Relationship of international law and municipal law — Treaties — Effect in municipal law — International Covenant on Civil and Political Rights, 1966 — Article 12(4) — Right not to be arbitrarily deprived of right to enter one's own country — Cancellation of permanent visa — Whether visa cancellation contrary to Article 12(4) right — Whether procedural fairness requiring respondent to notify visa-holder of possible non-compliance with Article 12(4) and to invite submissions on same prior to cancellation — Whether potential non-compliance with Article 12(4) is mandatory relevant consideration — Decision in *Teoh* — Effect — United Nations Convention on the Rights of the Child, 1989 — Relevance

Aliens — Visa cancellation — Migration Act 1958 (Cth) — Australia's international obligations — Whether Minister required to consider international obligations if not arising from representations made on behalf of affected person — International Covenant on Civil and Political Rights, 1966 — Article 12(4) — Whether decision of Minister consistent with Article 12(4) — Decision in *Teoh* — Effect — United Nations Convention on the Rights of the Child, 1989 — Relevance — The law of Australia

RATU *v.* MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS[1]

([2021] FCAFC 141)

Australia, Federal Court. 12 *August* 2021

(Farrell, Rangiah and Anderson JJ)

SUMMARY:[2] *The facts*:—Mr Ratu ("the appellant") was a citizen of the Republic of Fiji who arrived in Australia in 1985 as a four-year-old child. At all relevant times, he was the holder of a Certain Unlawful Non-Citizens visa ("Visa"). In 2018, the appellant was sentenced to 14 months' imprisonment for various offences. Consequently, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the respondent") cancelled the appellant's Visa pursuant to Section 501(3A) of the Migration Act 1958 (Cth)

[1] The appellant was represented by Mr O. Jones, instructed by Firmstone & Associates. The respondents were represented by Mr P. Knowles, instructed by Mills Oakley.
[2] Prepared by Mr A. Moss.

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("the Act").[3] Although the appellant made representations seeking the revocation of that decision, on 20 July 2020 the respondent, acting pursuant to Section 501CA(4) of the Act,[4] refused ("non-revocation decision"). These representations made no reference, however, to Article 12(4) of the International Covenant on Civil and Political Rights, 1966 ("ICCPR"), which provided that "no one shall be arbitrarily deprived of the right to enter his own country". Neither did the respondent consider Article 12(4) in making the non-revocation decision. The appellant sought judicial review of the non-revocation decision. That application was dismissed by the primary judge on 11 December 2020.[5] The appellant appealed.

The appellant argued that the respondent's failure to put the appellant on notice that a decision under Section 501(3A) or 501CA(4) might be made contrary to Australia's obligations under Article 12(4) of the ICCPR constituted a denial of procedural fairness. He sought to rely on the High Court's decision in *Teoh*,[6] which held that the Australian Government's ratification of Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 ("the Convention") established a "legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention", and thus procedural fairness required "notice and an adequate opportunity of presenting a case" if a decision-maker proposed to act inconsistently with the Convention. The appellant also submitted that Article 12(4) of the ICCPR was a "mandatory relevant consideration" which the respondent had failed to consider.

Held (unanimously):—The appeal was dismissed.

(1) In some circumstances where a person was not a citizen of Australia but held a permanent visa, Australia might be a person's "own country" for the purposes of Article 12(4) of the ICCPR. Cancellation of a visa in such circumstances might mean that the person was deprived of the right to enter their "own country" (paras. 50 and 52).

(2) *Teoh* did not establish a legitimate expectation that a statutory decision-maker will act in conformity with Australia's international obligations generally, but only that an administrative decision-maker will act consistently with the obligation under Article 3(1) of the Convention to treat the best interests of an affected child as a primary consideration (paras. 45-8).

(3) *Teoh* did not establish a legitimate expectation that Article 12(4) of the ICCPR will be observed by an administrative decision-maker, nor that

[3] See paras. 11 and 12 of the judgment. Section 501(3A) of the Act required cancellation of a visa where the visa-holder was sentenced to a term of imprisonment of at least 12 months, served on a full-time basis in a custodial institution.

[4] See para. 14 of the judgment. Section 501CA(4) of the Act allowed a cancellation decision made under Section 501(3A) to be "revoked" where representations were made by a person and the Minister was satisfied either that the person passed the "character test", or there was "another reason why the original decision should be revoked".

[5] *Ratu* v. *Minister for Home Affairs* [2020] FCA 1779.

[6] *Minister for Immigration and Ethnic Affairs* v. *Teoh*, 104 ILR 460 at 474-5.

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procedural fairness required that an affected person be given an opportunity to make submissions as to why the Minister should not depart from Article 12(4) when exercising the power under Section 501CA(4) of the Act (para. 47).

