FEDERAL COURT OF AUSTRALIA

CWE22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 1461

File number:	NSD 656 of 2022
Judgment of:	**WIGNEY J**
Date of judgment:	7 December 2022
Catchwords:	**MIGRATION** – Minister's failure or refusal to make decision in respect of applicant's visa application within a reasonable time – applicant charged with relatively minor conduct – visa application refused on character grounds pursuant to s 501(1) of *Migration Act 1958* (Cth) – that decision set aside by Administrative Appeals Tribunal and remitted to Minister with a direction as to non-applicability of s 501(6)(d)(i) in respect of character finding – bureaucratic dance ensued over 18-month period – consideration of decision-making framework for protection visas under *Migration Act 1958* (Cth) – finding that delay of over four years since initial visa application was and is unreasonable – no justification for delay established by Minister in the sense discussed in *Thornton v Repatriation Commission* (1981) 52 FLR 28 – writ of mandamus to issue compelling Minister to perform duty in respect of applicant's visa application – Minister to pay applicant's costs
Legislation:	*Migration Act 1958* (Cth) ss 36(2)(a), 36(1B), 36(1C), 36(1C)(b), 36(2), 36(2C), 36(2C)(b)(ii), 36A, 65, 501, 501(1), 501(6)(d)(i), 501A
Cases cited:	*AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424; [2019] FCAFC 27 *ASP15 v Commonwealth* (2016) 248 FCR 372; [2016] FCAFC 145 *Bidjara Aboriginal Housing & Land Company Ltd v Indigenous Land Corporation* (2001) 106 FCR 203 *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 *KDSP v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* (2021) 95 ALJR 666; [2021] HCA 24 *MZAPC v Minister for Immigration and Border Protection*

(2021) 390 ALR 590; [2021] HCA 17

Oliveira v The Attorney General (Antigua and Barbuda) [2016] UKPC 24

Plaintiff S297/2013 v Minister for Immigration and Border Protection (2014) 255 CLR 179; [2014] HCA 24

Re Australian Bank Employees' Union; Ex Parte Citicorp Australia Ltd (1989) 167 CLR 513; [1989] HCA 41

Thornton v Repatriation Commission (1981) 52 FLR 285

Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	144
Date of hearing:	14 November 2022
Counsel for the applicant:	Mr O Jones
Solicitor for the applicant:	Ray Turner Immigration Lawyers
Counsel for the respondent:	Mr G Johnson
Solicitor for the respondent:	Clayton Utz

ORDERS

NSD 656 of 2022

BETWEEN:	**CWE22** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **7 DECEMBER 2022**

THE COURT ORDERS THAT:

1. A writ of mandamus issue in the form annexed to these orders.

2. The respondent pay the applicant's costs.

THE COURT NOTES THAT:

3. The procedure for the return of the writ of mandamus is governed by r 25.13 of the *High Court Rules 2004* (Cth), as applied by s 38(2) of the *Federal Court of Australia Act 1976* (Cth).

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

REASONS FOR JUDGMENT

WIGNEY J:

1 The central issue raised by this application is whether the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs has failed or refused to make a decision in respect of the applicant's visa application within a reasonable time.

2 The applicant, who has been assigned the pseudonym 'CWE22', but who will be called **Afshin** (not his real name) in these reasons, applied for a protection visa, along with members of his family, as long ago as April 2017. His mother and sister were granted protection visas in, or shortly after, December 2017. There is no dispute that Australia owes Afshin protection obligations. He is a refugee. Yet no decision has been made in respect of his visa application. Nor, for reasons that will be explained, is a decision likely to be made in the near future. Afshin claimed that a reasonable time for the Minister to make a decision in respect of his visa application had well and truly passed. He contended that the Minister should not be permitted to delay or defer making a decision for any longer. The Minister, however, claimed that the over 5-year delay in making a decision in Afshin's case was reasonable and that the circumstances justified the further deferral of any decision.

3 For the reasons that follow, the Minister has failed to adequately explain or justify the delay in making a decision in Afshin's case. A reasonable time for making a decision has passed and it would not be reasonable for the Minister to defer making a decision as proposed. A writ of mandamus should issue compelling the Minister to make a decision in respect of Afshin's visa application forthwith, though the writ should be returnable in 14 days.

UNCONTENTIOUS OR INELUCTABLE FACTS

4 Most of the facts of Afshin's unfortunate case are uncontentious or ineluctable. It was the Minister's attempt to explain or justify the delay that was contentious.

Afshin's passage to Australia

5 Afshin is a 25-year-old Iranian citizen. In 1991, as a five-year-old child and while still in Iran, he witnessed a car accident in which five members of his family, including his father, were killed. Afshin's mother believed that the crash was politically motivated. She feared that she and her children would be harmed by the Iranian authorities due to her brother-in-law's political activism from Germany. She eventually decided to uproot her family and seek

asylum in Australia, though not through official channels. She and her family arrived at Christmas Island, by boat from Indonesia, in June 2013. None of them had visas which permitted them to enter Australia. Afshin was 16 years old at that time.

6 When they arrived in Australia, Afshin and his family were considered to be "unauthorised maritime arrivals", as that expression is defined in the *Migration **Act** 1958* (Cth). They were accordingly detained in immigration detention. In September 2013, they were granted bridging and temporary safe haven visas, and released from detention.

7 Unfortunately for Afshin, his freedom and time in the Australian community was relatively short-lived.

March 2015 – convicted of offences

8 Afshin and his family relocated to Sydney in 2014. He got a job at a restaurant. One night in March 2015, Afshin was walking home after work when he was assaulted by a group of youths. According to Afshin, the assault was unprovoked. While he was attempting to get away from his assailants, he saw a police car. He started to bang on the police car so as to get the officer's attention. The officer told Afshin to wait while he parked the car. At that point, Afshin, thinking that the officer was ignoring him, became angry and spat in the officer's direction while the officer was still in the car. The result was that Afshin was charged with assaulting an officer in the execution of his duty and destroying or damaging property. The former charge arose from Afshin's conduct in spitting at the officer. The latter charge related to damage to the window of the police car which was apparently caused when Afshin banged on it.

9 Afshin pleaded guilty to the offences and was convicted on 19 March 2015. Given the nature of the offending behaviour and the fact that Afshin was a first offender, it is perhaps unsurprising that he received a very light sentence. He was sentenced to a 12-month good behaviour bond.

April 2017 – Afshin applies for a protection visa

10 The next relevant event to occur was that, in April 2017, Afshin and his family applied for protection visas. It may be inferred that the delay in them applying for protection visas was in large part a product of the restraints imposed by the Act in respect of visa applications by unauthorised maritime arrivals.

11 Afshin did not himself claim to fear that he would be persecuted or seriously harmed if returned to Iran. Those claims were made by his mother. Afshin claimed that he met the criteria for a protection visa because Australia owed his mother protection obligations and he was a member of the same "family unit" as his mother.

December 2017 – protection visas granted to Afshin's mother and sister

12 The Minister's department, currently called the **Department** of Home Affairs, acted fairly promptly in respect of the visa applications made by Afshin's mother and sister. On 22 December 2017, a departmental officer and delegate of the Minister found that Australia owed Afshin's mother protection obligations. The officer found that Afshin's mother had converted to Christianity and that there was a real chance that she would be persecuted in Iran on account of her conversion and intention to practise her religion openly. It would seem that Afshin's mother and sister were subsequently granted protection visas. There is no evidence as to precisely when those visas were granted. In the absence of any contrary evidence, however, I would readily infer that decisions were made in respect of the visa applications of Afshin's mother and sister on or shortly after 22 December 2017.

