HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **PLAINTIFF M19A/2024**
First Appellant / First Applicant

and others in accordance with the Schedule

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

SUBMISSIONS OF THE APPELLANTS / APPLICANTS

PART I: CERTIFICATION

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

PART II: ISSUES

2 A **delegate** of the Respondent cancelled the First Appellant's protection visa under s 116(1AA) of the *Migration **Act** 1958* (Cth) (**Cancellation Decision**). That cancellation automatically triggered the cancellation of the Second and Third Appellants' protection visas under s 140(1). By an amended application for a constitutional or other writ, the Appellants challenged the validity of the Cancellation Decision.[1] Gordon J dismissed the application. The Amended Notice of Appeal against her Honour's judgment raises three issues:

2.1 The delegate sent a notice of intention to cancel to the First Appellant which was returned to sender. The delegated treated information provided by Australia Post indicating that the recipient refused delivery, and information that the First Appellant failed to respond or engage in the cancellation process, as part of the reason to cancel the visa. Did the use of information that was not provided by the First Appellant as part of the reason to cancel, without providing an opportunity to comment and respond, breach s 120 of the Act? Was the use of that information otherwise unreasonable? The Appellants contend the answer is "yes". (**Ground 1**)

2.2 In making the Cancellation Decision, the delegate purported to apply a policy that required them to consider the best interests of the child as a primary consideration. Did the delegate fail to consider the best interests of the children as a primary consideration and therefore make a jurisdictional error? The Appellants contend the answer is "yes". (**Ground 2**)

2.3 The delegate was required to consider the legal consequences of the Cancellation Decision, which included the detention and removal of the Second and Third Appellants. The delegate did not expressly refer to those considerations. Could it nonetheless be inferred that they were "considered" in the sense required of a mandatory relevant consideration? The Appellants contend the answer is "no". (**Ground 3**)

[1] Neither the Federal Circuit and Family Court of Australia (Division 2), nor the Federal Court of Australia, had jurisdiction in relation to the Cancellation Decision: Act, ss 476(2)(a), 476A; **CAB 332 [3]**.

3 The proceeding also incorporates an application for leave to appeal, which was filed against the possibility Gordon J's judgment was an "interlocutory judgment" within the meaning of s 34(2) of the ***Judiciary Act*** *1903* (Cth) and, therefore, requires leave to appeal. That raises a fourth issue: is leave required to appeal from an order of a single Justice of the Court dismissing an application for a constitutional or other writ, following a determination on the merits? The Appellants contend the answer is "no".

4 These submissions address each of the four issues identified above. They are intended to supersede the submissions on those issues that are set out in the Application for Leave dated 15 November 2024.

PART III: SECTION 78B NOTICE

5 A notice under s 78B of the Judiciary Act is not required.

PART IV: CITATION OF REASONS FOR JUDGMENT

6 The medium neutral citation for Gordon J's unreported reasons for judgment is *Plaintiff M19A/2024 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCASJ 39.

PART V: FACTS

7 **The Appellants:** The First, Second and Third Appellants arrived in Australia in 2010: **CAB 332 [6]**. The First and Second Appellants are husband and wife. The Third Appellant is their son, who was 2 years old when he arrived in Australia, and is now 17 years old. The three of them were granted permanent protection visas on 27 September 2011: **CAB 332 [6]**.

8 The Fourth Appellant is the first daughter of the First and Second Appellants. She was born in Australia and is now 10 years old. Because she was born in Australia and her parents were permanent residents at the time of her birth, she is an Australian citizen: **CAB 334 [13]**.

9 The Fifth Appellant is the second daughter of the First and Second Appellants. She was also born in Australia and is now 2 years old. She is not an Australian citizen, however, because, at the time of her birth, neither of her parents were permanent residents (as a result of the Cancellation Decision): **CAB 334 [13]**.

10 **The Cancellation Decision:** In 2018, the Department internally referred the First Appellant's visa for consideration for cancellation under s 116(1AA) of the Act: **CAB**

333 [7]. Found within Subdiv D of Div 3 of Pt 2, s 116(1AA) relevantly provides that "the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity".

11 Before exercising that power, the Minister must comply with the "requirements of the natural justice hearing rule" as exhaustively stated in Subdiv E of Div 3 of Pt 2 (in relation to the matters it deals with).[2] Relevantly:

11.1 Under s 119(1), if the Minister is considering cancelling a visa under s 116, "the Minister must, in writing, notify the holder that there appear to be grounds for cancelling it", "give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist" (para (a)), and "invite the holder to show within a specified time that … those grounds do not exist … or there is a reason why it should not be cancelled" (para (b)).

11.2 Under s 120, if the Minister considers that information ("**relevant information**") other than non-disclosable information "would be the reason, or a part of the reason, for cancelling a visa", "is specifically about the holder … and is not just about a class of persons of which the holder … is a member", "was not given by the holder", and "was not disclosed to the holder" in the notification under s 119 (sub-s (1)), then the Minister must by written notice "give particulars of the relevant information to the holder", "set out why it is relevant to the cancellation" and "invite the holder to comment on it" (sub-s (2)).

12 For the purposes of complying with the requirement in s 119(1), on 30 October 2019, the Department sent to the First Appellant, by registered mail to an address in South Australia, a "Notice of Intention to Consider Cancellation under s 116 of the Migration Act" (the **NOICC**): **CAB 333 [9]**, **121**. The family had moved from that address earlier that year: **CAB 333 [8]**. The First Appellant did not receive the NOICC. The letter was returned to sender, bearing a sticker with the option "Refused" circled: **CAB 333 [9]-[10]**, **133**.

[2] Act, s 118A(1).

13 The delegate then proceeded to make the Cancellation Decision on 19 December 2019: **CAB 333 [11]**. Before doing so, they did not give any further notice to the First Appellant. The delegate's reasons for the Cancellation Decision relevantly set out that:

13.1 The delegate was satisfied that there was a ground for cancellation because they were not satisfied of the First Appellant's identity: **CAB 334 [14], 17**.