(4) Parliament had expressed its intention that decisions made under Sections 501(3A) and 501CA(4) of the Act would not be "arbitrary" in the relevant sense, and therefore not inconsistent with Article 12(4) of the ICCPR. This was inconsistent with any obligation upon the Minister to draw Article 12(4) of the ICCPR to the attention of the relevant person and give them an opportunity to make submissions as to why the Minister should not depart from that Article (paras. 54-61).

(5) Unless Australia's international treaty or Convention obligations were raised in, or clearly arose from, the representations made on behalf of an affected person, the Minister was not required to consider them when making a decision under Section 501CA(4) of the Act and had no general or abstract duty to invite representations concerning such obligations (paras. 66 and 74).

The following is the text of the judgment of the Court:

1. This is an appeal against the judgment of a single judge of this Court in *Ratu* v. *Minister for Home Affairs* [2020] FCA 1779.

2. The primary judge dismissed the appellant's application for judicial review of a decision made by the respondent (the Minister) to not revoke the mandatory cancellation of the appellant's visa. The Minister's decision was made pursuant to s 501CA(4) of the Migration Act 1958 (Cth) (the Act).

3. The appellant's arguments in the appeal focus upon Art. 12(4) of the International Covenant on Civil and Political Rights (ICCPR), which provides that no-one shall be arbitrarily deprived of the right to enter their own country. The appellant submits that the Minister's failure to put the appellant on notice that a decision may be made contrary to Australia's obligation under Art. 12(4) was a denial of procedural fairness. The appellant also submits that the obligation under Art. 12(4) was a mandatory relevant consideration which the Minister failed to consider.

4. It is necessary to describe the factual background, the relevant legislative provisions, the Minister's decision and the judgment of the primary judge before considering the submissions of the parties.

BACKGROUND

5. The appellant is a citizen of Fiji. He arrived in Australia in 1985, as a four-year-old child. In 1999, he was granted a Certain Unlawful Non-Citizens (Class AG Subclass 833) visa.

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6. In 2001, the appellant was sentenced to a term of 16 years of imprisonment for murder. He was released from prison in 2016, but was sentenced to 14 months' imprisonment in 2018 for various offences against his partner, including assault occasioning bodily harm.

7. On 21 May 2018, a delegate of the Minister cancelled the appellant's visa pursuant to s 501(3A) of the Act (the cancellation decision).

8. The appellant was invited under s 501CA(3)(b) of the Act to make representations seeking revocation of the cancellation decision, and the appellant took up that invitation. On 22 July 2020, the Minister made the decision to not revoke the cancellation decision.

9. The appellant then applied to the Federal Court of Australia for judicial review of the Minister's non-revocation decision. That application was dismissed by the primary judge on 11 December 2020.

THE RELEVANT LEGISLATION

10. Section 501 of the Act has the heading, "Refusal or cancellation of visa on character grounds". Subsections 501(1) and (2) respectively confer a discretion upon the Minister to refuse or cancel a visa where the relevant person does not satisfy the Minister that the person passes the "character test" under s 501(6). Under s 501(3), the Minister's discretion to refuse or cancel a visa is enlivened when the Minister reasonably suspects that the person does not pass the "character test", and is satisfied that refusal or cancellation is in the national interest.

11. Section 501(3A) of the Act requires the cancellation of a visa in specified circumstances. The section provides:

> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

12. Section 501(6)(a) provides that a person does not pass the "character test" if, relevantly, the person has a "substantial criminal record". Section 501(7) provides that a person has a "substantial criminal record" if, (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the

person has been sentenced to a term of imprisonment of 12 months or more.

13. Section 501(6)(e) provides that a person does not pass the "character test" if a court in Australia or a foreign country has, (i) convicted the person of one or more sexually based offences involving a child; or (ii) found the person guilty, or found the charge proved, for such an offence.

14. The Minister's decision to not revoke the cancellation decision was made pursuant to s 501CA(4) of the Act. Section 501CA provides, relevantly:

501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)

(1) This section applies if the Minister makes a decision (the *original decision*) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
(2) For the purposes of this section, *relevant information* is information (other than non-disclosable information) that the Minister considers:
  (a) would be the reason, or a part of the reason, for making the original decision; and
  (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
(3) As soon as practicable after making the original decision, the Minister must:
  (a) give the person, in the way that the Minister considers appropriate in the circumstances:
    (i) a written notice that sets out the original decision; and
    (ii) particulars of the relevant information; and
  (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
(4) The Minister may revoke the original decision if:
  (a) the person makes representations in accordance with the invitation; and
  (b) the Minister is satisfied:
    (i) that the person passes the character test (as defined by section 501); or
    (ii) that there is another reason why the original decision should be revoked.

