minister to reject outright all of the claims of harm in the DRC, and to give no credence to this reason put forward by the appellant.
4. That conclusion was adverse to the appellant, as his fear of harm on return to the DRC was a significant factor capable of weighing in favour of revocation.
5. The conclusion that the Minister was unable to accept the appellant’s account because there were not enough details or corroborative support was not a conclusion which would have been obvious on the material known to the appellant. He had provided a first-hand account from his lived experience. He could reasonably expect that, whoever the decision-maker was, the decision-maker would *not* have had that direct experience or knowledge. He had provided specific examples of harm in the past. He had explained the ethnic basis for the harm he feared. Some of the events and facts critical to his narrative were notorious and he might reasonably have expected the Minister or his advisers to be aware of them. The appellant had offered to provide further information if needed, and in a process with no right to a hearing that is all he could do. He had been responsive, in detail, when asked to provide responses. The appellant had not been through any kind of protection visa assessment process before, which might otherwise have given him more appreciation of the level or nature of information required. The appellant is not a lawyer and could not reasonably understand what adverse forensic issues might arise with the account he had given.
6. Other relevant points which arise from *SZBEL* are:
7. An assessment whether a person’s accounts are “plausible” can attract the operation of the *Alphaone* principles – there is no strict dichotomy between a conclusion “which would not obviously be open on the known material” and reasoning that is a part of the decision-maker’s mental processes. Other circumstances may arise which are not covered by these descriptions (*SZBEL* at [30]-[31]).
8. What the procedural fairness obligation fastens on in the particular statutory context is critical ([33]). In *SZBEL*, the person affected was entitled to “give evidence and present arguments relating to the issues arising in relation to the decision under review” (s 425(1) of the Migration Act as it then was). In s 501CA(4), a person is entitled to make representations setting out reasons why the visa cancellation should be revoked. Just as the Court in *SZBEL* said the “issues” were particular, so too here the “reasons” for revocation are particular.
9. As the Court explained at [42] in *SZBEL*, the “deep seated” flaw in the decision-maker’s approach was that SZBEL:

was not on notice that his account of how his ship’s captain came to know of his interest in Christianity, and his account of the captain’s reaction to that knowledge, were issues arising in relation to the decision under review.

1. So too here, the appellant was not on notice that the level of detail he had provided in his narrative about the DRC was considered insufficient to give what he said any credence. The process in s 501CA(4) provides no opportunity to put a person in the appellant’s position “on notice” other than through a communication to him: cf *SZBEL* at [43] and the observations about what occurred during the hearing.
2. In the circumstances facing the appellant – both at a factual level and under the statutory regime – including what he had been instructed to do, it was far from obvious that he had not provided enough detail about what had happened to him in the past in the DRC, what had happened to his family in the past, and what he feared would happen in the future, for his claims to be dismissed as so unsubstantiated they could be given no weight. The appellant was describing matters within his lived, direct experience, matters of which the decision-maker themselves had no knowledge or experience to draw upon (cf some of the other factors under Direction 65 and Direction 79).
3. The Department’s letter of 22 April 2020 was likely to suggest to the appellant that he would be asked for responses in relation to matters of substance adverse to his revocation request. Since he was the person who had experienced these events in the DRC, and since he had not been through any similar process before in relation to the grant of a visa in Australia, I do not consider it should have been obvious to him in the circumstances that he needed to provide a much greater level of detail about what had happened to his family in the DRC, or that his account might essentially be disbelieved at every turn. That is, in my opinion, what the Minister did. The “unable to find” conclusion is in substance a positive refusal to accept what the appellant says, albeit couched in some euphemism.
4. The authorities to which the Minister referred do not alter my opinion. Those authorities were *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1169 at [57]-[58], applying ***Paerau*** *v Minister for Immigration and Border Protection* [2014] FCAFC 28; 219 FCR 504 at [27], [118]-[119], *Downes v Minister for Home Affairs* [2020] FCA 54; 168 ALD 498 at [36] (also applying *Paerau*), *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Jokic* [2020] FCA 1434 at [15]-[19].
5. As far as I can see, those authorities did not engage, and the Court in those cases was not invited to engage, with how the procedural fairness obligation outlined in *Alphaone* and endorsed in *SZBEL* would operate in the circumstances before it. Rather, a different line of argument was in issue, namely: whether there was some free standing, generally applicable obligation on a decision-maker to make further inquiries. That is not the way the appellant’s case is put on the appeal.
6. The Minister also relied on several Full Court cases which he submitted stood for the similar proposition that the Minister is not under any obligation to clarify or seek out information about a person’s representations, namely: *Minister for Immigration v Maioha* [2018] FCAFC 216; 267 FCR 643, *Navoto v Minister for Home Affairs* [2019] FCAFC 135, *Pennie v Minister for Home Affairs* [2019] FCAFC 129 and ***EVK18*** *v Minister for Home Affairs* [2020] FCAFC 49; 274 FCR 598.
7. In my opinion, these decisions are particular considerations of the applicable principles, depending on their own facts. That is the problem with urging upon a Court multiple comparisons with other Full Court (or single judge) decisions in a jurisdiction with such a high volume and tremendous proliferation of different arguments on different facts: see the observations of the Chief Justice in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153at [14], [18] and [29] about the peculiar characteristics of this jurisdiction. One aspect of this was recognised by the Full Court in *EVK18* at [15].
8. Further, having reviewed the authorities (including *Omar*), the Full Court in *EVK18* (at [12]) recognised the importance of a representation that a person would suffer harm if returned to their country of nationality:

When attention is focussed on an exercise of the power conferred by s 501CA(4), the making of representations pursuant to s 501CA(3) “play an important role in the decision-maker’s determination of whether he or she is satisfied that there is ‘another reason’ why the cancellation should be revoked”: *GBV18* (2020) 274 FCR 202 at [31(c)]. The Full Court there observed that although “the decision-maker has a degree of ‘decisional freedom’ as to what constitutes such a reason, he or she must consider whether a particular representation made by the affected person, which is clearly expressed and is significant, that they may suffer harm if returned to the country of origin, constitutes ‘another reason’ …”: *GBV18* (2020) 274 FCR 202 at [31(e)].

1. The importance of this aspect of the exercise of the revocation power demonstrates why the principles in *Alphaone* and *SZBEL* are attracted, and may in a given case assume particular importance. None of these authorities considered those principles in the context of s 501CA(4). All reasoning in an exercise of power of the kind in *Alphaone*, *SZBEL* and s 501CA(4) involves a “mental process” and therefore characterising findings such as those in the Minister’s reasons as simply part of the Minister’s mental processes does not resolve the legal question. What *Alphaone* and *SZBEL* demonstrate is that an attempt must be made to identify when fairness requires a person to put on notice, before a decision, of adverse potential conclusions which are sufficiently critical to the exercise of power, and to the interests of the person affected, that some disclosure is required so a person has a meaningful opportunity to address them before the power is exercised.
2. In my opinion, ground 2 should be upheld. With respect, the primary judge’s conclusions on this argument erroneously gave insufficient weight to the principles from *Alphaone* and *SZBEL*.
3. The Minister did not contend that if the Court found a denial of procedural fairness, considerations of materiality should result in the error not being characterised as jurisdictional. The Minister’s failure to afford procedural fairness to the appellant deprived him of a realistic possibility of a different outcome on his revocation request; so much is clear from the centrality and importance of the reason advanced by the appellant to the exercise of power under s 501CA(4), as the Full Court explained in *Omar*.

