FEDERAL COURT OF AUSTRALIA

Alexander Abramov v Minister for Foreign Affairs (No 2) [2023] FCA 1099

File number(s):	VID 335 of 2022
Judgment of:	**KENNY J**
Date of judgment:	15 September 2023
Catchwords:	**JUDICIAL REVIEW** – judicial review of Instruments made by the Minister designating and declaring the applicant pursuant to item 6A(a) of reg 6 of the *Autonomous Sanctions Regulations 2011* (Cth) (***Regulations***) – where item 6A(a) of the *Regulations* required the Minister to be satisfied that the applicant "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia" – proper construction of the *Regulations* – whether item 6A(a) of reg 6 requires a "clear and substantial nexus" – whether Instruments challenged are legislative or administrative in character – whether Minister's public statements constituted her reasons or findings – whether the Minister constructively failed to exercise jurisdiction in failing to understand the discretionary nature of the power – whether the Minister's state of satisfaction was reasonably formed on the material before her – whether the Minister acted on an error of fact resulting in the failure to perform the task required under item 6A(a) of reg 6 – whether the Minister denied the applicant procedural fairness in designating and declaring him without notice – whether the *Autonomous Sanctions Act 2010* (Cth) and the *Regulations* exclude procedural fairness **JUDICIAL REVIEW** – where the applicant made an application for revocation under reg 10 of the *Regulations* – where the Minister revoked the first Instrument of designation and declaration and immediately made a further Instrument re-designating and re-declaring the applicant – whether the Regulations permitted the Minister to re-designate and re-declare the applicant – whether the Minister departed from procedural representation to provide the applicant with an opportunity to comment on material by not disclosing a Departmental submission – whether Minister erred in not having applicant's statutory declaration physically before her
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth)

Autonomous Sanctions (Sanction Law) Declaration 2012 (Cth)

Autonomous Sanctions Act 2011 (Cth)

Autonomous Sanctions Amendment (Russia) Regulations 2022 (Cth)

Autonomous Sanctions Bill 2010 (Cth)

Judiciary Act 1903 (Cth)

Legislation Act 2003 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Statutory Declaration Act 1959 (Cth)

Cases cited:

ABT17 v Minister for Immigration and Border Protection [2020] HCA 34; 269 CLR 439

Amway of Australia Pty Ltd v Commonwealth of Australia [1999] FCA 283; 41 ATR 443

Anderson v Minister for the Environment, Heritage and the Arts [2010] FCA 57; 182 FCR 462

Applied Medical Australia Pty Ltd v Minister for Health [2016] FCA 35; 246 FCR 555

Athavle v New South Wales [2021] FCA 1075; 290 FCR 406

Australian Broadcasting Tribunal v Bond [1990] HCA 33; 170 CLR 321

Australian Retailers Association v Reserve Bank of Australia [2005] FCA 1707; 148 FCR 446

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353

Bank Mellat v Her Majesty's Treasury (No. 2) [2014] AC 700

Bienke v Minister for Primary Industries and Energy [1994] FCA 626; 125 ALR 151

Bosanac v Commissioner of Taxation [2019] FCAFC 116; 267 FCR 169

Burgess v Assistant Minister for Home Affairs [2019] FCAFC 152; 271 FCR 181

Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107; 252 FCR 352

Carroll v Sydney City Council (1989) 15 NSWLR 541

Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 66; 276 FCR 75

Chief Commissioner of Police v Nikolic [2016] VSCA 248; 338 ALR 683

Commissioner of Taxation v Rio Tinto Limited [2006]

FCAFC 86; 151 FCR 341

Commonwealth v Grunseit (1943) 67 CLR 58

CPCF v Minister for Immigration and Border Protection [2015] HCA 1; 255 CLR 515

Day v Harness Racing New South Wales [2014]; NSWCA 423; 88 NSWLR 594

Disorganized Developments Pty Ltd v South Australia [2023] HCA 22; 97 ALJR 575

Evans v Bread Manufacturers of New South Wales [1981] HCA 69; 180 CLR 404

Ex parte Hebburn Ltd: Re Kearsley Shire Council (1947) 47 SR (NSW) 416

Gardiner v Taungurung Land and Waters Council [2021] FCA 80

Greyhound Racing NSW v Cessnock & District Agricultural Association Inc [2006] NSWCA 333

Haoucher v Minister for Immigration and Ethnic Affairs [1990] HCA 22; 169 CLR 648

Harvey v Minister Administering Water Management Act 2000 [2008] NSWLEC 165; 160 LGERA 50

Hill v Green [1999] NSWCA 477; 48 NSWLR 161

Holmes v Deputy Commissioner of Taxation (NSW) (No 2) (1988) 19 ATR 1173

Kioa v West [1985] HCA 81; 159 CLR 550

Mackenzie v Head, Transport for Victoria [2021] VSCA 100

Marine Hull and Liability Insurance Co Ltd v Hurford [1985] FCA 548; 10 FCR 234

McQueen v Minister for Immigration, Citizenship and Multicultural Affairs (No 3) [2022] FCA 258

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; 264 CLR 541

Minister for Immigration and Border Protection v WZARH [2015] HCA 40; 256 CLR 326

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611

Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) [2004] HCA 32; 207 ALR 12

Minister for Immigration and Multicultural Affairs; Ex parte Miah [2001] HCA 22; 206 CLR 57

Minister for Immigration, Citizenship and Multicultural Affairs v McQueen [2022] FCAFC 199; 292 FCR 595

Minister for Immigration, Citizenship, Migrant Services

and Multicultural Affairs v Viane [2021] HCA 41; 274 CLR 398

Minister for Industry and Commerce v Tooheys Ltd (1982) 42 ALR 260 at 265; 60 FLR 325

Minister for Local Government v South Sydney City Council [2002] NSWCA 288; 55 NSWLR 381

Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd [1993] FCA 46; 40 FCR 381

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17; 273 CLR 506

Nathanson v Minister for Home Affairs [2022] HCA 26; 403 ALR 398

Nguyen v Minister for Home Affairs [2019] FCAFC 128; 270 FCR 555

O'Connor v Adamas [2013] FCAFC 14; 210 FCR 364

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; 246 CLR 636

Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic) [2018] VSC 589; 238 LGERA 344

Queensland Medical Laboratory v Blewett [1988] FCA 708; 84 ALR 615

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; 214 CLR 1

RG Capital Radio Ltd v Australian Broadcasting Authority [2001] FCA 855; 113 FCR 185

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; 241 CLR 252

SAT FM Pty Ltd v Australian Broadcasting Authority [1997] FCA 647; 75 FCR 604

Sinnappan v State of Victoria [1995] 1 VR 421

Tickner v Chapman [1995] FCA 987; 55 FCR 316

Twist v Randwick Municipal Council (1976) 136 CLR 106

Visa International Service Association v Reserve Bank of Australia [2003] FCA 977; 131 FCR 300

Wilkie v The Commonwealth [2017] HCA 40; 263 CLR 487

Zhao v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 998

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	337

Date of hearing:	25 October 2022, 26 October 2022
Counsel for the Applicant:	Mr R Merkel KC, with Mr S Rajanayagam and Mr J Maxwell
Solicitor for the Applicant:	Levitt Robinson
Counsel for the Respondent:	Mr P D Herzfeld SC with Mr B Lim
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 335 of 2022

BETWEEN:	**ALEXANDER ABRAMOV** Applicant
AND:	**MINISTER FOR FOREIGN AFFAIRS** Respondent

ORDER MADE BY: **KENNY J**

DATE OF ORDER: **15 SEPTEMBER 2023**

THE COURT ORDERS THAT:

1. Unless a party notifies the Court in writing within 7 days of today that orders to give effect to these reasons have been agreed between them, then the parties are to file and serve submissions (limited to 2 pages) in support of such orders as they propose to give effect to these reasons, together with a minute of order, by 4 pm on 29 September 2023.
2. Unless a party notifies the Court in writing within 7 days of today that an order as to costs has been agreed between them, then the parties are to file and serve submissions as to costs (limited to 3 pages) by 4.00 pm by 4 pm on 29 September 2023.
3. The parties have liberty to apply on reasonable notice.

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

REASONS FOR JUDGMENT

KENNY J:

1 Mr Alexander Abramov, who is the applicant in this proceeding, has applied under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act)** and ss 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) for judicial review. For the following reasons, Mr Abramov succeeds on one ground of his application. He does not succeed on the other grounds.

2 Mr Abramov is a Russian national. Until comparatively recently, he was on the board of the Skolkovo Institute for Science and Technology (**Skoltech**) and the Russian Geographical Society (**RGS**). He was also the non-executive Chairman of Evraz plc (**Evraz**) for some years before his resignation on 11 March 2022. Evraz is a company incorporated in the United Kingdom, with a number of subsidiaries (**Evraz Group**). The company's Annual Report & Accounts 2021 (to which both parties referred) disclosed that the Evraz Group is a very large multinational steel and coal-producing conglomerate, and that a substantial part of the Group's business involves the manufacture of steel products in Russia and Kazakhstan for use in those countries. The same document disclosed that the Evraz Group is also engaged in the production of coal, much of which it supplies to Evraz steel mills, and other major Russian coke and steel producers. It also disclosed that Mr Abramov is effectively Evraz's second largest shareholder.

3 The Minister for Foreign Affairs (**Minister**) is the respondent in the proceeding. This is because Mr Abramov challenges his inclusion by the Minister in the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth) (**Russia and Ukraine List 2014**) in April 2022 and, again, in September 2022.

4 On 7 April 2022, the Minister (formerly, Senator the Hon Marise Payne) made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No 11) Instrument 2022* (Cth) (**First Designation Instrument**). In so doing, the Minister amended the Russia and Ukraine List 2014. Relevantly for this case, the amendment added Mr Abramov's name and details as item 103 in Pt I of Sch 2 to the Russia and Ukraine List 2014, as follows:

103	Name of individual	Alexander Grigoryevich ABRAMOV
	Date of birth	20 February 1959
	Place of birth	Moscow, Russia

Instrument of first designation and declaration	*Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 11) Instrument 2022*
Additional information	Co-founder and Chairman of Evraz

In consequence, Mr Abramov became a "designated person" for Russia pursuant to reg 6(a) and "declared" pursuant to reg 6(b) of the *Autonomous Sanctions Regulations 2011* (Cth) (**Sanctions Regulations)**.

5 The Minister made the Russia and Ukraine List 2014 under reg 6 of the Sanctions Regulations. Relevantly for this case, item 6A in the table in reg 6 was introduced into that table by the *Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth) (**Russia Regulations**) on 24 February 2022. The title, text and timing of the Russia Regulations and the relevant Explanatory Statement indicate that the Russia Regulations were made in response to Russia's invasion of Ukraine. The Explanatory Statement recorded:

> The purpose of the *Autonomous Sanctions Amendment (Russia) Regulations 2022* ... is to introduce new listing criteria under the existing autonomous sanctions regime in relation to Russia in response to that country's significantly elevated threat to Ukraine's sovereignty and territorial integrity. Russia's aggression towards Ukraine presents a serious threat to the international rules-based order which underpins global security.
>
> ...
>
> The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. ...
>
> The purpose of a declaration is to prevent a person from travelling to, entering, or remaining in Australia. ...

6 On 16 September 2022 (and after this proceeding was instituted) the Minister (by then, Senator the Hon Penny Wong) made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No. 19) Instrument 2022* (**Revocation Instrument**) under reg 10(3) of the Sanctions Regulations. The Revocation Instrument amended the Russia and Ukraine List 2014 by removing item 103 in Pt 1 of Sch 2, thus ending Mr Abramov's "designated person" and "declared" status under reg 6 of the Sanctions Regulations.

7 After making the Revocation Instrument and on the same day, the Minister made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No. 20) Instrument 2022* (Cth) (**Second Designation Instrument**). In so doing, the Minister again amended the Russia and Ukraine List 2014, relevantly by re-

introducing Mr Abramov's name and details (again as item 103 in Pt 1 of Sch 2), with the result that Mr Abramov again became a "designated person" for Russia pursuant to reg 6(a) and "declared" pursuant to reg 6(b) of the Sanctions Regulations.

MR ABRAMOV'S APPLICATION

8 Mr Abramov's amended originating application (**amended application**: see [56] below) in terms sought review of:

> (1) the decision on 7 April 2022 by the Minister for Foreign Affairs, pursuant to s 2 of Schedule 1 to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No 11) Instrument 2022* (Cth) ... to amend the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) List 2014 (Cth)* (the **List**) to:
>
> (a) designate the Applicant as a "designated person" for Russia; and
>
> (b) declare the Applicant for the purpose of preventing him from travelling to, entering or remaining in Australia; and
>
> (2) the decision on 16 September 2022 by the Minister for Foreign Affairs, pursuant to s 1 of Schedule 1 to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No 20) Instrument 2022* (Cth) ... to amend the List to:
>
> (a) designate the applicant as a "designated person" for Russia; and
>
> (b) declare the applicant for the purpose of preventing him from travelling to, entering or remaining in Australia.

THE LEGISLATIVE SCHEME

9 It is worth bearing in mind that all of the Regulations to which I have so far referred, as well as the Russia and Ukraine List 2014, the First Designation Instrument, the Revocation Instrument, and the Second Designation Instrument are legislative instruments for the purposes of the *Legislation Act 2003* (Cth) (**Legislation Act**). Unsurprisingly, therefore, the legislative scheme of which they are part determined the immediate context in which the issues in this proceeding arise. This context is critical to the following discussion. The following paragraphs identify key provisions of the Sanctions Act and the Sanctions Regulations, to assist the reader in appreciating the parties' arguments and my reasons for accepting or rejecting them.

The Autonomous Sanctions Act 2011 (Cth)

10 The *Autonomous Sanctions Act 2011* (Cth) (**Sanctions Act**) provided the legislative framework for the Sanctions Regulations (and the Russia Regulations) under which the First Designation Instrument, the Revocation Instrument, the Second Designation Instrument (and the Russia and

Ukraine List 2014) were made. (For present purposes, it suffices to say that the Russia and Ukraine List 2014 was made under the Sanctions Regulations, with the amendments to the Sanctions Regulations relevant to this case being made under the Russia Regulations).

11 The objects of the Sanctions Act are set out in s 3:

> (1) The main objects of this Act are to:
>
> (a) provide for autonomous sanctions; and
>
> (b) provide for enforcement of autonomous sanctions (whether applied under this Act or another law of the Commonwealth); and
>
> (c) facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions (whether applied under this Act or another law of the Commonwealth).
>
> *Country-specific sanctions*
>
> (2) Without limiting subsection (1), the autonomous sanctions may address matters that are of international concern in relation to one or more particular foreign countries.
>
> *Thematic sanctions*
>
> (3) Without limiting subsection (1), the autonomous sanctions may address one or more of the following:
>
> (a) the proliferation of weapons of mass destruction;
>
> (b) threats to international peace and security;
>
> (c) malicious cyber activity;
>
> (d) serious violations or serious abuses of human rights;
>
> (e) activities undermining good governance or the rule of law, including serious corruption;
>
> (f) serious violations of international humanitarian law.

12 There is a definition of 'autonomous sanction' in s 4:

> ***autonomous sanction*** means a sanction that:
>
> (a) is intended to influence, directly or indirectly, one or more of the following in accordance with Australian Government policy:
>
> (i) a foreign government entity;
>
> (ii) a member of a foreign government entity;
>
> (iii) another person or entity outside Australia; or
>
> (b) involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by a person or entity described in subparagraph (a)(i), (ii) or (iii) in action outside Australia that is contrary to Australian Government policy.

13 Sections 10 to 15 in Pt 2 of the Sanctions Act address specific aspects of the power to provide for sanctions by regulations. Relevantly here, s 10 specifically provides:

> **10 Regulations may apply sanctions**
>
> (1) The regulations may make provision relating to any or all of the following:
>
> (a) proscription of persons or entities (for specified purposes or more generally);

(b) restriction or prevention of uses of, dealings with, and making available of, assets;

(c) restriction or prevention of the supply, sale or transfer of goods or services;

(d) restriction or prevention of the procurement of goods or services;

(e) provision for indemnities for acting in compliance or purported compliance with the regulations;

(f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b).

(2) Before the Governor-General makes regulations for the purposes of subsection (1), the Minister must be satisfied that the proposed regulations:

(a) will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or

(b) will otherwise deal with matters, things or relationships outside Australia.

(3) Despite subsection 14(2) of the *Legislation Act 2003*, regulations made for the purposes of subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

…

14 It is perhaps worth noting that s 28, the sole provision in Pt 5, also confers a general regulation-making power referable to matters required or permitted by the Sanctions Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Sanctions Act.

15 Part 3 of the Sanctions Act concerns offences relating to sanctions. Thus, s 16 prohibits individuals and bodies corporate from engaging in conduct that contravenes a sanction law (being a provision specified by the Minister as such: ss 4 and 6(1)), or a condition of an authorisation under a sanction law.

