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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

VID284/2022

On Appeal from the Federal Court

DIRECTOR-GENERAL OF SECURITY
First Appellant

MINISTER FOR HOME AFFAIRS
Second Appellant

COMMONWEALTH OF AUSTRALIA
Third Appellant

PLAINTIFF S111A/2018
Respondent

APPELLANTS' OUTLINE OF SUBMISSIONS

A. Introduction

1. This appeal is concerned with two adverse security assessments (**ASAs**) of the respondent made by the first appellant, the Director-General of Security, on 23 April 2018 (**2018 ASA**) (**AB Tab 17**) and 27 October 2020 (**2020 ASA**) (**AB Tab 22**). Unclassified versions of the reasons for each assessment were provided in the form of "truncated statements of grounds" (**TSOG**): see **AB Tab 18** for the **2018 TSOG** and **AB Tab 23** for the **2020 TSOG**.

2. For reasons published on 5 April 2022 (**PJ**) (**AB Tab 6**), while the primary judge rejected many of the respondent's grounds of challenge her Honour concluded that both ASAs were invalid. By orders made on 22 April 2022 (**AB Tab 7**), her Honour set aside both ASAs and in consequence set aside a decision of the second appellant, the Minister for Home Affairs, to refuse to grant the respondent a protection visa made because of the 2018 ASA. By orders made on 23 May 2022 (**AB Tab 9**) for reasons published on that day (**AB Tab 8**), the primary judge ordered the appellants to pay a percentage of the respondent's costs.

3. By amended notice of appeal (**AB Tab 10**), the appellants appeal from the orders made on 22 April and 23 May 2022. However, the appeal from the orders as to costs is entirely consequential; no independent appeal ground is directed to the question of costs. For the following reasons, the appeal should be allowed.

B. Background

(a) Basic facts

4. The respondent arrived in Australia in May 2012 as an unlawful non-citizen. He has been in immigration detention since that time. The respondent was born in Egypt, and lived in Egypt, Albania, the United Kingdom, Iran and Indonesia before arriving in Australia.

5. Interpol issued a "Red Notice" (**the Red Notice**) in relation to the respondent in 2001, at the request of Egypt. Egypt made the request following a mass trial in which the respondent was convicted, *in absentia*, of charges including being a member of a terrorist organisation. That trial is known in this proceeding as the "**Returnees from Albania trial**". The Red Notice was cancelled in February 2018, following a review by the Commission for Control of Interpol's files. Its report was in evidence and is at **AB Tab 14.**

6. The respondent has been interviewed by ASIO five times in connection with the ASAs, most recently on 15 September 2020 prior to the 2020 ASA (**the 5th Interview**). A transcript of the 5th Interview, at which the respondent was legally represented, is at **AB Tab 21**.

(b) Relevant legislation and policy

7. Section 37(1) of the *Australian Security Intelligence Agency Act 1979* (Cth) (**ASIO Act**) empowers ASIO to furnish "security assessments", as defined in s 35. Section 37(4) empowers the Director-General to determine matters that are to be taken into account in making security assessments. Two such "security assessment determinations" are relevant: Security Assessment Determination No 2 (**AB Tab 25**) which applied to the 2018 ASA and Security Assessment Determination No 3 (**AB Tab 26**) which applied to the 2020 ASA.

8. Two internal ASIO documents are relevant: (a) an unclassified extract of a 6 August 2020 version of a policy entitled "*Prohibition on the Use of or Involvement with Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*" (**the Policy**) (**AB Tab 28**); and (b) an unclassified extract of a 9 January 2019 version of a procedure entitled "*Treatment of Information Derived from the use of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*" (**the Procedure**) (**AB Tab 29**). The evidence was that the Policy was in substantively the same form at the time of the 2018 ASA (**AB Tab 30**).