## Defective invitation to make representations (Ground 4)

1. This ground of appeal has sufficient merit to warrant the grant of leave to the appellant to rely upon it. That is because it involves the somewhat complex interaction of a number of Full Court decisions and a High Court decision, and their application to the evidence of what occurred in relation to the s 501CA(3) invitation issued to the appellant. I accept that the reason for the late raising of the ground is the recent decision in *Sillars* (and the other decision made at the same time, ***EPL20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173; 395 ALR 36). These two cases developed and applied findings of an earlier Full Court, and of the High Court in *Minister for Immigration and Border Protection v* ***EFX17*** [2021] HCA 9; 338 ALR 351. Because they concern the wording on a standard form used in the s 501CA process, the issues raised are capable of affecting a large number of revocation requests under s 501CA, and it is in the interest of the administration of justice that the appellant’s contentions be considered and decided.
2. While leave to raise the ground should be granted, the ground itself should be rejected. I do not accept that *Sillars* and *EPL20* stand for the proposition the appellant contends. Rather the appellant’s argument goes further than *Sillars* and *EPL20* and should be rejected. From here onwards, unless the context requires, I shall simply refer to *Sillars* as that was the decision the appellant focussed on.
3. The legislative provisions in issue are s 501CA(3) and reg 2.52(2)(b) of the Migration Regulations. Section 501CA(3) provides:

As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

1. Regulation 2.52(2)(b) provides:

The representations must be made:

(a) …; and

(b) for a representation under paragraph 501CA(3)(b) of the Act--within 28 days after the person is given the notice and the particulars of relevant information under paragraph 501CA(3)(a) of the Act.

1. The focus of the argument in *Sillars* was what “given the notice” meant in reg 2.52(2)(b). The Full Court’s reasoning in *Sillars* is to some extent an application of the High Court’s reasoning in *EFX17*.
2. In *Sillars* on 7 November 2018, a notice of visa cancellation had been sent via registered mail to Mr Sillars at his address in prison. The notice adopted the definition in the Migration Regulation at reg 2.55 of when a document is “received” and instructed Mr Sillars he would be taken to have received the notice seven working days after the date of the notice, and that the 28 day period would run from after that seven working day period. The Full Court held this instruction did not convey the correct operation of the Act and reg 2.52(2)(b).
3. The evidence was that Mr Sillars received the notice on 18 November 2018, completed part of an application for revocation of the cancellation decision and left the partly-completed form with prison staff for it to be completed by his family or his partner. The form was not completed and submitted to the Minister until 27 December 2018. At a merits review hearing before the Administrative Appeals Tribunal, the Minister contended Mr Sillars’ representations had been made outside the period prescribed in the Regulations, and therefore the Tribunal lacked jurisdiction to deal with a review of the refusal to revoke the cancellation decision. The Tribunal accepted this argument. The same argument was made by the Minister to the Tribunal in *EPL20*, also successfully. At first instance, this Court dismissed Mr Sillars’ application for judicial review of the Tribunal’s decision.
4. Relevantly on appeal, the Full Court held that Mr Sillars was deemed to have been served with the cancellation notice on 18 November 2018, and even taking the correct description of how the 28-day period operated (see below), Mr Sillars had not given his representations to the Minister within the 28-day period. However, the Full Court determined that, because the notice incorrectly fixed the time in which Mr Sillars was to provide representations, the notice was not one inviting the person affected to make representations “within the period and in the manner ascertained in accordance with the regulations” as s 501CA(3)(b) of the Migration Act required: *Sillars* at [48]-[51]. In reaching this conclusion, the Full Court adopted and endorsed what was said by an earlier Full Court in *Stewart* that the requirement that representations be “made” within the 28-day period does not mean “received” but means “dispatched”, because the statutory context “contemplated and intended that the prisoner would have a limited capacity to communicate with the Minister”. The Full Court rejected the Minister’s contention that *Stewart* was “plainly wrong”. In that statutory context, the Full Court in *Sillars* endorsed what was said at [50] in *Stewart*:

the legislative expressions “makes” and “made” in s 501CA and reg 2.52 focus on the act of the prisoner, not the position of the Minister as the intended recipient of the representations.

1. In *Sillars*, the Full Court therefore concluded (at [48]):

In the present case, by in effect stating that the appellant’s representations had to be received by the Minister within the 28-day time period, the invitation incorrectly fixed the time under reg 2.52(2)(b). This meant that the invitation was not one under s 501CA(3)(b) to make representations “within the period … ascertained in accordance with the regulations”: *EFX17* at [41] – [42].

1. The effect of this invitation not being one under s 501CA(3)(b), the Full Court held at [51], was that no valid invitation had been sent:

As *EFX17* demonstrates, the failure to invite representations “within the period … ascertained in accordance with the regulations”, for the purposes of s 501CA(3)(b) of the Act, is not a failure in mere procedure. To apply the reasoning in *EFX17* (at [41]) it can hardly be supposed that Parliament intended that a person whose visa had been cancelled would not be given the information that would reveal the date by which representations must be made if the person is to avoid the strict consequences of failing to make representations.

1. It appears the Full Court concluded that the Tribunal’s decision it had no jurisdiction was incorrect and should be quashed. It would appear (although with respect it is not clear from the reasons or the Full Court’s orders) that the intention was that Mr Sillars’ merits review before the Tribunal could proceed.
2. A similar outcome was reached on similar facts in *EPL20*, and special leave to appeal from *Sillars* and *EPL20* was recently refused by the High Court: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EPL20; Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Sillars* [2022] HCASL 9.
3. On this appeal, the appellant submitted that the notice of the visa cancellation contained the same error as the notice in *Sillars*. The appellant contended the text of the notice was the text contained in the document filled out by the appellant and described as “Request for Revocation of a Mandatory Visa Cancellation Under S501(3A)”. Relevantly that notice read as follows:

If you decide to request the Minister to revoke the mandatory cancellation of your visa, ***your request must be received by the Department of******Immigration and Border Protection (the Department), by mail, email or* *fax, within 28 days after you are taken to have received the notice regarding the cancellation of your visa. Details of where to mail, email or* *fax your request for revocation to, are provided in the Notice of visa cancellation under s501(3A) of the Migration Act 1958.***

(Emphasis original.)

1. The Minister contended the applicable notice and invitation for the *Sillars* argument was the document headed “Notice of visa cancellation under s501(3A) of the Migration Act 1958”. Relevantly the passages in that document stated:

Any representations made in relation to the revocation of a mandatory cancellation decision must be made within the prescribed timeframe. The combined effect of s501CA(3)(b) and s501CA(4)(a) of the Act and Regulation 2.52 of the Regulations is that any representations MUST be made within 28 days after you are taken to have received this notice.

If you make representations about revocation of the visa cancellation decision but the representations are received outside the prescribed timeframe of 28 days, the Minister or his/her delegate is not able to consider the representations because they would not have been made in accordance with the invitation, as required by s501CA(4)(a) of the Act.