The Sanctions Regulations

16 Part 2 of the Sanctions Regulations provided for the imposition of sanctions by reference to various criteria. As noted above, the Minister made the First Designation and Second Designation Instruments, which imposed sanctions on Mr Abramov, under reg 6. Regulation 6 (made pursuant to s 10(1)(a) of the Sanctions Act) enabled sanctions to be imposed by reference to a person or entity's relationship to a specific country.

17 Regulation 6 of the Sanctions Regulations stated:

6 Country-specific designation of persons or entities or declaration of persons

For paragraph 10(1)(a) of the Act, the Minister may, by legislative instrument, do either or both of the following:

(a) designate a person or entity mentioned in an item of the table as a ***designated person or entity*** for the country mentioned in the item;

(b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

That is, reg 6 conferred a discretionary power on the Minister (see: "may") to make the legislative instruments designating Mr Abramov as a designated person for Russia under reg 6(a) and declaring him under reg 6(b) **but only** if Mr Abramov met a criterion referable to Russia in the table in reg 6.

18 At all times relevant to this proceeding, the table in reg 6 included item 6A, as follows:

Countries, persons and entities		
Item	**Country**	**Activity**
6A	Russia	(a) A person or entity that the Minister is satisfied is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia. (b) A current or former Minister or senior official of the Russian Government. (c) An immediate family member of a person mentioned in paragraph (a) or (b).

The effect of reg 6 and item 6A(a) was clear. It was open to the Minister to consider whether to designate Mr Abramov as a designated person for Russia under reg 6(a) and to declare him under reg 6(b) if satisfied that Mr Abramov met the activity description in (a): it was not suggested that Mr Abramov met either activity description in (b) or (c). That is, the Minister had to be satisfied that Mr Abramov "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia" **and** that it was appropriate as a matter of discretion to designate him for Russia under reg 6(a) and declare him under reg 6(b).

19 A designation under reg 6(a) and a declaration under reg 6(b) ceases to have effect after three years pursuant to reg 9(1) and reg 9(2) of the Sanctions Regulations, unless extended by the Minister under reg 9(3). Regulation 9(5) further provided that:

(5) To avoid doubt:

(a) subregulation (1) does not prevent the revocation, under regulation 10, of a designation; and

(b) subregulation (1) does not prevent the making, under paragraph 6(a) ... of a new designation that is the same in substance as another designation (whether the new designation is made or takes effect before or after the other designation ceases to have effect because of subregulation (1)); and

(c) subregulation (2) does not prevent the revocation, under regulation 10, of a declaration; and

(d) subregulation (2) does not prevent the making, under paragraph 6(b) ... of a new declaration that is the same in substance as another declaration (whether the new

declaration is made or takes effect before or after the other declaration ceases to have effect because of subregulation (2)).

20 Under subregs 10(1), (2) and (3) of the Sanctions Regulations, the Minister had a discretionary power to revoke a designation under reg 6(a) or declaration under reg 6(b) by legislative instrument on the Minister's own initiative or on application by "the person or entity to which the designation or declaration relates". Regulation 11 makes specific provision for such an application, which was to be in writing and to "set out the circumstances relied upon to justify the application".

21 Part 3 of the Sanctions Regulations contains provisions prohibiting certain conduct designed to ensure that sanctions imposed under the autonomous sanctions regime were effective. For example, being a designated person for Russia, Mr Abramov was subject to the prohibitions in regs 14 and 15 of the Sanctions Regulations. In substance, reg 14 prohibited an asset being made available to, or for the benefit of, a designated person, other than as authorised by a permit under reg 18. Regulation 15 prohibited a person holding a controlled asset (being an asset owned or controlled by a designated person) from using or dealing with such an asset, or allowing or facilitating such use or dealing, other than as authorised by a permit under reg 18. Both provisions constituted a sanctions law for the purposes of the Sanctions Act, and their breach was an offence that could attract serious consequences of the kind set out in s 16 of that Act. See Sanctions Act, s 6 and *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth).

First Designation Instrument

22 While the First Designation Instrument added numerous names and related details to Pt 1 of Sch 1 or Sch 2 to the Russia and Ukraine List 2014, this proceeding is concerned only with the inclusion of Mr Abramov's name and details in item 103 of Pt 1 of Sch 2.

23 It was undisputed that the Minister relied on a Departmental submission (**First Departmental Submission**) in making the First Designation Instrument. The First Departmental Submission was entitled "Ukraine: Sanctions against Russian Oligarchs and Senior Officials", and requested that the Minister take certain urgent action because of the Russian invasion of Ukraine. In particular, the Submission sought the Minister's "approval to list 67 persons for targeted financial sanctions and travel bans, including **52 Russian oligarchs/elites**" (emphasis added). Mr Abramov was included in this latter group. The Submission described the other individuals proposed for listing as senior government officials, senior Russian military officials, and two pro-Russian Ukrainian officials. It advised that the "tranche" of **67 targeted**

persons "builds on earlier listings of Russian officials and oligarchs … and aligns with sanctions imposed by the US, UK, EU, Canada and Japan".

24 The First Designation Submission recommended:

That you:	**Decision:**
a) Consider the Declaration and Decision Record at **Attachment A** and:	
i) if you are satisfied the 67 persons in Part C meet the criteria for listing, designate them for targeted financial sanctions and declare them for travel bans by signing Part A of the Decision Record;	Signed / Not Signed
ii) note that, if you do not agree to a designation or declaration, you should indicate this by initialling the 'Do Not List' column corresponding to the relevant person in Part C of the Decision Record.	Noted
b) if you agree to designate 67 persons for targeted financial sanctions, and declare the persons for travel bans:	
i) sign and date the first page of the legislative instrument at **Attachment B;** and	Signed / Not Signed
ii) agree to the Explanatory Statement and Statement of Compatibility with Human Rights at **Attachment C**.	Agreed / Not Agreed

25 The Submission further advised the Minister that the 52 Russian oligarchs/elites had "interests in sectors that form a core part of Russia's economic base", and that:

> These persons have a range of business interests and are a key source of revenue for Putin's regime. These interests include oil and gas companies, financial institutions, mining, and state-owned infrastructure companies. Particularly prominent individuals include … Alexander Abramov (Chairman of Evraz, and close associate of Roman Abramovich, who you have already listed) ...
>
> ...
>
> Of the persons we propose to list, the United States has listed 15, Canada 21, the European Union 25, the United Kingdom 46, and Japan 3. Listing these 67 individuals will demonstrate Australia's commitment to imposing sanctions on a broad range of persons, in alignment with likeminded partners.

26 The First Departmental Submission also informed the Minister that:

> Russia's National Security Strategy, published in 2021, outlines how national defence and economic strategy (financial stability, technological renewal of industry, construction, communications, energy, agriculture and mining, and development of efficient transport infrastructure) are key national priorities.

It further advised that the majority of the 67 targeted persons have:

> ... business interests in these national priorities, including e-commerce; petrochemicals; transport; investment holding companies; healthcare; food retail;

pharmaceuticals; agriculture; infrastructure; chemical products/fertilizers; telecommunications; nuclear technology; oil and gas sector; engineering; power supply; real estate development; food product manufacturing and delivery; steel production; coal and mineral fertilizers.

27 The First Departmental Submission informed the Minister of the listing criteria for Russia in item 6A of the table in reg 6 of the Sanctions Regulations. The Minister was also given the following further information specifically about Mr Abramov. This information was footnoted as indicated (with the footnotes containing hyperlinks to external websites):

> **17. Name: Alexander Grigoryevich ABRAMOV**
> **Nationality: Russian**
>
> - Alexander Grigoryevich ABRAMOV is co-founder and Chairman of multinational steel company Evraz.[109]
> - Evraz's operations are mainly based in Russia, including steel production, coal mining, iron ore mining and vanadium production. Evraz is among the top steel producers in the world,[110] and is one of Russia's largest taxpayers.[111]
> - During ABRAMOV'S tenure at Evraz, it is alleged the company was providing steel to the Russian military for use in the production of tanks. [112]
> - [Public interest immunity claimed]
> - Given his position in Evraz, it is open for the Minister to be satisfied that ABRAMOV is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia.
>
> 109 Companies House – Gov.UK
>
> 110 Evraz – Our assets
>
> 111 Publications Office (europa.eu)
>
> 112 Abramovich-linked steel firm denies providing material for Russian tanks and CONSOLIDATED LIST OF FINANCIAL SANCTIONS TARGETS IN THE UK (publishing.service.gov.au)

Nothing ultimately turns on whether the Minister opened these hyperlinks, although this was in issue at one point in the proceeding: see below at [331]. Also, as indicated, the Minister claimed public interest immunity with respect to the fourth point above: Mr Abramov did not ultimately contest this claim: see below at [116].

28 The Minister signed Pt A of the Decision Record. In so doing, the Minister recorded that she was satisfied that Mr Abramov (and others) met the criteria for designation and declaration set out in item 6A of the table in reg 6 of the Sanctions Regulations. She also indicated that she had considered the statement of case in the Submission respecting Mr Abramov (and others). In a list in Pt C of the Decision Record headed "Decision on designation", there was the following entry for Mr Abramov:

Ref No	Primary name	Title	Place of Birth	DOB (DD/MM/YY)	Listed by likemindeds as at 29 March 2022	DO NOT LIST
17.	Alexander Grigoryevich ABRAMOV	Co-founder and Chairman of Evraz	Moscow, Russia	20/02/1959		

29 On 7 April 2022, the Minister signed the First Designation Instrument, designating and declaring Mr Abramov under reg 6 of the Sanctions Regulations. The First Designation Instrument came into effect on 8 April 2022.

FACTUAL BACKGROUND

Commencement of Proceedings – 16 June 2022

30 On 16 June 2022, Mr Abramov instituted proceedings in this Court under the ADJR Act and the Judiciary Act, seeking an order "quashing item 103 of Sch 2 to the [Russia and Ukraine] List, or alternatively an order setting aside the decision to add item 103 of Sch 2 to the List". The Court later ordered that, to the extent necessary, the applicant have an extension of time to lodge his application for an order of review under the ADJR Act.

Revocation Application – 18 July 2022

31 On 18 July 2022, Mr Abramov's solicitors also made an application to the Minister under reg 11 of the Sanctions Regulations, for revocation of his listing on the Russia and Ukraine List (**revocation application**). In substance, Mr Abramov contended that he did not meet the criterion in item 6A(a) in the table in reg 6, and was therefore ineligible for designation or declaration. It was submitted that "Mr Abramov could not realistically play any role that could influence Russia to end its aggression towards Ukraine nor does he or his functions have any relevant connection to that aggression". Mr Abramov subsequently provided the Minister with a statutory declaration dated 21 July 2022 (**first statutory declaration**).

32 In a letter of 29 July 2022, the Minister's legal representatives advised that the Minister would consider the revocation application by reference to "the facts and statutory criteria as at the date of the decision in relation to that application". The letter warned that, if satisfied the criteria for listing were met and it was appropriate, "the Minister may choose to revoke the original decisions and make a new determination ... based on the material then before her". The letter

assured Mr Abramov that the Minister would provide him with an opportunity to comment on the material before the Minister made her decision.

33 By letter dated 12 August 2022 (**12 August 2022 letter**) the Department of Foreign Affairs and Trade (**the Minister's Department**) invited Mr Abramov to comment on: (1) key issues; (2) material, facts and discretionary considerations (including as identified by the Minister) that might fall for the Minister's consideration; and (3) appropriate procedure. The letter identified potentially relevant documents (including 29 attachments) and referenced factual propositions about the Evraz group, Mr Abramov's role in Evraz plc and predecessor companies, Skoltech, and the RGS.

34 Mr Abramov responded to the 12 August 2022 letter by email dated 29 August 2022. The **29 August 2022 response** included submissions about: (1) Evraz plc, the Evraz Group and predecessor companies; and (2) Mr Abramov's relationship with Skoltech and the RGS. It also included Mr Abramov's **second statutory declaration** of 27 August 2022.

35 On 31 August 2022, the Minister's Department sent another letter inviting further comment from Mr Abramov, who responded by an email dated 4 September 2022 (**4 September 2022 response**). Mr Abramov also provided the Minister with a statutory declaration by a former director of Evraz plc dated 5 September 2022 (**former Evraz director's statutory declaration**).

Revocation Instrument – 16 September 2022

36 Mr Abramov does not challenge the Revocation Instrument subsequently made on 16 September 2022 revoking his designation and declaration under the First Designation Instrument. In his written submissions, the Minister contended, however, that Mr Abramov's grounds of challenge to the Second Designation Instrument "involve[d] arguments that the procedure adopted by the Minister in making [the Revocation Instrument] was affected by error". The Minister submitted that, "if those arguments were to succeed, then the appropriate relief would be to quash the Revocation Instrument, with the consequence that the Designation Instrument would not, in law, have been revoked".

Second Designation Instrument – 16 September 2022

37 The Second Designation Instrument, which was made immediately after the Revocation Instrument, amended Pt 1 of Sch 2 of the Russia and Ukraine List 2014 by re-introducing item 103, with the applicant's name and following details:

103	Name of individual	Alexander Grigoryevich ABRAMOV
	Date of birth	20 February 1959
	Place of birth	Krasnodar, Russia
	Instrument of first designation and declaration	*Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 11) Instrument 2022*
	Instrument of revocation of first designation and declaration	*Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 19) Instrument 2022*
	Instrument of second designation and declaration	*Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 20) Instrument 2022*
	Additional information	Co-founder of Evrazmetall, former CEO and Chairman of Evraz Group SA and former non-executive Chairman of Evraz plc.

The Revocation and Second Designation Instruments were registered on 20 September 2022 pursuant to the *Legislation Act*.

38 It was undisputed that the Minister relied on a Departmental submission (**Second Departmental Submission**) in making the Second Designation Instrument. The Second Departmental Submission, which bore the title "Alexander Abramov: revocation application", advised that, in response to Mr Abramov's revocation application, the Department had prepared "a new Statement of Case based on contemporary evidence and it remains our view that Mr Abramov meets the listing criteria". The Department recommended that the Minister revoke Mr Abramov's current listing and relist him. The Submission, which was addressed to the Minister, requested:

Recommendation:	**Decision:**
That you:	
a) Note that you have considered the Statement of Case and its attachments (**Attachment A**), Mr Abramov's revocation application (**Attachment B**) and Mr Abramov's response to the Department's procedural fairness letter (**Attachment C** and **Attachment D**);	**Noted**
b) Note the Department's recommended option to revoke Mr Abramov's listing and relist him;	**Noted**
c) Note that if you are satisfied that Mr Abramov meets the relevant criteria under regulation 6 of the Regulations, the decision to revoke his current listing and/or relist him is at your discretion;	**Noted**

If you consider that Mr Abramov's current listing should be revoked, revoke it by:

d) signing and dating the first page of the legislative instrument (**Attachment E**); and **Signed / Not Signed**

e) agreeing to the explanatory statement and statement of compatibility with human rights (**Attachment F**) and; **Signed / Not Signed**

If you revoke Mr Abramov's current listing, are satisfied that Mr Abramov meets the relevant criteria under regulation 6 of the Autonomous Sanctions Regulations 2011, and consider that he should be listed, re-designate him for targeted financial sanctions and redeclare him for a travel ban by:

f) signing Part A of the Decision Record (**Attachment G**); and **Signed / Not Signed**

g) signing and dating page 1 of the legislative instrument (**Attachment H**); and **Signed / Not Signed**

h) agreeing to the explanatory statement and statement of compatibility with human rights (**Attachment I**). **Signed / Not Signed**

39 Under the heading "Background", the Minister was informed of various matters, including the First Designation Instrument, these proceedings, the revocation application, relevant correspondence, and the documentary material provided by Mr Abramov in support of his position. Most of this material accompanied the Submission as attachments. The Second Departmental Submission also incorporated a section referred to in the Department's recommendations to the Minister as a 'statement of case'. The parties proceeded on the basis that the statement of case was the section of the Second Departmental Submission commencing immediately after the 'Background' section. Having referred, amongst other things, to reg 6 (including item 6A in the table in reg 6), the Second Departmental Submission (in what has been referred to as the statement of case) advised the Minister that:

> 8. If, having considered Abramov's application and supporting material, and other material provided to you by Abramov and the Department:
>
> 8.1 you <u>are not</u> satisfied that Abramov is or has been engaging in an activity or performing a function that is of economic or strategic significance to Russia; or
>
> 8.2 you <u>are</u> satisfied that Abramov is or has been engaging in an activity or performing a function that is of economic or strategic significance to Russia but, in your discretion, you consider that Abramov <u>should not</u> be designated and declared under regulation 6;
>
> then you should by legislative instrument revoke his designation and declaration.
>
> 9. If, however, having considered that material:

> 9.1 you are satisfied that Abramov is or has been engaging in an activity or performing a function that is of economic or strategic significance to Russia; and
>
> 9.2 in your discretion, you consider that Abramov should remain designated and/or declared under regulation 6;
>
> then the Department's recommendation is that you revoke his designation and declaration ... and make a new decision to designate and declare him under regulation 6(a) and 6(b) to ensure Abramov's designation and declaration is based on contemporary evidence that has been tested with Abramov. You can also decide to retain his designation and declaration under the [First Designation Instrument].

