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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

RESPONDENT'S OUTLINE OF SUBMISSIONS

Introduction

1. The Commonwealth Government — specifically, the Minister for Home Affairs — seeks this Court's blessing for the proposition that the Director-General of Security, in rendering a security assessment of a person under s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (***ASIO Act***), may rely upon evidence extracted by the torture of a human being.

2. The appellants candidly confirm that ASIO's policies permit such reliance: AS [12]-[13]. Nor is such reliance confined to circumstances where the evidence extracted by torture is corroborated by other material; the Commonwealth expressly disclaims any such limitation: AS [15].

3. These submissions should "shock the conscience"[1] of this Court. They should be rejected.

Factual background

4. The respondent arrived in Australia on 11 May 2012. Since that time, for over a decade, he has been held in immigration detention.

5. In July 2012, in response to a request for advice from what is now the Department of Home Affairs (**DHA**), ASIO advised that it had no security-related concerns in relation to the respondent. But in August 2012, ASIO withdrew that advice after being alerted to the fact that the respondent was the subject of an Interpol Red Notice (**IRN**) issued by Egyptian authorities. The IRN had been issued after the respondent was, along with around 100 other accused, convicted in Egypt of terrorism-related offences. He had been tried *in absentia*. The trial is known as the 'Returnees from Albania trial' (**RFAT**). As elaborated below at [15]-[16], evidence used against the respondent in that trial was the product of torture by Egyptian authorities.

6. On 17 July 2014, the Director-General of Security (**DGS**) issued an "adverse security assessment" (**ASA**) in respect of the respondent under s 37 of the *ASIO Act* (**2014 ASA**). The 2014 ASA is not the subject of the present proceeding.

7. On 18 May 2015, the Minister "lifted the bar" to an application for a visa by the respondent. On 12 June 2015, the respondent applied for a temporary protection visa (**TPV**). Some three years down the track, on 23 April 2018, the DGS issued a fresh ASA in respect of the respondent (**2018 ASA**), recommending that the respondent's TPV application be refused: **AB 404**. The 2018 ASA was accompanied by a 35-page "truncated statement of grounds" (**2018 TSOG**): **AB 405**. The 2018 TSOG avowedly placed "some weight" on evidence from the RFAT: **AB 412 [29]**. Numerous of its

[1] *A v Secretary of State for the Home Department* [2006] 2 AC 221 (**A v Home Secretary**) at [150] (Lord Carswell).

paragraphs referred to that evidence.[2] Several of these contained conclusions by ASIO that were premised upon an unquestioning acceptance of the RFAT evidence.[3]

8. Two months later, on 13 June 2018, the Minister implemented the 2018 ASA's recommendation that the respondent's TPV application be refused. In August 2018, the respondent commenced proceedings in the High Court.[4] The proceedings put in issue, amongst other things, the validity of the 2018 ASA.[5] The proceedings were remitted by consent on 20 February 2019.[6]

9. On 15 September 2020, ASIO officers interviewed the respondent, informing him that "ASIO is reviewing your adverse security assessment": **AB 510** (T15.7). And on 26 October 2020, ASIO officers provided the DGS with a brief that recommended he approve the furnishing of a fresh ASA in relation to the respondent: **AB 751**. The brief identified its "[p]recedence" as "priority" and stated,

> ASIO is required to furnish this updated ASA [i.e. *Adverse* Security Assessment] by 29 October 2020 as directed by the Federal Court.

10. In fact, there had been no judicial direction to conduct a fresh security assessment, let alone a direction that any such "updated" assessment be an *adverse* one.

11. The brief to the DGS also contained a draft letter from the DGS to the Secretary of DHA (**AB 1125**), stating, "[a]ttached is a security assessment for the Minister for Home Affairs recommending that [the respondent's] visa application be refused."

12. On 27 October 2020, the DGS approved the fresh ASA (**2020 ASA**) (**AB 735**) and signed the letter to the Secretary of DHA. The 2020 ASA was accompanied by a 15-page "truncated statement of grounds" (**2020 TSOG**) (**AB 736**), which confirmed that the purpose of the 2020 ASA was

> to advise the Minister for Home Affairs or their delegate whether the requirements of security make it *necessary or desirable for prescribed administrative action to be taken to refuse to grant [the respondent] a TPV (subclass 785).* [Emphasis added.]