. . .

THE MINISTER'S DECISION

15. The Minister began by considering s 501CA(4)(b)(i) of the Act, and concluded that, by the operation of ss 501(6)(a) and (7)(c), the

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appellant had a "substantial criminal record", having been sentenced to a term of imprisonment of 12 months or more. The Minister was therefore not satisfied that the appellant passed the "character test".

16. The Minister then turned to the question of whether there was "another reason" why the cancellation decision should be revoked pursuant to s 501CA(4)(b)(ii) of the Act. The Minister summarised the reasons articulated by the appellant and then considered those reasons along with other relevant matters.

17. The Minister stated that, in conformity with Art. 3 of the Convention on the Rights of the Child (CROC), he had treated the best interests of the appellant's minor children as a primary consideration. The Minister concluded that it was in the best interests of the children for the cancellation decision to be revoked.

18. The Minister considered the impediments the appellant would face if removed from Australia to Fiji in terms of establishing himself and maintaining basic living standards. The Minister accepted that the appellant considered Australia to be his home, that he may experience emotional hardship if removed from Australia and separated from his family, and that he had no family, friends or support network in Fiji. The Minister concluded, however, that the appellant was relatively young and was resourceful and had work skills that may assist him in securing employment in Fiji.

19. The Minister considered the strength, nature and duration of the appellant's ties to Australia. The Minister accepted that as the appellant had lived in Australia for most of his life from a very young age, the Australian community may afford a higher tolerance of his criminal conduct. The Minister found that the appellant had made a positive contribution to the community for a period of time. The Minister accepted that the appellant's immediate family would experience emotional hardship and substantial financial and practical hardship if the cancellation decision were not revoked.

20. The Minister noted that, following the sentencing of the appellant for murder, a decision had been made on 13 February 2012 to not cancel the appellant's visa. The Minister observed that following the appellant's release from prison in 2016, he had committed acts of violence against his partner which resulted in a sentence of an aggregate term of 14 months' imprisonment. The Minister regarded the appellant's criminal conduct as very serious.

21. The Minister considered that there was an ongoing risk that the appellant would re-offend, and that if he re-offended in a similar manner, it could result in physical and psychological harm to a member or members of the Australian community.

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22. The Minister concluded that the appellant represented an unacceptable risk of harm to the Australian community, and that the protection of the Australian community outweighed the best interests of the children and other minor family members and other considerations. The Minister was not satisfied that there was "another reason" why the cancellation decision should be revoked.

23. It may be noted that the appellant did not make any representation to the Minister concerning the application of Art. 12(4) of the ICCPR, and that the Minister did not consider that Article.

THE JUDGMENT OF THE PRIMARY JUDGE

24. Before the primary judge, the appellant's first ground of review was that the Minister fell into jurisdictional error by failing to give proper, genuine and realistic consideration to the appellant's employment prospects in Fiji. The primary judge rejected that ground, and it has not been reprised in the appeal.

25. The appellant's second ground of review was that the appellant was denied procedural fairness by the Minister's failure to put the appellant on notice that the Minister might make a decision that would, contrary to Art. 12(4) of the ICCPR, arbitrarily deprive him of the right to enter or remain in Australia. The primary judge noted that:

> 15. . . . In support of that argument, it was contended that:
>
> (a) Australia is Mr Ratu's "own country" within the meaning of Art. 12(4) by reason that he has been in Australia since the age of four;
> (b) the Minister's decision not to revoke the cancellation decision "arbitrarily" deprived Mr Ratu of the right to enter and remain in Australia; and
> (c) that *Minister of State for Immigration and Ethnic Affairs* v. *Teoh* [1995] HCA 20; 183 CLR 273 (*Teoh*) remains good law and is authority that if the Minister is to act inconsistently with Article 12(4) of the ICCPR, the Minister must accord procedural fairness to Mr Ratu by giving notice that he intends to act inconsistently with the Article and the opportunity to Mr Ratu to respond.

26. The primary judge found it unnecessary to consider whether Australia was the appellant's "own country", or whether the visa cancellation was "arbitrary", within Art. 12(4), or whether *Minister for Immigration and Ethnic Affairs* v. *Teoh* (1995) 183 CLR 273 remained good law. Her Honour gave the following reasons for rejecting the appellant's ground:

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17. First, Mr Ratu's visa was cancelled by force of s 501(3A) of the Act, which requires the Minister to cancel a visa in the circumstances prescribed. There was no dispute that the circumstances prescribed applied to Mr Ratu and the Minister was required to cancel Mr Ratu's visa. It was that decision, and not the Minister's decision under s 501CA(4) of the Act, which rendered Mr Ratu liable for removal from Australia under s 198 of the Act and unable to re-enter. There is no scope for a procedural fairness obligation in respect of the Minister acting inconsistently with Art. 12(4) of the ICCPR in relation to the decision under s 501(3A) by reason that the decision of the Minister to cancel Mr Ratu's visa was mandatory upon satisfaction of the matters in that section.