13 The important point to emphasise at this juncture is that it is readily apparent that, despite decisions having been made in respect of the visa applications made by Afshin's mother and sister, and despite the fact that Afshin was part of the same family unit as his mother, the Minister made no such decision in respect of Afshin's visa application. There was no direct evidence which explained why the Minister made no decision in Afshin's case. In the absence of any evidence to the contrary, I would infer that the Minister made no decision in Afshin's case at this point in time because, over two and a half years earlier, Afshin had been convicted of the fairly minor criminal offences referred to earlier. There appears to be no other rational or reasonable explanation.

14 What is perhaps even more significant is that, as will be seen, another three years passed and yet no decision was made in respect of Afshin's visa application. No explanation whatsoever has been proffered for that over three-year delay. It would again appear that the only rational explanation is that the delay was occasioned by a number of incidents that occurred over that period that resulted in Afshin being convicted of various criminal offences. It might reasonably be ventured, however, that had Afshin's visa application been decided promptly, along with his mother's and sister's applications, none of those events may have occurred.

March 2018 – immigration detention

15 In early March 2018, Afshin was dismissed on the first day of his employment in a trade, apparently because he was thought not to possess the necessary skills. Afshin became angry and sent a threatening text to his erstwhile employer. Worse still, he attended his employer's house and damaged his car. As a result, Afshin was charged with using a carriage service to menace, harass or offend, destroying or damaging property, and stalking or intimidating. It would seem that Afshin pleaded guilty to the first of those offences on 7 March 2018, shortly after being charged, and pleaded guilty to the further offences a few months later. In relation to the first offence, Afshin was convicted and released, without passing sentence on him, upon him entering a recognizance to be of good behaviour for 12 months. He was similarly sentenced to good behaviour bonds in relation to the other two offences.

16 While Afshin received non-custodial sentences in respect of those offences, the Minister nevertheless decided to cancel his bridging visa with the result that, on 7 March 2018, he was taken into immigration detention. Afshin has effectively been in immigration detention since that time, though he has spent some short period in prison. He is currently on remand in respect of an offence allegedly committed while in immigration detention.

April 2018 to November 2019 – incidents in immigration detention

17 Afshin's time in immigration detention has been difficult. Incidents that have occurred in the centres where Afshin has been detained have led to him being charged and convicted of various offences. When one considers the facts and circumstances of those offences, it is difficult to avoid the conclusion that they were largely the product of the circumstances of Afshin's detention and his understandable sense of frustration and hopelessness.

18 In early April 2018, not long after his immigration detention commenced, Afshin vented his frustration on a computer monitor and television set in the common room of the immigration detention centre. A departmental note in respect of the incident recorded that during the "takedown" – an apparent reference to the fact that a detention officer restrained Afshin by "placing [him] on the ground" – Afshin bit the officer's arm. As a result of that incident, Afshin was charged, and in due course convicted, of causing harm to a Commonwealth public official and damaging Commonwealth property. He was ultimately released, without the passing of any sentence on him, upon him entering a recognizance to be of good behaviour for 12 months.

19 In March 2019, Afshin was involved in a more serious incident. On 28 March 2019, Afshin was sitting with a number of other detainees when his friend was seriously assaulted by another detainee. Afshin attempted to assist his friend and break up the fight. Later that evening, another scuffle broke out between detainees, apparently as a result of the earlier altercation. While Afshin was not initially involved in that scuffle, when a number of detention officers subsequently attended the area where the violence was occurring, Afshin attempted to run though the "staff containment line". He was intercepted and restrained. One of the officers who restrained Afshin received an injury, though apparently not a serious one.

20 A number of detainees were charged as a result of that incident. Afshin was charged with affray and obstructing a Commonwealth officer. In November 2019, he pleaded guilty and was convicted. For the affray, he was sentenced to a 24-month conditional release order. For the obstruction offence, he was sentenced to three months' imprisonment.

21 After Afshin's conviction in November 2019, a further 15 months passed without any decision in respect of his visa application. Apart from the short period he spent in prison as a result of the March 2019 incident, Afshin remained in detention during that period. There is no explanation for why no decision was made during that 15-month period.

March 2021 – Afshin's visa application refused on character grounds

22 On 5 March 2021, a delegate of the Minister made a decision in respect of Afshin's visa application. The delegate decided to refuse Afshin's visa application pursuant to s 501(1) of the Act.

23 Section 501(1) of the Act provides that the "Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Section 501(6) lists a number of circumstances in which a person does not pass the character test. One of those circumstances is, relevantly, that: "in the event the person were allowed to … remain in Australia, there is a risk that the person would … engage in criminal conduct in Australia": s 501(6)(d)(i) of the Act. The delegate, it seems, concluded, on the basis of Afshin's "criminal history", that if Afshin was allowed to stay in Australia there was a risk that he would engage in criminal conduct.

2 June 2021 – the Tribunal sets aside the delegate's decision

24 Afshin lodged an application to review the delegate's decision with the Administrative Appeals **Tribunal**. On 2 June 2021, the Tribunal set aside the delegate's decision and remitted Afshin's visa application to the Minister with a direction that Afshin is "not a person to whom paragraph 501(1)(d)(i) of the Migration Act applies". It may be assumed that the Tribunal intended that its direction refer to s 501(6)(d)(i) of the Act. While perhaps not directly relevant, it is worth setting out the concluding paragraphs of the Tribunal's reasons (at [75] and [76]) which summarise the basis of that finding:

> In my view, his behaviour in immigration detention, including his behaviour which led to criminal convictions, does not provide a realistic indicator of his tendency to engage in criminal conduct in the wider community. Moreover, the *deterrent effect* upon a person in his early twenties of such a long period of indefinite detention under conditions of strict detention, detained without any significant criminal record, cannot be underestimated. I note that eighteen months has passed since the magistrate noted that he required ongoing treatment in the community, and that he has been in the challenging circumstances of immigration detention for three years, without any definite release date
>
> Under the circumstances, I consider that there an insignificant risk of the Applicant engaging in further criminal conduct. His overall criminal record does not support a finding that he would engage in criminal conduct if allowed to remain in Australia. I am therefore not satisfied that the Applicant fails the character test by reason of paragraph 501(6)(d)(i).
>
> (Emphasis in original.)

25 It is equally worth noting that the Tribunal concluded that, even if it had been satisfied that Afshin did not pass the character test by reason of s 501(6)(d)(i), it would nonetheless have decided not to refuse Afshin's visa application. The Tribunal weighed up all the relevant discretionary considerations and concluded that those that weighed against refusing Afshin's visa outweighed those that weighed in favour of refusal.

The bureaucratic dance since remittal in June 2021

26 That brings us to the events that have occurred since Afshin's visa application was remitted to the Minister on 2 June 2021, noting that almost 18 months have passed since the remittal. That 18-month period is in many respects critical to the outcome of this application. As the Minister would have it, however, further deferral of the making of any decision in Afshin's case would be reasonable and justifiable no matter what happened over that 18-month period. The following outline of events is mostly based on the documentary record, or the evidence of departmental officers based on that documentary record.

27 Nothing much appears to have happened in the month following the remittal.

28 On 7 July 2021, an officer in one branch of the Department sent an email to officers in another branch and requested an "update" in respect of Afshin's visa application for potential inclusion in a "client brief" that the officer was preparing for the Minister's office. The email noted that Afshin's case had been "remitted with [a] direction on 2 June 2016", though that date appears to have been a typographical error and should have read 2 June 2021.

29 On 19 July 2021, the Department wrote to Afshin's representative and requested further information with respect to Afshin's claim that he was a member of the same family unit as his mother. While Afshin had previously been assessed as being part of the same family unit as his mother, it was considered necessary to conduct a further assessment given the effluxion of time.