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[2] 2018 TSOG (commencing **AB 405**) at [18]-[21], [24], [29], [42]-[50], [55], [93], [103]-[105].
[3] 2018 TSOG (commencing **AB 405**) at [43] ("ASIO assesses these collections were likely for the purpose of assisting EIJ members (and their families) who had been imprisoned in Egypt"); [44] ("ASIO assesses this transfer of funds from the RIH bank account to [redacted] was likely for the purpose of providing financial support the families of imprisoned EIJ members in Egypt"); [46] ("On the basis of the efforts to conceal the money and the EIJ connections to the recipient of the money, ASIO assesses the transfers described by [redacted] in his confession were likely for the purpose of supporting EIJ, although the exact nature and purpose of the funds transfers are unknown").
[4] *Plaintiff S111A/2018 v Minister for Home Affairs (No 2)* [2020] FCA 499 at [2].
[5] *Plaintiff S111A/2018 v Minister for Home Affairs* [2019] FCA 1271 at [9]-[10].
[6] *Plaintiff S111A/2018 v Minister for Home Affairs (No 3)* [2021] FCA 207 at [3].

13. The respondent had not made any new TPV application since his application of June 2015 had been refused in 2018. Nor had the Minister given any indication, at any material time, that the refusal of that TPV application might be reconsidered.

14. The 2020 TSOG stated that "[t]he same classified and open source information referred to [in it] was also relied upon in the 2014 and 2018 ASAs and their statements of grounds": **AB 749 [59]**. But despite the 2020 TSOG containing no new material information, its authors now *disavowed* reliance upon any RFAT material: **AB 749 [59]**.

Use of torture in the RFAT

15. The primary judge (**PJ**) found there to be a "likelihood" that evidence in the RFAT "was obtained through torture and/or 'prepared' by Egyptian authorities": J[8]. Similarly, her Honour found that ASIO's preparedness to take into account this evidence in the context of the 2018 ASA amounted to "acquiesc[ence] in the use of torture or other cruel, inhuman or degrading treatment or punishment": J[353]. Indeed, the PJ found that this preparedness on ASIO's part entailed a "preparedness to rely on the products of such conduct in its own assessments": J[353]. The appellants do not appear to challenge any of these findings. They do not appear to deny that RFAT evidence against the respondent was the product of torture.

16. Nor could the appellants deny this. There was a profusion of unchallenged evidence demonstrating that evidence in the RFAT was the product of torture: see, eg, **AB 400 [65]**; **411 [22]**; **1257**; **1259**; **1263**; **1279**; **1281**; **1283**; **1285**; **1311-1312**; **1346**; **1351-1353**. The Department that became DHA itself formed the view that documents provided to it indicated that evidence used against the respondent in the RFAT was obtained under torture: **AB 49**. In the balance of these submissions, evidence derived from the use of torture — specifically, confessions or other testimony extracted from a person as a result of torturing that person — will be referred to as **"torture evidence"**.

Ground 1: validity of the 2018 ASA

17. The PJ concluded that the 2018 ASA had to be set aside because its reliance upon the RFAT material either rendered it legally unreasonable (J[8c], [344]) or resulted in a denial of procedural fairness (J[8a], [341]). Her Honour was correct for the reasons she gave, as explained below.

Legal unreasonableness

18. Parliament is taken to intend that a statutory power will be exercised reasonably.[7] The question is whether, "in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker" (original emphasis).[8] That question must be answered by reference to "the values drawn from the statute and the common law that fall to be considered in assessing the decision".[9] Chief amongst those values relevant to the decisions in the present matter is that "the English common law has regarded torture and its fruits with abhorrence for over 500 years".[10] That "rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system."[11] Accordingly, "[t]he law will not lend its support to the use of torture for any purpose whatever."[12] It excludes the use of torture evidence "on grounds of its barbarism, its illegality and its inhumanity".[13]

19. When considering whether the decision-maker here has abused his power, this "deeply ingrained"[14] common law norm is brought to bear upon the assessment not only of the outcome of the exercise of power but also upon "the reasoning process by which the decision-maker arrived at" that exercise.[15] In this regard, "the correct approach is to ask whether it was open to the [decision-maker] to engage in the process of reasoning in which it did engage".[16] The respondent's submission is that, properly construed, s 37 does not permit the decision-maker to engage in a reasoning process that takes account of torture evidence, and that the 2018 ASA was therefore legally unreasonable.