1. The document identified by the Minister (the notice of cancellation) is the equivalent document to that identified by the Full Court in *Sillars*: see *Sillars* at [8]. I consider this is the “invitation” for the purposes of s 501CA(3)(b), s 501CA(4)(a) and reg 5.52.
2. According to the appellant, an invitation complying with s 501CA(3)(b) and reg.2.52 is a pre-condition to the discretion in s 501CA(4)(a) of the Migration Act. On the appellant’s submission, the Minister’s failure to fulfil the pre-condition meant the Minister did not have power to decide whether to revoke the cancellation decision. The appropriate relief was contended to be an order in the nature of mandamus to compel the Minister to issue a new invitation for representations that complies with s 501CA(3). Initially, the appellant submitted that *Sillars* and *EPL20* were authority for these submissions. However, during oral submissions senior counsel for the appellant accepted that the facts of those cases differed from the facts of the present proceeding, insofar as the appellant in this case *had* made representations to the Minister within time, however it was calculated, despite the defective notification, whereas the applicants in *Sillars* and *EPL20* had not. Nevertheless, senior counsel for the appellant maintained these submissions were the “logical extension” of *Sillars* and *EPL20*.
3. In the Minister’s submission, the factual distinction between the appellant’s situation and *Sillars* (and *EPL20*) is fatal to the merit of this argument. That is because the issue in those cases was whether a person had wrongly been denied the opportunity to make representations on revocation. The Minister submitted that *Sillars* does not suggest that the s 501CA(4) power could not arise where a person did in fact make representations, even if the invitation set out an incorrectly calculated period. In support of that submission, the Minister drew an analogy with the Court’s finding in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Parata***[2021] FCAFC 46; 284 FCR 62 at [47], [70]-[71] that an application for merits review of a migration decision can be made validly before the applicant has received a notice that complies with s 66 of the Migration Act.
4. As the Full Court said in *Sillars*, an incorrect invitation was capable of (wrongly) imposing the “the strict consequences” for which s 501CA(4)(a) provides, namely: to suggest that the Minister (and on, any available review, the Tribunal) is forbidden from considering a revocation request if representations have not been made “in accordance with an invitation”. The wording of s 501CA(4)(a) must be understood as referring to a legally correct invitation. If the invitation sets out an incorrect time frame, then that invitation cannot operate to the detriment of the person affected, by precluding the Minister (or Tribunal) from considering the revocation request. Rather, the invitation is invalid. Respectfully, this is not explained so much in *Sillars* as it is in *EPL20*. In *EPL20* at [24], the Full Court described the effect in particular of *EFX17*:

It is necessarily implicit in what the High Court said in *EFX17*, particularly at [42], that a failure to comply with the statutory obligations regarding notification and inviting representations as required by s 501CA(3)(b) gives rise to jurisdictional error and **results in the purported notification and invitation being invalid**.

(Emphasis added.)

1. The absolute nature of the High Court’s finding in *EFX17* was emphasised by the Full Court in *EPL20* at [40]:

Finally, we do not accept the Minister’s submission that, even if the second notification letter contained an error in the way described in *EFX17*, when read with *Stewart*, the requirements in s 501CA(3) are not such that any departure there resulted in invalidity and there was a necessity to consider the extent and consequences of the departure. A sufficient response to that contention is that in *EFX17*, the High Court accepted that an error by one day in crystallising the period for making representations was sufficient to uphold the respondent’s notice of contention without any consideration of the extent or consequences of departure. This was despite the fact that [EFX17] had never made, or sought to make, any representations to the Minister concerning the visa cancellation decision. Furthermore, contrary to the Minister’s submission, no particular significance should attach to the fact that the applicant had the advantage of being represented when the representations were made.

1. That passage appears in *EPL20* after the Full Court had discussed another Full Court decision, ***BDS20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91; 285 FCR 43. *BDS20* considered whether the Minister could issue a second invitation to make representations under s 501CA. By majority, the Full Court held that the Minister could not. As the Court in *EPL20* pointed out, the majority reached this conclusion because the first invitation issued by the Minister was held not to have been validly issued. In other words, the Full Court in *EPL20* appeared to endorse the proposition that if an invitation by the Minister under s 501CA(3) was found to be invalid, there would be no impediment to the Minister being able (or being compelled to) issue a second invitation.
2. This was the relief sought by the appellant.
3. This appears to be relief which the Minister has subsequently conceded is available: see *CHVS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 34 at [86]-[91]. I note in that case, Kerr J also considered it appropriate to grant declaratory relief, over the Minister’s objection. That case also concerns a situation where, on any view of the correct 28-day period, CHVS’s representations were received outside that period.
4. Therefore, the novel question raised on the application of *Sillars* and *EPL20* to the facts on this appeal is whether the power in s 501CA(4) arises, and can be exercised without excess of jurisdiction, if a person has in fact made representations to the Minister and the Minister has not refused to consider those representations because of them apparently being given outside the (incorrect) period specified in an invitation. That is the appellant’s contention. Alternatively, as the Minister put it:

…*Sillars* should be understood as holding only that a mis-statement in an invitation of the time within which the person could make representations is always material, if the person does not make representations within time and is thereby prevented from seeking revocation of the cancellation decision.

(Original emphasis.)

1. In other words, the Minister seeks to have the issue viewed through the prism of materiality.
2. Part of the difficulty in considering these arguments is that in neither *EPL20* nor *Sillars* did the Full Court expand in its reasons or in its orders on what should or could occur *after* the decision of the Tribunal (in each case) was quashed. They did not address whether the existence of an invitation *not* in accordance with the Act meant that a new invitation had to be issued (cf *BDS20* and what the Court said in *EPL20*) and the whole process had to commence again at delegate/first instance level, or whether the existence of an invitation not in accordance with the Act simply meant that there was no jurisdictional obstruction to the Tribunal dealing with the merits review application.
3. If that difficulty needs to be worked through at some point, it does not need to be worked through on this appeal. That is because in my opinion the Minister’s materiality argument should be accepted. In the circumstances of *EPL20*, *Sillars* (and *CHVS*), what miscarries is the exercise of the power in s 501CA(4): it miscarries because there is a *refusal* to exercise the power (either by the Minister if personally exercised or by the Tribunal on the Minister’s objection), on the misconceived basis that there the person affected had been given an invitation to make representations that was “in accordance with” the Act, when they had not. Here, there was no refusal, and therefore any error was not material.
4. While different judges may express the principles differently, or place different emphasis on aspects of them, the core question which the recent decision of the High Court requires this Court to ask was expressed by the Full Court in *BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 124 at [35] and [41]:

That conclusion then invites attention to whether the Tribunal’s error was material, in the sense that “compliance could realistically have resulted in a different decision”: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421, 445 [45] (Bell, Gageler and Keane JJ). In this regard, as Mortimer and Bromwich JJ held in *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66; (2020) 276 FCR 75, 93 [66], “the adjective ‘realistic’ in the statements of principle by the majority in the High Court in [*SZMTA*] is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable, no more than that.”

….

It is not for this Court to assess whether the degree of social isolation to which the appellant adverted rises to the standard of serious or significant harm. The analysis on judicial review is limited to whether or not there is a realistic possibility that the Tribunal could have been satisfied on those tests had it properly exercised the jurisdiction vested in it.

1. On any view, compliance with the issuing of an invitation which was “in accordance with” s 501CA(3) and reg 2.52(b) could not realistically have resulted in a different decision by the Minister. That is because the Minister did engage with the appellant’s representations and embarked on the exercise of power under s 501CA(4). He did not refuse to do so in the way that occurred in *EPL20*, *Sillars* and *CHVS*.
2. While what is said by the Full Court in *Parata* at [71] might provide a broad analogy, I do not consider it advances the argument one way or the other, being concerned with different statutory provisions, and not being based on materiality.
3. Leave should be granted to raise ground 4 of the amended notice of appeal, but the ground should be rejected.