40 The Second Departmental Submission also advised the Minister that, "[w]e have addressed the issues raised by Mr Abramov in the new Statement of Case". Indeed, the information in this Submission about Mr Abramov and the entities with which he was reportedly involved was significantly more than the equivalent kind of information in the First Departmental Submission. Under the heading "Activities and functions of economic significance to Russia", the Second Departmental Submission detailed the Evraz Group (pars 10-17) and Mr Abramov's roles in Evraz and its predecessors (pars 18-25). It also addressed Skoltech (pars 26-30) and the RGS (pars 33-38) and his roles in those two bodies (pars 31-32; pars 39-41). The following few paragraphs are an abbreviated account of the facts as the Department stated them in the Second Departmental Submission. The sources of the information disclosed in the Submission were apparent in its extensive footnotes. Most sources were available to the Minister in the documents accompanying the Submission.

41 Amongst other things, the Second Departmental Submission recorded that the Evraz Group:

> ... is one of Russia's largest employers. It is also one of the largest steel and vanadium producers in the world. Evraz's 2021 annual report states that over 94% of its employees are located in Russia and the Commonwealth of Independent States region and that Evraz is one of Russia's largest taxpayers.

After noting Mr Abramov's response to these matters in his second statutory declaration, the Submission noted Evraz's importance "for the Russian state by providing construction and railway products for the development of infrastructure"; and that:

> It is the leader in the long products and rail segments market in Russia, and estimates that market shares in Russia for its key products were, in the 2021 reporting period, 97% for rails, 69% for beams, 55% for grinding balls and 28% for railway wheels. Evraz's coal business supplies Evraz steel mills, provides coking coal to major Russian coke and steel producers, and exports coking coal (30.3 million tonnes in 2021) outside Russia. Evraz's vanadium business is based on processing vanadium slag from its steelmaking operations. It is the world's largest producer of vanadium, with a global market share of 14%.

The Submission referred to statements in Russia's National Security Strategy about the strategic significance of the construction, rail and mining sectors to the Russian Government. It also referred to "amendments to the Federal Law on Defence to empower the Russian Government to require companies to enter contracts for the supply of goods, implementation of projects and the provision of services necessary to support operations ... outside Russia".

42 The Submission also advised the Minister that Evraz (as the ultimate holding company of the Evraz Group) was established under UK law and subject to the regulatory standards applicable to companies listed on the London Stock Exchange. It stated that Mr Abramov was a founder of Evraz's predecessor company, EvrazMetall, and traced the history of his involvement in that company and the companies historically related to it. The Submission also recorded that Mr Abramov was Chairman of the Evraz Board from 14 October 2011 until 11 March 2022, being the day after the UK announced sanctions on Evraz's largest shareholder. It went on to advise the Minister that Mr Abramov remained effectively Evraz's second largest shareholder; that he also had the power to appoint a number of its non-executive directors; and that even if he were unable to 'control' shareholder resolutions, or determine Evraz's activities, his indirect shareholding was "large enough to influence such resolutions and activities".

43 Regarding Skoltech, the Second Departmental Submission noted that Mr Abramov was a board member from 2012 until December 2021. It noted that Skoltech began in partnership with the Massachusetts Institute of Technology (**MIT**), "with the vision of being a world-leading academic institute of science and technology". The Submission noted that the partnership ended in February 2022, in response to the 2022 Russian invasion of Ukraine; and that the US had later sanctioned it, citing its close relationship with Russia's defence sector. The Submission also recorded that Mr Abramov maintained that he had "played a very minor role" in its affairs and was not involved in any relationship between Skoltech and Russia's defence sector.

44 Regarding the RGS, the Second Departmental Submission recorded that Mr Abramov had been a member of its Board of Trustees since about March 2010, and that President Putin was its Board Chairman and Russia's Defence Minister, its President. It noted that, at a Board meeting in 2017, President Putin had presented Mr Abramov with the RGS's Grand Silver Medal. The Submission observed that the RGS's objectives included the promotion of the "geographical, historical and cultural heritage of Russia as an object of national pride"; and that its Charter acknowledged that its activities were "based on pursuing its interests in accordance with the

national interests of Russia". It observed that branch activities in the Ukrainian territories of Crimea and Sevastopol "could be characterised as 'soft power' activities that support Russia's attempts to consolidate and maintain power in the annexed Ukrainian territory". The Submission also noted Mr Abramov's response, including that: (1) he was unaware of some of these matters and had not attended more than three annual general meetings, at which there were 50 to 100 others; and (2) the Board's only responsibility was "to sign off on the annual accounts and annual report of activities".

45 Under the heading "Conclusion as to Statutory [sic] Criteria", the Second Departmental Submission concluded that it was open to the Minister "to find that Abramov is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia" (referencing item 6A(a) in reg 6 of the Sanctions Regulations) because:

> 42.1 Evraz has grown to become one of Russia's largest corporate groups, employers and taxpayers, which operates in key strategic sectors of the Russian economy, including in particular construction, rail and mining. Further, Evraz (through its Russian subsidiaries) is reported to have supplied the Russian military for more than a decade. However, even if these reports are incorrect (as Evraz and Abramov claim), recent amendments to Russian Federal Law empower the Russian Government to require companies such as Evraz plc's Russia-based subsidiaries to supply it with goods and services to support Russian military operations outside Russia (such as in Ukraine).
>
> 42.2 Abramov has personally made a significant contribution to the growth and success of Evraz through his performance of numerous high-level roles within the group over an extended period, including in particular his roles as co-founder and General Director of EvrazMetall from its inception in 1992, CEO and Chairman of Evraz Group SA from December 2004 until January 2006, and Chairman of Evraz Group SA and then Evraz plc from December 2008 to April 2022. ...
>
> 42.3 Abramov remains ... the second largest shareholder in Evraz, with the power to appoint directors, notwithstanding his resignation from the role of Chairman (which occurred the day after UK sanctions were announced targeting the largest shareholder) and the fact that he is currently not entitled to appoint directors due to the current size of the board. Given this, and his longstanding contribution to the strategic development of Evraz since its inception, it is open to you to find that he plays and will continue to play an influential role within the group, notwithstanding he is no longer a director and no longer the Chairman.

46 The Second Departmental Submission advised the Minister that nothing said by Mr Abramov denied:

> ... Abramov's significant past contribution to the success of the Evraz group's businesses as a whole from their inception, nor his ability as a substantial indirect minority shareholder to continue to influence those businesses. Nor do they deny the ongoing economic and strategic significance to Russia of both his past contribution

> and ongoing influence ... irrespective of Abramov's awareness of or formal responsibility for all of the activities carried out by Evraz plc's subsidiaries.

47 Regarding Evraz Group's taxation liabilities, the Submission stated:

> [I]t's the Department's view that the economic significance to Russia of those tax payments does not depend on them being paid to the Russian central government (as opposed to other government entities within Russia) nor on whose behalf they are made, particularly when Evraz's activities are what generates the relevant tax liability. Furthermore, Abramov himself estimates that 40% of those (very substantial) tax payments go to the Russian central government, which 'funds things such as defence'.

48 As to Mr Abramov's submission that UK-imposed sanctions had "substantially reduced Evraz's economic significance to Russia", the Second Departmental Submission responded:

> [T]here is no evidence that the UK government sanctions have substantially interfered with Evraz's operations in Russia, which represents its biggest domestic market. Nor is there any evidence that the sanctions have reduced Evraz's Russia-based employer or revenue base, or Russian taxes, to a point where Abramov (through his roles and continuing functions at Evraz) can no longer be regarded to have any economic or strategic significance to that country.

The Submission added that, even if UK sanctions were to have reduced Evraz's economic significance to Russia, it would be open to the Minister to take into account Evraz's economic or strategic significance to Russia prior to the imposition of those sanctions, because of the terms of item 6A(a) of the table in reg 6.

49 Regarding Skoltech, the Second Departmental Submission affirmed:

> Abramov's roles on the boards of Skoltech and the RGS provide additional evidence on which it is open to you to find that he is or has been engaging in an activity or performing a function that is of economic or strategic significance to Russia. Skoltech, which has been sanctioned by the US, pursues research and education in areas of recognised strategic significance to Russia, and has reportedly partnered with numerous Russian defence enterprises. The RGS, whose board is chaired by President Putin, promotes Russian geographical, historical and cultural heritage as an object of national pride, consistently with the national interests of Russia. Its activities in Crimea and Sevastopol can be characterised as soft power efforts to support Russia's consolidation and maintenance of power in annexed Ukraine. Through his senior roles in these organisations, Abramov can be seen to have contributed to their promotion of Russia's strategic interests domestically and abroad.

50 The Submission further stated:

> Although Abramov's role ended recently, he held it for around a decade. His role, however minor, can be seen to have contributed to the strategic direction of Skoltech. In this way he has supported and enabled that institution to engage in a range of activities of strategic significance to Russia, even if the high level nature of his role meant that he was not specifically aware of all of those activities.

51 As to the RGS, the Second Departmental Submission advised:

> Abramov similarly submits that his role on the RGS board does not provide a basis to sanction him. Again, he says that he had no knowledge of RGS's promotion of Russian heritage as an object of national pride, its activities in Crimea and Sevastopol, and other objectives and activities of RGS ... But this does not mean that, through his role as a board member, he cannot be seen to have enabled and supported these activities. Similarly, although he submits that his role was 'extremely limited' ... evidently his contribution was considered significant enough to warrant his being presented with an award by President Putin as Chair of the RGS board. Abramov's role as an RGS board member is therefore relevant to your decision, particularly when considered in combination with Abramov's other roles and functions.

52 Under the heading, "Other Discretionary Considerations", the Second Departmental Submission referred to the factors advanced by Mr Abramov that the Minister might consider, including that no other country had sanctioned him and his claim to have no personal or political connections to the Russian Government or President Putin. The Minister was advised that:

> The Department assesses it is unlikely that a businessman of Abramov's standing – with a net worth of US$6.4B (according to Forbes) – and with over 30 years in the steel and coal industry in Russia has no personal or political connection to the Russia Government.
>
> Additionally, Abramov claims that he has no material connection to the Russian invasion of Ukraine. Whether or not he has, or has had, a material connection to the Russian invasion of Ukraine is not relevant to his listing under the Russia listing criteria specified in item 6A of Regulation 6.
>
> Furthermore, even if his assertions are correct, it does not mean his activities and functions are not of economic or strategic significance to Russia, and thereby a lawful object of Australian sanctions. However, these claims may be relevant to the exercise of your discretion.

53 The Second Departmental Submission also recorded Departmental scepticism about the enforceability of the undertakings that Mr Abramov had proffered. As to the adverse effect of sanctions on Mr Abramov and his associates, "particularly certain business ventures in New Zealand", the Submission observed that:

> If, in your discretion, you decide that Abramov should continue to be sanctioned, the effect and intention of designation and declaration under Regulation 6 of the [Sanctions] Regulations is that adverse consequences of this kind will continue to affect Abramov and his associates. This is a matter that you may consider in deciding whether to maintain sanctions against Abramov.

54 The Minister signed Pt A of the Decision Record on 16 September 2022. In so doing, the Minister recorded that she was satisfied that Mr Abramov met the criteria for designation and declaration in item 6A(a) of the table in reg 6 of the Sanctions Regulations; and that, in exercise of her discretion, she would so designate and declare Mr Abramov. She also confirmed that she had considered the Second Departmental Submission and its accompanying material,

including Mr Abramov's revocation application, his 29 August 2022 response, his second statutory declaration, his 4 September 2022 response, and the former Evraz director's statutory declaration. The Decision Record recorded that:

> **PART A: DESIGNATION AND DECLARATION**
>
> I am satisfied that Alexander Abramov meets the criteria for designation and declaration outlined in Part B below.
>
> I exercise my discretion to:
>
> a. designate Alexander Abramov as a designated person for Russia.
>
> b. declare Alexander Abramov for the purpose of preventing him from travelling to, entering or remaining in Australia.
>
> I confirm that, in reaching my decision, I have considered the Ministerial Submission dated 9 September 2022, its attachments, and the attachments to those attachments. In particular, I have reviewed the statement of case prepared by my Department (**Attachment A**), Mr Abramov's revocation application (**Attachment B**) and Mr Abramov's responses to the Department's procedural fairness letter (**Attachment C** and **Attachment D**).

Part B of the Decision Record set out the criteria in item 6A of the table in reg 6 of the Sanctions Regulations.

55 On the same day, the Minister also signed the Second Designation Instrument, designating and declaring Mr Abramov under reg 6 of the Sanctions Regulations. This instrument came into effect on 17 September 2022.

GROUNDS OF REVIEW IN AMENDED APPLICATION (4 OCTOBER 2022)

56 Mr Abramov filed his amended application on 4 October 2022. This challenged both his first and second listing in the Russia and Ukraine List 2014, pursuant to the First Designation Instrument and the Second Designation Instrument.

57 Mr Abramov's amended application challenged his first listing in the Russia and Ukraine List 2014 on the basis that the Minister's stated satisfaction that he "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia" was "legally unreasonable, and/or irrational or illogical, and/or erroneous". It also said that his listing involved a denial of procedural fairness that was otherwise contrary to law. Mr Abramov's written submissions dated 12 September 2022 identified the three grounds of alleged invalidity as follows:

> The Minister's decision to designate and declare Mr Abramov is invalid because:
>
> 1. the Minister failed lawfully to form the requisite state of satisfaction on the

basis of the evidence and other material placed before her in relation to Mr Abramov [in that "it was legally unreasonable, and/or irrational or illogical, and/or erroneous" for the Minister to be satisfied that Mr Abramov "is, or has been , engaging in an activity or performing a function that is of economic or strategic significance to Russia"];

2. the Minister's failure to consider whether to exercise her discretion to designate or declare Mr Abramov was an error of law and constituted a constructive failure to exercise jurisdiction; and

3. the Minister failed to accord Mr Abramov procedural fairness

58 At the time the hearing began, Mr Abramov challenged the Second Designation Instrument on the following grounds:

- Ground 4 – constructive failure to discharge her duty to consider his revocation application personally by failing personally to consider his first statutory declaration, and relying instead on a Departmental summary of it.
- Ground 5 – failure to accord procedural fairness in determining the revocation application and in making the Second Designation Instrument, by departing from a previous representation about the procedure the Minister would follow without prior notice to the applicant.
- Ground 6 – that it was not open to the Minister, on the material before her, lawfully to form the requisite state of satisfaction to designate him for Russia under reg 6, in conjunction with item 6A(a) of the table.
- Ground 7 – that the Sanctions Regulations did not empower the Minister to resolve the applicant's revocation application by revoking his designation and declaration and simultaneously re-designating and re-declaring him.

None of the other grounds enumerated in the amended application were mentioned or developed in written submissions or at the hearing.

CONSIDERATION

59 Some issues arose in the proceeding that affected more than one aspect of the case. One such issue concerned the construction of the criterion in item 6A(a) of the table in reg 6 of the Sanctions Regulations. Another issue concerned the nature of the challenged decisions.

Construction issues: general remarks

60 Plainly enough, the Sanctions Act is, broadly speaking, directed to enabling the Minister to impose autonomous sanctions (i.e., sanctions that do not depend on a prior decision of the

United Nations Security Council) in pursuit of Australia's foreign policy. This is reflected in the objects of the Act (s 3), in the definition of autonomous sanctions (s 4) and elsewhere in the Act. In this context, it is worth noting that the legislative conception of an "autonomous sanction" is very broad, and that the lawfulness of any such sanction is necessarily related to Australia's foreign policy. Thus, under the Sanctions Act, an autonomous sanction includes a measure that "is intended to influence", whether directly **or indirectly**, a person outside Australia "in accordance with Australian Government policy": see para (a) of the definition. Also under that Act, an autonomous sanction includes the prohibition on conduct connected with Australia that directly or **indirectly** facilitates the engagement by a person outside Australia in action outside Australia that is contrary to Australian Government policy: see para (b) of the definition. In effect, the Sanctions Act gave what senior counsel for the Minister, Mr Herzfeld SC, described as "very considerable latitude… to the judgment[] of the executive". This is relevant to a number of issues in this proceeding, as discussed below.

61 Further, the definition of "autonomous sanction" in s 4 of the Sanctions Act makes it clear that, under the Act, the imposition of sanctions on individuals is not limited to individuals who are able to exert personal influence on a foreign government or a member of a foreign government. In this case, neither the First Departmental Submission nor the Second Departmental Submission suggested that Mr Abramov had any such capacity. The Second Departmental Submission merely noted that the Minister might consider Mr Abramov's representations about his lack of capacity to influence either the Russian Government or its President in the context of exercising her discretion: see [52] above. There was no error in this approach.

Submissions about the construction of the criterion in item 6A(a) of reg 6

"Is, or has been" – the applicant's submissions

62 In order to exercise the power referable to paragraph (a) of item 6A of the table in reg 6 of the Sanctions Regulations, the Minister had to be satisfied that a person or entity "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia". The applicant submitted that the use of the words "is, or has been" required the Minister to identify either ongoing conduct having the relevant significance, or an activity or function having that significance that began in the past and continued, or the immediate effect of which continued, to the present. The applicant also submitted that this kind of temporal limitation implied that the activity or function must have the requisite "economic or strategic

significance to Russia" at the time the Minister exercised the power to designate or declare a person under reg 6 of the Sanctions Regulations.