13.2 In assessing whether to exercise the discretion to cancel the visa, the delegate stated that they had taken into account the Procedural Instruction "*General visa cancellation powers (s 109, s 116, s 128, s 134B and s 140)*" (the **Policy**)[3] and considered each of the factors outlined in that policy: **CAB 335 [16], 18**.

13.3 The delegate concluded that "the grounds for cancelling the visa outweigh the reasons not to cancel the visa": **CAB 21**.

14 The Second and Third Appellants' protection visas were cancelled by operation of s 140(1): **CAB 345 [52]**. Section 140(1) relevantly provides that if a person's visa is cancelled under s 116, "a visa held by another person because of being a member of the family unit of the person is also cancelled".

15 The First and Second Appellants did not discover that the visas had been cancelled until June 2021, by which time the period for applying for review by the Administrative Appeals Tribunal had expired: **CAB 334 [12]-[13]**.

PART VI: ARGUMENT

A GROUND 1: MISUSE OF NON-RESPONSE TO THE NOICC

16 In the record of the Cancellation Decision, the delegate recorded multiple times that the First Appellant did not respond to the NOICC: **CAB 17-20**. The First Appellant's "past and present behaviour towards the Department" was part of the reason for cancelling the visa (**CAB 19**):

> The visa holder has failed to respond to the Notice or engage in the cancellation process. The Notice was sent to the visa holder's last known address according to departmental records. However, information provided by Australia Post indicates that while delivery was attempted to this address, the recipient refused to sign for the article.

I give this consideration some weight in favour of cancelling the visa.

[3] See Appellants' / Applicants' Book of Further Materials (**ABFM**) at 2.

17 The delegate thereby breached s 120 of the Act, and did not comply with the implied obligation of reasonableness.

A.1 No opportunity to comment under s 120

18 In making the Cancellation Decision, the delegate used:

18.1 the "information provided by Australia Post" that the First Appellant "refused to sign for the article"; and

18.2 his failure to respond to the NOICC or engage in the cancellation process;

as part of the reason for cancelling the visa. Each of those matters was "relevant information" within the meaning of s 120.

A.1.1 Relevant information

19 Each of the two matters was "information" as that term is used in the chapeau in s 120(1), and was not "non-disclosable information".[4] The term "information" carries its ordinary sense of "knowledge of relevant facts or circumstances communicated to or received by the [decision-maker]".[5] It is not concerned with "the existence of doubts, inconsistencies or the absence of evidence".[6]

19.1 The sticker on the envelope containing the NOICC that was marked "refused", from Australia Post, was "information".

19.2 The fact or circumstance of the First Appellant having "failed to respond to the Notice or engage in the cancellation process" was knowledge received by the 20 delegate, from the Department's receipt of the returned NOICC and/or from the Department's own records.[7] It was also "information". It was not an "absence of evidence"; it was treated by the delegate as a form of deliberate inaction by the First

4 As defined in s 5 of the Act.

5 *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 436 FCR 549 at [24(ii)] (Finn and Stone JJ), approved in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [205] (Allsop J) (in turn cited in ***Plaintiff M174/2016 v Minister for Immigration and Border Protection*** (2018) 264 CLR 217 at [24] (Gageler, Keane and Nettle JJ)); *Singh v Minister for Immigration and Border Protection* (2017) 253 FCR 267 at [52] (Mortimer J, Jagot and Bromberg JJ agreeing).

6 ***SZBYR*** *v Minister for Immigration and Citizenship* (2007) 147 CLR 297 at [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Minister for Immigration and Citizenship v* ***SZGUR*** (2011) 241 CLR 594 at [9] (French CJ and Kiefel J); *Plaintiff M174* (2018) 264 CLR 217 at [9] (Gageler, Keane and Nettle JJ).

7 Including, for example, the "Case Note" of phone calls made to the Second Appellant that went to voicemail: see **CAB 119, 347 [60]-[61]**.

Appellant. So much is reinforced by the delegate's reference to the First Appellant's failure to "engage in the cancellation process", suggesting a recalcitrance in the First Appellant's posture and actions.

20 As to the criteria specified in the paragraphs of s 120(1), it ought to be inferred from the delegate's reasons that the delegate considered that:

20.1 The information "would be the reason, or a part of the reason" for visa cancellation (s 120(1)(a)). Where the delegate's reasons expressly weighed those matters in favour of visa cancellation, the inference to be drawn is that the delegate was of the opinion that those matters would be a part of the reason for cancellation.[8]

20.2 The information was specifically about the First Appellant, rather than a class of persons (s 120(1)(b)).

20.3 The information was not "given by" the First Appellant (s 120(1)(c)). It was received by the delegate from Australia Post and/or the Department's own records.

20.4 The information was not disclosed in the NOICC (s 120(1)(d)). The NOICC did not inform the First Appellant that a failure by him to respond might be regarded as "behaviour towards the Department" and given weight in favour of cancelling the visa. Nor was the information from Australia Post included in the NOICC; it necessarily post-dated the NOICC.

21 In light of some authorities concerning similar provisions, it is necessary to say something more about the criterion in s 120(1)(a).

A.1.2 Section 120(1)(a)

22 Section 120(1)(a) is worded similarly to other provisions in the Act, including ss 57, 359A and 424A. In the context of those provisions, authority establishes that whether information "would be the reason, or part of the reason" for refusing to grant a visa "is to be determined in advance — and independently — of the [decision-maker's] particular reasoning on the facts of the case", by reference to the applicable criteria in the Act.[9]. As observed by Gageler, Keane and Nettle JJ, it has been held in this Court that the

8 See *Minister for Immigration and Citizenship v* ***SZLFX*** (2009) 238 CLR 507 at [24], [26] (French CJ, Heydon, Crennan, Kiefel and Bell JJ), approving *SZKLG v Minister for Immigration and Citizenship* (2007) 164 FCR 578 at [33] (Dowsett, Bennett and Edmonds JJ).