20. Certainly, the common law recognises that in particular statutory contexts its abhorrence of the fruits of torture must yield to the executive decision-maker's duty to protect public safety.[17] But AS at [20] are wrong in their apparent suggestion that the common law's condemnation of torture results only in a refusal to admit its fruits as evidence in a court of law. Abhorrence of torture would ring

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[7] *Minister for Immigration and Citizenship v* ***Li*** (2013) 249 CLR 332 at [26], [29], [63], [88]; *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541 at [80].
[8] *SZVFW* (2018) 264 CLR 541 at [80].
[9] *Minister for Immigration and Border Protection v* ***Stretton*** (2016) 237 FCR 1 at [9] (Allsop CJ). Nothing in *Stretton* is inconsistent with what was said in *SZVFW*: *Minister for Immigration and Border Protection v Mohammed* (2019) 269 FCR 70 at [26].
[10] *A v Home Secretary* at [51] (Lord Bingham).
[11] *A v Home Secretary* at [83] (Lord Hoffmann).
[12] *A v Home Secretary* at [112] (Lord Hope). This passage was cited with approval by a unanimous UK Supreme Court in *Shagang Shipping Company Ltd (in liq) v HNA Group Company Ltd* [2020] UKSC 34 at [107].
[13] *A v Home Secretary* at [112] (Lord Hope); *Shagang Shipping Company Ltd (in liq) v HNA Group Company Ltd* [2020] UKSC 34 at [107].
[14] *A v Home Secretary* at [129] (Lord Rodger).
[15] *Minister for Immigration and Border Protection v* ***Singh*** (2014) 231 FCR 437at [47]; SZVFW at [81]-[82].
[16] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [133].
[17] See *A v Home Secretary* at [132] (Lord Rodger).

hollow if it entailed nothing more than a rule of evidence in judicial proceedings and a shrug of indifference in other contexts. Everything depends upon statutory context, from which (at least on one view[18]) the requirement of reasonableness derives.[19]

21. Here, that context supports the respondent's submission that the legislature cannot be taken to have countenanced the use of torture evidence by ASIO. In rendering a security assessment under s 37 of the *ASIO Act*, ASIO is bound by the strictures of natural justice,[20] subject to statutory modifications such as those limiting the disclosure of sensitive information.[21] Thus, the formulation of an assessment is not a power of an "essentially operational or short-term character"[22], such as might necessitate the use of torture evidence.[23] It is not akin to a power to act on a lead as to "the whereabouts of a ticking bomb".[24] Rather, it is a deliberative process, as confirmed by the fact that it is subject to full merits review in the AAT,[25] at which the applicant is entitled to be present, to adduce evidence and to put submissions.[26] When the AAT conducts such a review, it stands in the shoes of the original decision-maker,[27] and the DGS must provide it with "all relevant information …, whether favourable or unfavourable to the applicant".[28] The AAT's findings supersede those of ASIO (to the extent that they do not confirm ASIO's assessment).[29] None of this is redolent of a parliamentary intention that ASIO, and hence the AAT, be permitted to rely upon torture evidence, thereby flying in the face of the common law values which are the presumed backdrop for the enactment of the legislation.

22. To be clear: under this statutory scheme, a necessary implication of the appellants' position (AS [11]-[15]) that security assessments under s 37 may rely upon torture evidence is that the AAT may also rely upon such evidence. This would "abuse or degrade the proceedings"[30] in the Tribunal, especially where the statutory task of that body is to provide a "fair" review of administrative decisions in a way that "promotes public trust and confidence" in its decision-making.[31] AS are an

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[18] cf *Davis v Minister for Immigration* (2021) 288 FCR 23.
[19] *Li* (2013) 249 CLR 332 at [26], [29], [63], [88]; *SZVFW* (2018) 264 CLR 541 at [80].
[20] *Leghaei v Director General of Security* [2005] FCA 1576 at [83] (finding not challenged on appeal).
[21] See SDCV v Director-General of Security (2021) 284 FCR 357.
[22] *A v Home Secretary* at [73] (Lord Nicholls).
[23] Cf *A v Home Secretary* at [69] (Lord Nicholls).
[24] *A v Home Secretary* at [68] (Lord Nicholls).
[25] *ASIO Act* s 54(1).
[26] *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) s 39A(6), (13).
[27] *AAT Act* s 43
[28] *AAT Act* s 39A(3).
[29] *ASIO Act* s 61.
[30] *A v Home Secretary* at [150] (Lord Carswell). The phrase comes from *United States v Toscanino* 500 F 2d 267 (2d Cir. 1974) at 276.
[31] *AAT Act* s 2A.