30 Afshin's representative provided information in response to that request within three days.

31 On 26 July 2021, a delegate of the Minister found that Afshin was a member of the same family unit as his mother. The delegate also noted that Afshin's mother had been found to be a person in respect of whom Australia owed protection obligations and, based on her finding that Afshin was a member of the same family unit as his mother, determined that Afshin "is a person in respect of whom Australia has protection obligations as outlined in s36(2)(b) of the Act". The delegate's report also included the following note:

> I also note that on 10 June 2020, [Afshin], having been convicted by a final judgment of a particularly serious crime, was found not to be a danger to the Australian community. The delegate was satisfied that s36(1C)(b) of the Act does not apply to [Afshin] and that [Afshin] is not ineligible for the grant of a protection visa under s 36(2C) of the Act.
>
> Also, on 2 June 2021 the Administrative Appeals Tribunal set aside the delegate's decision to refuse to grant [Afshin] a Temporary Protection visa under the character provisions of the Act, and remitted the matter to the Department with a direction that s 501(6)(d)(i) does not apply to [him].
>
> (Footnotes omitted.)

32 The Minister did not, in this proceeding, adduce any evidence concerning the decision of a delegate, made on 10 June 2020, that she or he was not satisfied that s 36(1C)(b) applied to Afshin and that Afshin was not ineligible for the grant of a protection visa under s 36(2C) of the Act. Nor are those decisions referred to in the statement of reasons in respect of the delegate's decision to refuse Afshin's visa application pursuant to s 501(1) of the Act.

Putting that rather unsatisfactory state of affairs to one side for the moment, the significant point to emphasise is that, from as early as 10 June 2020, a delegate of the Minister had determined that, despite his past convictions, Afshin was not a danger to the Australian community: see s 36(1C)(b) and s 36(2C)(b)(ii) of the Act.

33 It should also be noted that the affidavit evidence adduced by the Minister suggested that the delegate's report dated 26 July 2021 was a draft report or assessment. There is, however, nothing on the face of the report to suggest that it is a draft. It is dated and signed by the delegate. In any event, on 26 July 2021, the same delegate prepared a note in which she recorded, for the purposes of s 36A of the Act, that she was satisfied that Afshin satisfied the criterion in s 36(2)(a) of the Act with respect to Iran (that is, that Afshin was a person in respect of whom the Minister was satisfied that Australia had protection obligations because he is a refugee) and also satisfied the criterion in s 36(1C) of the Act (that is, that Afshin was not a person whom the Minister considered, on reasonable grounds, was a danger to Australia's security, or a danger to the Australian community).

34 The delegate who made the decision on 26 July 2021 identified no reason why Afshin would not be eligible for a protection visa given the findings that had been made in his favour.

35 And yet there was still no decision in respect of Afshin's visa application.

36 What followed next could fairly be characterised as amounting to little more than bureaucratic buck-passing or paper-shuffling. I will avoid, where possible, using the multitude of acronyms employed by the bureaucrats as that makes the narrative borderline impenetrable.

37 On 30 July 2021, the Humanitarian Program Operations Branch of the Department referred Afshin's case to the Visa Applicant Character Consideration Unit of the same Department, which is apparently a unit within the Department's "National Character Consideration Centre". The purpose of that referral was said to be to "enable VACCU [Visa Applicant Character Consideration Unit] to complete any other considerations in respect of s 501 of the Act, including whether the then Minister is inclined to consider using his power under s 501A of the Act". Section 501A of the Act empowers the Minister to, among other things, set aside a decision of the Tribunal not to refuse a visa application under s 501(1) of the Act and refuse to grant a visa to the visa applicant. Before doing so, the Minister must be satisfied, among other things, that the refusal is in the "national interest".

38 Nothing much appears to have happened during August and September 2021, though affidavit evidence adduced by the Minister suggested that during that period "NCCC [the National Character Consideration Centre] engaged with CCCS [Complex and Controversial Cases Section] to determine if further action might be taken in respect of section 501A of the Act". That supposed engagement was not documented in any way and the officer who gave that evidence had no personal knowledge or recollection of the engagement.

The 23 September 2021 advice and recommendation

39 On 23 September 2021, the **Director** of the National Character Consideration Centre sent an email to Mr Luke **Morrish**, the **Assistant Secretary** of the Character and Cancellation Branch of the Department, who in that position also had responsibility for the Complex and Controversial Cases Section and the National Character Consideration Centre. As will be seen, Mr Morrish was called by the Minister as a witness in this proceeding. The email sought Mr Morrish's views and endorsement in respect of the Director's views and recommendations concerning two cases, one of which was Afshin's case. The Director's views and recommendations in respect of Afshin's case included the following:

> In light of the finding and direction made by the AAT in this case it would be open for the Minister to refuse the visa [under] one of the other limbs of the character test. However, looking at the offending type we do not think we should pursue the offending on other grounds as the offending is not sufficient enough to meet the national interest threshold. As noted below, Laura will shortly be providing some more detailed advice on our current concerns around the overuse of the national interest power and the implications of this.

40 The references to the "national interest threshold" and the overuse of the "national interest power" were plainly references to the requirement in s 501A that, before setting aside a decision of the Tribunal and refusing a visa application, the Minister must be satisfied that refusal is in the national interest. It is abundantly clear that the view of the Director of the National Character Consideration Centre was that Afshin's offending was not such that it could be said that refusing his visa application was in the national interest.

41 Under the subheading "Next Steps", the Director of the National Character Consideration Centre recommended that Afshin's offending was "not serious enough to warrant a Client Brief" and that his case should be referred back to the "processing area". In other words, the Director did not think that Afshin's case warranted referral to the Minister for the purposes of the Minister considering whether to exercise his powers under s 501A of the Act.

42 Mr Morrish did not reply or otherwise respond to the Director's email. Nor did he have any discussions with the Director in respect of his recommendations concerning Afshin's case. Moreover, despite the Director's clear recommendation that Afshin's case be referred back to the "processing area", it is readily apparent that it went nowhere. It supposedly remained with the Complex and Controversial Cases Section which, as has already been explained, was a section within the National Character Consideration Centre and the Visa Applicant Character Consideration Unit. If that sounds like Afshin's case was stuck in some sort of bureaucratic limbo, that would be a pretty fair assessment of the situation.

43 As has already been noted, the Minister called Mr Morrish as a witness in this proceeding, apparently in an endeavour to explain the delay in deciding Afshin's visa application. He was questioned in particular about what happened after, or as a result of, his receipt of the email from the Director of the National Character Consideration Centre. As discussed in more detail later, it would perhaps be an understatement to say that Mr Morrish's evidence was far from impressive or persuasive.

Inactivity and the "client brief" in mid-December 2021

44 Virtually nothing appears to have happened in respect of Afshin's case between late September and early December 2021. The apparent suggestion that during that period departmental officers were busily working away on Afshin's case, or otherwise fully engaged deciding cases considered to have a higher priority, is dealt with later.

45 On 3 December 2021, the former Minister's office requested the Department to prepare a "client brief" in respect of Afshin's case. The purpose of that brief was said to be to "provide information to the former Minister about the applicant's case to aid the former Minister's consideration of whether to exercise the power under section 501A of the Act". The brief was prepared by 13 December 2021 and provided to the former Minister's office on 14 December 2021.

46 The brief to the Minister was cleared by the Assistant Secretary, Mr Morrish. It is a fairly anodyne document. It simply contains a short chronological summary of Afshin's "visa history", though the chronology ceases at the Tribunal's decision of 2 June 2021. While a portion of the document is redacted on the basis of a claim of legal professional privilege, there is nothing to suggest that the brief makes any reference to the views and recommendations of the Director of the National Character Consideration Centre that the

"national interest threshold" was not met in Afshin's case and that Afshin's case should be referred back to the visa processing area for decision.