9 *SZBYR* (2007) 147 CLR 297 at [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

information in question "should in its terms contain a 'rejection, denial or undermining' of the review applicant's claim".[10] That approach has not yet been applied by this Court in the context of s 120(1)(a). For the reasons set out below, it should not be adopted in the construction of this provision or, alternatively, the Court ought to reconsider that approach more generally.[11]

23 On that approach, in the context of a protection visa application requiring an applicant to satisfy the criteria in s 36 of the Act (for example), the question is whether the information contains "in [its] terms a rejection, denial or undermining" of the visa applicant's protection claims.[12] Construing "information" in s 120(1)(a) to mean information that inherently contains a rejection, denial or undermining of the First Appellant's claims is inapt in the context of s 120 generally and in this case specifically. It is true that the cancellation powers in s 116 of the Act are enlivened only if the Minister is satisfied of certain criteria (in this case, the criterion in s 116(1AA)). The reasoning that has been adopted in the context of other provisions therefore may have some attraction. But that attraction is superficial only, for three interrelated reasons.

24 *First*, once the power to cancel in s 116 is enlivened based on the Minister's satisfaction of a relevant criterion, the Minister has a very broad discretion as to whether to exercise the power.[13] That discretion is not "unbridled",[14] but is limited only by the subject matter, scope and purpose of the Act. Accordingly, in the exercise of the discretion, there are no enumerated statutory matters against which it is possible to measure, in advance of embarking on reasoning on the facts, whether information is "in its terms" adverse.

25 *Second*, the design of Subdiv E of Div 3 of Pt 2, involves two distinct steps. The first step is the issuance of a NOICC under s 119, which must give the particulars of the "grounds" that appear to exist for cancellation under s 116. The NOICC necessarily includes matters directed to the existence of one of the criteria in s 116 enlivening the power to cancel (although those matters may also be relevant to the exercise of the broad discretion).

10 *Plaintiff M174/2016* (2018) 264 CLR 217 at [9] (Gageler, Keane and Nettle JJ).

11 In *M174/2016* (2018) 264 CLR 217, no party asked the Court to reconsider that approach: at [9] (Gageler, Keane and Nettle JJ).

12 *SZBYR* (2007) 147 CLR 297 at [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at [22] (French CJ, Heydon, Crennan, Kiefel and Bell JJ). See also *Plaintiff M174/2016* (2018) 264 CLR 217 at [72] (Gageler, Keane and Nettle JJ).

13 Unless there exist prescribed circumstances in which a visa must be cancelled: s 116(3).

14 See *Wotton v Queensland* (2012) 246 CLR 1 at [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

Section 120 then operates as a second step "closer to the point of decision making".[15] At that step, the information to be disclosed may be relevant only to the exercise of the broad discretion whether to cancel, and not the "grounds" in s 116. The first point made above is even more stark in those circumstances.

26 *Third*, understood in the context of the first two points, s 120 requires the disclosure of information that the decision-maker considers to be adverse in the course of reasoning on the facts of the case. That construction is consistent with the statute being conditioned on what the decision-maker "considers" would[16] be a part of the reason for cancelling the visa, as well as with the underpinning of the provision in the procedural fairness hearing rule at common law[17] (particularly in circumstances where Subdiv E does not provide for an oral hearing[18]). An analysis divorced from reasoning on the facts should accordingly not be applied to s 120; and the difficulties of such an approach revealed by s 120 also tend to suggest that the construction of similar provisions in that way is wrong.[19]

27 Accordingly, the correct evaluative exercise for the Court in relation to s 120(1)(a) is to ask whether, at the time when the delegate was considering cancellation and before the cancellation decision was made, the information was something that the delegate considered would be a reason or part of the reason for cancelling the visa. Here, the information that the NOICC envelope had been refused when Australia Post attempted delivery and the information that the First Appellant had not engaged in the cancellation decision were both clearly parts of the reason for cancelling the visa. So much is clear

[15] See *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at [23] (Hely, Gyles and Allsop JJ). That structure is reinforced by s 120(1)(d), which excludes from the scope of s 120 information that has already been disclosed in the NOICC.

[16] The use of "would", rather than "might", can be understood as importing a higher level of satisfaction on the part of the decision-maker during the course of their consideration as to how they intend to use the adverse information, before the requirement to invite comment is engaged: cf *SZBYR* (2007) 147 CLR 297 at [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[17] See *SZGUR* (2011) 241 CLR 594 at [9] (French CJ and Kiefel J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [18]-[21] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[18] In contrast to the similar provisions applicable to the Administrative Appeals Tribunal (as it then was), which also provided that the Tribunal must invite an applicant to appear at a hearing: ss 424A, 425 (within Div 4 of Pt 7) (s 424A being the provision considered in *SZBYR* (2007) 147 CLR 297); ss 359A, 360 (within Div 5 of Pt 5). It should be noted that the application of ss 359A and 424A to reviews by the Tribunal includes reviews of cancellation decisions made under s 116 (if an application for review may be made: see ss 338(3), 347(3), 411(1)(d), 411(2)).

[19] See, eg, *Springs v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 389 ALR 431 at [24]-[28] (Perram J) (application for special leave refused: *Springs v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCATrans 017).

from the reasons for decision in which that information was weighed against the First Appellant under the heading "behaviour towards the Department". The behaviour towards the Department during the cancellation process was, as a matter of logic, a matter that could not be determined in advance of the cancellation process.

A.1.3 Failure to give notice in accordance with s 120(2)

28 Because each of the matters identified in paragraph 18 above was "relevant information" within the meaning of s 120(1), s 120(2) required the delegate to give the First Appellant written notice of the particulars of the information, set out why it was relevant to the cancellation and invite the First Appellant to comment on it. That notice was to be given in the prescribed way: s 120(3).