# Conclusion

1. In my opinion, the appeal should be allowed on the basis of ground 2, with costs.

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| I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer. |

Associate:

Dated: 5 May 2022

REASONS FOR JUDGMENT

WIGNEY J:

1. The appellant is a citizen of the Democratic Republic of the **Congo**. His visa was mandatorily cancelled pursuant to s 501(3A) of the *Migration* ***Act*** *1958* (Cth) following his conviction and imprisonment for serious offences. He made representations to the respondent, the **Minister** for Home Affairs, about the revocation of his visa. The Minister, however, declined to revoke the cancellation of the appellant’s visa because he was not satisfied that there was “another reason” why the cancellation should be revoked: s 501CA(4)(b)(ii). In proceedings commenced in this Court, the appellant contended that the Minister’s decision was vitiated by jurisdictional error. The primary judge, however, rejected that contention and dismissed the appellant’s application: *EXT20 v Minister for Home Affairs* [2021] FCA 629 (**Judgment**). The appellant appealed that decision.
2. The appeal grounds essentially raise three questions.
3. The first question is whether, to the extent he was required to do so, the Minister “resolved” factual claims made by the appellant in the representations that he made about the revocation of the cancellation of his visa. The general effect of those claims was that the appellant believed, based on past incidents in Congo involving him and his family, that he would be seriously harmed if he was required to return to Congo.
4. The second question concerns the requirements of procedural fairness in circumstances where the Minister, or officers in his Department, had formed the view that the appellant’s factual claims contained insufficient particulars, or were not sufficiently substantiated, to enable the Minister to make positive findings in relation to the claims. The question, in essence, is whether procedural fairness required the Minister, or the Department, to notify the appellant that his claims may not be sufficiently particularised or substantiated, and afford the appellant an opportunity to address that issue and supplement his representations accordingly.
5. The third issue is whether a defective invitation to make representations about the revocation of the cancellation of a visa can invalidate a decision about the revocation in circumstances where the invitation is acted on and representations are made and considered by the Minister.
6. I have had the benefit of reading, in draft, the reasons to be published by both Mortimer J and Snaden J. The reasons of Mortimer J contain a comprehensive recitation of the relevant factual and procedural background, the reasons of the primary judge, the grounds of appeal and the respective submissions of the parties. That permits me to directly address the three questions raised by the appeal.

# Ground 1 – failure to “resolve a substantial and clearly articulated claim”

1. Ground 1 of the appellant’s grounds of appeal is that the “primary judge erred by failing to find that [the Minister] failed to afford procedural fairness to the [appellant], in that he failed to resolve a substantial and clearly articulated claim that the [appellant] is a refugee”.
2. Subject to what follows, I agree with both Mortimer J and Snaden J that ground 1 of the appeal must be rejected. In short, the Minister made findings in respect of the appellant’s claims, at least to the extent that he was required to do so. The primary judge was correct to reject the appellant’s contention to the contrary.
3. The appellant’s representations in relation to the revocation of the cancellation of his visa included a number of relatively detailed factual claims. The overall effect of those claims was that the appellant believed, based on past incidents or experiences in Congo, that if he returned to Congo he would be persecuted, seriously harmed or killed. The appellant’s essential complaint was that the Minister failed to make any findings in relation to those claims. His argument focussed on the fact that in his Statement of **Reasons** for Decision, the Minister said that he was “unable to make a finding” in relation to the claims given the “lack of specific detail” and “not having any supporting evidence” (Reasons at [82]), or “without further substantiation” (Reasons at [141]).
4. The primary judge concluded that the Minister’s statements that he was unable to make a finding in relation to the appellant’s claims “must be understood as a statement that the Minister was not satisfied, on the material before him, that the [appellant] faced a risk of harm if returned to [Congo]”: Judgment at [49]. It followed that the appellant’s contention that the Minister had failed to resolve his claim or claims had no merit: see Judgment at [52].
5. A fair reading of the Minister’s reasons supports the primary judge’s findings in that regard. The Minister gave detailed consideration to the appellant’s claims: Reasons at [68]-[82]. While the wording of the Minister’s ultimate conclusion in respect of the claims was perhaps unfortunate, read fairly and in context, the conclusion plainly amounts to a finding that the Minister was not satisfied, on the material before him, that there was a risk that the appellant would be seriously harmed if he returned to Congo. While that may not amount to an outright rejection of the entirety of the appellant’s claims, it nonetheless amounts to a factual finding in respect of the claims.
6. That is a sufficient basis upon which to reject ground 1 of the appeal.
7. It might also be added, however, that the underlying premise of ground 1 of the appeal – that the Minister was required to “resolve” the appellant’s claims – is, in any event, at best doubtful. The Minister was undoubtedly required to “consider and understand” the appellant’s representations: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane*** (2021) 395 ALR 403; [2021] HCA 41 at [13] (Keane, Gordon, Edelman, Steward and Gleeson JJ). It may be accepted that, in some cases, “depending on the nature and content of the representations”, the Minister “may be required to make specific findings of fact … by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law”: *Minister for Home Affairs v* ***Omar*** (2019) 272 FCR 589; [2019] FCAFC 188 at [39] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ). However “[n]o part of the statutory power conferred by s 501CA of the Act obliges the Minister to make actual findings of fact as an adjudication of *all* material claims made by an applicant”: *Viane* at [14] (emphasis added).
8. If not satisfied that an applicant passes the character test, the Minister must determine whether he (or she, as the case may be) is or is not satisfied that “another reason” exists for revoking the visa cancellation: *Viane* at [14]. However, the “breadth of the power conferred by s 501CA of the Act renders it impossible, nor is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation”: *Viane* at [15]. There is, therefore, no absolute rule that the Minister must “resolve” all factual claims that may be made in an applicant’s representations in support of revocation. Much will depend on the nature of the claims and representations, as well as the facts and circumstances of the case generally.
9. It is unnecessary to decide whether or not the Minister was required to make “actual” findings of fact about all of the appellant’s claims. That is because, for the reasons already given, the Minister made findings about the appellant’s substantive claims in any event.

# Ground 2 – denial of procedural fairness

1. Ground 2 of the appellant’s grounds of appeal is that the “primary judge erred by failing to find that the [Minister] … failed to afford procedural fairness in not notifying the [appellant] of the issues set out at paragraphs 70. [*sic*] 72, 74, 76, 80 and 81 of the statement of the reasons for the decision”.
2. The primary judge rejected the appellant’s contention that the Minister failed to afford him procedural fairness, including the contention that the Minister was required to give the appellant an opportunity to provide further particulars of his claims. His Honour held that the Minister was “not under a legal duty, referrable to jurisdictional error, to ask for further representations from the [appellant] or to make inquiries into the representations that were made”: Judgment at [71]-[72].
3. Like Snaden J, I have reached a different conclusion to Mortimer J in respect of ground 2 of the appeal. I too would reject the appellant’s contention that he was denied procedural fairness and reject the contention that the primary judge erred in so deciding.

## Relevant principles

1. It was common ground both at first instance and on appeal that the Minister was required to afford the appellant procedural fairness. The applicable general principles in respect of procedural fairness were also not in dispute either before the primary judge or on appeal. What was in issue was what procedural fairness required in the specific circumstances of the appellant’s case.
2. In general terms, procedural fairness required that the Minister adequately inform the appellant of the following things: *first*, the nature and content of any “adverse material from other sources” that was before the Minister; *second*, any “issue critical to the decision” which was not otherwise apparent from the nature and circumstances of the decision-making process; and *third*, any “adverse conclusions which has been arrived at which would not obviously be open on the known material”: *Commissioner for Australian Capital Territory Revenue v* ***Alphaone*** *Pty Ltd* (1994) 49 FCR 576 at 591-2 (Northrop, Miles and French JJ); ***SZBEL*** *v Minister for Immigration and Citizenship* (2006) 228 CLR 152; [2006] HCA 63 at [31]-[34] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Viane* at [32]. The overriding requirement was that the appellant be given “the opportunity to being heard”, which in turn required that the appellant be “given the opportunity of ascertaining the relevant issues” and be “informed of the nature and content of adverse material”: *Alphaone* at 590-591; *SZBEL* at [32].
3. The precise content of the requirement to afford procedural fairness in any given case depends on the statutory framework within which the decision in issue is made and the facts and circumstances of the case: *SZBEL* at [26]. The critical issue in this case, therefore, is what the Minister was required to do to ensure that the decision-making process in respect of the possible revocation of the appellant’s visa cancellation was procedurally fair, having regard to the statutory scheme in respect of revocation decisions and the particular facts and circumstances of the appellant’s case. Was the appellant given the opportunity of ascertaining the relevant issues and informed of the nature and content of any adverse material before the Minister? Was he given, in all the circumstances, a fair opportunity to be heard?