18. Secondly, s 501CA(4), read with s 501(3A), evinces a clear, contrary legislative intention to the proposition that procedural fairness required the Minister to provide the opportunity to Mr Ratu to make submissions on Art. 12(4) of the ICCPR before making his decision whether or not to revoke the mandatory cancellation of Mr Ratu's visa. First, the mandatory operation of s 501(3A) is not conformable with Art. 12(4) of the ICCPR. Secondly, as the visa was cancelled by the operation of a law that required the Minister to act inconsistently with Art. 12(4) of the ICCPR, it is difficult to see how procedural fairness mandates that Mr Ratu be given the opportunity to make submissions on whether the Minister should act conformably with Art. 12(4) of the ICCPR in the exercise of his power under s 501CA(4).

19. Thirdly, Mr Ratu was put on notice in any event that a decision may be taken which would result in him being removed from Australia, and although no specific reference was made to Art. 12(4), Mr Ratu was specifically asked to address the "strength, nature and duration of [his] ties to Australia" and the effect of return to his country of citizenship. This was sufficient to put Mr Ratu on notice that the Minister may make a decision that was not conformable with Art. 12(4) of the ICCPR. Moreover, the Minister did in fact consider both Mr Ratu's ties to Australia and the hardship he would suffer from being removed from Australia. The fact that these considerations were outweighed by other considerations does not demonstrate either any breach of procedural fairness or other reviewable error.

27. Accordingly, the primary judge dismissed the appellant's application for judicial review, with costs.

THE SUBMISSIONS

28. The notice of appeal is somewhat obtuse. However, two grounds of appeal may be discerned from the appellant's submissions.

29. The first ground is that the primary judge erred in failing to hold that the appellant was denied procedural fairness by the Minister's failure to put the appellant on notice that the Minister might make a decision that would, contrary to Art. 12(4) of the ICCPR, arbitrarily

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deprive the appellant of the right to enter or remain in Australia. The second ground is that Art. 12(4) is a mandatory relevant consideration which the Minister failed to take into account.

30. The appellant's principal focus was on the first ground. The appellant observes that in *Teoh*, the High Court held that the visa holder had a legitimate expectation that the Minister would comply with Art. 3(1) of the CROC and that the legitimate expectation arises regardless of whether the visa holder was aware of Art. 3(1). The Minister was obliged to invite comment from the visa holder upon a proposed departure from that Article. The appellant submits that the *ratio decidendi* of *Teoh* extends to relevant provisions of other international treaties, including Art. 12(4) of the ICCPR. The appellant submits that the Minister's decision to not revoke the cancellation decision under s 501CA(4) of the Act involved a departure from Art. 12(4), and the Minister had denied the appellant procedural fairness by failing to invite comment upon whether the obligation should be observed.

31. The appellant's second ground asserts that Art. 12(4) of the ICCPR is a mandatory relevant consideration which the Minister was bound to consider. The appellant submits that where an administrative decision affects an international obligation, the obligation may constitute a mandatory relevant consideration. The appellant submits that the appellant's arrival in Australia as a young child and absence of connections with Fiji readily suggest a need to consider Art. 12(4).

32. The Minister submits that to the extent the reasoning of the majority in *Teoh* depends on the doctrine of legitimate expectations, it is no longer good law, that doctrine having been rejected by the High Court in subsequent cases. The Minister submits, alternatively, that the *ratio* of *Teoh* should be regarded as confined to Art. 3(1) of the CROC. The Minister also argues that any obligation of procedural fairness is subject to any contrary indication either in the relevant statute or in the form of a statement by the executive government, and that a contrary intention is found in the statutory scheme itself. Further, the Minister submits that a contrary intention is found in Ministerial Direction No 79 issued under s 499 of the Act, which "provides a broad indication of the types of issues that the Minister is likely to take into account for deciding whether to revoke the original decision to cancel [his] visa", and leaves no room for an assumption that the Minister would not exercise the power in accordance with Art. 12(4). It is also submitted that the decision cannot be described as involving an "arbitrary" deprivation of the right of a person to enter the person's "own country".

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33. The Minister submits that the appellant's argument that Art. 12(4) of the ICCPR is a mandatory relevant consideration is contrary to authority and contrary to principle.