Clear and substantial nexus – the applicant's submissions

63 The applicant submitted, and I accept, that the Sanctions Act and legislative instruments made under it were to be construed having regard to the purposes of that Act. The applicant relied on the definition of "autonomous sanction" in s 4 of the Sanctions Act in submitting that sanctions served an instrumental purpose: that is, "to influence certain persons or entities to act in accordance with Australian Government policy". Regarding item 6A of the table in reg 6, the applicant submitted that the need for a person's activity or function to be of "economic or strategic significance to Russia" required a "material nexus (i.e. one which is clear and substantial) between the person and the relevant "situation of international concern" (here: Russia's aggression towards Ukraine). Mr Merkel KC, senior counsel for the applicant, further submitted that text and context required "a clear and material nexus between the function or activity that is engaged [in] ... and the economic and strategic significance that is necessary to flow from that function". The applicant supported these submissions by reference to the Replacement Explanatory Memorandum (**REM**) for the *Autonomous Sanctions Bill 2010* (Cth) (**2010 Bill**), which described autonomous sanctions as "highly targeted measures, applied only to the specific governments, individuals or entities ... that are responsible for, or have a nexus to, the situation of international concern". He also referred to the consequences of autonomous sanctions, including their penal effect.

64 Further, the applicant submitted that the reference in item 6A(a) to an activity or function of economic or strategic "significance" to Russia referred to an activity or function that was important to or, according to the applicant's 12 September 2022 submissions, "possibly even momentous" for Russia. The applicant supported this submission by reference to the purpose of reg 6 read with item 6A(a), which, he said, was "to enable the Minister to influence Russia to end its aggression towards Ukraine". In this context, the applicant also referred to the reference in the legislative history to the desirability of "highly targeted" sanctions. Indeed, Mr Merkel KC submitted at the hearing that:

> [T]he purpose of sanctions is to impose them on persons who have a capacity to influence the Russian Government in its activities, and a connection with that government is a vehicle for that influence to occur. ...
>
> And what lies behind that approach ... is that the individuals sanctioned can influence the country the subject of international concern in a manner that accords with Australian Government policy, which, in the present context, is to bring an end [to] the

> aggression against Ukraine and the invasion that has occurred of its territory. It's in that context, really, that an individual's connection with, or capacity to influence the country becomes a critical factor ... to be considered when a sanction decision is made.

65 In this context, the applicant also referred to paragraphs (b) and (c) of item 6A and the remainder of the table in reg 6, which focussed on persons with direct responsibility for situations of international concern or those directly related to such persons. Further, the applicant submitted that, to meet the item 6A(a) criterion, the Minister had to be satisfied that the activity or function of the person to be designated or declared was of the requisite economic or strategic significance to Russia, not just some activity or function of an entity with which the person was associated.

"Is, or has been" – the Minister's submissions

66 In the Minister's submission, the words "is, or has been, engaging" in item 6A(a) in the table in reg 6 applied to both present and past conduct, including past conduct that had ceased. The Minister contended that if "has been engaging" referred only to past conduct that is presently continuing, these words would be "entirely superfluous". Citing *Wilkie v The Commonwealth* [2017] HCA 40; 263 CLR 487 at [146], the Minister submitted that all the words in the expression "is, or has been, engaging" should be given an operation. The Minister accepted that "the thing that has to be of continuing significance is the activity or function", although "[t]here may be contestable questions which are for the Minister's evaluation of the way in which past activities remain of economic or strategic significance". In summary, Mr Herzfeld SC, for the Minister, contended that the words "is, or has been, engaging" are "covering both past and present conduct, and the limitation to be injected is simply one of reasonable satisfaction".

Clear and substantial nexus – the Minister's submissions

67 The Minister contended that there was no basis in the legislative history or scheme to support the applicant's argument for "a clear and material nexus" between an identified activity or function and its economic or strategic significance to Russia. The Minister submitted that the reference in the REM to the 2010 Bill to "highly targeted measures" did not support the applicant's narrow approach. Mr Herzfeld SC submitted that the REM described the proposed measures as "highly targeted", in the sense that "they're applied to minimise the impact on general populations". He submitted that this was "in contradistinction, for example, to other kinds of economic measures which might affect a whole country's population, or other kinds of international measures, such as the use of armed force, which might well have a broader

effect on a population". The Minister submitted that this aligned with the stated legislative purpose of the proposed Act, which was to strengthen Australia's autonomous sanctions regime "by allowing greater flexibility in the range of measures Australia can implement, thus ensuring Australia's autonomous sanctions match the scope and extent of measures implemented by like-minded countries": see REM to the 2010 Bill, p 1.

68 Further, regarding the requirement in item 6A(a) of the table in reg 6 that the Minister be satisfied that the relevant activity or function "is of economic or strategic significance to Russia", the Minister submitted that the Court should reject the applicant's attempt to give further content to the word "significance". The Minister drew attention to the fact that the relevant state of satisfaction concerned "government policy in the sphere of foreign relations" involving economic and strategic matters. Mr Herzfeld SC submitted that the Minister was required to make "a judgment of high policy concern relating to the Australian government's view of what is significant to Russia in an economic or strategic sense"; and that this was "a judgment of very considerable breadth". In this context, Mr Herzfeld SC submitted that the Court should not "read in any a priori narrowing words which would involve it in second guessing" the Minister's judgment "against a vague standard of momentousness or importance".

Consideration: construction of the criterion in item 6A(a) of reg 6

"Is, or has been"

69 Regulation 6 of the Sanctions Regulations relevantly permits the Minister to make a legislative instrument to designate a person "mentioned" in item 6A of the table in reg 6 as a designated person for Russia; and to declare a person mentioned in an item in the table for the purpose of preventing entry to Australia. The applicant is a person mentioned in item 6A if he meets the description in paragraph (a) of that item. This is so if the applicant is:

> [a] person ... that the Minister is satisfied **is, or has been**, engaging in an activity or performing a function that is of economic or strategic significance to Russia.
>
> (Emphasis added)

There was ultimately little dispute between the parties about the effect of the words "is, or has been". This said, I am inclined to prefer the Minister's submissions on this issue to the applicant's (although little turns on the differences between them.).

70 By virtue of reg 6 and item 6A(a) of the table, the Minister may declare a person, and designate a person for Russia, if the Minister is satisfied that that person is engaging in an activity or

performing a function that is of economic or strategic significance to Russia at the time the Minister makes the declaration or designation. The Minister may also declare and designate that person even though the person has ceased the activity or function, providing the Minister is satisfied that that activity or function is (still) of economic or strategic significance to Russia. The use of the verb form "has been ... engaging ... or performing" indicates that the activity or function to which these words relate began in the past and has continued for some time thereafter without a clear endpoint: cf Rodney Huddleston and Geoffrey K Pullum, *The Cambridge Grammar of the English Language* (Cambridge University Press, 2002) p 165. It follows that whether the relevant person has in fact ceased the activity or function at the time the Minister considers making the declaration or designation does not bring the Minister's power to declare or designate to an end providing the Minister forms the relevant satisfaction. I also accept that, as the Minister submitted, the use of this verb form would be superfluous if the words referred only to past and presently continuing conduct, and that this was not the intended result of the use of this verb form.

No clear and substantial nexus requirement

71 Plainly enough, before the Minister can designate a person in reliance on item 6A(a) in the table in reg 6 of the Sanctions Regulations, the Minister must be satisfied that the designated person is, or has been, engaging in an activity or performing a function that is of requisite significance to Russia. The Minister's concern here is with **that person's** activity or function, rather than with an activity or function engaged in or performed by an entity or entities with which the person is, or has been, associated. I would, however, reject the applicant's submission that, to rely on item 6A(a) of the table in reg 6, the Minister must be satisfied that there is a clear and substantial nexus between an activity or function of a designated person and the economic or strategic significance of that activity or function to Russia (or, if it matters, the situation of international concern).

72 The applicant's submission requires words to be read in to item 6A(a) that are not there, even by implication. Item 6A(a) in the table in reg 6 requires only than the Minister be satisfied that the activity or function in which the person is or has been engaging or performing is "of economic or strategic significance to Russia". I accept that, as the Minister submitted, the reference in the REM to the 2010 Bill to "highly targeted measures" does not support the applicant's argument. This is because the reference to "targeted" measures here clearly refers to the fact that autonomous sanctions would be applied "only to the specific" individuals,

entities or governments, "so as to minimise, to the extent possible, the impact on the general populations of the affected countries". The use of the word "targeted" did not define the nature of the nexus between the designated person's activity or function and the economic or strategic significance of that activity or function to Russia.

73 Furthermore, the REM clearly contemplated that autonomous sanctions would be applicable, relevantly, to individuals having "a nexus to" the situation of international concern. To limit the relevant nexus to one that is, as a matter of objective fact, "clear and substantial" as the applicant proposes would defeat the purpose of the 2010 Bill as identified in the REM. This was "to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, thus ensuring Australia's autonomous sanctions match the scope and extent of measures implemented by like-minded countries".

74 I accept the Minister's submission that there is nothing in reg 6 to limit the activities and functions mentioned in item 6A(a) of the table to activities and functions of "importance" let alone "momentous" economic or strategic significance to Russia. Item 6A(a) requires the Minister to make an assessment about whether a person has relevantly undertaken an activity or function that "is of economic or strategic significance to Russia". Plainly enough, such an assessment involves a sensitive judgment on foreign policy and other matters. It is, plainly enough, a judgment involving a wide range of considerations. It may call for reference to "a range of materials, including relevant strategic documents published by the Russian Government and information from Australian Government agencies" (Explanatory Statement for the Russia Regulations). I accept the Minister's submission that there is no justification for the Court in this context to seek to qualify the word "significance" in item 6A(a) in the table in reg 6 by reference to such imprecise measures as importance or momentousness. It is a matter for the Minister whether to form the requisite satisfaction, subject to the requirement to do so in conformity with the standard of legal reasonableness.

Submissions about character of the First Designation Instrument and the Second Designation Instrument (collectively, the Instruments)

75 In written submissions, the Minister contended that neither of the Instruments was a "decision of an administrative character" within the meaning of s 3 of the ADJR Act. The Minister submitted that, for this reason, they were not reviewable under s 5 of that Act. Rather, so the Minister submitted, the decisions expressed in these two Instruments were decisions of a

legislative character, having regard to the factors identified in ***RG Capital Radio*** *Ltd v Australian Broadcasting Authority* [2001] FCA 855; 113 FCR 185.

76 Before addressing the parties' submissions on the issue in more detail, I observe that both parties submitted that nothing much turned on its outcome. Mr Herzfeld SC, for the Minister, submitted that the applicant's grounds and the Minister's responses were the same, whether the challenged decisions were reviewable under the ADJR Act or s 39B of the Judiciary Act. He submitted that the standard for review for unreasonableness remained a stringent one under the Judiciary Act. He also submitted that the foreign policy context in this case meant that judicial review was necessarily limited. Mr Merkel KC, for the applicant, submitted that the issue was of limited importance because the applicant maintained that there had been jurisdictional error, including on the ground of unreasonableness and that relief was therefore available to him under s 39B of the Judiciary Act.

77 The Minister submitted that the effect of an instrument made under reg 6(a) of the Sanctions Regulations "is to give content to the general laws in regs 14 and 15", and that these regulations "regulate the conduct of all persons who might interact with a designated person". The Minister submitted, "a designation has binding legal effect in the sense of directly affecting the operation of other statutory provisions". The Minister argued that the effect of an instrument made under reg 6(b) was relevantly similar in that it also affected the content of another law. In this context, the Minister cited reg 2.43(1)(aa)(i) of the *Migration Regulations 1994* (Cth), pursuant to which the existence of a declaration is a ground for visa cancellation; and PIC 4003, pursuant to which the existence of such a declaration is a ground for visa refusal.

78 The Minister contended that the Instruments amended the Russia and the Ukraine List 2014 in a manner typical of legislation. The First Designation Instrument added numerous names to the Russia and Ukraine List 2014, which already had many "hundreds of names in it". The Minister added:

> If one had in the [Sanctions] Regulations, or indeed in the Act itself, listed these hundreds of names in [a] Schedule, one could pretty readily see that that is a legislative act because of the sheer number of people that are affected.

79 The Minister relied on the fact that an instrument under reg 6 must be made as a legislative instrument, which Parliament might disallow under s 42 of the Legislation Act. The Minister also relied on the public nature of such an instrument, being both a legislative instrument and an instrument subject to reg 22 of the Sanctions Regulations. The Minister submitted that reg 22 specifically required the publication of a document that set out all currently designated

persons and entities "to facilitate the legislative character of a designation in its application to all persons who might deal with a designated person".

80 The Minister submitted that the criterion applicable to the making of the Instruments was indicative of their legislative character, because item 6A(a) of reg 6 involved making an essentially political judgment. The Minister also relied on the absence of any provision for merits review. Noting that reg 10 enabled the revocation of a designation or declaration made by legislative instrument under reg 6, the Minister nonetheless contended that there was limited opportunity for the executive to vary or control a designation or declaration, once made. The Minister submitted that, while reg 18 conferred a power to issue permits and reg 19 a power to waive the operation of a declaration, these powers were only exercisable in the national interest and, in the case of waiver, also on humanitarian grounds.

81 In written submissions, the Minister submitted that, since the Instruments had a legislative character, the applicant could challenge them only for jurisdictional error under s 39B of the Judiciary Act, and on the more limited grounds available for a decision of a legislative kind. The Minister accepted that her satisfaction had to be formed reasonably in the legal sense, but contended that the Instruments' legislative character informed the applicable standard of review for the "no evidence", "erroneous findings" and unreasonableness grounds. In this regard, the Minister relied on ***Athavle v New South Wales*** [2021] FCA 1075; 290 FCR 406 at [94]-[97] and ***Bienke v Minister for Primary Industries and Energy*** [1994] FCA 626; 125 ALR 151 at 166.

82 At the hearing, Mr Maxwell, for the applicant, submitted that the two Instruments both involved a decision of an administrative character within the meaning of s 3 of the ADJR Act. While he accepted that the factors in *RG Capital Radio* were relevant to the question of characterisation, he submitted that these factors did not have equal weight. Rather, the principal reason for attributing an administrative character to the Instruments was, he submitted, that they did not create new rules of general application. Rather, so Mr Maxwell submitted, the Instruments applied existing rules to a particular person. Referring to ***Minister for Industry and Commerce v Tooheys Ltd*** (1982) 42 ALR 260 at 265; 60 FLR 325 at 331, he submitted that this was "at the core" of the distinction between administrative and legislative decisions. Mr Maxwell submitted that the Sanctions Regulations set out the rules of general application, such as the general prohibitions in regs 14 and 15; and that a decision did not acquire a legislative character simply because it filled out the content of such general prohibitions. He

referred, in this connection, to ***Visa International*** *Service Association v Reserve Bank of Australia* [2003] FCA 977; 131 FCR 300 at [589]-[594]. Mr Maxwell submitted that, as in that case so too in this, a designation or declaration merely identified the persons by reference to whom and the assets by reference to which laws of general application were to apply.

83 Mr Maxwell further submitted that, once the Instruments were made, the Minister retained the power to vary or control them in exercise of the power to revoke (reg 10(2)), to grant a permit (reg 18) and to waive the operation of a declaration (reg 19). He submitted that this indicated that reg 6 conferred a power to make an instrument of an administrative character. Citing ***Applied Medical Australia*** *Pty Ltd v Minister for Health* [2016] FCA 35; 246 FCR 555 at [47(x)], he submitted that the Sanctions Regulations had binding effect, not the designation or declaration decisions represented by the Instruments. He also submitted that provision for publication and the absence of merits review were essentially subsidiary factors.

84 In written submissions in reply, the applicant contended that designation and declaration under reg 6 did not create rules of general application. Rather, this was done by regs 14 and 15 of the Sanctions Regulations and reg 2.43(1)(aa)(i) of the *Migration Regulations 1994* (Cth). The applicant submitted that the fact that item 6A(a) in the table in reg 6 involved an evaluative judgment was of little significance, given that many decisions of an undoubtedly administrative character involve criteria calling for the same kind of judgment. Referring to ***Anderson*** *v Minister for the Environment, Heritage and the Arts* [2010] FCA 57; 182 FCR 462 at [42], the applicant submitted that provision for disallowance by Parliament was of marginal significance. The applicant also relied on the power in reg 10 as indicative of an administrative character. He further submitted that a decision to designate and declare a person under reg 6 did not bind anyone; rather the Sanctions Regulations had that effect.

Consideration of the character of the Instruments

85 First, I would note that the legislative character of the decisions represented by the Instruments is relevant to whether the applicant must establish jurisdictional error to succeed. Further, if properly characterised as legislative in character, the applicant may also be obliged to satisfy more stringent standards of review than otherwise. Both factors may affect whether the applicant succeeds in his application.