29 No such notice was given, in the prescribed way or otherwise. The delegate thus failed to comply with s 120. As s 124(1) makes clear, the obligation in s 120 is a condition of the valid exercise of the cancellation power in s 116. Authority[20] suggests that breach of that condition is jurisdictional "irrespective of any effect that the error might or might not have had on the decision that was made in fact".[21] For that reason (or alternatively because the breach was "material" for the reason identified in paragraph 32 below), the Cancellation Decision is invalid.

A.2 Legal unreasonableness

30 It was also legally unreasonable for the delegate to give weight, in favour of cancellation, to the matters that the First Appellant "refused to sign" and "failed to respond" to the NOICC. Behaviour towards the Department — "refusal to sign" or a failure to respond — can be relevant to a cancellation decision only if the behaviour is in some way non-compliant, dishonest, or otherwise rationally capable of favouring visa cancellation. There is no obligation on a visa holder to respond to a notice given under s 119. Thus, even a deliberate decision not to respond to an invitation to comment cannot rationally or reasonably be treated as "behaviour towards the Department" that favours cancellation. To reason as the delegate did in this case is to impose on a visa holder an obligation to

[20] See, in the context of ss 424A and 57 of the Act respectively, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [77] (McHugh J), [206]-[208] (Hayne J); *M174/2016* (2018) 264 CLR 217 at [11] (Gageler, Keane and Nettle JJ).

[21] Cf ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at [32] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

"behave" in a particular manner not required by the Act or on any other basis. The decision in this respect lacks an intelligible basis or is seriously irrational.[22]

31 Further, the delegate could not have been satisfied that the First Appellant had *actual* notice of the intention to cancel. The NOICC was returned to the Department because of the "refusal to sign". Even if the First Appellant was the person who "refused" to sign,[23] nothing on the outside of the letter even indicated that it came from the Department of Home Affairs: **CAB 133**.[24] The First Appellant *could not* have had actual notice that a cancellation process had been initiated, because the letter was returned to the Department. The delegate's reliance upon the "refusal" to sign for the letter and non-response as "behaviour" favouring cancellation was for that additional reason irrational or unreasonable.

32 This error, however characterised, was material. Had the First Appellant been given an opportunity to comment, he could have given evidence or submissions explaining that he had not in fact refused to sign for the letter, and that his non-response was because the letter had not been received.[25] Had he given that explanation, or had the delegate not reasoned irrationally, one of the considerations that weighed in favour of cancellation might have been absent. An invitation under s 120 would also have provided another opportunity for the First Appellant to engage in the cancellation process, which instead took place without a meaningful opportunity to be heard on the substance of the matter as well as on the question whether he refused the NOICC. In circumstances where the consideration of his behaviour towards the Department was weighed with other considerations, the evaluative decision as to whether the discretion to cancel should be exercised realistically could have been different.[26]

[22] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [63], [65], [72], [76] (Hayne, Kiefel and Bell JJ), [105] (Gageler J); *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541 at [53], [59] (Gageler J), [79]-[80], [82], [84] (Nettle and Gordon JJ), [135] (Edelman J); *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

[23] Her Honour found that there was more than a "skerrick of evidence" that the First Appellant refused to sign for the NOICC (in the form of the sticker with "refused" circled): **CAB 346 [57], 356 [93]**.

[24] The stamp on the right-hand side of the envelope ("HOME AFFAIRS NSW 13 NOV 2023") is dated after the letter was returned to sender; that is, on its receipt back by the Department.

[25] *LPDT* (2024) 98 ALJR 610 at [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); ***Nathanson*** *v Minister for Home Affairs* (2022) 276 CLR 80 at [33] (Kiefel CJ, Keane and Gleeson JJ), [47]-[51], [55]-[56] (Gageler J), [63], [76] (Gordon J).

[26] *LPDT* (2024) 98 ALJR 610 at [7], [16], [33]-[36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [49] (Beech-Jones J).

A.3 Leave to advance Ground 1 of the Amended Notice of Appeal

33 By Ground 3 of the amended application for a constitutional or other writ, as recorded by Gordon J at **CAB 355 [90]**, the Appellants argued that it was unreasonable and irrational for the delegate to give weight to the fact that the First Appellant failed to respond to the NOICC, failed to engage in the cancellation process and refused to sign for the NOICC, "where there was no evidence that the **First Appellant knew about the NOICC** or that it was the First Appellant who had refused to sign for the NOICC" (emphasis added). The "unreasonableness" argument developed above builds on the emphasised words of that ground, by reference to the same aspect of the delegate's reasons. However, the Appellants add an additional argument that the lack of notice to the First Appellant that the information would be a part of the reason for cancellation was a breach of s 120.

34 The Appellants therefore seek permission to raise the issue on appeal, there being no "absolute" rule against them doing so.[27] This is not a case where "if the issue had been raised at trial, it might have been the subject of evidence" or "where the issue requires a fresh consideration of facts that are neither admitted nor beyond controversy".[28] Rather, the Respondent's case "would not have been presented differently if the point had been taken below".[29] Indeed, if anything, the Respondent may not have presented a case at all: following Gordon J's judgment, the Appellants became aware of *Lazenby v Minister for Home Affairs* (S51/2022), in which the Minister conceded that a cancellation was legally unreasonable on the basis of equivalent arguments (subject to materiality[30]) and ultimately consented to an order that a writ of certiorari issue.[31]

B GROUND 2: BEST INTERESTS OF THE CHILD

35 Departure from a non-statutory policy may result in jurisdictional error where a decision-maker, "not bound to apply a policy, purports to apply it as a proper basis for disposing

[27] ***Bird*** *v DP (a pseudonym)* [2024] HCA 41 at [39] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

[28] *Bird* [2024] HCA 41 at [39] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), see also at [256] (Jagot J).

[29] *Bird* [2024] HCA 41 at [39] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

[30] See Plaintiff's Reply submissions (12 July 2022) at [2]; Plaintiff's Further Submissions (9 September 2022) at [4]. That reservation was made prior to the crystallisation of the relevant principles in *Nathanson* (2022) 276 CLR 80 and *LPDT* (2024) 98 ALJR 610.