eloquent demonstration of the truth of Sir William Holdsworth's observation that "[o]nce torture has become acclimatised in a legal system it spreads like an infectious disease."[32]

23. The respondent respectfully submits that in this statutory context, the PJ was correct to hold that ASIO's reliance upon torture evidence in the 2018 ASA was legally unreasonable, given the values that are necessarily brought to bear upon that assessment.[33] This Court should not countenance the distinction sought to be drawn at AS [11] between, on the one hand, "material and significant" reliance upon torture evidence and, on the other hand, reliance that is not "material and significant". Reliance upon torture evidence "corrupts and degrades"[34] the decision-making process irrespective of the precise extent of that reliance. The common law's condemnation of torture and its fruits does not turn upon fine gradations of materiality or significance. In any event, the sheer extent of the references to RFAT material in the 2018 TSOG (as observed above at [7]) demonstrates that the PJ was right to characterise ASIO's reliance upon it as she did. Mere assertions by ASIO that the material was treated "with caution" do not gainsay that conclusion (cf AS [11]).

Procedural unfairness

24. The requirements of legal reasonableness and procedural fairness necessarily intersect,[35] given that the procedure adopted by the decision-maker must be assessed against the applicable standard of reasonableness.[36] For the reasons explained above at [18]-[23], the process of decision-making with respect to the 2018 ASA was "corrupt[ed] and degrade[d]".[37] It resulted in "practical injustice"[38] to the respondent by requiring him to respond to evidence that had no lawful place in the reasoning process sanctioned by s 37 of the *ASIO Act*. In other words, just as the PJ held (J[341]), ASIO relied upon evidence that "*could not* be treated as credible, reliable and probative" (emphasis added) — that is, it was impermissible to treat the evidence that way. To do so was, as her Honour held (J[341]), to fail to adopt "a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances".[39]

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[32] Sir William Holdsworth, *A History of English Law* (3rd ed, 1945), vol 5, p194.
[33] *Stretton* at [9].
[34] *A v Home Secretary* at [82] (Lord Hoffmann).
[35] *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [62]; *Li* (2013) 249 CLR 332 at [99].
[36] *Singh* (2014) 231 FCR 437 at [47]; *SZVFW* at [81]-[82].
[37] *A v Home Secretary* at [82] (Lord Hoffmann).
[38] *Assistant Commissioner v Pompano Pty Ltd* (2013) 252 CLR 38 at [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [188] (Gageler J).
[39] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [53] (Gageler and Gordon JJ).

Ground 3 (and Notice of Contention): validity of the 2020 ASA

25. The respondent submits that the PJ should have held that the 2020 ASA relied upon torture evidence and hence was invalid for the reasons explained above at [18]-[24] (cf J[317]-[318]). In any event, the respondent submits that her Honour was correct to hold that the function of ASIO under s 37 of the *ASIO Act* was to "provide an assessment", which "needed to be prospective" (J[439]), and that ASIO had failed to do so (J[438], [444]).

Reliance upon torture evidence in the 2020 ASA

26. It is important at the outset to stress that where the Court is called upon to review an ASA, there is "little work for the principle that latitude is to be allowed in considering the reasons given by an administrative decision-maker".[40] On the contrary, the decision in question should be subjected to "a close examination".[41] That is the approach applied in the following submissions.

27. The 2020 TSOG articulates findings that "[i]t is likely [the respondent] travelled to Yemen in … 1995" (**AB 742 [28]**), and that he did so "as a member of [Egyptian Islamic Jihad (**EIJ**)]" (**AB 742 [29]**). No source is cited for either of these propositions (both of which the respondent had previously denied: **AB 742 [30]**). However, the first (unredacted) step in ASIO's reasoning to this conclusion is that "[o]pen source information from 20 November 2001 indicated EIJ members travelled to Yemen in December 1995 for a meeting attended by al-Zawahiri": **AB 742 [29]**. A source *is* cited for that proposition — namely, a November 2001 article from the *Wall Street Journal* entitled 'CIA-backed team used brutal means to break up terrorist cell in Albania': **AB 742 fn 54**.