(c) Factual background set out by the primary judge

9. The appellants note that at PJ [32]–[199], the primary judge set out what was described as "*uncontested background*". Particularly at PJ [32]–[64], her Honour set out extensive factual matters concerning the respondent's personal history. This was based primarily on an affidavit of the respondent (**AB Tab 13**). The appellants had submitted at trial that, in the context of judicial review, large parts of the affidavit regarding his history were irrelevant. As a result, the respondent was — "correctly" (see PJ [34]) — not cross-examined on these factual issues and no submissions were made in relation to them. The appellants accepted only that "*key events in the chronology are uncontentious*" (PJ [23]). Accordingly, care is required in approaching what the primary judge described as "*uncontested background*". Some of the matters there are (or may be) contrary to conclusions reached by ASIO. For example, what is said at PJ [40] is contrary to the conclusions at [22]–[23] of 2020 TSOG (**AB Tab 23, pp 740–741**). As before the primary judge, the truth of the "*uncontested background*" is not relevant to the judicial review challenge to the ASAs.

C. Ground 1 – Validity of the 2018 ASA

10. The 2018 TSOG referred to evidence from the Returnees from Albania trial at [29] and [48] (**AB Tab 18, pp 412, 417**). The primary judge found that there had been use by ASIO "*in a material and significant way, of evidence that had been wholly discredited, including because of the likelihood it was obtained through torture and/or 'prepared' by Egyptian authorities*"

(PJ [8]). Her Honour concluded it followed that the 2018 ASA denied the respondent procedural fairness and was legally unreasonable (PJ [8]). This conclusion involved seven discrete errors.

11. *First*, it was an error to find that ASIO's reliance on evidence from the Returnees from Albania trial was "*material and significant*". At [29] of the 2018 TSOG, ASIO expressly acknowledged criticisms of the trial. ASIO acknowledged the cancellation of the Red Notice as a result at [20]. At [48], it was made express that ASIO had treated information derived from the trial "*with caution*". At [29], ASIO noted that the information sometimes corresponded with other available information. Overall, ASIO attributed some weight to it, but noted it merely contributed to a broader intelligence case underlying the 2018 ASA (at [48]). Nothing in the 2018 TSOG suggests that ASIO's reliance on the evidence was "*material and significant*".

12. *Second*, the primary judge erroneously concluded at PJ [345]–[354] that any reliance on such evidence was contrary to ASIO's policies. Clause 7.2.2 of Security Assessment Determination No 2 (operative as at the time of the 2018 ASA) provided that a security assessor should consider the "*credibility, nature and authenticity of the relevant facts information and sources*" and consider the weight to accord to it, "*including whether the information can be corroborated*" (**AB Tab 25, p 761**). Clause 7.2.4 stated that weight to be given to information "*may be affected by the risk that it has been obtained using means which may amount to duress, torture or other cruel, inhuman or degrading treatment or punishment*" and provided that "*the decision maker should apply [the Policy]*".

13. Contrary to the reasoning of the primary judge, no policy required ASIO to refuse to take into account evidence from the Returnees from Albania trial. The Policy (**AB Tab 28, p 777**) states that "*ASIO does not act in a way that sanctions, acquiesces to, or encourages torture or other cruel, inhuman or degrading treatment or punishment [CIDTP] by others*". The Policy also provides (**AB Tab 28, p 776**) that:

> *This policy and the related Intelligence Procedure must be considered and, where appropriate, implemented in any of ASIO's activities, including (but not limited to) interviews, human source operations, special intelligence operations and collaboration activities. The related Intelligence Procedure provides guidance on steps to be taken when an ASIO staff member becomes aware that information ASIO has received has been, or is assessed as likely to have been, derived from the use of torture or other CIDTP.*

14. The referenced Procedure (**AB Tab 29, p 781**) provides that when an ASIO staff member becomes aware that information has been, or is likely to have been, obtained by the use of torture or other CIDTP, that ASIO staff member should:

> *Take into account in any assessment of the reliability and credibility of the information that the information has been, or is likely to have been, obtained by the use of torture or other CIDTP, and take suitable caution in the further use or dissemination of the information.*

The Procedure also provides (**p 783**):

> *Where ASIO becomes aware that information or intelligence it has received has been, or is assessed as likely to have been, obtained by the use of torture or other CIDTP, assessments made in respect of the reliability and credibility of the information must be informed by this fact.*