CONSIDERATION

Ground 1: Denial of procedural fairness

34. The first ground asserts that the appellant was denied procedural fairness by the Minister's failure to put the appellant on notice that the Minister might make a decision which would, contrary to Art. 12(4) of the ICCPR, arbitrarily deprive the appellant of the right to enter or remain in Australia. The appellant submits that a legitimate expectation arose that the Minister would observe relevant international obligations, including under Art. 12(4), when making a decision under s 501CA(4) of the Act.

35. Article 12(4) of the ICCPR provides that, "No one shall be arbitrarily deprived of the right to enter his own country."

36. It is apparent that the Minister did not draw the attention of the appellant to Art. 12(4), nor invite comment from the appellant upon any proposed departure from the Article. It is not apparent that the Minister was under any obligation to do so.

37. The appellant's argument relies upon a number of premises, including the following:

(1) The *ratio decidendi* of *Teoh* is that, subject to any contrary intention expressed by the legislature or executive, a legitimate expectation arises that the decision-maker will act in conformity with Australia's international treaty obligations, irrespective of whether or not the affected person is aware of such obligations; and if the decision-maker proposes to make a decision inconsistent with any such obligations, the decision-maker must notify the affected person of the proposed departure and give the person an opportunity to make submissions against that course.
(2) That *ratio* has not been overruled by the High Court, so that lower courts are bound to apply it.
(3) In respect of decisions under s 501CA(4) of the Act, that legitimate expectation and obligation of procedural fairness has not been displaced by any contrary intention expressed by the legislature or the executive.
(4) The Minister's decision to not revoke the cancellation decision departed from Art. 12(4) of the ICCPR by arbitrarily depriving the appellant of the right to enter his own country, Australia.

(5) The Minister's failure to give the appellant an opportunity to comment upon that departure was material to the outcome of the decision.

38. In *Teoh*, the High Court considered a decision made under s 6(2) of the Act, which then conferred a broad discretion to grant a residence permit if particular criteria were satisfied, or to refuse a residence permit. The respondent, who had several Australian children, was refused a residence permit on the basis that he was not of good character. The case concerned whether a legitimate expectation arose that the decision-maker would act consistently with Art. 3(1) of the CROC, which required that the best interests of the children be a primary consideration, and whether procedural fairness required that the decision-maker give the respondent an opportunity to present a case against acting inconsistently with that expectation.

39. Chief Justice Mason and Justice Deane held at 290-2:

> Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law is a less than compelling reason—legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. *Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration"*. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.
>
> . . .
>
> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the

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provisions of the unincorporated convention into our municipal law by the back door . . . *But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course*. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

(Emphasis added, citations omitted.)

40. The reasoning of Toohey J in *Teoh* was similar. His Honour observed at 302 that, "there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation".

41. Justice Gaudron reached the same conclusion, reasoning at 304-5 that Art. 3(1) of the CROC gave expression to a fundamental human right, and created an expectation that the obligation would be given effect. Her Honour indicated that position may not necessarily apply to other treaties or conventions, "not in harmony with community values and expectations".

42. The doctrine of legitimate expectations has since been rejected by *obiter dicta* statements of the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [25], [61]-[63], [81]-[83], [116]-[121] and [140]-[148], *Plaintiff S10/2011* v. *Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65] and *Minister for Immigration and Border Protection* v. *WZARH* (2015) 256 CLR 326 at [28]-[30].

43. In addition, to the extent that *Teoh* suggests as a general principle that the ratification of an international treaty gives rise to a presumption or expectation that the executive government will act consistently with the treaty, even in the absence of legislation adopting the treaty as part of domestic law, that reasoning was strongly doubted by a majority of the High Court in *Lam* at [95]-[96], [98], [120]-[121] and [147].

44. The High Court has not directly overturned *Teoh*. An earlier *ratio* of the High Court is not overturned by later *dicta* of the High Court: cf. *Viro* v. *R* (1978) 141 CLR 88 at 151. Further, in *Jacob* v. *Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200 at 207, 217 and *Western Export Services Inc.* v. *Jireh International Pty Ltd* (2011) 86 ALJR 1; [2011] HCA 45 at [3]-[4], the High Court firmly rejected the capacity of lower courts to adjudge its decisions to have been impliedly overruled.

45. However, there is some difficulty in identifying the *ratio* of *Teoh.* The critical passages from the reasons of Mason CJ and Deane

J give rise to uncertainty as to the width of the *ratio*. Those passages contain a mixture of some statements that appear to be confined to the CROC and others that appear to extend more generally to other treaties. For example, their Honours stated at 291, "ratification of a convention is a positive statement . . . that the executive government and its agencies will act in accordance with the Convention". Their Honours continued, "[t]hat positive statement is an adequate foundation for a legitimate expectation . . . that administrative decision-makers will act in conformity with the Convention . . .". The reference to "a convention" was to conventions generally, whereas the references to "the Convention" were specifically to the CROC. Justice Toohey made the general statement at 301 that, "the assumption of such an obligation may give rise to legitimate expectations", but his Honour's later references were specifically to the CROC. Justice Gaudron's reasoning was confined to the status of the children as Australian citizens and the CROC.