[31] Order of Justice Keane made on 15 September 2022.

of the case in hand [but] misconstrues or misunderstands it".[32] That can be understood as a type of "an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the factual result is perverse, by the decision-maker's own criteria".[33]

36 So, for example, in *Gray*,[34] the factors considered by the Administrative Appeals Tribunal indicated that it was purporting to apply a policy on deportation which required the benefit to the community accruing from a person's removal to first be identified by weighing relevant factors, and then balancing the benefit (if so found) against the hardship to the person.[35] The Tribunal, however, failed to make findings on Mr Gray's potential to contribute to the community and "did not recognise that the weighing exercise was an important element of the policy it was purporting to apply", giving rise to jurisdictional error.[36]

B.1 The Policy: best interests of the child as a primary consideration

37 The factors considered by the delegate in their consideration of whether the discretion to cancel the visa should be exercised were those set out in the Policy.[37] The Policy provided that it was "policy that delegates take into account" the matters listed therein, which included (emphasis added):

> Whether Australia has obligations under relevant international agreements that would be breached as a result of the visa cancellation, – as two examples:
>
> If there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, delegates are **obliged** to treat as **a primary consideration** the **best interests of the children** …

[32] *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 at [89] (Robertson J), approved in ***MQGT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 285 at [22] (Jagot, Kerr and Anastassoiu JJ). See also *Minister for Immigration, Local Government and Ethnic Affairs v* ***Gray*** (1994) 50 FCR 189 at 206-208 (French and Drummond JJ); *Elliott v Minister for Immigration and Multicultural Affairs* (2007) 156 FCR 559 at [41] (Ryan, Tamberlin and Middleton JJ); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at [61], [96] (Griffiths J), [118] (Mortimer J).

[33] *MQGT* (2020) 282 FCR 285 at [22] (Jagot, Kerr and Anastassoiu JJ), quoting *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435 at 453 (Wilcox J).

[34] (1994) 50 FCR 189 at 210-211 (French and Drummond JJ).

[35] *Gray* (1994) 50 FCR 189 at 203-204, 209 (French and Drummond JJ).

[36] *Gray* (1994) 50 FCR 189 at 211 (French and Drummond JJ) (Neaves J in dissent, finding that the Tribunal did not misconstrue or misapply the policy: at 192).

[37] **CAB 18-21**; **ABFM 57-58**.

38 The Policy also set out Art 3.1 of the *Convention on the Rights of the Child* (**CRC**),[38] which provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration".[39] In this context, "[t]he interests of the children are considerations in respect of their human development — their health, including their psychological health and happiness, their social and educational development as balanced, nurtured young citizens of this country".[40]

B.2 The delegate failed to apply the Policy

39 There were two minor children (the Third and Fourth Appellants, then aged 12 and 5 years old) whose best interests arose for consideration. The delegate "acknowledge[d] that the visa holder's son arrived to Australia aged two years old and has spent more time in Australia than Iran", that he had completed primary school in Australia and that "English may be his native language": **CAB 20**. The delegate also "acknowledge[d] that the visa holder's daughter was born in Australia and has spent all her life in Australia": **CAB 20**. The delegate reasoned (**CAB 20**, emphasis added):

> While I acknowledge that Iran would be a different cultural environment to Australia, I note the relatively young age of the visa holder's son and daughter and therefore consider that they would be able to integrate and adjust to life outside of Australia **if required to depart**.

40 Under the heading "family unity", the delegate then reasoned that because the wife and son's visas would be consequentially cancelled (**CAB 20-21**, emphasis added):

> a visa cancellation outcome would not result in separation of the family unit, as the visa holder, his wife and son can reside offshore together to maintain the family unit. I also consider the visa holder's daughter would have the **option of departing Australia** with the visa holder to maintain their family unit. …
>
> I consider that a decision to cancel the visa holder's visa would **not be in breach** of the [CRC]. …
>
> I give this consideration a **little weight** against cancelling the visa.

[38] [1991] ATS 4.

[39] **ABFM 87**. The Policy also addressed "family unity principles", by reference to Arts 23.1 and 17.1 of the *International Covenant on Civil and Political Rights*, and Arts 9 and 16 of the CRC: **ABFM 87-88**.

[40] *Perez v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 454 at [118] (Allsop J).

41 Gordon J found that the delegate "considered matters directed to the best interests of the Third and Fourth [Appellants] through the prism of the rights of the child and family unity": **CAB 357 [100]**. It can be accepted that the delegate considered matters *directed to* the question of best interests of the child. But that was not what the Policy required. The delegate misunderstood the task, and failed to carry it out.

42 The Policy "obliged" the delegate to positively act in accordance with Art 3 of the CRC by considering the best interests of the children as a *primary* consideration. To do so required identifying what the best interests of the children required, and then "asking whether the force of any other consideration outweighed it".[41] That did not occur. The delegate's reasons "remain[ed] at the level of mere hypothesis" about the best interests of the children and "never confronted the central question of what the best interests of the children required [them] to decide".[42] The delegate made no express findings about what outcome was in the best interests of the children, and gave the consideration "little weight" apparently on the basis that cancellation would not "breach" the CRC. The delegate did not engage with the consideration any further in the ultimate balancing.[43]

43 The delegate's failure to carry out the task required by Art 3.1 is particularly clear in relation to the Fourth Appellant — at the time, a 5-year-old Australian citizen. The delegate reasoned that she could adjust to life in a different country "if" required to depart, and that she had the "option" of departing to maintain family unity. The delegate did not consider the significance of her status as an Australian citizen, which is a "most relevant aspect" of a child's position.[44]

44 In those circumstances, it cannot be said that the delegate in fact considered the best interests of the children, let alone treated them as a primary consideration. The delegate

[41] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 292 (Mason CJ and Deane J), see also at 304-305 (Gaudron J). See, applying this passage, *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184 at [55] (Stewart J); *Wan* (2001) 107 FCR 133 at [31]-[32] (Branson, North and Stone JJ). See also *Lesianawai v Minister for Immigration and Citizenship* (2012) 131 ALD 27 at [43]-[45] (Katzmann J).