Silence and the closure of the client brief on 14 April 2022

47 It is abundantly clear that nothing happened in respect of Afshin's case in the four months that the client brief spent in the former Minister's office from 14 December 2021.

48 On 12 April 2022, an officer in the Detention Assurance and Reporting Section of the Audit and Assurance Branch of the Integrity Security and Assurance Division in the Chief Operating Officer Group of the Department sent an email to someone in the Visa Applicant Character Consideration Unit in respect of Afshin's case. The officer stated that she was preparing a "48 month report for the Ombudsman" in relation to Afshin's case. After recording the content of the previous October 2021 report to the Ombudsman in relation to Afshin's case, the officer requested an "update on the assessment of [Afshin's] TPV application under s501 of the Act, for inclusion in his 48 month report".

49 There was, in reality, nothing to update the Ombudsman about.

50 An acute appreciation of that reality appears to have prompted both the Visa Applicant Character Consideration Unit and the former Minister's office into uncharacteristically swift action, albeit action of the most mundane and bureaucratic kind. It prompted the acting Assistant Secretary of the Character and Cancellation Branch to contact the former Minister's office. That contact prompted the former Minister's office to authorise the closure of the "client brief" in relation to Afshin's case.

51 By 14 April 2022, the Visa Applicant Character Consideration Unit advised that it had "finalised its assessment under s501 and the case has been referred back to the visa processing area for further processing on 14/04/2022". An email from the Visa Applicant Character Consideration Unit to various other units or areas of the Department, including "Protection Assessment NSW and Qld", stated that "VACCU will not be taking any further action" in relation to Afshin's case and that "VACCU considers this referral finalised". More importantly, the email stated that "you may now proceed to finalise the client's visa application".

Events post-14 April 2022

52 Was Afshin's visa application finalised on or shortly after 14 April 2022 when the Visa Applicant Character Consideration Unit closed the referral and sent the case back to the "visa processing area" for finalisation? The short answer is no. It still has not been decided.

53 The Minister adduced affidavit evidence in order to explain why no decision was made after 14 April 2022, and why a decision has still not been made. More will be said concerning that evidence later in these reasons. It suffices to note at this point that the apparent justification for making no decision in respect of Afshin's case was that someone alleged that Afshin was involved in an assault at the Yongah Hill Immigration Detention Centre. There was, however, virtually no detail, let alone documentary evidence, concerning that allegation, or the Department's consideration of the allegation, or whether it provided any basis for any further delay in deciding Afshin's visa application. By 10 June 2022, the Australian Federal Police had advised that it had closed its investigation into the allegation. No charges were ever laid.

54 Perhaps more significantly, on 16 June 2022, Afshin was allegedly involved in an incident, again at the detention centre, which involved a fire. He was charged with an offence of damaging Commonwealth property. He has apparently been remanded in custody and is currently imprisoned at Albany Regional Prison. There was, however, virtually no evidence concerning the criminal charge or the progress of the criminal proceeding. The evidence extended no further than that the case against Afshin had been adjourned to 13 January 2023 for further mention in the Perth Magistrates Court.

55 As will be seen, the Minister in effect contended that the making of any decision in respect of Afshin's visa application can be deferred until the criminal proceeding against him is finalised, even if that may take many years.

RELEVANT PRINCIPLES

56 If a person makes a valid visa application, the Minister has a duty pursuant to s 47 and s 65 of the Act to consider and decide whether to grant, or whether to refuse to grant, the visa to the person.

57 There is no prescribed time within which the Minister must perform that duty. It is, however, well established that the duty must, by implication, be performed within a reasonable time,

the determination of which must be made "having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act": ***Plaintiff S297****/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179; [2014] HCA 24 at [37] (Crennan, Bell, Gageler and Keane JJ).

58 In ***Thornton*** *v Repatriation Commission* (1981) 52 FLR 285 at 292, it was said that, when considering whether an administrative decision had been made within a reasonable time, the "question is whether there are circumstances which a reasonable man might consider render [the] delay justified and not capricious" and that a delay "for a considered reason" may be justified, whereas a delay "in consequence of neglect, oversight or perversity" would not. That test has been followed and applied in a number of subsequent decisions, including decisions of the Full Court: see for example *Bidjara Aboriginal Housing & Land Company Ltd v Indigenous Land Corporation* (2001) 106 FCR 203; [2001] FCA 138 at [21]; *ASP15 v Commonwealth* (2016) 248 FCR 372; [2016] FCAFC 145 at [21]-[23].

59 Where there has been an unexplained delay in the making of an administrative decision, the persuasive onus shifts to the decision-maker to establish a satisfactory justification or explanation for the delay: *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590; [2021] HCA 17 at [109] (Gordon and Steward JJ); *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424; [2019] FCAFC 27 at [59] (Besanko and Thawley JJ).

60 Where no satisfactory justification or explanation for the delay is forthcoming, or the justification or explanation is not accepted, the delay is to be regarded as unreasonable: see ***BMF16*** *v Minister for Immigration and Border Protection* [2016] FCA 1530 at [27] and the cases there cited.

61 A writ of mandamus may issue to compel the performance of a public duty when there has been a refusal or failure to perform that duty: *Re Australian Bank Employees' Union; Ex Parte Citicorp Australia Ltd* (1989) 167 CLR 513; [1989] HCA 41 at 515. That includes where the duty has not been performed within a reasonable time: *Plaintiff S297* at [37].

THE DECISION-MAKING FRAMEWORK FOR PROTECTION VISAS

62 As just noted, when assessing whether a delay in making an administrative decision is unreasonable, regard must be had to the decision-making framework. It is necessary,

therefore, to consider the decision-making framework in respect of applications for protection visas.

63 Section 47 of the Act provides that the Minister is to consider a valid application for a visa and that that requirement continues until either the application is withdrawn, the Minister grants or refuses to grant the visa, or the further consideration is prevented by provisions of the Act that are not presently relevant.

64 Section 65 of the Act provides that, subject to provisions of the Act that are not presently relevant, after considering a valid application for the visa, the Minister is to grant the visa if satisfied that the applicable visa application charge has been paid, the health criteria (if any) and any other criteria prescribed by the Act or the *Migration* ***Regulations*** *1994* (Cth) have been satisfied, and the grant of the visa is not prevented by a number of other provisions of the Act including, relevantly, s 501 of the Act. The Minister must refuse to grant the visa if not satisfied of any of those things.

65 The criteria for a protection visa are set out in s 36 of the Act. The criteria may be summarised as follows.

66 First, the applicant must not have been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security: s 36(1B) of the Act. There has never been any suggestion that Afshin did not meet that criterion.

67 Second, the applicant must not be a person whom the Minister considers on reasonable grounds is a danger to Australia's security or, having been convicted of a particularly serious crime, is a danger to the Australian community: s 36(1C) of the Act. It has never been suggested that the Minister had any reasonable grounds to consider that Afshin was a risk to Australia's security. A delegate of the Minister decided as long ago as 10 June 2020 that Afshin was not a danger to the Australian community, or that there were no reasonable grounds to consider that he was. Afshin has not been convicted of any further offence since that date.

68 Third, the applicant must be a person in respect of whom the Minister is satisfied Australia owes protection obligations, or is a member of the same family unit of such a person: s 36(2) of the Act. A delegate of the Minister decided as long ago as 22 December 2017 that Australia owed protection obligations to Afshin's mother. Afshin's mother was granted a

protection visa on or shortly after that date. It may be inferred that Afshin's sister was also granted a protection visa, presumably on the basis that she was a member of the same family unit as her mother. There has never been any reason to doubt that Afshin was a member of the same family unit as his mother. On 26 July 2021, a delegate of the Minister determined that Afshin continued to be a member of the same family unit as his mother. There is nothing to suggest that any relevant circumstances have materially changed since those determinations were made.