46. In *Amohanga* v. *Minister for Immigration and Citizenship* (2013) 209 FCR 487, Edmonds J considered an argument similar to the argument presented in this appeal, that the applicant had a legitimate expectation that he would not, contrary to Art. 12(4) of the ICCPR, be arbitrarily deprived of the right to enter his own country. However, Edmonds J considered that the *ratio* of *Teoh* is limited to the principle of a legitimate expectation arising that a decision-maker will act consistently with the CROC. His Honour held at [37] that as *Teoh* had not considered the ICCPR, the Court was not bound to apply the decision in respect of the ICCPR.

47. The High Court did not directly refer to the ICCPR in *Teoh*. In light of the uncertainty as to the width of the ratio of *Teoh*, the narrow approach taken by Edmonds J in *Amohanga* should be accepted. It follows that *Teoh* does not establish that a legitimate expectation arises that Art. 12(4) of the ICCPR will be observed, nor that procedural fairness requires that the affected person be given an opportunity to make submissions as to why the Minister should not depart from Art. 12(4).

48. Even if the *ratio* of *Teoh* were understood as a broad principle that a legitimate expectation arises that a statutory decision-maker will act in conformity with Australia's international obligations, it was made clear in *Teoh* that a legitimate expectation is subject to any contrary indication by the legislature or executive. That qualification reflects the fundamental principle that the content of any obligation of procedural fairness depends upon the particular statutory context and the particular facts and circumstances of the case: see *SZBEL* v. *Minister for*

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Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 at [26]. As was observed by the High Court in *DQU16* v. *Minister for Home Affairs* (2021) 95 ALJR 352; [2021] HCA 10 at [19], the relevant question is not what the ICCPR provides, but the statutory question posed by the relevant provisions.

49. Section 501(3A) of the Act requires cancellation of a visa that has been granted to a person, in specified circumstances. Section 501CA(4) allows revocation of that cancellation. These are cognate provisions and should be considered together.

50. Article 12(4) of the ICCPR applies to protect a person from being "arbitrarily deprived" of the right to enter "his own country". In *Nystrom* v. *Australia* (Communication No 1557/2007), the United Nations Human Rights Committee stated at para 3.2 that the concept of "his own country" is broader than "country of his nationality", and at para 7.4 that the latter invites consideration of matters such as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere. It can be accepted that, in some circumstances, Australia may be a person's "own country" for the purposes of Art. 12(4) even though that person is not a citizen of Australia but holds a permanent visa.

51. Section 4(2) states that, "this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain". Under s 14, a non-citizen who is in the migration zone without holding a valid visa is an unlawful non-citizen. Sections 189 and 196 require detention of unlawful non-citizens followed by removal from Australia. The obvious intention of ss 501(3A) and 501CA(4) is that some non-citizens will be deprived of their right to enter or remain in Australia.

52. Section 501 "applies indifferently to all visas", as was observed in *KDSP* v. *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at [282]. Sections 501(3A) and 501CA(4) are not confined to recent entrants to Australia, but apply also to non-citizens who have lived in Australia for most or all of their lives and have no connection with another country other than formal citizenship. It can be accepted that, in some cases, Australia will be a visa holder's "own country", and that the cancellation of the visa will mean that the person is deprived of the right to enter their "own country".

53. As to what amounts to "arbitrary" deprivation under Art. 12(4), in *Nystrom*, the Committee stated at para. 7.6 that, "there are few, if any, circumstances in which deprivation of the right to enter one's own

country could be reasonable". The Committee seemed to be equating "unreasonableness" with "arbitrariness". In that case, the author's visa had been cancelled under s 501(2) of the Act: see *Minister for Immigration and Multicultural and Indigenous Affairs* v. *Nystrom* (2006) 228 CLR 566 at [3] and [72]. In circumstances where the decision to remove or deport the author had been made years after his convictions and release from prison and at a time when he was undergoing rehabilitation, the Committee ruled that the author's deportation was arbitrary.

54. For the reasons that follow, ss 501(3A) and 501CA(4) of the Act are inconsistent with any obligation upon the Minister to draw Art. 12(4) of the ICCPR to the attention of the relevant person and give the person an opportunity to make submissions as to why the Minister should not depart from that Article. The regime created under these provisions is quite different to the broad discretion under the version of s 6(2) of the Act that was considered in *Teoh*.