[42] *Nweke v Minister for Immigration and Citizenship* (2012) 126 ALD 501 at [18], [21] (Jagot J). See also ***Wan*** *v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [26] (Branson, North and Stone JJ).

[43] "I am satisfied that the grounds for cancelling the visa outweigh the reasons not to cancel the visa. I have therefore decided to cancel the visa holder's visa": **CAB 21**.

[44] *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 at 614, 618 (Burchett J), see also at 631 (Branson J). See also *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 at [54]-[56] (Allsop CJ).

accordingly misconstrued or misapplied the policy that they stated they were applying, and the decision is for that reason irrational and legally unreasonable. That error was material. Had the delegate considered the best interests of the two children as a primary consideration, the delegate could have given that factor more than "little weight" and realistically could have reached a different decision on the discretion whether to cancel.

C GROUND 3: LEGAL CONSEQUENCES OF THE DECISION

45 In making a decision to cancel a visa, the Minister is required to "take into account the legal consequences of a decision because these consequences are part of the legal framework in which the decision is made".[45] That legal framework includes (at least) "the direct and immediate statutorily prescribed consequences of the decision".[46] As explained by the Full Federal Court in *Taulahi*,[47] "[a]nother expression of this fundamental proposition is the well-established principle that a broad statutory discretion is nonetheless limited by the subject matter, scope and purpose of the Act that creates it". Its importance is reinforced when it is recognised that the consequences of visa decisions are often "important in human terms",[48] and acknowledging that the limits on statutory power are informed by fundamental values anchored in the common law.[49] A material failure to consider the legal consequences if the decision will give rise to jurisdictional error, which may be characterised as a failure to have regard to a mandatory relevant consideration.[50]

46 The Appellants argued (by Ground 1 below) that the delegate failed to consider the legal consequences of the decision that the Second and Third Appellants would be subject to

[45] ***Taulahi*** *v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at [84] (Kenny, Flick and Griffiths JJ). See also ***NBMZ*** *v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [9]-[10] (Allsop CJ and Katzmann J), [177]-[178] (Buchanan J); *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 at [2] (Allsop CJ and Katzmann J), [105] (Buchanan J); ***Cotterill*** *v Minister for Immigration and Border Protection* (2016) 240 FCR 29 at [104]-[107] (North J); [124]-[133] (Kenny and Perry JJ); ***AJN23*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 304 FCR 586 at [33] (Murphy, Stewart and McEvoy JJ). This well-established requirement was also reflected in the Policy applied by the delegate: **ABFM 57**.

[46] *Taulahi* (2016) 246 FCR 146 at [84] (Kenny, Flick and Griffiths JJ); *AJN23* (2024) 304 FCR 586 at [33] (Murphy, Stewart and McEvoy JJ).

[47] (2016) 246 FCR 146 at [84] (Kenny, Flick and Griffiths JJ),

[48] *NBMZ* (2014) 220 FCR 1 at [9] (Allsop CJ and Katzmann J). See also *Taulahi* (2016) 246 FCR 146 at [84] (Kenny, Flick and Griffiths JJ).

[49] See *SZVFW* (2018) 264 CLR 541 at [59] (Gageler J); ***Hands*** *v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [3] (Allsop CJ); Allsop, "Values in public law", in Williams, *Key Issues in Public Law* (2017) at 25.

[50] *Cotterill* (2016) 240 FCR 29 at [123] (Kenny and Perry JJ); *Taulahi* (2016) 246 FCR 146 at [87]-[89] (Kenny, Flick and Griffiths JJ),

the bar on further protection visa applications (s 46A), and would be liable to be detained (s 189) and removed from Australia (s 198). While the delegate considered that the Second and Third Appellants' visas would be automatically cancelled under s 140(1) as a result of the decision, the delegate did not consider the legal consequences that flowed from that cancellation.

47 Gordon J accepted that these matters "were not directly referred to" in the cancellation decision: **CAB 353 [80]**. However, her Honour held that the reasons reflected that the fact the Second and Third Appellants may be subject to immigration detention and removal "was not overlooked" by the delegate: **CAB 353 [83]**. Her Honour reasoned that the delegate had considered those consequences in relation to the First Appellant, and in "various aspects" of the decision found that the Second and Third Appellants' visas would be consequentially cancelled: **CAB 354 [80]**. Her Honour took the delegate to be aware that they would then face the same consequences. Her Honour similarly found there was "no reason to think that the delegate was unaware" of the s 46A bar: **CAB 354 [86]**.

48 Her Honour should have found that the delegate failed to consider these consequences in the requisite sense. There is an important distinction between an inference that a decision maker was *aware* of a matter, and the *consideration* of that matter in the sense of applying the mind to it and bringing it to bear on the evaluative exercise.[51] Where a matter is not mentioned in the reasons for decision, the usual inference to be drawn is that "it has not been adverted to, considered or taken into account",[52] or the decision-maker "did not consider the matter to be material".[53] The matter here involved the detention of a 12-year-old child (the Third Appellant). The delegate had contemplated a "possibility" that the First Appellant "may be subject to indefinite detention". If it is to be inferred that the delegate was "aware" the same consequences would apply to the Second and Third

[51] *Tickner v Chapman* (1995) 57 FCR 451 at 462 (Black J), 476 (Burchett J), 495 (Kiefel J); *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [23]-[27] (Kiefel CJ, Keane, Gordon and Steward JJ).

[52] ***NBMZ*** *v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [16] (Allsop CJ and Katzmann J). See also *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29 at [43], [103], [106] (North J).