15. *Third*, at PJ [232] and [326], the primary judge proceeded upon a misapprehension that the appellants' submission at trial had been that evidence potentially obtained by torture could only be used when it was corroborated. The appellants made no such submission. Consistently with point 2 above, the appellants' submission was that no security assessment determination or policy prohibited consideration of evidence obtained by torture, but rather required ASIO to assess the weight to be accorded to such evidence and to approach it with particular caution (see [78]–[85] of the appellants' closing submissions, at **AB Tab 5**).[1] Indeed, [85] of the appellants' closing submissions, reflecting [20] of the 2018 TSOG, stated only that "***in some cases*** *that evidence corresponded with other evidence available to ASIO and in other cases to information provided by the [respondent] himself*" (**emphasis added**).

16. *Fourth*, the primary judge erroneously proceeded on the basis that the findings of the Commission for Control of Interpol's files concerning the Returnees from Albania trial were more expansive and conclusive than they in fact were. At PJ [326], the primary judge extracted passages from the Commission's report and described them as the Commission's "*findings*". Those passages formed the basis for a conclusion by the primary judge that it was "*absolutely clear that [ASIO] should not rely on evidence obtained*" from the trial. Her Honour further concluded that the 2018 TSOG represented a "*sanitised summary*", a glossing over and omission of matters, and a "*fundamentally inaccurate*" downplaying and diminishing of the findings from the Commission's report (PJ [328]–[331], [337]–[338]).

17. However, the passages extracted by the primary judge were the Commission's summary of the respondent's submissions to the Commission, and other commentary on the Returnees from Albania trial, rather than the Commission's own findings. The Commission's conclusion was limited to the following (**AB Tab 14, p 401 [71]**):

> *The Commission rather finds that the [respondent] has demonstrated the existence of reasonable grounds to hold the real risk that evidence on which he was sentenced, was obtained by torture, and therefore to believe that the Red Notice challenged is based on*

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[1] The Appellants note that [79] of the closing submissions incorrectly referred to a superseded ASIO policy from 2012 (see **AB Tab 25**), rather than to the Policy, though both contained statements to the same effect.

> *conviction dependent on such evidence which would consequently be contrary to fundamental rights and could not serve as a basis for the Red Notice.*

Far from being ignored or downplayed by ASIO, the strength of the Commission's conclusion accords with what appears at [20] of the 2018 TSOG (**AB Tab 18, p 410**).

18. *Fifth*, the effect of the primary judge's conclusions at PJ [337] and [341] was that it was procedurally unfair for ASIO to use information derived from the Returnees from Albania Trial in any way, because it was sufficiently clear it was tainted by torture. This relied on supposed findings from the Commission's report, so was infected by the fourth error above. More fundamentally, the primary judge did not identify any authority for the radical proposition that reliance on material which is "*not credible or reliable*" is procedurally unfair. *Minister for Immigration and Border Protection v WZARH*[2] (cited at PJ [341]) does not stand for that proposition. Given the caution with which ASIO approached evidence from the Returnees from Albania trial (see [11] above), there was no procedural unfairness in a process whereby ASIO weighed that evidence against the respondent's evidence (contra PJ [342]). Further, ASIO's use of this evidence did not deny the respondent a meaningful opportunity to participate in his security assessment. He had been interviewed and invited to comment multiple times. At PJ [213], the primary judge accepted that the respondent "*well understands ASIO's reasoning at least in relation to its findings about his past activities and associations, even if he does not agree with them, and even if he does not know all the factual sources from which that reasoning is said to derive*".

19. *Sixth*, the primary judge ought not to have concluded, at PJ [327], that once it was sufficiently clear that evidence was tainted by torture, it was legally unreasonable for ASIO to use that information in any way. At PJ [340], the primary judge further found that such use was irrational and contrary to public policy. Like the fifth error, these conclusions relied on supposed findings in the Commission's report and were infected by the fourth error above. In any event, it was not inherently unreasonable for ASIO to use the information in the way that it did. At PJ [333]–[336], the primary judge appeared to suggest that the unreasonableness of using evidence in this way is clear from Security Assessment Determination No 2, including cl 7.2.4. This is incorrect, for the reasons explained in [12]–[13] above.