55. In the first place, there are strong indications that Parliament considered that decisions made under ss 501(3A) and 501CA(4) would not be arbitrary and, therefore, would not be inconsistent with Art. 12(4). In *Chu Kheng Lim* v. *Minister for Immigration* (1992) 176 CLR 1 at 38, the plurality held that courts should, "favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty". That is because, as Mason CJ and Deane J explained in *Teoh* at 287, in the enactment of a statute, Parliament is regarded, prima facie, as intending to give effect to Australia's obligations under international law.

56. Section 501(3A) is carefully drafted. It requires the Minister to be satisfied of the existence of specific conditions before the power to cancel can be exercised, namely that the person has been sentenced to a term of imprisonment of at least 12 months, or has been convicted or found guilty of at least one sexually based offence involving a child, and is serving a sentence of imprisonment on a full-time basis in a custodial institution. Although s 501(5) excludes the rules of natural justice in relation to a decision under s 501(3A), that reflects the mandatory nature of the cancellation decision and the provision of a later opportunity to make representations as to revocation. In *Falzon* v. *Minister for Immigration and Border Protection* (2018) 262 CLR 333, Gageler and Gordon JJ observed at [89] that, "the purpose of cancelling a visa pursuant to s 501(3A) is to exclude from the Australian community a class of persons who, in the view of Parliament, should not be permitted to remain in Australia". Accordingly, the purpose of s 501(3A) is to protect the Australian community.

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57. Section 501CA(4) allows a cancellation decision made under s 501(3A) to be revoked where representations are made and the Minister is satisfied that the person passes the "character test", or there is "another reason why the original decision should be revoked". Subsections 501CA(1)-(3) impose obligations of procedural fairness upon the Minister that must be complied with after the cancellation decision, but before a decision is made under s 501CA(4). Sections 476 and 476A provide for judicial oversight of the legality of visa cancellation decisions. Under Australian law, an administrative decision that is arbitrary may constitute a jurisdictional error and be liable to be quashed: see *Minister for Immigration and Citizenship* v. *SZMDS* (2010) 240 CLR 611 at [130], [135].

58. That Parliament considered the provisions do not *arbitrarily* deprive a person of the right to remain in Australia is strongly suggested by the assumption that Parliament intends to give effect to Australia's obligations under international law, taken together with the protective purpose of s 501(3A), the confinement of the provision to persons who have committed serious criminal offences and are currently serving a sentence of imprisonment on a full-time basis, the opportunity to seek revocation, the ability of the Minister to revoke the cancellation, and other legal protections.

59. There is another indication that Parliament considered that decisions made under ss 501(3A) and 501CA(4) would not infringe Art. 12(4) of the ICCPR. Section 8 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) requires that a member of Parliament who proposes to introduce a Bill must cause a statement of compatibility to be prepared. The statement must include an assessment of whether the Bill is compatible with human rights, including, under s 3(1), human rights recognised or declared by the ICCPR. The Explanatory Memorandum for the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), which introduced ss 501(3A) and 501CA into the Act, attached a Statement of Compatibility with Human Rights prepared by the Minister for Immigration and Border Protection. That statement discussed the potential incompatibility of the Bill with Arts. 6(1), 7, 9(1), 12(1), 13, 14(6) and (7), 17, 21, 22(1) and (2), 23(1), 24(1) and 26 of the ICCPR. It did not mention Art. 12(4). The inference to be drawn is that the Minister, and Parliament by passing the Bill, did not consider the Bill to be incompatible with Art. 12(4).

60. It may also be observed that the power to cancel a visa under s 501(3A) can only be exercised while the person is serving a sentence of imprisonment on a full-time basis in a custodial institution. In

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Nystrom, the Committee found that deprivation of the author's right to enter Australia was arbitrary where the cancellation of the visa had occurred "a number of years" after his release from prison. Although this is a relatively minor factor, it does demonstrate that the circumstances in *Nystrom* are distinguishable from any that may arise under ss 501(3A) and 501CA(4).

61. Parliament plainly saw the power to cancel a visa under s 501(3A), taken together with the power to revoke the cancellation decision under s 501CA(4), as rational, necessary, confined, reasonable, proportionate, and not arbitrary. Parliament must be understood to have considered that these provisions are not inconsistent with Art. 12(4) of the ICCPR.

62. In *WZARH*, the plurality held at [30] that, "the real question" is, "what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made".