28. That article was in evidence (**AB 1344**). Most of it is avowedly based upon "20,000 pages of confession transcripts and other documents" produced by the RFAT (**AB 1346**). It introduces its narrative with the statement, "the [RFAT] defendants' descriptions of their activities generally … provide a rare detailed account of the activities of a Muslim terrorist cell" (**AB 1346**). It repeatedly refers to their confessions (**AB 1347-1351**). The paragraph documenting the December 1995 meeting in Yemen cites a confession of Ahmed Ibrahim al-Naggar in the RFAT (**AB 1349**). A translated extract of the Egyptian court's decision in the RFAT that was also in evidence (upon which the 2018 TSOG relied and which it labelled as "[t]ranslated Egyptian court documents"[42]) (**AB 1128**) confirms that al-Naggar's confession in the case purported to disclose a December 1995

[40] *Jaffarie v Director-General of Security* (2014) 226 FCR 505 (*Jaffarie*) at [45] (Flick and Perram JJ).
[41] *SDCV v Director-General of Security* (2021) 284 FCR 357 at [169].
[42] 2018 TSOG (starting at **AB 405**) fn 33, 66, 68, 70-73, 75, 92, 97, 196-197.

meeting with Ayman al-Zawahiri in Sanaa, Yemen (**AB 1130**; **1133-1134**; **1136**[43]; **1137**; **1146**; **1149**). Other documents that were in evidence also confirm that al-Naggar was the victim of torture (see, eg, **AB 1311-1312**; **1351**).

29. The *Wall Street Journal* article was a secondary source that ASIO relied upon for the proposition that "EIJ members travelled to Yemen in December 1995 for a meeting attended by al-Zawahiri". As the article made plain, the primary source for that proposition was the RFAT confession of al-Naggar. The primary source was thus torture evidence. Reference to it in an American newspaper did not somehow sanitise it. Accordingly, ASIO's claim in the 2020 TSOG that it "has not taken into account any of the Returnees from Albania trial evidence" was false. So is the claim at AS [22] that the "2020 ASA placed no weight on information derived from [the RFAT]." The PJ erred in "treat[ing] what is said by ASIO in the 2020 TSOG as reflective of what in fact occurred": J[318].

30. Even if it were not for the clear reliance upon RFAT evidence identified immediately above, the respondent's submission that ASIO in fact relied upon torture evidence in the 2020 ASA should still be accepted. That is because, it is respectfully submitted, the 2020 ASA was no more than a preconceived repetition of opinions formed for the purposes of the 2018 ASA, which had themselves been based at least to some extent upon the RFAT material. Putting it another way, the 2020 ASA was a patch-up job designed to amend the 2018 ASA by disclaiming reliance upon the RFAT material, and the views expressed in the 2018 version were simply transposed to the 2020 iteration without the decision-maker undergoing a new, substantive mental process of assessment. Nor could the substantive bases for those original views (including the RFAT material) somehow be retrospectively forgotten or ignored. That is true despite ASIO's claims to the contrary.

31. The circumstances that would lead the Court to these conclusions are as follows. *First*, the 2020 ASA relies on no new material information. *Second*, the purported purpose of the 2020 ASA (to recommend refusal of the respondent's visa application) was nonsensical; there was no application capable of refusal. *Third*, the supposed impetus for the issue of the 2020 ASA — a direction from the court — was fictitious (see above at [10]). *Fourth*, ASIO's expression of that fictitious impetus displayed prejudgment by falsely imputing to the court a direction that the new assessment be "adverse" (see above at [10]). *Fifth*, the undertaking of the 2020 ASA happened to coincide with the pendency of a judicial proceeding in which the validity of the 2018 ASA was put in issue on the ground that it relied on torture evidence. *Sixth*, the brief to the DGS stated that "[t]his updated ASA will form part of [the Federal Court] challenge" (**AB 754**), even before the decision had been made

[43] The reference to December *1994* (as opposed to December 1995) appears to be a typographical error.