20. The primary judge's reliance on Commonwealth legislation and "*judicial approaches*" cited at PJ [340] was misplaced. Evidence admissible in a judicial proceeding is in a fundamentally different category to information appropriate for ASIO to use in forming assessments relevant

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[2] (2015) 256 CLR 326.

to Australia's security. The strictures of the law of evidence, for example, have no application. The only case cited by the primary judge, *A v Secretary of State for the Home Department (No 2)*,[3] is contrary to her Honour's reasoning. The House of Lords concluded that the Secretary of State had ***not*** acted unlawfully in relying on the material in question. Lord Bingham — the only member of the House of Lords whose reasons were cited by the primary judge — dissented on the question whether evidence must be excluded where there is a "*real risk*" it was obtained by torture; the majority concluded that a "*real risk*" was insufficient to warrant exclusion.[4]

21. *Finally*, the primary judge erred in finding at PJ [342] that a review of the 2018 ASA by Mr Cornall, the Independent Reviewer of ASAs, "*confirmed*" that evidence from the Returnees from Albania trial should not have been relied on. While Mr Cornall found that such reliance "*detracts from the quality of ASIO's assessment*" (**AB Tab 20, p 481**), his assessment was quite different from judicial review. He did not find that such reliance was irrational, unreasonable, unfair, or contrary to any ASIO policy or procedure.

D. Ground 3 – Validity of the 2020 ASA

22. The 2020 ASA placed no weight on information derived from the Returnees from Albania trial. That was accepted by the primary judge (PJ [318]). Instead, the primary judge found that the 2020 ASA was invalid as a result of a failure by ASIO to properly consider the respondent's "*current ideology*" and a "*failure to engage with the [respondent] about, and determine, the facts, material and information about the [respondent]'s circumstances*" (PJ [8], [409], [435]).

23. The primary judge's reasons involved the error of permitting a ground based on adequacy of consideration to slide into impermissible merits review.[5] The primary judge's reasons amount to a conclusion that ASIO did not explore the respondent's current ideology and future risk in the manner which the primary judge thought optimal. That is highlighted by the primary judge's choice, at PJ [434], to set out a list of matters about which her Honour considered the respondent was not, but should have been, asked. In any event, the primary judge's finding of a failure to consider the respondent's current circumstances was in error.

24. *First*, even if the primary judge was correct to find that an assessment pursuant to s 37(1) of the ASIO Act must be "*substantially forward looking*" (PJ [419]), it does not follow that information about the respondent's past is irrelevant to that assessment. To the contrary, an

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3 [2006] 2 AC 221.

4 Ibid at [56]–[57].

5 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [30] (the Court).

assessment of a person's current beliefs and possible future must necessarily take into account the person's past beliefs and past conduct.[6]

25. *Second*, the 2020 TSOG (**AB Tab 23**) included assessments that the respondent *"would be likely to engage in activities of security concern in the community*" (at [2(d)], [54]) and "*[l]ikely maintains an ideology supportive of [politically motivated violence] and [Egyptian Islamic Jihad] and [Al Qaeda]"* (at [47]–[49]). Those assessments were supported by detailed consideration of the respondent's ideology, his family and community ties and what he would do if released at [2(b)], [2(d)], [47]–[49], [54], [56]–[57] and [61]–[63]. As expressly stated in the 2020 TSOG, regard had been given to "*the currency, credibility, nature and authenticity of the relevant information and sources available to ASIO*" (at [61]).

26. *Third*, during the 5th Interview (**AB Tab 21**) the respondent was: told that "*[t]oday's interview will relate to your background, activities, associations and ideology*" (T9.8–9); told that the interview was his opportunity to "*clarify or confirm previous answers and provide any further information to put forward your case*" (T12.44–45); and asked about his ideology, and what would occur if he lived in the community in Australia, over a significant portion of the 5th Interview (T206–231).