[53] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5] (Gleeson CJ), [37] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ). While the reasons in the present case were not given pursuant to a statutory requirement, the reasons are detailed and the inference to be drawn is that they are a complete explanation for the exercise of power: *AYX17 v Minister for Immigration and Border Protection* (2018) 262 FCR 317 at [61] (Tracey and Mortimer JJ, Charlesworth J agreeing). See also *Minister for Immigration and Border Protection v* ***SZSRS*** (2014) 309 ALR 67 at [34] (Katzmann, Griffiths and Wigney JJ).

Appellants, then those were extremely severe consequences. Their significance is such that "it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons".[54] As those matters were not expressly referred to, that the correct conclusion is that they were not taken into account in the decision.

49 Further, if the delegate's awareness of the consequences is to be inferred from different portions of the reasons, the question remains — where was it weighed? The factor "legal consequences of the decision" was addressed only to the First Appellant, and was given "some weight" against cancellation. The factor "any consequential cancellations that may result", where the delegate considered that the Second and Third Appellants would be "liable" for visa cancellation, was given "a little weight" against cancellation. It cannot be inferred that the consequences of detention and removal for the wife and child were weighed here, as there could be no rational basis to give *less* weight to the legal consequences for these two individuals as compared to the First Appellant: cf **CAB 353 [83]**. Instead, the conclusion must be that the delegate did not consider those consequences for the Second and Third Appellants.

50 That error was material. Had those grave consequences been considered, demanding an "honest confrontation of what is being done to people",[55] it could have led the delegate to give greater weight to this consideration against visa cancellation.

D IS LEAVE TO APPEAL REQUIRED?

51 In correspondence, the Respondent has conveyed to the Appellants that the Respondent's position is that: the decision and orders of Gordon J were final in nature, not interlocutory; leave to appeal is therefore not required; and the Appellants have a right of appeal from the decision of Gordon J under ss 20 and 34 of the Judiciary Act. For the reasons explained below, that is also the position of the Appellants.

D.1 Leave to appeal is not required because the judgment was not interlocutory

52 Section 34(1) of the Judiciary Act relevantly provides that, subject to exceptions, the Court has "jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice … exercising the original jurisdiction of the High Court".[56] That jurisdiction is to be exercised by a Full Court: s 20(a).

[54] *SZSRS* (2014) 309 ALR 67 at [34] (Katzmann, Griffiths and Wigney JJ).
[55] *Hands* (2018) 267 FCR 628 at [3] (Allsop CJ).
[56] The term "Judgment" includes "any judgment decree order or sentence": Judiciary Act, s 2.

53 For the purposes of s 34(1), the only potentially relevant exception is that leave is required for an "interlocutory judgment": s 34(2). The Appellants' position is that Gordon J's judgment is not an "interlocutory judgment" for the purposes of s 34(2) of the Judiciary Act. Consistent with that position, on 1 November 2024, the Appellants' filed a notice of appeal to institute an appeal.[57] The Registry ultimately accepted that notice for filing. However, by reference to ***Sayed*** *v Principal Registrar of the High Court*,[58] the Registry raised the possibility that Gordon J's judgment was interlocutory and, therefore, an application for leave was required. The present application for leave was filed against that possibility.[59]

10 54 The "usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties in a principal cause pending between them".[60] What matters is whether the legal effect of the order is final.[61] That assessment must be made recognising that it is "well settled" that the "res judicata doctrine" — in the sense of "cause of action" or "claim" estoppel[62] — applies to judicial review proceedings.[63] By application of that "rule of law",[64] the legal effect of Gordon J's order is to preclude the Appellants from bringing a further application for a constitutional or other writ, contending that the delegate exceeded the jurisdiction conferred by the statute on a ground that was, as a matter of substance, decided by her Honour.[65] Gordon J's judgment was therefore final in the relevant sense.[66]

57 *High Court Rules 2004* (Cth), r 42.01. The Amended Notice of Appeal was later filed on 5 December 2024, pursuant to paragraphs 2 and 3 of the Order made by Gageler CJ on 3 December 2024.

58 [2023] HCASL 169.

59 As occurred in *Re Media, Entertainment and Arts Alliance and Theatre Managers' Association; Ex parte* ***Hoyts*** *Corporation Pty Ltd* (1994) 68 ALJR 179 at 180 (the Court).

60 ***Bienstein*** *v Bienstein* (2003) 195 ALR 225 at [25] (McHugh, Kirby and Callinan JJ)

61 *Re* ***Luck*** (2003) 78 ALJR 177 at [4] (McHugh ACJ, Gummow and Heydon JJ).

62 See *Clayton v Bant* (2020) 272 CLR 1 at [28] (Kiefel CJ, Bell and Gageler JJ), see also at [50]-[52] (Gordon J), [67]-[68] (Edelman J).

63 ***AIO21*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 80 at [57] (Kenny, O'Callaghan and Thawley JJ).

64 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [21] (French CJ, Bell, Gageler, Keane JJ).

65 *AIO21* (2022) 294 FCR 80 at [66] (Kenny, O'Callaghan and Thawley JJ).

66 See *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 354 at [38]-[40] (Katzmann, Sarah C Derrington and Kennett JJ). Compare *Macatangay v State of NSW (No 2)* [2009] NSWCA 272 at [11] (Allsop P, Tobias JA and Handley AJA), noting that one reason an order for summary dismissal was interlocutory was that it did "not create res judicata estoppels".

55 *Sayed* is not authority to the contrary. There, Steward J had dismissed that application for a constitutional writ on the basis that it lacked reasonable prospects of success and was an abuse of process.[67] The applicant filed a notice of appeal, seeking to appeal from Steward J's judgment. The Deputy Registrar refused to accept that notice on the basis that it was incompetent. The applicant then filed an application for a constitutional or other writ, seeking to compel the Principal Registrar to accept the notice of appeal. Citing *Luck*,[68] Edelman and Gleeson JJ concluded that the Deputy Registrar was correct to refuse the notice on the basis that judgment of Steward J was "interlocutory" for the purposes of s 34(2) of the Judiciary Act.