86 Second, I accept that in some cases whether a decision is of a legislative or administrative character does not admit of a ready answer: see *RG Capital Radio* at [40]-[47]. This is because a decision may have numerous characteristics, none of which is conclusive and some of which

point in different directions. In such a case, one must take account of the effect of the decision in the round.

87 Third, as Gummow J noted in *Queensland Medical Laboratory v Blewett* [1988] FCA 708; 84 ALR 615 at 634, "the Constitution does not forbid the statutory authorisation of the Executive to make laws". His Honour further explained:

> Rather, the federal legislative powers of the parliament ... authorise the parliament to repose in the Executive an authority of an essentially legislative character, at least where the exercise of the authority is subject to a measure of parliamentary control.
>
> ...
>
> The delegation of legislative authority has most frequently been effected by reposing a regulation-making power in the Governor-General in Council. ...
>
> However, a delegation by the parliament may also be made to other personae designatae (for example particular Ministers of State for the Commonwealth) subject to parliamentary control by procedures for disallowance by either House. ...

88 Fourth, it is commonly said that the basic difference between a legislative decision and an administrative decision is between creating or formulating "new rules of law having general application and the application of those general rules to particular cases". Compare *Minister for Industry and Commerce v Tooheys Ltd* 42 ALR 260 at 265; 60 FLR at 331, citing *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82. Indeed, the Full Court in *RG Capital Radio* noted (at [43]) that:

> Perhaps the most commonly stated distinction between the two types of decision is that legislative decisions determine the content of rules of general, usually prospective, application whereas administrative decisions apply rules of that kind to particular cases.

89 Notwithstanding this, the Full Court in *RG Capital Radio* at [47] accepted Gummow J's statement in *Blewett* at 635 that:

> ... to accept the general distinction stated by Latham CJ in *Grunseit* is not necessarily to accept the further proposition that, to qualify as a law, a norm must formulate a rule of general application; individual norms which apply only to the action of a single person on a single occasion may still be classed as laws.

As Gummow J added at 635, it is therefore "difficult to see how a sufficient distinction between legislative and administrative acts is that between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases". In conformity with this, Gummow J held in *Blewett* that a determination made under s 4A(8) of the *Health Insurance Act 1973* (Cth) to substitute a new pathology table for that in Sch 1A to the Act was of a legislative character. His Honour reasoned that, since the Schedules to that

Act were part of the Act and the determination had the same effect as if the Schedule had been amended by an amending statute, the determination had a legislative character.

90 In this case, it may be accepted that, in designating a person under reg 6(a) or declaring a person under reg 6(b), reg 6 required the Minister to consider a particular person. In this case, the Minister had to consider whether she was satisfied that Mr Abramov fell within the description in item 6A(a) of the table in reg 6. The Minister's focus was on his activities and functions and their economic or strategic significance to Russia. This kind of focus is commonly indicative of an administrative decision. Compare *Visa International* at [591]. As the foregoing may indicate, this is not the end of the analysis. This is because designation and declaration have consequences for provisions of the Sanctions Regulations, and other legislative provisions. By designating a person under reg 6(a), the Instruments enlivened the prohibitions in regs 14 and 15. That is, upon designating a person under reg 6, these prohibitions were completed and given life in the sense that they had binding effect as regards the designated person and any assets owned or controlled by the designated person. Compare *RG Capital Radio* at [77], citing *SAT FM Pty Ltd v Australian Broadcasting Authority* [1997] FCA 647; 75 FCR 604 at 608-609. Upon being given life and binding effect, the prohibitions became applicable to a potentially large, changing and as-yet unidentified group of people. This analysis is indicative, so it seems to me, of a legislative character.

91 Similarly, the fact that a person has been declared under reg 6(b) enlivens the power to cancel a visa held by that person, or to refuse any visa application made by that person: see reg 2.43(aa)(i) and public interest criterion 4003 of the *Migration Regulations 1994* (Cth).

92 Fifth, Parliamentary control is also indicative of legislative character: see *RG Capital Radio* at [51]-[56]. Pursuant to s 42 of the Legislation Act, the House of Representatives had the capacity not only to disallow the Sanctions Regulations, but also a legislative instrument made by the Minister under reg 6 of those Regulations. That is, the lower House had a measure of oversight and control of the Instruments by which the contested decisions were made. I reject the applicant's submission that provision for disallowance by Parliament was of marginal significance in this case. I also note that it seems to me that this is not what Foster J intended to affirm in *Anderson* at [42].

93 *Anderson* was a case in which the applicant sought judicial review of the Minister's decision to refuse to make declarations under ss 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to protect what the applicant believed to be a "significant

Aboriginal area" from injury or destruction. Foster J held that the Minister's decision to refuse to make a declaration was administrative in character, and therefore amenable to review under the ADJR Act. Although emergency declarations were made by legislative instrument and subject to disallowance by Parliament, a refusal to make a declaration only required the Minister to take "reasonable steps to notify the applicant or applicants of his or her decision". A refusal was not subject to disallowance by Parliament. Foster J held therefore that a refusal was an administrative decision, although a declaration had a legislative character: *Anderson* at [47], [52]. I accept that, as the Minister submitted, *Anderson* supports the proposition that, all things being equal, an instrument that is subject to disallowance by the Parliament is indicative of a legislative character.

94 Sixth, a further factor consonant with the legislative character of the Instruments is the requirement for their publication. Since the Instruments are legislative instruments registered pursuant to the Legislation Act, the Instruments are made available to the public at large. Furthermore, designation under reg 6(a) attracts the Departmental obligations in reg 22 of the Sanctions Regulations. These obligations include an obligation to make available to the public on the Departmental website information identifying any currently designated person and the date of that person's designation. I accept that, as the Minister submitted, this requirement was consistent with the legislative character of designation under a legislative instrument, since it assisted in making the fact of designation publicly available to a person who might deal with a designated person or that person's assets.

95 Seventh, I accept that the criterion applicable to the making of the Instruments involved an assessment of the economic and strategic significance of the applicant's activities and functions to Russia. It seems to me, however, that the nature of the assessment is neutral. Similarly, it seems to me that little turns on the revocation power in reg 10, and the power to issue permits in reg 18 and to waive the operation of a declaration in reg 19. I accept that, aside from the revocation power, there is only limited opportunity for the Minister to vary or control a designation or declaration once made. A power to revoke unilaterally might be seen as analogous to the capacity to repeal in the case of primary legislation. A limited opportunity to vary or control a designation or declaration might be seen as indicative of a legislative character since it might be seen as emphasising the importance of Parliamentary control. Equally, a limited opportunity might be seen as indicative of an administrative character, since the issue of a permit and the waiver of a declaration are in the nature of administrative decisions.

96 Further, I accept that, as the Minister submitted, the Instruments amended the Russia and the Ukraine List 2014 in a manner typical of legislation. It does not seem to me, however, that this is a significant factor: at best, it is consistent with the legislative character of the contested decisions. Finally, while the presence of merits review can be a strong indicator of an administrative decision, its absence here is also neutral.

97 Nonetheless, having regard to the effect of designation and declaration in enlivening other legislative provisions, as well as provisions for disallowance and publication, I am of the opinion that the designation and declaration made by the Instruments have a legislative character.

98 This means that the applicant is confined to seeking relief under s 39B of the Judiciary Act, for jurisdictional error on the grounds available for a decision of a legislative kind, and subject to the standard of review applicable to a decision of this character: *Athavle v New South Wales* at [94]-[97]; *Bienke v Minister for Primary Industries and Energy* at 166.

THE CHALLENGE TO THE FIRST DESIGNATION INSTRUMENT

Whether the Minister's public statements form part of the reasons

99 As already stated, the Minister made the First Designation Instrument on 7 April 2022. As already noted, reg 6 of the Sanctions Regulations empowered the Minister to designate and/or declare a person mentioned in an item in the table in reg 6 for the country mentioned in the item. As noted already, Mr Abramov became a designated person for Russia and a declared person on the basis that he was a person mentioned in paragraph (a) of item 6A of the table in reg 6. That is, he was "[a] person ... that the Minister is satisfied is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia".

100 The applicant submitted that the public statements made by the Minister at a press conference and in a press release on 7 April 2022 were the Minister's explanation for listing the 67 persons (including him) for sanctions that day. The applicant noted that the Minister made these statements the same day as she made the First Designation Instrument, and that the record of the press conference and the press release showed that she referenced the 67 people targeted for sanctions in that Instrument. The applicant submitted that the Minister's public statements at the press conference and in the press release included the material findings of fact on which the Minister relied in reaching the state of satisfaction required to engage item 6A(a) of the table in reg 6.

101 The Minister contended that it was unrealistic to conclude that statements at the press conference or in the press release constituted a statement of the Minister's reasons for reaching her state of satisfaction as required in paragraph (a) of item 6A of the table in reg 6. I accept the Minister's submission.

102 The content and nature of these public statements show that they were intended to be abbreviated and generalised communications to the press and the public about the effect of the Instrument she made that day. These public statements were not statements of reasons as to why the Minister was satisfied that the precondition to an exercise of the power to designate and declare had been met with respect to any particular person in the group of 67 people to whom she referred. It is worth noting that her statements at both the press conference and in the press release indicated that the 67 people were a disparate group, including members of the Russian military, members of the Russian elite, oligarchs, Russian Ministers of State and senior Russian government officials. Plainly enough, the specific circumstances that fell for consideration in designating and declaring each individual within the group of 67 were not the same. The statements at the press conference and in the press release did not disclose the specific facts about the applicant that the Minister considered material and justified his designation and declaration. These statements did not, as Mr Merkel KC submitted, constitute the Minister's "reasons and findings for the designation decision".

103 The cases to which Mr Merkel KC referred do not lead to a different conclusion. In ***Port Phillip Scallops*** *Pty Ltd v Minister for Agriculture (Vic)* [2018] VSC 589; 238 LGERA 344, Cavanough J ruled that certain public statements made by a State Minister were relevant to the plaintiff's case about that Minister's actual reasons for the decision, and were admissible on this basis: see *Port Phillip Scallops* at [17]. The statements at issue in *Port Phillip Scallops* are not, however, comparable to the public statements at issue here. This is because the statements in that case concerned the particular fisheries quota in dispute. Unlike the Minister's statements to the press in this case, the statements at issue in *Port Phillip Scallops* did not deal in a global way with the diverse circumstances of a significant number of people, each of whom was the subject of individual consideration before a separate decision about each of them was made.

104 For similar reasons, the applicant's reliance on ***Greyhound Racing NSW*** *v Cessnock & District Agricultural Association Inc* [2006] NSWCA 333 was misplaced. *Greyhound Racing NSW* concerned a decision made by a statutory authority on the basis of a briefing paper identifying the four relevant factors to be considered by the authority in its decision-making. After making

the decision, the authority sent a letter to the respondent and made a media announcement, only referring to two of those factors. This led the Court to infer that those two factors were the primary factors on which the authority had in fact based its decision: see *Greyhound Racing NSW* at [85]. This reasoning is inapplicable to the public statements at issue in this case. This is because, in contrast to *Greyhound Racing NSW*, the applicant here seeks to enlarge, as opposed to narrow, the field of material facts, beyond the undisputed evidence concerning the Minister's actual decision-making concerning him.

105 There is undisputed evidence of the material before the Minister when she made the impugned decision. The Minister's statements at the press conference and in the press release were extrinsic to the process of making that decision. Further, as noted, the Minister's statements to the press were not about the applicant specifically. Rather, the press conference and the press release contained generalised statements about a group of 67 people. These statements explained in a general way why the Minister had made the First Designation Instrument with respect to that group, rather than why the applicant fell into the group. The Minister's statements to the press did not detail the facts about Mr Abramov that the Minister considered justified her reaching the state of satisfaction required to engage item 6A(a) of the table in reg 6.

The applicant's no evidence ground

106 The applicant's claim that there was no evidence or other material before the Minister to form the state of satisfaction required by item 6A(a) of the table in reg 6 depended on the Court's acceptance of his submissions concerning the statements made by the Minister in the press conference and press release of 7 April 2022. The applicant's case was that there was no evidence for the Minister's "findings" as recorded in the record of the press conference and in press release: see applicant's submissions dated 12 September 2022, at [26]-[28]. In this context the applicant relied on *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) [2004] HCA 32; 207 ALR 12 at [38] in support of his contention that the Minister's state of satisfaction could not lawfully have been formed if there was no evidence to support the material findings of fact on which her satisfaction was based. Since none of the statements made by the Minister in the press conference and in the press release of 7 April 2022 formed part of the Minister's reasons for designating or declaring Mr Abramov pursuant to reg 6 of the Sanctions Regulations, this ground must fail.

The applicant's constructive failure to exercise jurisdiction ground

107 As noted earlier, to designate Mr Abramov for Russia and declare him pursuant to reg 6 (as a person mentioned in item 6A(a) of the table) the Minister had, first, to be satisfied that Mr Abramov "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia". Second, the Minister had to determine that it was appropriate as a matter of discretion to designate and declare him.

108 The applicant contended that the Minister failed to appreciate that, once relevantly satisfied, she had still to consider whether it was appropriate in the exercise of her discretion to designate and declare him. This, in the applicant's submission, amounted to a constructive failure to exercise jurisdiction, because the Minister failed to apply the correct test or misunderstood the nature of the power conferred on her. The applicant sought to make out this ground principally by reference to the First Departmental Submission, although senior counsel for the applicant also submitted that other materials accompanying the Submission supported this contention.

109 Mr Herzfeld SC, for the Minister, contended that it was not open to the Court to conclude on the balance of probabilities that the Minister had failed to understand the discretionary nature of the power merely because there was no express reminder to the Minister in the First Departmental Submission that the power was a discretionary one. He referred to ***Burgess*** *v Assistant Minister for Home Affairs* [2019] FCAFC 152; 271 FCR 181 in support of this contention. He also contended that the First Departmental Submission in fact informed the Minister that her decision was a discretionary one. Referring to the Departmental recommendation (see [24] above) at the outset of the Submission, the Minister submitted that the recommendation that the Minister "note… if you do not agree to a designation or declaration" was "inconsistent with any misapprehension that satisfaction as to the criteria compelled a decision". The Minister further submitted that the statements in the Submission about other countries' listings and the effect of Australia's listing "could only have been understood as relevant to the discretion and not to the criteria themselves".

110 Mr Herzfeld SC also relied on the fact that the Minister had issued the Explanatory Statement for the Russia Regulations (adding item 6A to the table in reg 6: see [5] above) earlier in 2022. He drew attention to the fact that the Explanatory Statement described autonomous sanctions as a "discretionary tool"; and that it stated:

> When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

He submitted that this supported the proposition that the Minister understood that "sanctions were discretionary tools".

111 For the reasons stated below, I accept the applicant's submission that there was jurisdictional error because there was a constructive failure to exercise jurisdiction.

112 As reference to [24] above shows, the recommendation at the beginning of the First Departmental Submission effectively advised the Minister that her consideration of the Submission could lead to only two possible outcomes. The Submission advised the Minister in substance that, if satisfied that the 67 individuals met the criteria for listing, then she should designate and declare them by recording this appropriately in the Decision Record. The Submission further advised the Minister that if she did not agree to a designation or declaration, then she should initial the "Do Not List" column in the Decision Record, as directed. There was no indication that the Minister had a discretion not to designate or declare Mr Abramov even though the Minister was satisfied he met the listing criteria in item 6A(a) in the table in reg 6. Rather, fairly read, and having regard to recommendation (a)(i), recommendation (a)(ii) merely directed the Minister on what to do if the Minister were not satisfied that a person met the listing criteria. In this context, the use of the word "or" in recommendation (a)(ii) is insufficient to support the Minister's contention that "or" pointed to a separate and undisclosed discretion. The result was that the Minister was advised in substance that there was only one critical issue for her to decide: whether she was satisfied that each of the 67 persons (including Mr Abramov) met the listing criteria set out in Pt B of the Decision Record. Recommendation (a)(ii) simply indicated what she should do if she was not so satisfied with respect to a particular person. Critically, there was no reference to a third possibility: that it was open to the Minister to conclude that a person met the criteria for designation and declaration but decide, as a matter of discretion, not to designate or declare that person.

113 Part A of the Decision Record also operated to confirm that the Minister only had these two options, there being no reference in Pt A to the third possibility.

114 Further, the material in the Decision Record informing the Minister about Mr Abramov fortifies this reading of the First Departmental Submission. There are five bullet points in the relevant entry: see [27] above. The first three points concerned Mr Abramov's functions and activities. These points were relevant to the fifth point:

> Given his position in Evraz, it is open for the Minister to be satisfied that [Mr Abramov] is, or has been, engaging in an activity or performing a function that is of

economic or strategic significance to Russia.

115 Plainly enough, this information was also relevant to whether Mr Abramov met the listing criterion in item 6A(a) of the table in reg 6. It did not point to the existence of a separate discretion to determine whether, even if he met these criteria, the Minister had still to consider the exercise of her discretion whether to designate and/or declare Mr Abramov pursuant to reg 6.