27. At trial, the appellants relied on the 5th Interview as a whole and referred to specific passages from T206–231 covering questions, answers and statements (contra PJ [414]; see [144]–[145] of the submissions at **AB Tab 5** and T275–277 from trial (**AB Tab 34**)). ASIO's assessment could properly consider both the respondent's answers to questions as well as statements volunteered by him, which may have pre-empted other questions.

28. Contrary to PJ [414]–[416], general and open-ended questions were an appropriate means of exploring the respondent's current ideology and future risk. In addition, the specific questions criticised by the primary judge at PJ [415] and [422]–[425] were unobjectionable. Even if many Australians might answer affirmatively to the question "*would you have ever described any of your friends as having extreme beliefs?*", it was an appropriate question. It would allow further exploration if any friends had been identified by the respondent. There is no evidence that a

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[6] See, eg, *MYVC v Director-General of Security* (2014) 234 FCR 134 at [52]–[53] (Rares J): "In many, if not most, cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because, as Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575: 'what has occurred in the past is likely to be the most reliable guide as to what will happen in the future.' It is therefore, ordinarily, an integral part of the process of making a determination concerning the chance of something occurring in the future that the decision-maker will arrive at conclusions concerning past events: see also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282–283 per Brennan CJ, Toohey, McHugh and Gummow JJ." See also *CCU21 v Minister for Home Affairs* (2022) 398 ALR 535 at [60] (Griffiths J).

mere positive answer to that question would have led to adverse inferences about the respondent without such further consideration. Similarly, there is no evidence that an affirmative answer to the question "*Have you ever held anti-American views or opinions?*" would, on its own, lead to adverse inferences about the respondent, rather than being a topic for further discussion.

29. At PJ [441]–[443], the primary judge found ASIO's approach to the respondent's current ideology denied him procedural fairness because he was "*denied not only a reasonable opportunity but any opportunity to advance*" matters including how he proposed to live in the community, who he would associate with, and how his family would conduct itself. Contrary to that finding, during the 5th Interview the respondent was given the opportunity to volunteer any further information he wished (eg at T239.8). He was given the opportunity to make further submissions through his legal representatives (eg at T237.47), who provided other information for consideration (see, eg the ground dismissed at PJ [355]–[361]). It is not apparent why procedural fairness required questions to be positively asked by ASIO, as opposed to the respondent being given an opportunity to provide information he wished to be considered. In any case, as noted above at [26], he was asked a range of questions about each of these matters.

30. *Fourth*, the primary judge appears to have placed significant weight on what was described at PJ [417] as the "*impossible and invidious position*" in which the respondent found himself, essentially because he was invited to disavow past ideologies which ASIO had assessed him to hold, but which he had consistently denied ever holding. For the reasons extracted at PJ [418] and articulated from T275 to 277 at trial (**AB Tab 34**), this did not occasion any denial of procedural fairness. Rather, it was the necessary consequence of ASIO's assessment of the respondent's past activities, the confidential nature of some of the information underlying that assessment, and ASIO's degree of confidence in the conclusions it had consequently drawn about the respondent's honesty during interviews with ASIO.[7]

E. Two final matters

31. There are two final matters.

32. *First*, at PJ [384]–[385], the primary judge concluded that the nature and content of ASIO's questioning during the 5th Interview "*makes it clear that the ASIO interviewers had a predetermined view when they commenced this interview*" and "*demonstrated a clear determination to adhere to and see implemented the consequences ASIO saw as flowing from its view of the [respondent]'s activities some 20-30 years ago*". However, because the primary

[7] See similarly, eg, *MYVC v Director-General of Security* (2014) 234 FCR 134 at [65]–[73].

judge found that such conduct could not be ascribed to the Director-General who made the 2020 ASA, no relief flowed from this finding.

33. Nevertheless, as acknowledged at PJ [384], the primary judge made a serious finding of actual bias against the ASIO officers. That being so, the appellants seek to have it corrected (ground 2 of the amended notice of appeal). For the reasons set out above in relation to ground 3, the conduct of the 5th Interview does not indicate that the ASIO officers prejudged the respondent. In a context in which ASIO had been assessing the respondent for over six years, it was natural and unsurprising, rather than an indication of prejudgment, that ASIO officers approached the 5th Interview with the benefit of material previously gathered from and about the respondent.