10 56 That conclusion was correct. An order is an "interlocutory" order "when it stays or dismisses an action or refuses leave to commence or proceed with *an action because the action is frivolous, vexatious, an abuse of the process of the court or does not disclose a reasonable cause of action*".[69] Both *Luck* and *Sayed* concerned orders meeting that description.[70] Other examples of interlocutory orders include "refusing to set aside a default judgment or refusing to grant an extension of time".[71] Gordon J's order was not of that kind. Her Honour considered, on their full merits, each of the five grounds advanced by the Appellants and, having done so, then dismissed the application. Such a judgment is not "interlocutory" in relation to those grounds.

57 *Hoyts* does not require a different conclusion. That case concerned the dismissal of an
20 application, made under the pre-2004 Rules, for an order nisi for writs of prohibition and certiorari.[72] That involved a "two-step (initially ex parte) process"[73] for such applications: in the "first instance", the application being for an "order calling on the proposed respondent to shew cause why the writ or order should not be issued or made, the

67 It appears (from the absence of any transcript), that Steward J did so under r 25.09.1 of the Rules, which permits a Justice to "dismiss an application, without listing the application for hearing, on the ground that the application does not disclose an arguable basis for the relief sought or is an abuse of the process of the Court".

68 (2003) 78 ALJR 177.

69 *Luck* (2003) 78 ALJR 177 at [9] (McHugh ACJ, Gummow and Heydon JJ) (emphasis added)

70 In *Luck*, the judgment was of Gleeson CJ refusing leave to issue a write of summons and a statement of claim, in circumstances where a direction had been made that required leave before the filing of such documents: see (2003) 78 ALJR 177 at [2] (McHugh ACJ, Gummow and Heydon JJ).

71 See *Bienstein* [2003] HCA 7 at [25].

72 See *Hoyts* (1994) 68 ALJR 179 at 180 (the Court).

73 See Explanatory Statement, High Court Amendment (Constitutional Writs and Other Matters) Rules 2018.

information filed or other relief given".[74] Following the commencement of the 2004 Rules, under Pt 25, the Court could continue to make such an order: r 25.05.3(c).[75] That was the position at the time that *Plaintiff S164/2018 v Minister for Home Affairs* was decided.[76] That does not reflect the current procedure under current Pt 25 of the Rules, as the Court acknowledged when the old Pt 25 was repealed and substituted in 2018.[77] There is now only a single step process, with no "show cause" mechanism. Both *Hoyts* and *Plaintiff S164* are therefore distinguishable.

D.2 If required, leave should be granted

58 If leave to appeal is required, it should be granted. "The principles that govern the grant of leave to appeal are well established. An applicant for leave must establish that the decision in question is attended with sufficient doubt to warrant the grant of leave. The applicant must also show that substantial injustice will result from a refusal of leave to appeal".[78]

59 Both requirements are satisfied here. For the reasons explained above, Gordon J's judgment is attended with sufficient doubt to warrant the grant of leave. If leave is refused, the consequences include the potential detention and removal of the First to Third Appellants. Those consequences for a 17-year-old who has spent almost his entire life in Australia, and carrying also an uncertain future for his two younger sisters, followed a cancellation process of which the Appellants had no actual notice. It would be a substantial injustice to shut out these children from ventilating meritorious grounds on appeal.

PART VII: ORDERS SOUGHT

60 The Appellants seek the following orders:

(1) The appeal is allowed.

(2) The order of Gordon J dated 18 October 2024 is set aside and, in its place, it is ordered:

[74] Order 55 r 1(2); subject to irrelevant exceptions for present purposes: r 1(3)-(4).

[75] "On the hearing of an application for an order to show cause a Justice may order that … the defendants show cause before the Court or a Justice why relief claimed by the plaintiff and specified in the order should not be made on grounds specified in the order".

[76] (2018) 92 ALJR 1039, where Edelman J concluded that an order of Gageler J, dismissing an application for show cause under old 25.05.3(a) was "interlocutory" based on *Hoyts*.

[77] See Explanatory Statement, High Court Amendment (Constitutional Writs and Other Matters) Rules 2018 (Cth).

[78] *Bienstein* (2003) 195 ALR 225 at [29] (McHugh ACJ, Gummow and Heydon JJ).

(a) it is declared that the Cancellation Decision was made beyond power;

(b) a writ of certiorari issue to quash the Cancellation Decision;

(c) the Defendant pay the Plaintiffs' costs of the amended application filed on 31 July 2024 for a constitutional or other writ;

(3) The Respondent pay the Appellants' costs of the appeal.

(4) The filing fee for the application for leave be refunded.[79]

PART VIII: ESTIMATE OF TIME

61 It is estimated that 1.5 hours will be required for the Appellants' oral argument.

Dated: 31 January 2025

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[79] The Appellants sought waiver of the fee in circumstances where a filing fee had already been paid to file the notice of appeal, but was advised that waiver was not possible under the *High Court of Australia (Fees) Regulations 2022* (Cth).

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANTS / APPLICANTS

Pursuant to Practice Direction No 1 of 2024, the Applicants / Appellants sets out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Judiciary Act 1903* (Cth)	Current	s 34	Act in force at the date of filing of the Notice of Appeal	1 November 2024
2.	*Migration Act 1958* (Cth)	As at 19 December 2019	ss 46A, 116, 118A, 119, 120, 140, 189, 198	Act in force at the date of the Cancellation Decision	19 December 2019

SCHEDULE OF APPELLANTS / APPLICANTS

PLAINTIFF M19B/2024
Second Appellant / Applicant

PLAINTIFF M19C/2024
Third Appellant / Applicant
by their litigation guardian Plaintiff M19B/2024

10 **PLAINTIFF M19D/2024**
Fourth Appellant / Applicant
by their litigation guardian Plaintiff M19B/2024

PLAINTIFF M19E/2024
Fifth Appellant / Applicant
by their litigation guardian Plaintiff M19B/2024