## The appellant’s contentions

1. Stripped of unnecessary and unhelpful rhetoric, the appellant’s case in respect of procedural fairness essentially reduced to the contention that, in the particular circumstances of his case, procedural fairness required the Minister to do two things: *first*, make the appellant aware in some way that his factual claims relating to his belief that he would be harmed if returned to Congo may not be sufficiently particularised or substantiated by the material he had provided to enable the Minister to make a positive finding in respect of his claims; and *second*, give the appellant the opportunity to address that issue and supplement his representations accordingly.
2. As has already been noted, to address that contention it is necessary to have regard to both the statutory scheme mandated by s 501CA of the Act and the specific facts and circumstances of the appellant’s case.

## The statutory scheme

1. The statutory scheme in s 501CA, in short summary, involves: *first*, the Minister giving the person whose visa has been cancelled notice of the “original decision” (being the cancellation decision) and particulars of “relevant information”, being information “specifically about the person” that the Minister considers “would be the reason, or a part of the reason, for making the original decision”; *second*, the Minister inviting the person to make representations “about revocation of the original decision”; *third*, the receipt of representations by the Minister made in accordance with that invitation; and *fourth*, the “formation of a state of satisfaction, or not, by the Minister that the cancellation decision should be revoked”: see *Viane* at [13].
2. The appellant did not contend that the Minister had failed to comply with the requirement to give him particulars of “relevant information” or (subject to the timing issue that is the subject of appeal ground 4) the requirement to invite him to make representations.
3. As for the balance of the statutory scheme, the important point to emphasise is that the scheme involves the person whose visa has been revoked making representations about why the cancellation of his or her visa should be revoked and the Minister forming the relevant state of satisfaction based on those representations. It is for the person whose visa has been cancelled to put before the Minister, by way of representation, what the person wants the Minister to consider: *Minister for Immigration and Border Protection v* ***Maioha*** (2018) 267 FCR 643; [2018] FCAFC 216 at [48] (Rares and Robertson JJ). The Minister’s duty or obligation is to “consider whether or not he or she has the requisite state of satisfaction to revoke the cancellation *by reference to the material in the representations*”: *Omar* at [34(g)] (emphasis added). The Minister is not necessarily obliged to ask the person for further or more detailed representations, or to make any further inquiries into the facts or circumstances contained in the representations: *Maioha* at [48]; see also *Navato v Minister for Home Affairs* [2019] FCAFC 135 at [100] (Middleton, Moshinsky and Anderson JJ); *Pennie v Minister for Home Affairs* [2019] FCAFC 129 at [14] (Davies, Derrington and Colvin JJ).

## Relevant facts and circumstances

1. As for the particular facts and circumstances of the appellant’s case, the appellant was notified in writing of the cancellation of his visa and invited to make representations about the revocation of the cancellation by a letter dated 18 January 2019. The appellant was incarcerated at that time. The notification included a relatively detailed explanation of the types of issues that the representations might address and enclosed forms for completion by the appellant. The forms invited the appellant to give his reasons for why the cancellation should be revoked, as well as personal information which might be relevant to the Minister’s decision.
2. There could be little doubt that, despite his incarceration and personal circumstances, including his limited education and command of English, the appellant understood the importance of providing detailed reasons and information in support of his request that the cancellation of his visa be revoked. He provided lengthy and detailed representations on 31 January 2019 (received by the Department on 12 February 2019), 6 February 2019 (received by the Department on 18 February 2019), 14 June 2019, 18 June 2019, 20 December 2019 and 21 February 2020 (received by the Department on 2 March 2020). Some of those representations included supporting documents. The representations provided a relatively detailed account of the events and circumstances that were said to found his fear or belief that he would be persecuted or harmed if he was required to return to Congo.
3. On 22 April 2020, the Minister’s Department wrote to the appellant and provided him with particulars of further information, potentially adverse to him, which the decision-maker may take into account. The appellant was invited to comment on that information. He did so on 3 May 2020. The appellant made further representations on 11 May 2020 (received by the Department on 25 May 2020).
4. A brief to the Minister in respect of the appellant’s revocation request was completed on 5 October 2020 and received by the Minister or his staff on 7 October 2020. The brief contained a detailed summary of the appellant’s representations, including the claims that formed the basis of the appellant’s representation that he would be persecuted or seriously harmed if returned to Congo. The brief also annexed all of the appellant’s representations and supporting documents.
5. The author of the brief stated, in relation to the appellant’s representation or claim that he feared that he would be persecuted or harmed if returned to Congo, that the Minister may consider that he was “unable to make a finding, given the lack of specific detail in relation to the claims or the source of the fears stated, as well as not having any supporting evidence such as credible country or other information or evidence in support of the claimed past fear of harm or harm that was said to have eventuated”. The brief also annexed a draft statement of reasons.
6. On 27 October 2020, the Minister decided to consider the appellant’s revocation personally, and to not revoke the cancellation. He signed the draft statement of reasons on the same day. He did not amend the draft. The relevant parts of the reasons are set out in the reasons for judgment of Mortimer J. It suffices to note that the reasons reflect the views, expressed in the brief, that the appellant’s claims lacked specific detail about certain matters and that there was a lack of supporting evidence.