34. In particular, contrary to PJ [381], nothing in the transcript indicates that the ASIO officers accused the respondent of being a liar. There is a meaningful distinction between that pejorative, personal insult, and what was put to the respondent. ASIO officers told him that they: did not believe his answers, believed that he had withheld information or did not believe that he was telling the truth. Consistently with PJ [382] and the conclusions of Wigney J in *El Ossman v Minister for Immigration and Border Protection*,[8] questioning of this kind was necessary to afford procedural fairness to the respondent.

35. *Second*, though unconnected with any ground of review, the primary judge made certain other criticisms of aspects of the adverse security assessments which are of systemic importance. At PJ [185] and [228], the primary judge criticised, as beyond ASIO's functions, the inclusion in each TSOG of consideration given by ASIO to the adverse consequences to the respondent of an adverse security assessment (the refusal of his visa application) and ASIO's statement that it "*considers that the refusal of his visa application is appropriate and proportionate to the assessed risk to security should he be granted [the visa]*." At PJ [450(b)], her Honour criticised ASIO's consideration of the respondent's contribution to the cumulative risk of Islamist extremist radicalisation and activity in Australia. These criticisms were misplaced and should be addressed by this Court.

36. The definition of "security assessment" in s 35 of the ASIO Act is very broad. Such assessments are given, not in the abstract, but in connection with "prescribed administrative action" (here, an exercise of power under the *Migration Act 1958* (Cth) to grant or refuse the respondent a visa).[9] Comments of the kind criticised by the primary judge are "comment[s] expressed in connection with" the recommendation, opinion or advice about whether the requirements of

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8 (2017) 248 FCR 491 at [129].

9 *MYVC v Director-General of Security* (2014) 234 FCR 134 at [54] (Rares J); *SDCV v Director-General of Security* (2021) 284 FCR 357 at [170], [177] (Bromwich and Abraham JJ).

security make it "necessary or desirable" or whether it would be "consistent with" the requirements of security for prescribed administrative action to be taken in respect of a person. At the least, they are comments that "could relate" to those questions.[10]

37. Notions of necessity and desirability, or of consistency with the requirements of security, can readily be understood to contain elements of evaluation: what is "necessary" goes beyond things that are "absolutely essential" and extends to what is "reasonably required";[11] "desirable" connotes something preferable but not absolutely required. Both notions leave room for the evaluation of contrary matters, including the consequences to the individual. An assessment of "consistency" equally involves an evaluative judgement. It is therefore part of ASIO's function in furnishing a security assessment to consider these matters. Further, in contrast to what the primary judge said at [450(b)], an assessment can properly consider both direct and indirect risks to security, including risks arising from a consequently elevated risk posed by others.[12]

38. Even if that were not so, ASIO's power to furnish security assessments is no doubt subject to an implied condition that an assessment be made reasonably.[13] Indeed, the primary judge's conclusion that the 2018 ASA was invalid rests on that premise. A security assessment could be attacked as legally unreasonable on the ground that the adverse consequences to the individual of the prescribed administrative action would be disproportionate to the security benefit of the prescribed administrative action. That being so, it must be permissible for ASIO to consider and then express a view about that question.

F. Orders

39. The appeal should be allowed and orders made as in the amended notice of appeal.

Date: 13 September 2022

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[10] See, in this respect, the discussion of "relates" in the ASIO Act in *CCU21 v Minister for Home Affairs* (2022) 398 ALR 535 at [52]–[61] (Griffiths J).

[11] See, eg, *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 469 (Higgins J); *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56 (the Court); *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51] (Gaudron, Gummow and Callinan JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ).

[12] *SDCV v Director-General of Security* (2021) 284 FCR 357 at [177] (Bromwich and Abraham JJ).

[13] See generally *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at [29] (French CJ), [88]–[92] (Gageler J); *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at [3], [18]–[20] (Kiefel CJ, Bell, Gageler and Keane JJ).