116 The fourth dot point was redacted. It was the subject of a public interest immunity claim made by the Minister. Although the applicant initially contested the claim, at a hearing on 26 August 2022, Mr Berger KC, for the Minister, informed the Court that the parties had reached an agreement. Pursuant to this agreement, the applicant did not pursue his opposition to the claim and the Minister made the following statement to the Court:

> The respondent accepts that the information over which public interest immunity is claimed does not bear upon satisfaction as to (a) Mr Abramov's activities or functions, and (b) the economic or strategic significance to Russia of any of Mr Abramov's activities or functions. Secondly, ... the information ... over which public interest immunity is claimed is of potential relevance only to the Minister's decision as to whether to make a designation or declaration in respect of Mr Abramov.

117 The Minister submitted that the Court should infer from this statement that the fourth bullet point was in fact relevant to the exercise of her discretion. I would not do so. If the Minister had given consideration as to whether she should, as a matter of discretion, designate and declare Mr Abramov, the relevance and weight of the fourth dot point or any other consideration would have been for her to determine at the time she made her decision. By agreement between the parties, the Minister has affirmed that the information in that dot point was "of potential relevance only to the Minister's decision as to whether to make a designation or declaration in respect of Mr Abramov". This evidently remains the Minister's opinion. It is not, however, for the Court to determine the relevance of the fourth dot point, including because it does not know its contents.

118 Mr Merkel KC, for the applicant, submitted that I should infer that the fourth point was intended to support the conclusion in the fifth point. I would not do so. This would, it seems to me, be inconsistent with the statement made by agreement on 26 August 2022.

119 The outcome of the dispute about the fourth dot point in the information about Mr Abramov presented to the Minister in the Decision Record does not matter much, however. The fact is that there is nothing in the material before the Court to indicate that, when the Minister made

her decision, her attention was directed to the existence of the discretion. This is a much weightier matter.

120 In the absence of any reference to the existence of the discretion, it seems to me that one would naturally understand the statements in the First Designation Submission about other countries' listings and the effect of Australia's listing as intended to contextualise the Departmental recommendations, and the steps the Minister was requested to take to give effect to them. These statements do not provide a basis to infer that the Minister was made aware of and exercised the discretion conferred on her by reg 6. I reject the Minister's contrary submission.

121 To the extent relevant, I accept that, as Mr Merkel KC submitted, the draft Explanatory Statement issued for the First Designation Instrument did not mention the discretionary nature of the power in reg 6. Nor did the draft Statement of Compatibility with Human Rights. Both these documents were before the Minister when she made the First Designation Instrument. These documents provide limited further support for the applicant's case.

122 I reject the Minister's submission that the Explanatory Statement for the Russia Regulations indicated that that the Minister had a discretion of the kind conferred by reg 6. In the exercise of that discretion, the Minister might consider the circumstances of a particular person before designating and declaring them. That Explanatory Statement did not concern this kind of discretion. Rather, it concerned a discretion at a higher and more general level, that is, in the framing of foreign and other national policies, including the strategic decision to apply autonomous sanctions as a matter of foreign policy. In any event, though it was before her, there is no reason to believe that the contents of the Explanatory Statement were in the Minister's mind at the time she came to consider the First Departmental Submission regarding the 67 persons, including Mr Abramov.

123 The First Departmental Submission would have led the reader to conclude that, to the contrary, if the Minister was satisfied that a person met the listing criteria (relevantly, in item 6A(a) of the table in reg 6), then the Minister would designate and declare that person. There is nothing in that Submission to support the conclusion that the Minister considered whether she **should** designate and declare Mr Abramov even though satisfied he met the criterion in item 6A(a) of the table in reg 6, and that she determined that she should. The Minister's statement at the hearing on 26 August 2022 that the fourth point was "of potential relevance only to the Minister's decision as to whether to make a designation or declaration in respect of Mr Abramov" does not overcome this deficiency. It does not provide a sufficient basis to infer

that the Minister was aware of the discretion and exercised it. There is, moreover, nothing to indicate that the Minister was aware of, and exercised, the discretion notwithstanding the absence of any reference to it in the First Departmental Submission.

124 For the foregoing reasons, I conclude that, on the balance of probabilities, the Minister failed to appreciate the discretionary nature of the power conferred by reg 6 of the Sanctions Regulations. *Burgess* is an entirely different case that turned primarily on the proper inferences to be drawn from the Departmental submission relevant to that case. It is of no assistance to the Minister here. In this event, there is a constructive failure to exercise jurisdiction, because the Minister failed to apply the correct test, misunderstood the nature of her jurisdiction, or failed to address the correct questions.

125 In a much-cited passage in *Ex parte Hebburn Ltd: Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420, Jordan CJ said that there would be a constructive failure to exercise jurisdiction where the decision-maker misunderstood the nature of the jurisdiction to be exercised, and applied a "wrong and inadmissible test"; or "misconceive[d]" the duty to be performed; or failed to address the question that the law prescribed; or misunderstood the nature of the opinion to be formed. There are many examples of the application of this statement, including *Sinnappan v State of Victoria* [1995] 1 VR 421 at 443-4, to which Mr Merkel KC referred.

126 The error was evidently material. Applying ***MZAPC*** *v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506 at [38] and ***Nathanson*** *v Minister for Home Affairs* [2022] HCA 26; 403 ALR 398 at [32]-[33], I am satisfied that, as "a matter of reasonable conjecture", the Minister's consideration of whether, in the exercise of her discretion, she should designate and declare Mr Abramov pursuant to reg 6 of the Sanctions Regulations might have led to a different decision. For example, the Minister might have considered it relevant that no other country had sanctioned Mr Abramov and/or that he was no longer a member of the Evraz Board. It may also be that, where the relevant error involves a misunderstanding of the nature of the power to be exercised, the Court must necessarily find that acting upon a correct understanding of the nature of the power could have resulted in the making of a different decision: compare *Nguyen v Minister for Home Affairs* [2019] FCAFC 128; 270 FCR 555 at [45]-[51]; *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66; 276 FCR 75 at [69]-[70]. It is unnecessary to delve into this question in any detail because, on any analysis, the error identified here was material.

127 I would therefore uphold the applicant's challenge to the First Designation Instrument, on the ground that there was a constructive failure to exercise jurisdiction.

Failure to form requisite satisfaction lawfully: applicant's unreasonableness ground

128 As we have seen, the applicant challenged the making of the First Designation Instrument on the ground that the Minister was not lawfully satisfied that Mr Abramov "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia", as item 6A of the table in reg 6 required. The applicant submitted that "it was legally unreasonable, and/or irrational or illogical, and/or erroneous" for the Minister to reach that state of satisfaction.

129 In support of this ground, the applicant relied on alleged errors of fact in the Minister's statements at the press conference and in the press release of 7 April 2022. As explained at [105] above, these statements did not form part of the Minister's reasons for designating and declaring Mr Abramov pursuant to reg 6 of the Sanctions Regulations. In particular, they did not detail the facts about Mr Abramov that the Minister relied on in reaching the state of satisfaction required to engage item 6A(a) of the table in reg 6. Accordingly, the applicant's attempt to rely on statements at the press conference and in the press release on 7 April 2022 in support of this ground must fail.

130 I turn to that part of the applicant's challenge based on alleged errors in the First Departmental Submission. As noted earlier, the Minister signed Pt A of the Decision Record that accompanied the Submission. In so doing, the Minister recorded that she was satisfied that Mr Abramov met the criteria for designation and declaration, and that she had considered the part of the statement of case in the Submission respecting him.

131 The applicant contended that the power conferred by reg 6 in conjunction with item 6A(a) of the table in reg 6 was "narrowly tailored to the instrumental purpose of influencing the Russian Government in relation to the invasion of Ukraine". The applicant submitted that item 6A(a) was only engaged "with respect to the conduct of persons that has the requisite nexus to Russia's aggression towards Ukraine". In the applicant's submission, none of the matters set out in the submission to the Minister, individually or in combination, were sufficient to enable the Minister lawfully to conclude that he was or had been engaging in activities or functions with that nexus.

132 The applicant also submitted that, regarding the information said to be about him (see [27] above), much of the information was not about him but about the activities and functions of Evraz. In the applicant's submission, by directing herself to matters relating solely to Evraz, the Minister had conflated the applicant with Evraz, or attributed Evraz's functions and activities to him without a proper basis. The applicant argued that such an attribution was unjustified. He submitted that the roles of 'chairman' and 'co-founder' (upon which the Minister relied to connect him with Evraz were merely offices, disclosing no relevant functions or activities. He submitted that the fact he held these offices was insufficient to permit the attribution of Evraz's functions and activities to him. The applicant submitted that, to justify this attribution, the Minister would have had to conclude that he exercised personal control or influence over Evraz. The applicant submitted that this conclusion was not open to the Minister. The applicant submitted that affidavits filed by him in the proceeding showed that Evraz's listing on the London Stock Exchange required compliance with stringent regulations precluding his personal control or influence.

133 Separately, the applicant also submitted that it was unreasonable for the Minister to have accepted the "bare allegation" that Evraz had supplied steel to the Russian military for the production of tanks, particularly as the material before the Minister showed that Evraz had denied that allegation. The applicant submitted that the absence of any material indicating that either he or the Board were involved in or had knowledge of the alleged supply exacerbated the unreasonableness of the requisite satisfaction being reached.

134 The Minister contended that the applicant's case with respect to this ground rested on an erroneous construction of item 6A(a) of the table in regulation 6. The Minister argued that, contrary to the applicant's construction, this item conferred on the Minister an evaluative latitude that, coupled with the exacting standard required to make out the ground of legal unreasonableness, meant the applicant must fail. The Minister also denied that there had been any "attribution" of Evraz's activities to the applicant or "conflation" of Evraz's activities with those of the applicant. Rather, so the Minister submitted, the Minister had turned her mind to the applicant personally, focussing on the activities and functions he performed in connection with Evraz.

135 The Minister also submitted that Mr Abramov's role as co-founder and chairman of Evraz was rationally capable of supporting the Minister's satisfaction that he had been engaging in activities or performing functions of economic or strategic significance to Russia. The Minister

contended that this conclusion was unaffected by the argument (even if it be accepted) that a non-executive chairman is not involved in a company's day-to-day operations, or that the co-founding had occurred in the past. Mr Lim, for the Minister, submitted that the applicant's arguments, taken at their highest, showed only that different views might be open about what could be inferred from the applicant's role as chairman and co-founder. He submitted that this would fall well short of the conclusion that the Minister's satisfaction with respect to the applicant was not open on the material before her.

136 Further, the Minister submitted that it was open to her to rely on the material alleging that Evraz supplied steel to the Russian military, and that it was for her to determine what weight, if any, to place on that material. Referring to *Minister for Immigration and Citizenship v* ***SZMDS*** [2010] HCA 16; 240 CLR 611 at [135] and ***ABT17*** *v Minister for Immigration and Border Protection* [2020] HCA 34; 269 CLR 439 at [19], the Minister submitted that it was irrelevant that the applicant submitted in this proceeding that the allegation was untrue.

137 The Minister contended that it was impermissible for the applicant to challenge the reasonableness of her state of satisfaction by reference to matters set out in affidavits filed in the proceeding, being material that was not before the Minister. While the Minister accepted that extrinsic evidence may be admitted to support an unreasonableness ground, the Minister argued that courts had admitted such evidence only to permit an assessment of a decision in the context of knowledge in a particular technical area. In this context, the Minister referred to ***Australian Retailers Association v Reserve Bank of Australia*** [2005] FCA 1707; 148 FCR 446 and ***Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd*** [1993] FCA 46; 40 FCR 381. The Minister submitted that extrinsic evidence could not be used to challenge the correctness of the material that lay before the Minister in support of a state of satisfaction on "an essentially political or subjective criterion". This was not, so Mr Lim submitted, "a criterion that invites admission of extrinsic evidence ... seeking to contradict factual propositions that were instructed to the Minister".

Consideration – the applicant's unreasonableness ground

138 For the following reasons, it seems to me that this ground cannot succeed.

139 I accept that, as Mr Herzfeld SC submitted, the standard of legal unreasonableness is high, whether referable to a decision having an administrative or legislative character. Whether a purported exercise of power is so unreasonable that no reasonable administrative decision-

maker could have exercised the power as the decision-maker did is a stringent test. See, e.g., *Minister for Immigration and Citizenship v* ***Li*** [2013] HCA 18; 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ); [105]-[109] (Gageler J); and *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [11] (Kiefel CJ); [82] (Nettle and Gordon JJ). In this context, as Hayne, Kiefel and Bell JJ concluded in *Li*, "[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification". The standard would appear to be even higher where the challenged act or decision is of a legislative character. See, for example, *Athavle v New South Wales* [2021] FCA 1075; 290 FCR 406 at [94]-[97] (which, unlike this case, concerned subordinate legislation) and *Bienke v Minister for Primary Industries and Energy* [1994] FCA 626; 125 ALR 151 (which, like this case, involved a decision subject to disallowance by one of the Houses of Parliament) at 166 (Gummow J). The Court must assess the applicant's contention that the making of the First Designation Instrument was unreasonable in the legal sense according to these principles.

140 First, there is nothing in the text of reg 6, read with item 6A of the table in reg 6, to support the applicant's submission that the power conferred on the Minister arose only "with respect to the conduct of persons that has the requisite nexus to Russia's aggression towards Ukraine". Such a nexus does not fix the boundaries of legal reasonableness. I reject the applicant's submissions to the contrary. I discuss the proper construction of these provisions at [69]-[84] above. I accept that the Russia Regulations, which introduced item 6A into the table in reg 6, were made in response to Russia's invasion of Ukraine; but nothing in the text of reg 6, read with item 6A of the table, supports the requirement for which the applicant contends. To accept the applicant's contention would require the introduction of words into the text that simply do not appear there, either expressly or by implication.

141 Second, I accept that, as the Minister submitted, it was open to the Minister to have regard to the material alleging that Evraz had supplied steel to the Russian military for tank construction. It was essentially for the Minister to determine what weight, if any, she gave this material. In this context, it was irrelevant that the applicant maintained in this proceeding that the allegation was false.

142 Third, I accept the Minister's submission that, in this case, the applicant's unreasonableness ground (that the Minister could not reasonably have formed the requisite state of satisfaction)

ought be decided by reference to the material before the Minister at the time she decided to designate Mr Abramov for Russia and to declare him under reg 6.

143 At the outset of his written submissions on this ground, the applicant accepted that, if the Court rejected his submission that the Minister's press statements were, relevantly, her reasons for decision, then "the question whether the Minister has lawfully formed the requisite state of satisfaction is to be determined by asking whether it was open, on the materials before the Minister, lawfully to form that state of satisfaction". Upon the basis that the Minister has not given reasons, the applicant relied on the well-known statement of Dixon J in ***Avon Downs*** *Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360. His Honour there said:

> Moreover, the fact that [the decision-maker] has not made known the reasons why he was not so satisfied will not prevent the review of [the] decision. ... If the result appears unreasonable on the supposition that [the decision-maker] addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which [the decision-maker] has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

144 In other parts of the applicant's written submissions on this ground, however, the applicant referred to his affidavit filed in this proceeding on 13 September 2022. In particular, as part of his argument in support of this ground, the applicant referred to this affidavit in support of the proposition that there was no rational basis to attribute Evraz's activities and functions to him at the time the Minister designated and declared him under reg 6. This attribution was, so the applicant said, inherent in the information about Mr Abramov set out in the First Departmental Submission, which the Minister confirmed that she had considered in signing the Decision Record.

145 There are at least two difficulties with this approach. First, there is no express and direct attribution of the activities and functions of Evraz to Mr Abramov in the First Departmental Submission, including in the particular information about Mr Abramov: see [27] above. Further, the Submission does not **attribute the activities and functions** of Evraz to Mr Abramov in the way the applicant would have it, even by implication. Rather, the focus of the Submission is on the importance of Mr Abramov's **own** activities as co-founder of the company and his **own** functions as its Chairman. It is his activities as co-founder and his functions as Chairman of the company that lead to the Submission's conclusion that "[g]iven his position in Evraz", it was open to the Minister to be relevantly satisfied. It is true that the

information about Mr Abramov includes two sets of information about Evraz: first, the nature of its business, its principal location and taxpayer status in Russia; and, second, the existence of an allegation that the company had supplied steel to the Russian military "[d]uring [the applicant's] tenure". These two latter points contextualise the significance of the applicant's activities and functions as co-founder and Chairman of such a large and globally important company. That is, the Submission is not asserting, even by implication, that Mr Abramov was closely involved in the operations of the company. Rather, it is saying that it might be inferred from the status of the positions he held within such a company that he was or had been engaging in activities or performing functions of economic or strategic significance to Russia. In this regard, it cannot be said that, in reaching the requisite state of satisfaction, the Minister reached a conclusion that lacked evident and intelligible justification: see *Li* at [76]. Since the standard is even higher in the case of challenge to an act or decision of a legislative character, it is evident that this ground must fail.

146 In any event, even if contrary to my conclusion, the applicant's reading of the First Departmental Submission was open, that alternative reading would support the Minister's ultimate satisfaction. This is clearly not a case where "the conclusion ... reached [by the decision-maker] ... "is capable of explanation only on the ground of ... misconception": *Avon Downs* at 360.