69 Section 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. It may be accepted that the decision-making framework "includes a reasonable opportunity, where relevant, for the Minister or delegate (where permitted) to consider, and exercise, any powers under s 501" of the Act: *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 95 ALJR 666; [2021] HCA 24 at [54].

70 As outlined earlier, the former Minister, or at least one of his delegates, first turned his mind to whether to refuse Afshin's visa application pursuant to s 501(1) of the Act on 5 March 2021, almost four years after Afshin's visa application was lodged and well over three years after visas had been granted to Afshin's mother and sister. The delegate's decision to refuse Afshin's visa application pursuant to s 501(1) was swiftly overturned by the Tribunal and was remitted with a direction.

71 The former Minister and the Department appear to have been in a state of decision-making paralysis in respect of Afshin's case ever since.

A LENGTHY DELAY

72 There has unquestionably been a delay in the Minister making a decision in respect of Afshin's valid visa application. A valid visa application was made on Afshin's behalf as long ago as 26 April 2017. No decision has been made in respect of that application.

73 The delay in making a decision in respect of Afshin's visa application plainly requires a satisfactory explanation from the Minister.

74 It is useful to break the delay down into three periods: first, the period between the making of the visa application on 26 April 2017 and the delegate's decision made on 5 March 2021; second, the period between the Tribunal's decision on 2 June 2021 to set aside the delegate's

decision and remit Afshin's case to the Minister with a direction and 16 June 2022, when Afshin was charged with the latest offence; and third, the period from 16 June 2022 to present.

The first period of delay – 26 April 2017 to 5 March 2021

75 As detailed earlier, Afshin's visa application was lodged, as a member of his mother's family unit, as long ago as 28 April 2017. That is well over five and a half years ago.

76 A fairly prompt decision was made in respect of Afshin's mother's visa application. She was granted a protection visa on or shortly after 22 December 2017. It may be inferred that Afshin's sister was also granted a visa as a member of the same family unit as her mother. No decision was made in respect of Afshin's visa application until 5 March 2021, when a delegate refused the application pursuant to s 501(1) of the Act.

77 The delay of almost four years (or over three years from the time a decision was made in respect of his mother's visa application) is the first period of delay. It is a very lengthy delay and, as will be seen, the Minister made no attempt whatsoever to explain or justify it.

The second period of delay – 2 June 2021 to 16 June 2022

78 The second period of delay is the delay after the Tribunal set aside the delegate's decision to refuse Afshin's visa application pursuant to s 501(1) of the Act. That occurred on 2 June 2021, almost 18 months ago. The Tribunal remitted Afshin's matter to the Minister with a direction that Afshin was not a person to whom s 501(6)(d)(i) of the Act applied. That was and remains the only basis upon which it has ever been suggested that Afshin does not satisfy the character test.

79 The Tribunal's reasons for finding that Afshin was not a person to whom s 501(6)(d)(i) of the Act applied and directing the Minister accordingly were forceful and emphatic. Yet eighteen months have passed and there has still been no decision.

80 It may perhaps be accepted that it is reasonable to permit the Minister some period of time to consider the exercise of the power under s 501A of the Act. In this case, however, from at least 23 September 2021, a senior officer of the Department in the very area responsible for advising or assisting the Minister in respect of decisions of that nature had advised and recommended that Afshin's case was not serious enough to warrant even briefing the Minister about a possible decision under s 501A of the Act.

81 As will be seen, the evidence establishes that the advice and recommendation made on 23 September 2021 was either overlooked, neglected, or ignored. Nothing happened until early December 2021, when the Minister's office requested a brief in respect of Afshin's case. That brief was prepared and provided to the Minister in mid-December 2021. Yet nothing happened. When, in April 2022, the Department was required to provide an update to the Ombudsman in respect of Afshin's case, the brief was swiftly returned. It plainly had not been acted upon in any way.

82 After the client brief was closed, Afshin's case was referred back to the visa processing area for finalisation. But it was not finalised.

The third period of delay – 16 June 2022 to present

83 The third period of delay starts from 16 June 2022, when Afshin was charged with an offence of damaging Commonwealth property.

84 This period of delay is critical because, as will be seen, the Minister contended that the fact that Afshin was charged with that offence on 16 June 2022 not only somehow justified why no decision has been made to date, but also reasonably explains or justifies the ongoing deferral of the making of a decision in Afshin's case, perhaps for many years.

THE DELAY HAS BEEN AND IS UNREASONABLE

85 The Minister endeavoured to explain or justify at least some of the delay in deciding Afshin's visa application. The explanation or justification was, however, manifestly unsatisfactory. The delay in making a decision in respect of Afshin's case has been and is unreasonable in all the circumstances. A reasonable time for the making of a decision in respect of Afshin's visa application has passed. No further delay should be countenanced.

The first period of delay

86 The Minister made no attempt whatsoever to explain or justify the first period of delay and inactivity – the four years that passed between the time Afshin's mother lodged a protection visa application including Afshin as part of her family unit and the time that a delegate of the Minister decided to refuse to grant Afshin a visa pursuant to s 501(1) of the Act. In particular, no attempt was made to explain why, when decisions were made in respect of the visa applications by Afshin's mother and sister in December 2017, no decision was made in Afshin's case for a further three years and two months.

87 As discussed in detail earlier in these reasons, the only rational explanation for why no decision was made in respect of Afshin's visa application in December 2017 is that he had been convicted of two summary offences in March 2015. The offences were on just about any view not serious in all the circumstances. That is reflected in the fact that Afshin only received a 12-month good behaviour bond. He plainly was of good behaviour for the next two and a half years. Yet, those minor offences, committed in March 2015, appear to have stood in the way of Afshin being granted a visa when his mother and sister were granted visas in December 2017.

88 The events which followed are also discussed earlier in these reasons. Afshin was convicted of some further offences in March 2018 and, while he again received entirely non-custodial sentences for those offences, the Minister cancelled Afshin's bridging visa and he was taken into immigration detention. He was 21 years old at the time.

89 Afshin was subsequently convicted of offences committed while in immigration detention. It is tolerably clear from the evidence concerning the circumstances of those offences, and the sentences that were imposed in respect of them, that the offences were the product of the stress and frustration felt by Afshin as a result of his incarceration and the difficult conditions he encountered while in the detention centre. Yet the fact that Afshin committed those offences in detention was the main reason given by the Minister's delegate for refusing Afshin's visa application.

90 There is a cruel irony involved in this aspect of Afshin's treatment. Afshin spent almost three years in immigration detention before a delegate of the Minister deigned to make a decision in respect of his case. Had a decision been made in respect of Afshin's visa application within a reasonable time, it is highly unlikely he would have ever found himself in immigration detention and highly unlikely he would ever have committed the offences which provided the very basis for the delegate's refusal of his visa application.

91 The almost four-year delay between the time Afshin's visa application was lodged in April 2017 and the delegate's decision to refuse Afshin's visa application in March 2021 was manifestly unreasonable. The Minister made no attempt to explain or justify that delay. While the main focus of Afshin's case in support of the grant of a writ of mandamus was the delay which followed the decision of the Tribunal to set aside the delegate's decision and remit his case to the Minister with a direction, the initial delay cannot be ignored. The delay

that has occurred since June 2021 must be considered in light of the four-year delay which preceded it.

The second period of delay

92 The Minister made some attempt to explain or justify the second period of delay – the period of 12 months that passed between the Tribunal remitting Afshin's case to the Minister with a direction and the incident which occurred on 16 June 2022 which provides the basis of the Minister's ongoing justification for not making a decision in respect of Afshin's visa application.