## Was the appellant afforded procedural fairness?

1. As has already been indicated, the appellant contended that, in the particular circumstances of his case, procedural fairness required the Minister to notify him that his claims may not be sufficiently particularised or substantiated by the material to enable the Minister to make positive findings and to give him an opportunity to address that issue by supplementing his representations. For the reasons that follow, I am unable to accept that procedural fairness required the Minister to give the appellant any such notification, or a further opportunity to supplement his representations. It follows that I am unable to accept that the primary judge erred in rejecting the appellant’s contention that he was denied procedural fairness.
2. While procedural fairness requires a decision-maker to advise a person likely to be affected by the decision of any “issue critical to the decision which is not apparent from its nature or the terms of the statue under which it is made”, as well as any “adverse conclusion which has been arrived at which would not obviously be open on the known material”, it does not require the decision-maker to “expose his or her mental processes or provisional views to comment before making the decision in question”: *Alphaone* at 591-592; see also ***Snedden*** *v Minister for Justice* *for the Commonwealth* (2014) 230 FCR 82; [2014] FCAFC 156 at [176] (Middleton and Wigney JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* ***Palme*** (2003) 216 CLR 212; [2003] HCA 56 at [22] (Gleeson CJ, Gummow and Heydon JJ); *SZBEL* at [29]-[32] and [48]; *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 at [9] (French CJ and Kiefel J); *Viane* at [32].
3. While the appellant endeavoured to frame his complaint in terms which did not involve the suggestion that the Minister was obliged to disclose his provisional views or provide advance notice of his decision, that was ultimately the true crux or essence of his complaint. The appellant submitted that the principle that a decision-maker is not required to expose his or her mental processes or provisional views does not apply where the relevant decision-making process does not involve a hearing. There is, however, no merit in that submission. Both *Palme* and *Viane* were visa cancellation cases where there was no hearing. The principle has also been applied in other cases where no hearing was involved: see, for example, *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39; *Snedden* at [234]; *Minister for Home Affairs v Smith* [2019] FCAFC 137.
4. The appellant argued that the requirement that the Minister notify him of the perceived deficiencies in his claims and give him an opportunity to address those deficiencies arose in two ways which were independent of the communication of mental processes or provisional views.
5. First, he contended that the circumstances of his case were such that it was not, or would not have been, reasonably apparent to him that the level of detail of his claims in his representations was likely to be an issue, or that the Minister might be unable to make any findings about his claims on the basis of the information and supporting materials he had provided. In the appellant’s submission, the Minister was therefore required to identify or notify him of that issue. The appellant pointed out, in that regard, that he was in prison when he was required to make his representations, that he did not have legal representation or any other assistance at that time, and that his command of English was relatively poor. His claims relating to his fear of harm in Congo also involved traumatic events that had occurred many years ago.
6. The appellant likened the circumstances of his case to the circumstances in *SZBEL*, where the Refugee Review Tribunal decided a factual claim adversely to the applicant in circumstances where that claim had not been in issue before, and indeed had been accepted by the delegate whose decision was being reviewed.
7. Second, he contended that the Minister’s finding that some aspects of his claims were not sufficiently particularised or substantiated was not a finding which would obviously be open on the known material. Neither, it was submitted, was the finding that the Minister could not, on the information and material which had been supplied, be satisfied that the appellant was at risk of harm in Congo. In the appellant’s submission, the Minister was therefore required to advise him of that prospective finding and give him an opportunity to address it by supplementing his representations.
8. Neither of those contentions can be accepted.
9. As for the first contention, while it may of course be accepted that the appellant was in a difficult position and faced real challenges in making his revocation representations, I am nevertheless unable to accept that it was not, or would not have been, reasonably apparent to the appellant that the adequate particularisation and substantiation of his claims was a critical issue in relation to the Minister’s decision. That issue must have been apparent to him from the nature and circumstances of the relevant decision-making process and the material that was sent to him by the Department in respect of the cancellation of his visa and his opportunity to make representations. Indeed, it may readily be inferred that the appellant in fact appreciated the importance of providing sufficient details and substantiation of his factual claims. That is why he repeatedly supplemented his initial representations with further representations which included further details of his claims.
10. It follows that the Minister was not required to specifically identify to the appellant that the particularisation or substantiation of his claims may be an issue critical to the revocation decision, nor notify the appellant of what the Minister saw as the deficiencies in the information and material that he had provided in respect of his claims. The circumstances of this case were far removed from the circumstances in *SZBEL*, where the applicant in question had every reason to believe that the aspects of his factual claims ultimately determined adversely to him were not in issue in the review.
11. As for the second contention, it may be accepted that the Minister’s finding that he was not satisfied, on the material which the appellant had provided, that the appellant faced a risk of harm if returned to Congo was a finding which was adverse to the appellant. It was not, however, a finding which was not obviously open on the material. The appellant must have appreciated that it was for him to provide information and material which, amongst other things, would satisfy the Minister that the risk that he would be harmed if he returned to Congo provided a reason for the revocation of the cancellation of his visa. While the appellant no doubt hoped and believed that the information and material which he had provided about his past experiences in Congo would be sufficient to satisfy the Minister that he was at risk of harm, it cannot be accepted that he did not appreciate or understand, or could not reasonably have appreciated or understood, that the Minister might not be so satisfied. The Minister’s finding was at least open on the known materials and could not have come as a complete surprise to the appellant.
12. It follows that the Minister was not required to advise the appellant that he might find that his claims were not sufficiently particularised or substantiated to allow him to make a finding in his favour. Nor was the Minister obliged to give the appellant a further opportunity to address that prospective finding.
13. It is perhaps not difficult to appreciate why the appellant may feel aggrieved that he was not given an opportunity to supply further particulars in respect of those aspects of his claims that the Minister found wanting. It may be inferred that at least some of the further particulars that the Minister considered to be important could have been easily supplied by the appellant had he been given the opportunity to do so. To give but a few examples, it is likely that the appellant could readily have provided specific details about where his family had lived and the names and ages of his siblings who may also have faced persecution: cf Reasons at [70]. It is also likely that he could readily have supplied details as to where his parents’ house was located at the time, as well as the dates of the deaths of his parents: cf Reasons at [72]. It may perhaps be accepted that the appellant may not have fully appreciated that further particulars of those particular aspects of his claims may have been required. It is also somewhat unlikely that the appellant would necessarily have appreciated that he should provide “credible country information to demonstrate the source of his past stated events” (cf Reasons at [81]). It is even more unlikely that he would have been readily able to access such material given his incarceration and other adverse circumstances.
14. That said, other aspects of the appellant’s claims that were considered by the Minister to be lacking were not so straightforward and may not have been able to be so easily resolved. Examples include the detail of the persecution the appellant’s family were said to have faced (cf Reasons at [70]) and the sources of the appellant’s fear of harm and whether those sources remained a threat to the appellant given the passage of time (cf Reasons at [74] and [76]). It cannot be accepted that the appellant did not appreciate that his representations should have included details of those elements of his claims. Nor can it be accepted, as the appellant submitted, that it was “far from obvious” that he needed to provide particulars of those elements of his claims if he was able to. The same could perhaps be said about the absence of any “supporting evidence” of the appellant’s claims: cf Reasons at [81]. It is difficult to accept that the appellant would not have appreciated that he should provide supporting evidence of his claims if he was able to do so. The more obvious inference is that he would not have been able to provide any supporting evidence in respect of his claims, even if he had been given a further opportunity to supplement his representations.
15. In any event, the point remains that the statutory scheme in relation to visa revocation decisions places the onus on the person whose visa has been cancelled to include in their representations all the information and material that they want the Minister to have regard to when considering whether there is, or is not, another reason for revoking the cancellation. It was, in those circumstances, for the appellant to put his best case to the Minister at the outset. The Minister was not required to tease out the appellant’s case by notifying the appellant of deficiencies in the material he had provided and requesting further particulars or supporting material to address those deficiencies.
16. It might perhaps be said that it would have been better, or fairer, for the Minister to have given the appellant a further opportunity to address what were seen to be deficiencies or inadequacies of the information and material that the appellant had provided in respect of his claim that he was at risk of harm in Congo. It would have been open to the Minister, in the exercise of his discretion, to do so. The relevant question, however, is not what procedure might have been better or fairer. The relevant question is what was legally required to be done to afford procedural fairness to the appellant, having regard to the relevant statutory scheme and the particular facts and circumstances of the case.
17. In the appellant’s case, the Minister and the Department did what was required to ensure that the appellant was afforded procedural fairness. The appellant was invited to make representations concerning the revocation of the cancellation of his visa. He was sufficiently apprised of the relevant decision-making process and the issues likely to be important in relation to the decision concerning the revocation. He made representations in response to the invitation. The Minister considered and made his decision based upon the representations that the appellant had made. The Minister was not obliged, in all the circumstances, to do anything more. Specifically, he was not obliged to inform the appellant of, and give him an opportunity to address, the Minister’s reasoning process or the provisional view that the Minister, or Departmental officers, had formed about the inadequacy of the details and evidence that had been provided in support of his claims. Nor was the Minister required to give the appellant an opportunity to supplement his representations by providing further details or particulars of his claims.
18. The primary judge was correct to dismiss the appellant’s complaints concerning procedural fairness.

# GROUND 4 – DEFECTIVE INVITATION

1. I agree with Mortimer J that, for the reasons given by her Honour, the appellant should be granted leave to rely on a new ground of appeal (ground 4) based on the decision in *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174, but that the ground should be rejected.