to issue the ASA and hence before the respondent had had any opportunity to react to it. *Seventh*, despite ASIO having had over 8 years to assess the respondent while he remained in immigration detention, the 2020 brief to the DGS had "priority" urgency and a deadline that fell only three days from the date on which it was "cleared" by ASIO (**AB 751**). *Eighth*, the 2018 ASA had recommended "that a further security assessment be requested from ASIO *should [the respondent] lodge a further visa application*" (emphasis added) (**AB 404**), which had not occurred. *Ninth*, as the PJ correctly concluded (J[384]), ASIO officers conducting the September 2020 interview had prejudged the issue, merely going through the motions in an interview consisting in large measure of "puttage". *Tenth*, of the vast set of information upon which ASIO did *not* rely for the 2020 ASA, it went out of its way to identify only one category — the RFAT material. *Eleventh*, despite the 2020 ASA occurring later in time (and hence despite ASIO having had longer to gather evidence), the 2020 TSOG is 20 pages shorter than the 2018 TSOG, providing less analysis and sparser reasoning. *Twelfth*, the 2020 TSOG confirmed, "[t]he same classified and open source information referred to above was also relied upon in the 2014 and 2018 ASAs and their statements of grounds" (**AB 749 [59]**).

32. In those circumstances, the Court should comfortably infer that the findings in the 2020 ASA were, in substance, those of the 2018 ASA. Accordingly, the Court should also conclude that the bases for those findings had not changed, despite ASIO's claims to the contrary. Once conclusions like those in the 2018 ASA have been reached, one cannot retrospectively, by the stroke of a pen, amend the grounds upon which they were reached in the first place.

The 2020 ASA was not forward-looking

33. The PJ held that an "assessment" for the purposes of ss 35 and 37 of the *ASIO Act* must be "substantially forward looking" (J[419]). AS appear not to take issue with that requirement so much as with her Honour's analysis of whether it was satisfied by the 2020 ASA: AS [23]-[28]. Her Honour's conclusions that the 2020 ASA was not "substantially forward looking" and hence that there was a "failure by [the DGS] … to perform the task that s 37(1) requires" (J[444]) were correct.

34. In order to understand why that is so, it is important to appreciate that an assessment under s 37 "is not a matter that exist[s] in the abstract under the *ASIO Act* divorced from any prescribed administrative action[44] to which the assessment was connected and for which it was made."[45] The

[44] "Prescribed administrative action" is defined in s 35 of the *ASIO Act*.
[45] *MYVC v Director-General of Security* (2014) 234 FCR 134 at [54]. This was endorsed by the Full Court in *SDCV v Director-General of Security* (2021) 284 FCR 357 at [170].

"function of ASIO in preparing the adverse security assessment necessarily was concerned with the prescribed administrative action proposed".[46] Accordingly, the 2020 ASA, and the procedure adopted for the purpose of arriving at it, must be analysed in light of the "prescribed administrative action" to which it was directed. In this connection, the appellants submitted before the PJ:

> The prescribed administrative action with which the 2018 and 2020 ASAs were concerned was, and was only, *the refusal of the applicant's visa*. All that ASIO was required to consider was *the potential effect on security of the refusal of the visa*: **AB 137 [96]**. [Emphasis added.]

35. As it happens, the "prescribed administrative action" with which the 2020 ASA was concerned — refusal of the respondent's TPV application — was impossible to perform, since the application had already been refused some two years earlier, and had not been renewed (hence the PJ's conclusion that references to refusal of a visa were "inexplicable": J[242]). Thus, one reason the PJ *must* have been right in the conclusions identified above at [33] is that the 2020 ASA purported to address the effects of, and to recommend, a "prescribed administrative action" that was not, and cannot have been, in contemplation. Picking up the language of the appellants' submission quoted above at [34], ASIO cannot have considered any "potential" future "effect … of the refusal of the visa", because that refusal had already taken place, and, in the circumstances that obtained at the relevant time, could not take place again.

36. For that reason, the 2020 ASA cannot have been anything other than backwards-looking. In that light, the PJ's analysis of the questioning of the respondent by ASIO officers (J[409]-[444]) was necessarily correct, as was the conclusion that there was a failure to perform the task that s 37(1) requires (J[444]). No doubt there were "prescribed administrative actions" under the *Migration Act 1958* (Cth) to which the 2020 ASA *might* theoretically have addressed itself conformably with s 37 of the *ASIO Act*. But then, as recognised in the appellants' own submissions (see above at [34]), ASIO would have had to consider the potential security effects of *those* particular administrative actions, whatever they might have been. It did not do so. It addressed itself to a question that had arisen only in the past — namely, whether the respondent's TPV application should be refused.

37. For these reasons, the appeal should be dismissed.

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21 September 2022

[46] *MYVC v Director-General of Security* (2014) 234 FCR 134 at [54]. This was endorsed by the Full Court in *SDCV v Director-General of Security* (2021) 284 FCR 357 at [170].