93 The Minister's attempt to explain the delay during that period was a miserable failure.

94 The Minister adduced affidavit evidence from two departmental witnesses in order to explain the delay during this period: Ms Jill **Ogden** and Mr Morrish. Neither of those witnesses appear to have had any direct personal knowledge or direct involvement in Afshin's case.

95 Ms Ogden is currently the Assistant Secretary of the Humanitarian Program Operations Branch within the Refugee, Humanitarian and Settlement Division of the Department of Home Affairs. Ms Ogden did not, however, commence in that position until the end of July 2022. She was previously the Assistant Secretary of the COVID Border Measures Division of the Department. It is tolerably clear, therefore, that Ms Ogden was not in the branch or division of the Department which was responsible for making a decision, or ensuring a decision was made, in Afshin's case until very recent times. Her evidence seeking to explain or justify the past delay was plainly based entirely on what she had read or been told by others.

96 In any event, Ms Ogden's affidavit evidence contained no proper or acceptable explanation or justification for the delay in making a decision in respect of Afshin's case between the remittal from the Tribunal on 2 June 2021 and the date when Afshin was charged with an offence of damaging Commonwealth property.

97 Ms Ogden explained the bureaucratic processes that occurred following the remittal of Afshin's case on 2 June 2021. In summary, Afshin's application was first referred to a Protection Obligation Decision Maker for an assessment under s 36A of the Act. When (not surprisingly) that officer found that s 36A did not apply in Afshin's case because he was part of the same family unit as his mother, in respect of whom it had already been found Australia

owed protection obligations, Afshin's case was "returned" to the Visa Applicant Character Consideration Unit "to complete any other considerations in respect of s 501 of the Act". That occurred on 30 July 2021.

98 Afshin's case remained with the Visa Applicant Character Consideration Unit from 30 July 2021 to 14 April 2022.

99 It will be necessary to return to Ms Ogden's evidence again later as she also sought to justify or explain the delay that has occurred in respect of Afshin's case from 14 April 2022. To endeavour to understand what happened between 30 July 2021 and 14 April 2022, it is necessary to go to Mr Morrish's evidence.

100 As previously noted, Mr Morrish was and still is the Assistant Secretary of the Character and Cancellation Branch of the Department. In that position he was responsible for the Complex and Controversial Cases Section, the National Character Consideration Centre and the Visa Character Consideration Unit. Despite the fact that Afshin's case was supposedly referred to and assessed by both the National Character Cancellation Centre and the Visa Character Consideration Unit, Mr Morrish said that he had no direct involvement in Afshin's application. While he had some "touchpoints" in relation to "broader issues around the [Tribunal] process and the briefing of the Minister's office", he had no personal recollection of how Afshin's case was dealt with by the Department beyond what was recorded in the Department's documents.

101 As already noted, Afshin's visa application was referred to the Visa Applicant Character Consideration Unit on 30 July 2021. Mr Morrish's evidence was that "[i]n or about August and September 2021" Afshin's case was "considered" by the National Character Consideration Centre and referred to the Complex and Controversial Cases Section for consideration as to whether it "met the relevant threshold for referral to the former Minister … for consideration of exercising power under section 501A of the Act". Exactly how Mr Morrish was able to give that evidence is unclear given that he produced no document which recorded any such consideration or referral and, as already noted, he had no personal recollection of Afshin's case. Mr Morrish did not elaborate on what the relevant "threshold" for referral to the Minister was.

102 The only document referred to and produced by Mr Morrish which recorded any consideration that was given to Afshin's case by any person in any of the sections or units of

the Department in respect of which Mr Morrish had responsibility was an email that the Director of the National Character Consideration Centre sent to Mr Morrish on 23 September 2021. The contents of that email were discussed at length earlier in these reasons. It contained emphatic advice that Afshin's offending was not serious enough to warrant referral to the Minister and an emphatic recommendation that Afshin's application be referred "back to [the] processing area". It requested Mr Morrish's "views/endorsement" in respect of that recommendation.

103 Mr Morrish said nothing in his affidavit about receiving, reading or responding to that important email. He was, however, cross-examined about those topics. His evidence was unimpressive to say the very least. He claimed to have no recollection of responding to the email, though he appeared to accept that he most likely did not reply to it because the Department had no documentary evidence of him having done so. He said that he had a general practice of responding to emails that sought his views, but could give no explanation for why he did not follow that practice and reply to the Director's email, which clearly sought his views. He also had no recollection of discussing the content of the email with its author. There was no record of him having done so.

104 It is, in all the circumstances, abundantly clear that Mr Morrish did not respond to the email or take any action in respect of it. This is what he said in his evidence when pressed as to whether he was able to offer any explanation for why he did not respond to the email:

> No, I've – I've already indicated that – that I can't offer an explanation in relation to why I didn't respond other than the ongoing discussions in relation to the AAT case load, which was of significant interest to the Minister's office, resulted in a conversation with the Minister's office and, albeit some time later, in respect to this particular matter. And I would – I would say if I did, on reflection reading this particular matter and email, that would have been a course of action that I would have pursued in any case in terms of the Minister's office was clearly focussed on terms of AAT outcomes and application of personal powers in those particular matter.

105 That response rather typified the lack of clarity and obfuscatory nature of much of Mr Morrish's evidence. It amounted to little more than bureaucratic gibberish. When pressed to explain what he was talking about in that and similar responses, Mr Morrish ultimately revealed that his reference to the "AAT case load" was in fact a reference to the large number of cases at the time in which the Tribunal had set aside decisions of delegates of the Minister to refuse visa applications on character grounds. The Minister at the time was apparently "interested" in those cases and the possibility of him exercising the power under s 501A to set

aside such decisions on "national interest" grounds. The problem, however, was that there was no appropriate procedure to determine which of the matters could be dealt with without engagement with the Minister's office, and which warranted escalation to the Minister's office.

106 That, of course, did not explain why Mr Morrish did not respond to the email in respect of Afshin's case, though it perhaps assists in understanding why effectively nothing happened in respect of Afshin's case over the following months. The then-Minister and his delegates, it seems, made lots of adverse visa decisions on character grounds which were promptly reversed by the Tribunal. The Minister was "interested" in considering exercising his power to effectively overturn the Tribunal's decisions in those cases, but the Department did not have any system in place to sift out those cases which actually warranted the Minister's attention and those that did not. As a result, nothing happened in respect of those cases. Afshin's case got caught up in that bureaucratic stasis.

107 Despite the lack of any documentary record of what actually occurred, and despite Mr Morrish's lack of any actual recollection concerning Afshin's case, this is what Mr Morrish said in his affidavit about what occurred in the months between August and December 2021:

> The CCCS continued to work with VACCU as it appeared there were additional character limbs that might not have been assessed under the Tribunal ruling. In my experience, it is not uncommon for teams in the same branch to work through cases together.

108 That evidence is rejected as entirely unreliable and lacking in credibility. When questioned about it in cross-examination, Mr Morrish conceded that he had no actual knowledge or recollection that any such work was in fact being undertaken. He also conceded that there was no documentary record that anyone in the units or branches that he was responsible for in fact continued to assess Afshin's case after 23 September 2021. He claimed that his evidence was based on nothing more than his knowledge of the "standard practice" of the Visa Applicant Character Consideration Unit and Complex and Controversial Cases Section of the Department. That provided the most flimsiest of bases for his assertion that work was being undertaken. Mr Morrish's evidence about supposed activity in relation to Afshin's case between August and December really amounted to little more than speculation.