147 I note that, in the present case, the applicant relied on his own affidavit in support of his contention that the activities and functions of Evraz should not be attributed to him. Ordinarily, of course, material that was not before the decision-maker at the time of the decision will be irrelevant in subsequent judicial review proceedings, and evidence of such material will be inadmissible: see ***Mackenzie*** *v Head, Transport for Victoria* [2021] VSCA 100 at [153]. Both parties accepted as much. There is no hard and fast rule, however; and the admissibility of evidence that was not before the decision-maker will depend on the ground of review and the circumstances of the case: see, for example, *Mackenzie* at [153].

148 In *Mackenzie* the Victorian Court of Appeal identified one class of evidence that may be admissible in these circumstances as "[e]xpert evidence that is capable of showing that there was no intelligible foundation for the decision". Both *Australian Retailers Association v Reserve Bank of Australia* and *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* fall into this class.

149 In the former case, the applicant contended that the Bank had acted irrationally, and not in accordance with sound economic principles in designating the EFTPOS system under s 11 of the *Payment Systems (Regulation) Act 1998* (Cth). The applicant challenged the decision on judicial review. Both parties adduced evidence about the effects of designation. As Weinberg J explained, at [460], however:

> When it is put that a body, such as the RBA, acted irrationally, and not in accordance with sound economic principle, the fact that experts in "payment systems" and regulatory theory say that they would have arrived at the same decision must be probative, at least as regards that issue. What is "sauce for the goose, is sauce for the gander". It follows that evidence by experts that the decision to designate was taken in disregard of fundamental, and quite basic economic principles, must equally be admissible as bearing on the same issue. ...

In other words, the expert evidence in that case was admissible because it addressed technical issues concerned with "payment systems" within the meaning of the relevant Act and the regulatory theory relevant to understanding the effect of the decision under review within the relevant statutory context: cf: *Australian Retailers Association v Reserve Bank of Australia* at [454]-[460].

150 *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* also falls into this class. The case was an appeal against a declaration made by a single judge that a provision of a management plan under the *Fisheries Act 1952* (Cth) was void. An expert in statistics gave expert opinion evidence at first instance as to the existence of a statistical fallacy in the formula for the allocation of catch quotas. The Full Court dismissed the appeal on the basis that the Minister's exercise of power under s 7B(5)(b) of that Act depended on a formula for the allocation of catch quotas, which produced absurd results as the expert's evidence had shown. The Court held that the exercise of statutory power was therefore irrational, and no reasonable person could have exercised the power in that way.

151 The evidence on which Mr Abramov sought to rely was not expert evidence serving a purpose akin to that in either of these two cases. Of course, as *Mackenzie* shows, the admissibility of evidence, which was not before the decision-maker at the relevant time, is not confined to expert evidence. There is no need to discuss other occasions here, however. As I have said, the applicant relied on his own affidavit in support of his contention that the activities and functions of Evraz should not be attributed to him. Since I would not read the First Departmental Submission in this way (see [145] above), the evidence on which the applicant sought to rely was irrelevant and inadmissible. Plainly enough, neither of the cases to which the Court was referred would lead to a different conclusion here.

152 For these reasons, this ground cannot succeed.

Failure to form requisite satisfaction lawfully: the applicant's erroneous findings of fact ground

153 The applicant further contended that the Minister had failed lawfully to form the state of satisfaction required by item 6A(a) in the table in reg 6 because she had been so satisfied on the basis of erroneous "findings" of fact. The Minister came close to submitting that this was not a tenable ground. For present purposes, however, the applicant's ground can be understood to support a submission that the Minister failed to address the matters that item 6A(a) of the table in reg 6 required her to address because her satisfaction was reached on the basis of erroneous facts.

154 In support of this ground, the applicant relied on two propositions drawn from the Minister's public statements to the press on 7 April 2022. Since I have rejected the applicant's submission that these public statements constituted the Minister's reasons for designating and declaring Mr Abramov pursuant to reg 6, the errors, if any, in these public statements are irrelevant for present purposes.

155 The two other impugned assertions of fact were, first, that Mr Abramov was co-founder of Evraz and, secondly, that he was its Chairman. These assertions appear in the statement of case about Mr Abramov and the description of his "title" in the list in Pt C of the Decision Record: see [27] and [28] above. There was also a further reference to his position as Chairman of Evraz in the First Departmental Submission under the heading "Background". As noted already, the Minister signed Pt A of the Decision Record, thereby indicating that she had considered the statement of case about Mr Abramov and was satisfied that he (being a person listed in Pt C) met the criteria for designation and declaration. There was also a description of Mr Abramov as "Co-founder and Chairman of Evraz" in the list in Schedule 1 to the First Designation Instrument.

156 The applicant submitted that the statement that he was a "co-founder" of Evraz was erroneous. In his affidavit filed on 13 September 2022, he deposed that, although he had co-founded EvrazMetall in 1992, he did not co-found Evraz. Rather, so he deposed, Evraz was created in 2011, following decisions by the Board and shareholders of Evraz SA (of which he was non-executive Chairman at the time).

157 Regarding the First Departmental Submission's description of him as "Chairman of Evraz" or "Chairman of multinational steel company Evraz", the applicant deposed that he had resigned as Chairman of the company on 11 March 2022. Further, he deposed that, from 14 October 2011 until 11 March 2022, he was a non-executive (and not an executive) Chairman of the company. In this context, he submitted that this was a distinction of consequence, given that the Minister relied on his activities or functions as Chairman in reaching the requisite state of satisfaction.

158 The applicant submitted that the factual errors in the information presented to the Minister in the First Departmental Submission and accompanying documents, and on which she must be taken to have relied in designating and declaring him, vitiated the Minister's state of satisfaction.

159 Citing *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) [2004] HCA 32; 207 ALR 12 at [38], the applicant submitted that a state of satisfaction will not be lawfully formed where it is "not based on findings or inferences of fact supported by logical grounds". This would be the case, so the applicant submitted, where a state of satisfaction was based on material findings of fact that were erroneous. In support of this argument, the applicant referred to ***Duggan*** *v Federal Commissioner of Taxation* [1972] HCA 66; 129 CLR 365, ***Lu*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; 141 FCR 346, ***WCJS v*** *Minister for Home Affairs* [2021] FCA 1093, and ***Chang*** *v Neill* [2019] VSCA 151; 62 VR 174. Citing *MZAPC*, *Nathanson*, and *Chang*, the applicant submitted that the factual errors were serious and important to the Minister's decision, and in consequence deprived him of a realistic possibility of a different outcome.

160 In response to the Minister's contention that *Duggan* was not a judicial review proceeding and therefore did not provide authority for this case, the applicant contended that "a statutory appeal from disallowance of an objection is a proceeding in the nature of judicial review". He supported this proposition by referring to *Avon Downs*; *Amway of Australia Pty Ltd v Commonwealth of Australia* [1999] FCA 283; 41 ATR 443 at [20]; and *Bosanac v Commissioner of Taxation* [2019] FCAFC 116; 267 FCR 169. The applicant further submitted that there was nothing about *Duggan* to warrant the conclusion that the principle in that case was inapplicable here.

161 The Minister began with the contention that this part of the applicant's case was "a legally unavailable ground of challenge". Citing ***Australian Broadcasting Tribunal v Bond*** [1990]

HCA 33; 170 CLR 321 at 356, the Minister submitted that "[t]here is no error of law simply in making a wrong finding of fact". Mr Herzfeld SC submitted that the applicant's approach –

> ... embraces, in the context of a jurisdictional pre-condition expressed by reference to the decision-maker's satisfaction, an ability to challenge on objective grounds with extrinsic evidence findings of fact made by the decision-maker along the way. And that would be nothing short of a revolution in administrative law.

162 Senior Counsel submitted that, for the applicant to succeed, the applicant had to show how the making of the alleged factual errors involved a legally unreasonable process of decision-making. He submitted that the applicant had not undertaken this analysis and that:

> There's no suggestion that any factual error of the kind of which the applicant complains means that the Minister didn't consider the question that the Minister was required to consider.

163 Mr Herzfeld SC contended that the authorities did not support the proposition that material errors going to states of satisfaction are of themselves jurisdictional errors. He submitted that, in each of the cases to which the applicant referred, the applicant had identified the way in which the alleged errors of fact resulted in the Minister failing to perform the task required by the governing legislation. For example, in *Lu*, the Court held that a mistaken understanding of the applicant's criminal record meant that the Minister failed to consider the applicant's actual criminal record as required by law. The Minister submitted that *Chang* was another example of the same kind of problem. In *WCJS*, the Court held that the sheer number of factual mistakes in the Minister's brief impelled the conclusion that the Minister reached the decision through a legally unreasonable (and thus legally unavailable) process of reasoning.

164 The Minister contended that Stephen J's reasoning in *Duggan* was inapplicable in the context of the present proceeding because *Duggan* turned on the specific and unusual terms of the applicable statutory provisions. The Minister referred to *Holmes v Deputy Commissioner of Taxation (NSW) (No 2)* (1988) 19 ATR 1173 at 1185 in support of the proposition that an appeal to the High Court under s 187 of the *Income Tax Assessment Act 1936* (Cth) was relevantly different to a judicial review proceeding. The Minister also noted that in *Duggan* there was no suggestion that material extraneous to the actual decision-making process affected the outcome. Senior counsel for the Minister further submitted that, if considered in this way, *Duggan* was support "only for a no evidence ground, or perhaps an irrationality ground", to be assessed by reference to the material before the decision-maker.

165 In written submissions, the Minister submitted that the challenged findings were not made. Rather:

> Her finding was that she was satisfied on the basis of the material before her that the Applicant should be designated. Whether that involved an acceptance of some or all of the facts briefed to her is unknown.

166 At the hearing, however, Mr Lim, for the Minister, properly noted that Schedule 1 of the First Designation Instrument, which included Mr Abramov in the list (at 103), included "Additional information" with the listing. This information noted Mr Abramov as "Co-founder and Chairman of Evraz": see [4] above. Mr Lim accepted that "that is a finding in relation to the decision".

167 The Minister argued that neither of the challenged propositions was erroneous. Respecting the proposition that Mr Abramov was Chairman of Evraz, Mr Lim noted that while the first dot point in the statement of case about him said that he "**is** Chairman of multinational steel company Evraz", this is not reflected in the First Designation Instrument. Mr Lim noted that "the present or past tense ... did not matter to the statutory criteria, and the actual finding, as reflected in the instrument itself, placed no significance on any temporal aspect". Mr Lim also noted "some ambiguity" in the first dot point about whether the Minister was in fact being instructed that the applicant "is presently" the Chairman, given that it was "slightly odd" to affirm that Mr Abramov "is presently co-founder" of Evraz. The Minister noted that the last dot point in the statement of case affirmed that it was open to the Minister to reach the requisite state of satisfaction; and that this involved her being satisfied that Mr Abramov "is or has been" engaging in or performing a relevant activity or function. In this context, so the Minister submitted, Mr Abramov's very recent resignation from the role of Chairman was factually immaterial. This was because his tenure as Chairman was not so historically remote as to fall outside of the scope of the statutory criterion. The Minister submitted that an error of this kind did not vitiate the jurisdiction to make the First Designation Instrument.

168 Respecting the proposition that Mr Abramov was the "co-founder of Evraz", Mr Lim submitted that, since Mr Abramov accepted that he co-founded Evraz's corporate predecessor, nothing turned on the precise corporate history of Evraz. Mr Lim noted that the information in the first dot point in the statement of case about Mr Abramov did not describe Evraz with any particularity.

169 Mr Lim submitted that, in the circumstances set out by Mr Abramov in his affidavit (at [16]-[22] and [30], [32]-[33]) it was "not inaccurate" to describe Mr Abramov as co-founder of Evraz. Mr Lim submitted that "in any realistic sense Mr Abramov is co-founder of Evraz by reason of co-founding EvrazMetall in 1992 and Evraz Group SA in 2004 and Evraz in 2011".

Mr Lim referred to Mr Abramov's statements that: (1) he co-founded EvrazMetall in 1992; (2) Evraz Group SA ultimately came to hold the assets of EvrazMetall; (3) Mr Abramov held an indirect interest in two-thirds of the share capital in the holding company at the time; (4) Mr Abramov was the Chief Executive Officer and executive Chairman of Evraz Group SA from its establishment to 31 December 2005; (5) Mr Abramov became non–executive Chairman again on 1 December 2008; and (6) was a Board member in the intervening period. Mr Lim also referred to Mr Abramov's account of the establishment of Evraz following the decision of the Board of Evraz Group SA in 2011, when Mr Abramov was its Chairman and held a substantial proportion of its share capital. Mr Lim also referred to the Chairman's Statement in Evraz's Annual Report and Accounts, which he noted included not only a photograph of Mr Abramov but also Mr Abramov's statement about the company's operations.

170 The Minister submitted that, even if the Court accepted that the Minister made the decision to designate and declare Mr Abramov based on the two factual errors the applicant identified, these errors would be "at the very margin" of the statutory task performed by the Minister and could not affect the efficacy of the First Designation Instrument.

Consideration of the applicant's erroneous findings of fact ground

171 As already noted, the Minister accepted that the description of Mr Abramov as "Co-founder and Chairman of Evraz" in the list in Schedule 1 to the First Designation Instrument was a finding in relation to the Minister's designation and declaration of him under reg 6 of the Sanctions Regulations. I also accept that the information about Mr Abramov in the First Departmental Submission and its accompanying documents was information that the Minister read, considered and relied on in designating him: Cf. *O'Connor v Adamas* [2013] FCAFC 14; 210 FCR 364 at [248]-[249].

172 Further, although the applicant sometimes appeared to treat a mistake of fact as sufficient to vitiate the related exercise of power, this did not, it seemed to me, reflect the gravamen of his complaint. As will be explained, the applicant did not in substance contend that a mere error of fact could justify a finding of jurisdictional error (or reviewable error for the purposes of the ADJR Act): cf *Australian Broadcasting Tribunal v Bond* at 356. Rather, the applicant's case was that the consequence of the alleged errors of fact was that the Minister did not lawfully form the requisite state of satisfaction, which was a condition precedent to the exercise of power to designate and declare him.

173 On examination, the authorities on which the applicant relied support the proposition that, in order to make out this ground, the applicant needed to show that the errors were of such a magnitude and of such an importance to the legislative task the Minister was required to perform that the Minister failed to perform that task. Thus, in *Chan*g the Court of Appeal of the Supreme Court of Victoria relevantly concluded at [92] that:

> A factual error may constitute jurisdictional error if it amounts to a constructive failure to perform the statutory function conferred on the decision-maker. ... Whether such a factual error amounts to a constructive failure to perform the statutory function conferred on the decision-maker will depend on the importance of the material to the exercise of the function and the seriousness of the error.

174 The error in *Lu* was a jurisdictional error because its effect was that the decision-maker failed to consider a matter that the governing statute required the decision-maker to consider. *Lu* concerned the cancellation of a visa by the Minister on the ground that the appellant did not pass the "character test" because he had a "substantial criminal record" (as these terms were defined by the *Migration Act 1958* (Cth)). An Issues Paper prepared by the Department and provided to the Minister for the purpose of making a decision under s 501A(2) of the Act misstated the appellant's criminal record. It was common ground that, under the Act, the appellant's criminal record was a matter that the Minister was bound to consider. A Full Court of this Court held that the Minister had failed to consider the appellant's criminal record as he was required to do, because of the errors of fact about the record in the Issues Paper. The identified jurisdictional error was therefore a failure to have regard to a (mandatory) relevant consideration, and thus a failure to perform the statutory task.

175 The sheer number of errors made by the decision-maker led Stewart J in *WCJS* to the conclusion that there had been jurisdictional error in the decision under review. In that case, the applicant challenged the Minister's decision to refuse him a visa, again on the basis that he did not pass the statutory character test. Stewart J noted (at [109]) that:

> ... in order to consider whether the applicant satisfied him that he passed the character test, the Minister was required to consider whether there was "a risk that the person would engage in criminal conduct in Australia" – that being the relevant "character test" (s 501(6)(d)(i)).

His Honour concluded (at [113]) that "the sheer number of errors made by the Minister [in his reasons for decision] betray a process of reasoning that is legally unreasonable and, therefore, beyond power". His Honour added (at [114]):

> ... It may be that none of those errors by themselves amount to jurisdictional error. Rather, it is my view that all of them, taken together, amounted to jurisdictional error

> in the Minister's decision. That is because they have the effect that the Minister's ultimate conclusions that if the applicant was allowed to remain in Australia there is a risk that he will engage in criminal conduct and that that would expose the Australian community to a risk of harm such as to outweigh countervailing factors was without intelligible justification, illogical and irrational ...

176 The last of the cases to which the applicant referred was *Duggan.* The applicant relied on the following passage of Stephen J's reasons as being particularly apposite to the present case:

> … if the Commissioner selects factors on which he bases his opinion and, in describing them, makes it clear that he has misconceived the relevant facts, that is, facts which he has chosen to treat as relevant and to elevate them to the status of factors on which his opinion is based, his opinion then ceases, in my view, to be of any legal effect. It is as if he has failed to reach any conclusion or has reached it on the basis of irrelevant facts.