# CONCLUSION AND DISPOSITION

1. The appeal should be dismissed with costs.

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| I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 5 May 2022

REASONS FOR JUDGMENT

SNADEN J:

1. I have been fortunate to review a draft of Mortimer’s J reasons for judgment in this appeal. I respectfully agree with the majority of her Honour’s conclusions and the reasoning that supports them; but, regrettably, not with the orders that she proposes. For the reasons articulated below, I would dismiss the appeal and make the usual order as to costs. In saying so, I gratefully adopt her Honour’s comprehensive recitation of the background facts. It affords me the luxury of brevity, upon which I should hope to capitalise in what follows. I shall use the same defined terms as her Honour has.
2. By his first ground of appeal, the appellant contends that the Minister’s non-revocation decision of 27 October 2020 should be set aside as a product of jurisdictional error because, *en route* to making it, the Minister did not “…resolve a substantial and clearly articulated claim that the [appellant] is a refugee”.
3. The observations that the Minister made in the reasons that he published in support of his decision have already been recited. In short, the Minister considered that the material and submissions that the appellant had put before him did not contain detail sufficient to permit the making of substantive findings about the various species of very significant harm that the appellant fears will befall him in the event that he is returned to the DRC.
4. The primary judge was critical of that reasoning. Ultimately, his Honour construed it as a finding against the appellant—that is, as a conclusion that the Minister “…was not satisfied, on the material before him, that the applicant faced a risk of harm if returned to the DRC”: *EXT20 v Minister for Home Affairs* [2021] FCA 629, [49] (O’Bryan J). I make two observations, both with respect.
5. First, the primary judge’s construction of the Minister’s observations must be correct. To record, as the Minister did, a perceived inability to make any finding one way or the other about the legitimacy or soundness of the appellant’s fears that he will be harmed if he returns to the DRC is to reflect, I think, a want of satisfaction on the Minister’s part that such fears were relevantly real and well-founded. But, of course, it must also reflect an acceptance of the possibility that they might be.
6. It is that reality that inspires the appellant’s first ground of appeal. He maintains that the Minister was obliged to “resolve” the claims that he advanced about what might or will happen to him if he returns to the DRC; that is, to draw conclusions (or make findings) one way or the other as to whether those fears might be legitimate or well-founded (and, if they are, about whether that might have been sufficient to constitute “another reason” why the cancellation of his visa ought to have been revoked).
7. That leads conveniently to the second observation: contrary to what the appellant submitted, the Minister did not labour under any obligation to make such findings. The only findings that he was *obliged* to make concerned the matters enumerated in s 501CA(4) of the Migration Act: (1) did the appellant make representations as to why the cancellation of his visa ought to be revoked; (2) if he did, was the Minister satisfied that the appellant was a person who passed the character test; and (3), if he wasn’t, was he (the Minister) satisfied that there was another reason why that cancellation ought to be revoked? Here, as in most similar matters, the first two issues were not in contest. The only issue substantively in dispute was whether the circumstances about which the appellant “ma[d]e representations” were such as to disclose “another reason” of which the Minister ought to have been satisfied. The Minister concluded—that is to say, made a finding—that they did not (or, more accurately, that he was not so satisfied). In the circumstances, that was the only species of finding that the Migration Act obliged him to make.
8. The appellant’s real complaint is that, in forming that state of non-satisfaction, the Minister failed properly to consider the claims that the appellant advanced regarding the harm to which he will or might be subjected if he returns to the DRC. There is no doubt that the appellant advanced claims of that nature, nor that the Minister was obliged to consider them: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 (“***Viane***”), [13] (Keane, Gordon, Edelman, Steward and Gleeson JJ). In the right circumstances, a court might infer, from the absence of relevant findings within the Minister’s reasons, that claims of that nature went relevantly unconsidered: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 (McHugh, Gummow and Hayne JJ). But two points bear noting.
9. First—and to repeat a point already made—the appellant’s submission that the Minister was obliged to “resolve” what he had advanced is incorrect: *Viane*, [14]-[15] (Keane, Gordon, Edelman, Steward and Gleeson JJ); *CAR15 v Minister for Immigration and Border Protection* (2019) 272 FCR 131, 149-150 [76] (Allsop CJ, Kenny and Snaden JJ).
10. Second, in circumstances where the matters that the appellant raised were the subject of extensive (and accurate) reference throughout the Minister’s reasons, the court should be very reluctant to conclude that they nonetheless were not considered: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 (French, Sackville and Hely JJ). Inferences of that kind are not lightly to be drawn: *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 364 [48] (Griffiths, White and Bromwich JJ); *RRFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 27, [30] (Nicholas, Yates and Burley JJ). No occasion to draw one arises presently.
11. It is apparent from his reasons that the Minister was conscious of and turned his mind to the claims that the appellant made. He did not accept that they were particularised to a point that enabled the making of relevant findings. Reaching that view did not involve any failure to consider that which the appellant had advanced. Indeed, precisely the opposite is true. To make the point rhetorically: how could the Minister here form the view that the appellant’s claims lacked detail sufficient to permit the making of relevant findings unless he first considered what those claims were?
12. I respectfully agree with Mortimer J that the first ground of appeal should be rejected. Subject to the observations recorded above, I also agree with her Honour’s reasons for so concluding. Likewise, that agreement extends in respect of the final ground (or proposed ground) of appeal (ground 4). For the reasons that her Honour has identified, the appellant should have leave to agitate that ground but the ground itself should be rejected.
13. I regret that I must, however, part ways with her Honour on the second ground of appeal. By it, the appellant charges the Minister with having made the non-revocation decision without first affording him procedural fairness. That deficiency is said to lie in the Minister’s failure to invite the appellant to furnish him with the detail regarding the refugee (and related) claims upon which he declined to make substantive findings. The appellant submits that, in the circumstances that here applied, the Minister’s obligation to afford procedural fairness required that the appellant be alerted in advance to—and be given an opportunity to address—the Minister’s view that the material and submissions that he (the appellant) had supplied as to the risks of harm to which he would be subjected if he returned to the DRC lacked detail sufficient to enable the making of relevant findings.
14. There was no dispute between the parties on matters of principle. It was common ground that, in assessing the appellant’s request that the cancellation of his visa be revoked, the Minister was obliged to afford the appellant procedural fairness and that the practical manifestations of that requirement took their colour and shape from the circumstances surrounding his request. The appellant maintains that those circumstances sufficed here to require what the Minister failed to do: namely, invite further submissions from him.
15. That was said to be so at least because of the following circumstances, namely that:
16. the appellant’s request for revocation of the cancellation of his visa—and the material that he advanced in support of it (much of which was hand-written)—was made without legal assistance;
17. much of it was put together when he was in prison;
18. the appellant’s command of English is limited;
19. the material that the appellant relied upon was advanced (and, therefore, was available for consideration) over an extended period;
20. the appellant indicated in that material that he could provide further information if requested;
21. after receiving a briefing from his department, the Minister decided personally to consider the appellant’s revocation request (rather than have a delegate decide the matter); and
22. in consequence, the appellant could not avail himself of an additional opportunity to argue the merits of his application before a second (administrative) decision maker (which would have been the case had the determination been made by a delegate, rather than by the Minister personally).
23. The appellant submitted that those circumstances were sufficient to invoke the principle described by a full court of this court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 (Northrop, Miles and French JJ). There, this court observed (at 591-592):