109 The more plausible and credible inference is that none of the work that Mr Morrish speculated about was in fact undertaken in respect of Afshin's case. It is clear from the

limited evidence adduced on the Minister's behalf that, at least by by 23 September 2021, the view had been reached at the Director level of the National Character Consideration Centre that, in Afshin's case, there was no reasonable basis for pursuing "additional character limbs" beyond the "limb" that had already been so soundly rejected by the Tribunal. In the face of the 23 September 2021 email, and the absence of any other documentary record, Mr Morrish's claim that "CCCS continued to work with VACCU" and that "teams" may have been working through Afshin's case was errant nonsense. The plain fact is that an assessment had been made about Ashfin's case by 23 September 2021 and that Mr Morrish, as the head of the relevant branch, did nothing whatsoever about that assessment.

110 It is worth pausing at this point to note that, save for a very short period of time when Afshin was in prison, by September 2021 Afshin had already been in immigration detention for three and a half years.

111 Nothing happened in respect of Afshin's case for another two months, when the Minister's office requested the preparation of a brief. Whether that inaction was a result of neglect, oversight or incompetence is beside the point.

112 There was a rather faint suggestion in Mr Morrish's affidavit that the lack of action in relation to Afshin's case had something to do with "prioritisation considerations" and that, compared to other cases, Afshin's case was not "afforded the highest priority". Once again Mr Morrish's evidence on that topic, when tested, was demonstrated to be entirely lacking in credibility and reliability. He conceded that he had no actual knowledge or recollection of any consideration in fact having been given to the prioritisation of Afshin's case. He also conceded that there was no documentary record of any such consideration having been given. He initially claimed that his evidence concerning prioritisation was based again on his knowledge of standard practice. That standard practice supposedly included that all cases were reviewed on a regular basis, but Mr Morrish was unable to even give a credible answer to the question whether those regular reviews were documented. When pressed further about the source or basis of his evidence that Afshin's case was not afforded the highest priority, Mr Morrish claimed that someone in the Department had given him that information, though his evidence as to exactly who provided him with the information remained very vague. Mr Morrish also conceded that his affidavit did not disclose that his evidence was based in part on what he had been told by others.

113 Mr Morrish also appeared to suggest, albeit indirectly or impliedly, that the Visa Applicant Character Consideration Unit was understaffed or overworked in the period between August 2021 and April 2022. Even if staffing or resourcing issues could provide a reasonable explanation or justification for delays in some cases, it provides no justification or explanation in this case. That is because, by the end of September 2021 at the latest, a senior officer within the relevant unit had in fact assessed Afshin's case and had advised, in fairly emphatic terms, that there was no basis for refusing his visa application on character grounds and that Afshin's case should be returned to the "processing area". The bureaucratic and administrative inactivity or paralysis that followed that advice had nothing whatsoever to do with staffing or resourcing issues. In any event, "absence of resources is not in general an excuse for maladministration": *Oliveira v The Attorney General (Antigua and Barbuda)* [2016] UKPC 24 at [37]; *BMF16* at [104].

114 As has already been noted, effectively nothing further happened in respect of Afshin's case until 3 December 2021 when the former Minister's office requested that a "client brief" be prepared. As discussed earlier, that was done fairly promptly, though the content of the brief was fairly anodyne and did not refer at all to the candid views and recommendation of the Director of the National Character Consideration Centre as recorded in his email to Mr Morrish on 23 September 2021. In any event, the preparation and conveyance of the client brief to the Minister in December 2021 did nothing whatsoever in terms of actually advancing a decision about Afshin's visa application. It is abundantly clear that the client brief was not acted upon at all.

115 Nothing whatsoever happened in respect of Afshin's case between 14 December 2021 and 12 April 2022. The Minister made no attempt to explain or justify that period of delay. It is readily apparent that neither Mr Morrish, nor anyone else in his branch, attempted to follow up the client brief or inquire of the former Minister what he intended to do in respect of Afshin's case during the period 14 December 2021 and 12 April 2022.

116 In April 2022, the Department was required to provide information concerning Afshin's case to the Ombudsman. The officer responsible for providing that report requested an update from the Visa Applicant Character Consideration Unit. That prompted a flurry of bureaucratic paper-shuffling on 14 April 2022 which resulted in the closure and return of the client brief from the former Minister's office, the finalisation of the assessment of Afshin's

case by the Visa Applicant Character Consideration Unit, and the referral of his case back to the "visa processing area" for further processing.

117 The speed with which the client brief was returned on 14 April 2022 clearly supports an inference that the former Minister had given no consideration whatsoever to Afshin's case while the client brief was with him. The speed with which the Visa Applicant Character Consideration Unit finalised its assessment on 14 April 2022 strongly supports an inference that nothing had changed since the assessment recorded in the email of 23 September 2021. Nothing had changed in the preceding seven months.

118 One would perhaps expect, in the circumstances, that when Afshin's case was returned to the "visa processing area" on 14 April 2022, a decision would have been made in respect of his case fairly swiftly. That was certainly not the case.

119 It is necessary to return again to Ms Ogden's evidence to try to work out what happened in the months following 14 April 2022. Regrettably, her evidence in that regard was, with the greatest respect, unhelpfully vague and general.

120 Ms Ogden stated that between 29 April and 2 May 2022 "NAFS [the National Allocations and Finalisation team] consulted internally regarding the operational impacts" of an assault allegation which had been made against Afshin in March 2022. Ms Ogden's affidavit contains no detail concerning the precise nature of the assault allegations. According to Ms Ogden, there were "further internal consultation in HPOB on the processing impact" of that allegation on 5 and 6 May 2022. Ms Ogden does not say who was involved in those consultations, or what, if anything, was decided or resolved to be done. Nor does she produce any documentary record whatsoever concerning those internal consultations. Ms Ogden does not even identify the source of her evidence about those matters. That is particularly significant given that she was not in the relevant branch at the time of the supposed internal consultations about the allegations and therefore plainly had no direct personal knowledge about them.

121 In any event, nothing eventuated from the assault allegation or the supposed consultations about it. The Australian Federal Police closed its investigation in early June 2022. No charges were ever laid.

122 In all the circumstances, Ms Ogden's evidence failed to provide a reasonable or adequate explanation for the two-month delay between 14 April 2022 and 16 June 2022, when Afshin was charged with the offence. Ms Ogden plainly had no personal knowledge of what occurred during that period and her vague and general evidence concerning the internal consultations that supposedly occurred during that period was unsupported by any documentary record and is deserving of little, if any, weight.

123 In all the circumstances, the Minister failed to provide a reasonable or adequate explanation or justification for the delay in making a decision in respect of Afshin's visa application from the time the Tribunal remitted the matter to the Minister on 2 June 2021. A reasonable time for the making of a decision in respect of Afshin's case passed by the end of September 2021 at the very latest, shortly after the Director of the National Character Consideration Centre sent an email to Mr Morrish which contained his candid views and recommendations. What followed that frank assessment by the Director could accurately be characterised as, at best, bureaucratic oversight and neglect or, at worse, administrative incompetence or perversity. On either view, it was not a delay "for a considered reason": *Thornton* at 292.

124 The Minister's submission that the delay has been adequately explained or justified has no merit and is rejected. The explanation or justification that was advanced related, in one way or another, to the supposed consideration of whether Afshin's visa application should be refused pursuant to s 501(1) of the Act on some basis other than that decided by the Tribunal, or the supposed consideration of whether the Minister should exercise the power under s 501A of the Act, or perhaps the consideration of whether Afshin fails to meet the criterion in s 36(1C)(b) of the Act. By the end of September 2022, however, the Minister and the Department had had more than ample opportunity to consider those issues.