63. In *Lam*, McHugh and Gummow JJ observed at [101] that the judgments in *Teoh* had accepted that unenacted international obligations are not mandatory relevant considerations. In *Applicant S270/2019* v. *Minister for Immigration and Border Protection* (2020) 94 ALJR 897; [2020] HCA 32, the plurality held at [33] that any non-refoulement obligation owed under Art. 33 of the Convention Relating to the Status of Refugees (Refugees Convention) is not a mandatory relevant consideration under s 501CA(4), and continued at [36]:

> It follows in this matter that, although the s 501CA(4) discretion is wide, it must be exercised by the Minister considering the claims and material put forward by the applicant. If *no* non-refoulement claim is made—as in this case—non-refoulement does not need to be considered in the abstract.

64. Similarly, in *Minister for Immigration and Border Protection* v. *DRP17* (2018) 267 FCR 492, the Full Court held at [47]:

> . . . There was only one question that the Minister ultimately had to answer under s 501CA(4)(b)(ii) of the Act. It was whether he was satisfied that there was another reason why the original decision should be revoked. In the course of answering that question, the Minister was required to consider the representations as a whole as a mandatory relevant consideration. If the Minister overlooks a substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked, which if accepted would or could be dispositive of the decision, the Minister may commit jurisdictional error . . . The primary judge held that "the right question" was whether non-refoulement obligations arose on account of what would happen

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to the respondent (being a person who had applied for a protection visa in Australia) if he were returned to China. As we have held, that claim was not raised in the representations and the Minister was not required to consider it. There was no error as a result of the Minister's failure to answer that question . . .

(Citations omitted.)

65. In *Minister for Immigration and Border Protection* v. *Maioha* (2018) 267 FCR 643, the Full Court, referring to *DRP17*, held at [48]:

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

(see also *Pennie* v. *Minister for Home Affairs* [2019] FCAFC 129 at [12]; *Hong* v. *Minister for Immigration and Border Protection* (2019) 269 FCR 47 at [66]-[70]; *Tohi* v. *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 at [60]).

66. Unless Australia's international treaty or convention obligations are raised in, or clearly arise from, the representations, the Minister is not required to consider them when making a decision under s 501CA(4) of the Act. The Minister has no general or abstract duty to invite representations concerning such obligations.

67. The appellant's proposition is that procedural fairness requires that the Minister notify any person whose visa is cancelled under s 501(3A) of the existence of Art. 12(4), inform the person that an adverse decision under s 501CA(4) may not conform with that Article and invite the person to make submissions upon that matter. That proposition cannot be accepted in light of the view taken by Parliament that ss 501(3A) and 501CA(4) are not inconsistent with Art. 12(4) and the legislative intention that the Minister is not required to consider Australia's international obligations unless they arise from the representations made.

68. It is unnecessary to consider whether the appellant was arbitrarily deprived of the right to enter his own country.

69. It is unnecessary to consider whether, upon Art. 12(4) of the ICCPR being raised in the representations in a particular case, it would be open to the Minister to decide that "another reason" for revocation is that the cancellation of the visa would contravene Art. 12(4). That issue was not argued.

70. It is also unnecessary to consider the Minister's further argument that Direction No 79 indicates an intention by the executive that

there can be no expectation that Art. 12(4) of the ICCPR will be complied with.

71. The primary judge was correct to hold that ss 501(3A) and 501CA(4) evince a clear, legislative intention inconsistent with any proposition that the Minister must notify the person of Art. 12(4) of the ICCPR and provide an opportunity to a person to make submissions upon why it should not be departed from. The appellant's first ground of appeal must be rejected.

Ground 2: Failure to take into account a mandatory relevant consideration

72. The second ground is that Art. 12(4) of the ICCPR is a mandatory relevant consideration for the Minister when making a decision under s 501CA(4) of the Act, and that the Minister failed to take that consideration into account.

73. As has been discussed, McHugh and Gummow JJ held in *Lam* at [101] that *Teoh* had accepted that unenacted international obligations are not mandatory relevant considerations: see also *Snedden* v. *Minister for Justice* (2014) 230 FCR 82 at [147]. In *Applicant S270/2019* v. *Minister for Immigration and Border Protection* (2020) 94 ALJR 897; [2020] HCA 32, the plurality held at [33] that any non-refoulement obligation owed under Art. 33 of the Refugees Convention is not a mandatory relevant consideration for s 501CA(4) of the Act.

74. There is nothing in the text, subject matter, scope or purpose of s 501CA(4) of the Act which requires that Art. 12(4) of the ICCPR must be taken into account, unless raised in, or clearly arising from, representations made to the Minister.

75. The appellant's alternative ground of appeal must be rejected.

DISPOSITION

76. The appeal must be dismissed.

77. The appellant should pay the respondent's costs of the appeal.

The Court orders that:

1. The appeal is dismissed.
2. The appellant pay the respondent's costs of the appeal.

[Report: Transcript]

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