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

1. Those observations (and particularly the observation in the penultimate sentence) were not, in this matter, controversial. They were the subject of recent high court endorsement: *Viane*, [32] (Keane, Gordon, Edelman, Steward and Gleeson JJ).
2. Here, the appellant’s complaint is that he could not have been expected to know, from the material that he had advanced, that the Minister might form the view that he formed: specifically, that the appellant’s claims regarding the harm to which he feared that he would be subjected upon return to the DRC were inadequately particularised to a point that didn’t permit of substantive findings (and, in particular, findings that might have warranted an outcome favourable to the appellant). In the circumstances enumerated above (at [174]), he submits that the Minister was obliged to alert him to that possibility before making the decision that was made; and that the primary judge erred by concluding otherwise.
3. I do not accept that submission. The power that the Minister here declined to exercise—namely, the power of revocation that s 501CA(4) of the Migration Act confers—was one whose exercise the appellant requested. In doing so, it was for the appellant to paint as fulsome a picture as he could in support of his request: *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 (“***Maioha***”), 655 [48] (Rares and Robertson JJ). Failure to do so necessarily—and quite obviously—carried with it a risk of disappointment.
4. No doubt precisely for that reason, the appellant sought to impress upon the Minister (or, more accurately, upon whomever would decide his request) the matters that he felt should oblige the statutory indulgence for which he moved. That he did so in a manner that the Minister considered was deficient is neither here nor there. The Minister was entitled to form that view about what the appellant had advanced—and, indeed, any other view that might have been formed within the wide bounds of what was legally reasonable. Not only was he entitled to form it; he was entitled to act upon it.
5. The need to present a fulsome and cogent case for revocation (and the consequence that a failure to do so might lead to an unfavourable result) is no less obvious to an incarcerated or self-represented applicant as it is to one who is otherwise. It is obvious from the point that the request for revocation is made and it remains so until that request is determined, no matter for how long that process endures or what trajectory it takes before coming to the Minister’s (or anybody else’s) attention. The fact that, for reasons over which he or she has little or no control, an applicant might struggle or fail to present the best narrative that might otherwise be available has no bearing on that reality. There is, in my view, nothing about any of the circumstances to which the appellant here points (above, [174])—either individually, or in combination—that suffices to invoke the principle described in *Alphaone*.
6. The appellant’s submission, in truth, distils to this: that the obligation to afford procedural fairness here required that he be informed of (and be given an opportunity to address) the Minister’s adverse view about the adequacy of his material before the decision about his revocation request was made. That is a contention that the High Court has routinely rejected: *Viane*, [32] (Keane, Gordon, Edelman, Steward and Gleeson JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 599 [9] (French CJ and Kiefel J, with whom Heydon and Crennan JJ agreed); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 (“***Muin***”), 1010-1011 [265]-[266] (Hayne J); *Abebe v The Commonwealth* (1999) 197 CLR 510, 576 [187] (Gummow and Hayne JJ); *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).
7. Indeed, it has gone further. It is, I think, well settled that those charged with making decisions such as the one presently in focus are under no general duty (and certainly none referrable to common law standards of natural justice or procedural fairness) to make inquiries related to relevant subject matters: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290 (Mason CJ and Deane J); *Abebe v The Commonwealth* (1999) 197 CLR 510, 576 [187] (Gummow and Hayne JJ). In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 (“***SZIAI***”; French CJ, Gummow, Hayne, Crennan Kiefel and Bell JJ), the proposition was put succinctly (at 1129, [24]), albeit in the factual context of that case:

It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of natural justice or procedural fairness.

1. In *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128 (Jagot, Barker and Perry JJ), this court considered those principles in the context of a decision to cancel a visa. In considering the appropriateness of cancellation, the tribunal had occasion to consider the impact that it might visit upon the visa-holder’s children. It accepted that it was in the children’s interests for the visa not to be cancelled and for their father to remain in Australia; but, in doing so, it noted that it was “…unaware as to whether the applicant’s removal from Australia would be likely to have a significant adverse effect…[and that it had] reservations as to whether it would be likely to do so…” Before this court, it was suggested that the tribunal had erred in not making inquiries about the adverse effects that would befall the appellant’s children in the event that he was removed from Australia for want of a visa. Citing *SZIAI*, the court observed (at [30]):

It was for the appellant to make his case. The fact that the Tribunal was left “unaware as to whether the [appellant’s] removal from Australia would be likely to have a significant adverse effect on either of the children” is nothing more than an inevitable consequence of the material that was made available to the Tribunal. The fact that proceedings before the Tribunal are inquisitorial does not involve any form of a general duty to inquire…

1. In *Maioha,* similar sentiment was expressed in relation to decisions made pursuant to s 501CA(4). There (at 655 [48]), Rares and Robertson JJ expressed the position succinctly:

It was for the [revocation applicant] to put before the Minister by way of representation what it was she wished the Minister to take into account. The Minister had no legal duty, referable to jurisdictional error, to ask for further representations from the respondent or to make inquiries into the representations she had made.

1. Long has it been more generally so. In *STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 251 (Ryan, Jacobson and Lander JJ), this court rejected a submission that a tribunal erred by not inviting witnesses to give additional evidence in a visa application matter:

This submission is directly contrary to Australian authority. It is well established that a decision-maker has no duty to make his or her own enquiries in order to make out the applicant’s case; see *Abebe v The Commonwealth* (1999) 197 CLR 510 at [187] (Gummow and Hayne JJ). There is a limited exception to the rule namely “where it is obvious that material is readily available which is centrally relevant to the decision”; see *Prasad v Minister for Immigration and Ethnic Affairs* (1984-85) 6 FCR 155 at 170 (Wilcox J); see also *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 at 558-559 (Black CJ, Von Doussa, Sundberg and Mansfield JJ).

1. There may be circumstances in which a decision maker’s “…failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review”: *SZIAI*, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Two observations bear noting on that score. First, the ground that was advanced in this appeal was more defined: the appellant’s contention was that the Minister’s failure to invite further submission was such as to deny him procedural fairness. That contention sits uneasily with (if it doesn’t collide headlong into) the contrary observations made in the authorities recorded above. Second and in any event—and for reasons equivalent to those adopted in *Sami*—this is not a case in which the Minister could sensibly have thought that the missing particulars that led him not to make substantive findings about the appellant’s fears were easily ascertainable or matters of obvious inquiry. On the contrary, if the appellant had at his disposal the information that the Minister considered was missing, the Minister might very reasonably have expected that he would have advanced it over the lengthy period of time during which he had precisely that opportunity. True it is that the appellant expressed a willingness to provide additional detail if it were requested; but that is not reason enough for the Minister to assume that what was missing could easily be supplied. His failure to take the appellant up on that offer is not relevantly dispositive.
2. The appellant described as “astonishing” and “unacceptable” the fact that the Minister proceeded to make his decision in this case without first inviting the appellant to furnish the additional information that he felt was missing. Neither description is fair. The Minister was entitled to decide the application on the material that the appellant gave to him. He was entitled to reason that the narrative that the appellant had advanced was lacking in the ways that he identified. He was entitled not to make the findings that he felt, in consequence, unable to make. He was entitled to make a decision on those bases without further notice to the appellant. Doing so was not “astonishing” or “unacceptable”. It was orthodox. To adapt observations that Hayne J made in *Muin* (at 1010 [265]):

The [Minister] was not obliged to tell [the appellant] that [he] was minded to reach a view about [a matter that the appellant advanced], which was contrary to the view that [the appellant] sought to have [the Minister] form, and then ask him whether he wished to contradict that view. That [the appellant] had to make out his claim…was apparent from the outset of the [Minister’s] review. Indeed, it was apparent from the moment [the appellant] made his claim… This was not some issue that emerged only in the course of the [Minister’s consideration].

1. With respect, the primary judge was correct to decide as he did on this question.
2. The primary judgment was not attended by error as alleged. The appeal should be dismissed with the usual order as to costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 5 May 2022