125 The delay in making a decision in respect of Afshin's visa application from at least September 2021 was and is unreasonable. It has not been adequately or satisfactorily explained or justified. Indeed, the Minister's attempt to explain or justify the delay was an abject failure. The real explanation would appear to be that Afshin's case was the victim of administrative neglect, oversight or incompetence, or some form of decision-making paralysis.

The third period of delay and the future

126 For the reasons that have already been given, a reasonable time for the making of a decision in respect of Afshin's visa application has long passed. A decision in respect of his case should reasonably have been made no later than September 2021. That provides a sufficient basis for the granting of the relief sought by Afshin in this proceeding. It is nevertheless necessary to give some consideration to the events that have occurred since 16 June 2022 and the Minister's current explanation or justification for why no decision need be made in respect of Afshin's case in the near future.

127 It is readily apparent that the current explanation for why no decision has been made in respect of Afshin's case relates to the fact that on 16 June 2022, Afshin was charged with an offence of damaging Commonwealth property arising out of a fire at the Yongah Hill Immigration Detention Centre. All that is known in relation to the charge, however, is that it is alleged that Afshin set fire to his room in the detention centre. There is virtually no evidence as to what has happened in respect of the charge since it was laid over five months ago, save for an email tendered at the hearing which records that the criminal proceeding in respect of the charge has been adjourned for mention in the Perth Magistrates Court on 13 January 2023. Afshin did not apply for bail and was remanded in custody.

128 The evidence as to what the Minister and the Department have actually done, or decided to do, in respect of Afshin's visa application since he was charged is also far from satisfactory.

129 It may be accepted that the fact that Afshin has been charged with an apparently serious offence is a relevant fact when it comes to making a decision about Afshin's visa application. Ms Ogden's affidavit evidence, however, says nothing as to what, if any, deliberations have actually occurred, or what, if any, consideration has actually been given by the Department to Afshin's case since 16 June 2022. There is no suggestion, for example, that Afshin's case has yet again been referred to the Visa Applicant Character Consideration Unit as a result of his being charged. Nor is there any evidence to suggest that another "client brief" has been sent to the Minister. Indeed, there is no evidence that the Minister or anyone in the Department has specifically turned their mind to Afshin's case between June 2022 and the commencement of this proceeding. There is certainly no documentary evidence recording what, if any, consideration has been given to Afshin's case over the last six months.

130 The implicit suggestion in Ms Ogden's affidavit appeared to be that the fact that Afshin had been charged with an offence on 16 June 2022 was sufficient justification for the Department's apparent inactivity in relation to Afshin's case since that time.

131 As for the current position, the crux of Ms Ogden's evidence was, in effect, that the Department did not intend to make any decision in respect of Afshin's visa application until after the criminal charge against him has been finally determined. That is because, according to Ms Ogden, where there are pending charges against a visa applicant, "the Department's practice is that the decision-maker [in respect of the visa application] would await the final judgment of a court as this may influence the decision-makers assessment of whether the Applicant has satisfied the criteria outlined in s 36(1C) of the Act".

132 That is not to say that Afshin could expect that a decision would be made in respect of his visa application within a short space of time after the conclusion of the criminal proceedings. It appears from Ms Ogden's evidence that once the criminal proceedings were concluded, the merry-go-round would start all over again.

133 It is clear that, if Afshin was convicted and a delegate found that he was a danger to the Australian community, his visa application would be refused because he would fail to satisfy the criteria in s 36(1C) of the Act. But what if the delegate found that, despite his conviction, Afshin satisfied the criteria in s 36(1C) because he was not a danger to the Australian community? It seems that, even then, Afshin could not expect a speedy decision in his favour. According to Ms Ogden, if Afshin was found to meet the criteria in s 36(1C), his case would again be "referred to VACCU for consideration under s 501 of the Act" and if "VACCU were to determine that [Afshin] did not fail the character test VACCU would refer to the application back to HPOB for relevant processing under remaining Schedule 2 requirements including, that the applicant must satisfy regulation 785.226 of the Regulations and Public Interest Criterion 4001". That would presumably also be the case if Afshin was acquitted.

134 It will be recalled that as long ago as June 2020, a delegate of the Minister had decided that Afshin satisfied the criteria in s 36(1C) of the Act. It will equally be recalled that Afshin's case has already been referred to and from VACCU on various occasions over the last five years.

135 For the reasons that have already been given, a reasonable time for the Minister to decide Afshin's visa application has already expired. It expired as long ago as September 2021, if not before. The Minister was under a duty to make a decision in Afshin's case from that time.

136 The Minister contended, in effect, that even if there was a duty to make a decision in respect of Afshin's case back in September 2021, that changed when Afshin was charged with an offence in June 2022. In the Minister's submission, from that point in time there was no longer any active duty to make a decision in respect of Afshin's visa application. The making of any decision could be deferred until the criminal proceedings against Afshin were finalised, even if that may take many years.

137 The Minister's submission to that effect is rejected.

138 It might perhaps be accepted that, in some cases at least, it might be reasonable for the Minister to defer making a decision in respect of a visa application where the visa applicant has been charged with an offence. That might be the case where, for example, there had not already been an unreasonable delay in deciding the application and where the further delay was expected to be for a relatively short and determinate period. In *Thornton*, for example, it was held that it was not unreasonable for the decision-maker to delay making a decision until the High Court handed down a decision which was likely to bear on the legality of the decision. That delay was considered to be justified because it was a "delay for a finite and not an indefinite period" and the delay pending the handing down of the decision was unlikely to be "excessive": *Thornton* at 292.

139 This is not such a case. The delay in making a decision in respect of Afshin's case has already been excessive and manifestly unreasonable. It has not been satisfactorily explained or justified. The further delay envisaged by the Minister is, in effect, a delay for an indefinite period. It is also a delay that is in all the circumstances highly likely to be excessive. Despite the fact that six months has passed since Afshin was charged with the offence in question, little appears to have occurred in the criminal proceeding. He has not even been committed for trial. His criminal trial may not be heard for many years. It would, in all the circumstances, be unreasonable for the Minister to defer any further consideration of Afshin's case until the completion of the criminal proceedings, including any appeal or appeal period.

140 It should perhaps also be noted in this context that the Minister has a broad power to cancel a visa on character grounds under s 501(1) of the Act. It follows that, if the Minister decided to grant a protection visa to Afshin prior to the finalisation of the criminal proceedings, and Afshin was subsequently convicted, it would be open to the Minister to consider cancelling the visa. That provides another reason why it would be unreasonable to further delay the making of a decision in respect of the visa application.

A WRIT OF MANDAMUS SHOULD ISSUE

141 The Minister did not dispute that the Court had the jurisdiction and power to issue a writ of mandamus if it were found that the Minister had failed to perform the duty to make a decision in respect of Afshin's visa application within a reasonable time. For the reasons that have been given, there has been an unreasonable delay in making a decision in respect of Afshin's visa application. The Minister failed to adequately explain or justify that delay. A reasonable time for the Minister to make a decision in respect of Afshin's visa application has passed. It passed well over a year ago.

142 In all the circumstances of this case, the fact that Afshin was subsequently charged with a criminal offence in June 2022 provided no reasonable justification or explanation for the failure to make a decision in Afshin's case to date. It also provides no reasonable justification for continuing to defer the making of any decision until the finalisation of the criminal proceedings against Afshin. A reasonable time having already passed, the Minister has a duty to make a decision in respect of Afshin's case now on the basis of the information currently at hand. No further delay is warranted or justified.

143 A writ of mandamus compelling the Minister to perform the duty to make a decision in respect of Afshin's visa application forthwith, though the writ will be returnable in 14 days from the date of this judgment. A form of that writ will be annexed to the orders.

144 The Minister should pay Afshin's costs of this application.

I certify that the preceding one hundred and forty-four (144) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:

Dated: 7 December 2022