177 In that case, however, Stephen J held that "at least one of the errors of fact affecting the grounds upon which the Commissioner formed his opinion [was] so fundamental as to vitiate that opinion": *Duggan* at 373. His Honour also held (at 372) that the taxpayers' "allegations that there had been a failure to examine the whole of the material facts, and as a distinct ground, that the exercise of discretion was made upon inadequate information or improper criteria and was unreasonable or capricious" were "sufficient to cover the matters argued": *Duggan* at 372.

178 In the language of *Li*, his Honour might equally have said that "at least one of these errors of fact affecting the grounds upon which the Commissioner formed his opinion" would have led to the conclusion that the Commissioner's opinion was unreasonable in the sense that it had no evident and intelligible justification: Cf. *Duggan*, at 372-373. Whichever way one approaches *Duggan* it is clear that *Duggan* is not relevantly different in principle from the more recent cases of *Lu* and *WCJS*.

179 Further, if it matters, *Duggan* was a case where the mistakes of fact made by the Commissioner were apparent on the face of the material before the Commissioner. In the present case, the alleged mistakes of fact were not apparent in the material before the Minister, a factor that distinguishes *Duggan* from this case.

180 None of the cases on which the applicant relied would support the submission that an error of fact relied on by the Minister in reaching the requisite state of satisfaction operates in and of itself to vitiate that satisfaction. Rather, as the Minister submitted, in order to succeed on judicial review, as in each of the cases just discussed, the applicant must identify how an error of fact resulted in the Minister failing to perform the task required by the governing legislation. That is, in the language of *Chang*, the applicant must establish that such errors of fact amounted to a constructive failure to perform the statutory function conferred on the Minister.

181 This does not end the discussion of this ground, however. This is because at times the applicant formulated this ground in a different way. In his written submissions, the applicant emphasised that the Minister "was bound to consider… activities and functions that are of strategic and economic significance to Russia" (emphasis original). The emphasis correctly recognised that the Minister's assessment of whether a person meets the criterion in item 6A(a) of the table in reg 6 required the Minister to identify the person's functions and activities and to be satisfied that at least one such activity or function is of economic or strategic significance to Russia. The gravamen of the applicant's challenge at this point was that the Minister misconceived the activity or function that was attributed to him and, in so doing, failed to perform the task required by reg 6, read with item 6A(a) of the table. If understood in this way, the ground is in substance that the errors of fact resulted in a constructive failure to perform the function that reg 6 required the Minister to perform. If this is how the applicant's ground is properly understood, then the question is, did the Minister act on an error of fact in identifying a relevant activity or function, with the result that she failed to perform the task that reg 6 required her to perform?

182 The proposition that Mr Abramov is "co-founder of Evraz" may be understood in different ways: in essence it means that Mr Abramov is one of a number of people or bodies that brought about the company. Let it be accepted that Mr Abramov co-founded EvrazMetall in 1992. On Mr Abramov's own account, EvrazMetall was the corporate predecessor of the entire Evraz group (and therefore Evraz). I accept the Minister's submission that, in this circumstance, it is not erroneous to describe Mr Abramov as a "co-founder of Evraz". There was no factually incorrect statement in this regard.

183 The proposition that Mr Abramov is "Chairman of Evraz" attracts different considerations. I reject the Minister's submission that the First Departmental Submission indicated an awareness that Mr Abramov's Chairmanship had ended. It is unlikely that this item of information was conveyed to the Minister obliquely as it was at one point argued by the Minister. The references to Mr Abramov as "Chairman of Evraz" in the First Departmental Submission, the Decision Record and the additional information about Mr Abramov set out in his listing in the First Designation Instrument expressly say that he "is" Chairman, or would reasonably be understood as indicating that he is Chairman. At the hearing, the Minister did not dispute that Mr Abramov was no longer Chairman of Evraz at the time the Minister designated and declared him under reg 6, having resigned from this position several weeks earlier.

184 This mistake of fact was not, however, of such a magnitude and importance to the legislative task to be performed by the Minister that the Minister failed to perform that task. As already stated, reg 6, read with item 6A(a) of the table, required that, to enliven the power, the Minister reach a state of satisfaction that Mr Abramov "**is, or has been**, engaging in an activity or performing a function" having the requisite significance to Russia. The statement of case concerning Mr Abramov concluded with the statement that it was open to the Minister to reach this state of satisfaction "[g]iven his position in Evraz". The previous items of information informed the Minister, first, that Mr Abramov had co-founded Evraz and held a high-status role in the company (whether as executive or non-executive Chairman was immaterial in this context). Second, the Minister was also informed about the company's Russian base, its operations (including its global importance as a steel producer), and its economic and, by implication, strategic significance to Russia. It may reasonably be assumed that this information was equally correct several weeks earlier when Mr Abramov was in fact Chairman of the company. Third, the Minister was informed of an allegation that Evraz had supplied the Russian military with steel for use in the production of tanks "during Mr Abramov's tenure at Evraz". These specific factual propositions were therefore the focus of the Minister's understanding of Mr Abramov's "position in Evraz" and the basis of her satisfaction that he "is, or has been, engaging" in activities or performing functions that were of strategic or economic significance to Russia.

185 I accept that, as the Minister submitted, Mr Abramov's very recent resignation from the position of Chairman was factually immaterial. This was because his being Chairman was not so historically remote as to fall outside of the scope of the statutory criterion. The mistake of fact about the applicant's continuing tenure as Chairman did not result in the Minister failing to perform the task required of her by reg 6, read with item 6A(a) of the table. In particular, the Minister did not misconceive the activity in which Mr Abramov engaged or the function he performed in reaching the requisite state of satisfaction. In contrast to *Lu,* the error was not of such magnitude and importance that there was a failure to perform the requisite task.

186 For these reasons, this ground must also fail.

The applicant's procedural fairness ground

187 The applicant submitted that the Minister unlawfully denied him procedural fairness because the Minister did not give him an opportunity to comment on the matters that "might be thought to support his designation and declaration". He submitted that the failure to accord him

procedural fairness was material, citing *MZAPC*. Accepting that the Minister gave the applicant no such opportunity, the critical issue is whether he was entitled to one. The determination of this issue depends on whether the Minister owed the applicant a duty of procedural fairness before designating and declaring him pursuant to reg 6 of the Sanctions Regulations.

188 The applicant submitted that neither the Sanctions Act nor the Sanctions Regulations showed a clear intention to exclude the requirements of procedural fairness in relation to an exercise of power under reg 6. Citing *Hill v Green* [1999] NSWCA 477; 48 NSWLR 161 at [143] and other cases, the applicant contended that the Sanctions Act did not authorise, either expressly or by necessary implication, the making of regulations that wholly excluded procedural fairness. In this context, the applicant noted that: (1) the regulation-making power in s 28 was expressed in general terms; (2) there was no reference to procedural fairness in s 10(1) (concerning specific matters that might be the subject of regulations); and (3) the Sanctions Act contained provisions that "expressly rebut[ted] various interpretative presumptions that would otherwise apply to regulations made under s 28".

189 Mr Rajanayagam, for the applicant, submitted that ss 11-13 in particular showed that Parliament had considered "what it wanted to authorise the regulations to do" and that it had chosen not to authorise the exclusion of procedural fairness. He submitted that the Sanctions Act indicated that "the sanctions machinery, as set out in the Regulations, attracted the requirements of procedural fairness", because the sanctions were highly targeted, punitive and "single[] out individuals". He referred to ***Haoucher*** *v Minister for Immigration and Ethnic Affairs* [1990] HCA 22; 169 CLR 648 at 652; and ***Harvey*** *v Minister Administering Water Management Act 2000* [2008] NSWLEC 165; 160 LGERA 50 at [109]. He submitted that the Minister's decision had "serious impacts on [the applicant's rights] and interests… and its public nature… had [adverse] reputational consequences".

190 Mr Rajanayagam also submitted that reg 21 of the Sanctions Regulations did not weigh against the proposition that the applicant was entitled to an opportunity to be heard. He submitted that this regulation was "premised on a designation and declaration having been made but not [having] been published, and ... not only is it directed to a different class of persons, but it's directed to the situation ... after a designation and declaration has been made".

191 The applicant contended that the fact that the power in reg 6 "may be exercised with respect to more than one person at a time does not mean that procedural fairness has been excluded" because the exercise of the power in reg 6 "is apt to affect the interests of designated and

declared persons individually". The applicant submitted that the scrutiny and registration requirements in the Legislation Act were "no substitute for procedural fairness". Citing ***Evans v Bread Manufacturers*** *of New South Wales* [1981] HCA 69; 180 CLR 404 at 416 (Gibbs CJ), 432-433 (Mason and Wilson JJ), the applicant added that the availability of procedural fairness did not depend on whether an exercise of power was of an administrative or legislative character.

192 Citing numerous cases, the applicant further submitted that procedural fairness was not "inconsistent" or "incongruous" with an exercise of power in reg 6. Such cases included: ***Kioa v West*** [1985] HCA 81; 159 CLR 550 at 586 (Mason J), 615-625 (Brennan J), and 632 (Deane J); ***Marine Hull*** *and Liability Insurance Co Ltd v Hurford* [1985] FCA 548; 10 FCR 234 at 241; ***CPCF*** *v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 515 at [368]; ***Day*** *v Harness Racing New South Wales* [2014]; NSWCA 423; 88 NSWLR 594 at [105]-[107]; *Chief Commissioner of Police v* ***Nikolic*** [2016] VSCA 248; 338 ALR 683 at [94]; and ***Saeed*** *v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [47].

193 The applicant contended that there was no evidence that designating and declaring him was urgent, and that affording him procedural fairness would have frustrated the power in reg 6. The applicant submitted that this was "evidenced by the fact that there was no basis on which the Minister could conclude that [he] had (and has) assets in Australia or plans to visit Australia". In the circumstance of the case, the applicant submitted the proper approach was to focus on what procedural fairness required in his circumstances.

194 Further, so the applicant submitted, the fact that a person might apply pursuant to regs 10 and 11 for revocation of their designation and declaration did not "mean that procedural fairness [was] not required to be afforded before the person is designated or declared". The applicant submitted that this was because "the revocation regime is a creature of the Regulations". He also submitted that "the right to seek revocation [was not] an answer to a failure to accord procedural fairness". In this regard, the applicant referred to *Day* at [127]; *Re Minister for Immigration and Multicultural Affairs;* ***Ex parte Miah*** [2001] HCA 22; 206 CLR 57 at [146]; ***Twist*** *v Randwick Municipal Council* (1976) 136 CLR 106 at 116; and ***Zhao*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 998 at [17]. He also relied on a number of considerations. These were: (1) the original decision-maker, rather than an independent tribunal, would consider a revocation application; (2) revocation had only a prospective effect; (3) designation and declaration pursuant to reg 6 was final in

character, and that "some degree of formality attend[ed] the decision insofar as [it must] be made by way of legislative instrument"; (4) designation and declaration occasioned irreparable harm; and (5) there was no urgency attending his designation and declaration.

195 Mr Rajanayagam also submitted that provision for disallowance and therefore Parliamentary scrutiny could not be an adequate substitute for procedural fairness. He submitted that provision for disallowance and associated matters were a product of the Sanctions Regulations, rather than the Sanctions Act, a circumstance which he submitted distinguished ***Plaintiff S10/2011*** *v Minister for Immigration and Citizenship* [2012] HCA 31; 246 CLR 636 from this case. He further submitted that *Plaintiff S10/2011* was different because in that case every individual had an opportunity for merits review: see *Plaintiff S10/2011* at [100].

196 At the hearing Mr Herzfeld SC, for the Minister, submitted that the issues arising at this point of the case were as follows:

> [F]irst, does the [Sanctions] Act empower the making of regulations which permit the Minister to seek the view of a person proposed to be the subject of a designation or declaration, but do not give the person a right to this, and instead give the person a right to have a revocation application considered. And secondly, if the Act does empower this, do these regulations do that?

197 The Minister contended that the Sanctions Act and the Sanctions Regulations did not require the Minister to afford the applicant an opportunity to be heard in advance of making the First Designation Instrument. Referring to *Plaintiff S10/2011* at [97]-[100], the Minister contended that a "necessary intendment" to exclude procedural fairness can be established by implication from the subject-matter, scope and purpose of that legislation and the characteristics of the relevant power in reg 6.

198 The Minister contended that the Sanctions Act authorised the exclusion of procedural fairness by the Sanctions Regulations. Mr Herzfeld SC drew attention to the breadth of s 10(1) of the Sanctions Act. The Minister submitted that the Sanctions Act set out the scheme for sanctions "only at a high level, leaving the creation of sanctions measures themselves to the Regulations". Referring to the General Outline in the REM to the 2010 Bill, the Minister submitted that this high-level approach was designed "to allow the Government to respond to international developments 'in a timely way'". The Minister submitted that, to allow for timely and flexible responses, the Sanctions Act conferred an extremely broad regulations-making power, "and thus impliedly authorised the exclusion of procedural fairness".

199 The Minister referred to several features of the legislative scheme that, so it was submitted, indicated that the Sanctions Act conferred power on the Governor-General to exclude the requirements of procedural fairness in exercising the power in reg 6 to designate and declare. First, the Minister relied on the nature of the power in reg 6 and its subject-matter. The Minister observed that sub-ss 10(1) and (6) of the Sanctions Act contemplated that regulations under the Act may confer on the Minister a personal, non-delegable power to proscribe persons or entities by legislative instrument. After referring to the requirement in the Legislation Act that legislative instruments were to be tabled in Parliament and subject to disallowance, the Minister submitted that:

> The personal, non-delegable nature of a power, and the immediate accountability that tabling requirements impose, are features that indicate that the nature of the power is not one conditioned on affording procedural fairness to a sanctioned individual (see similarly *Plaintiff S10* at [99(i)-(ii)]).

Second, the Minister submitted that these features were "consistent with the legislative character of the power", and that:

> While it may be accepted that some of the reasons in *Evans v Bread Manufacturers NSW* suggest that the mere characterisation of a power as legislative may not be determinative of whether procedural fairness is owed, the substantive features of a power which lead to its characterisation as legislative may also indicate an intention not to require a hearing. *Evans*, of course, concerned a public inquiry into prices.

200 Third, the Minister relied on the fact that the exercise of power in reg 6 did not depend on anyone requesting its exercise, and submitted that it did not involve matters of the kind that attracted a duty of procedural fairness. In this context, the Minister referred to *Minister for Local Government v* ***South Sydney City Council*** [2002] NSWCA 288; 55 NSWLR 381 at [18] and *Harvey* at [108]. Rather, so the Minister submitted, the task under reg 6 read with item 6A(a) of the table, was to make an assessment "of a 'polycentric' or 'multifactorial' or 'political' nature involving judgement as to what is of economic or strategic significance to Russia and judgement as to where Australia's foreign policy interests lie". Indeed, so the Minister argued, these matters presented "an even stronger case than the 'public interest' criterion which weighed in favour of exclusion of procedural fairness in *Plaintiff S10/2011* at [99(iv)-(v)]". Referring to the Explanatory Statement for the Russia Regulations, the Minister submitted that it was inapposite to "condition" the Government's use of autonomous sanctions "on the reception of representations of individuals" since sanctions of this kind were a "sensitive and inherently political tool".

201 Relying on the Explanatory Statement for the Russia Regulations, the Minister submitted that a hearing in advance would frustrate the purpose and operation of the sanctions scheme, because it involved giving notice that would afford a person an opportunity to deal with their assets in advance of designation. The Minister submitted that "[t]he analogy with *ex parte* freezing orders made by courts is obvious". Referring to reg 21, the Minister contended that it was clear that the Regulations assumed that a designation decision would generally be made without notice. The Minister submitted that it was irrelevant that, in individual circumstances, there might be no need to prevent dealing in assets. The Minister submitted that:

> That argument gives too little emphasis to the objects of the sanctions regime, which are directed to implementing foreign policy as against foreign States, and not simply to a personal decision in relation to sanctioned individuals. ...[U]rgency can arise from that broader context irrespective of the individual's circumstances ... Further, establishing whether ... a person has assets in Australia or is planning to travel to Australia would require investigation, which itself would delay the taking of action.
>
> The need for sanctions decisions to be made urgently and flexibly in response to international events is incompatible with a right for affected persons to a hearing before those decisions are made. ...

202 Referring to the introduction of item 6A into the table in reg 6 and the Explanatory Statement to the Russia Regulations, the Minister further submitted that a central object of the legislative regime, including the country-specific sanctions for Russia, was to enable urgent action. The Minister noted that the Explanatory Statement "contemplated action against categories of persons, who would potentially be numerous, and coordinated action with other countries". The Minister submitted that:

> If the object of such sanctions is to bring pressure to bear to stop an invasion, then the scheme can hardly have been intended to delay that pressure by the need to afford numerous hearings.

203 In a related submission, the Minister submitted that the legislative regime was intended to be used to "join with like-minded countries" in expressing Australia's condemnation of actions of foreign nations. The Minister further submitted that the regime was intended to enable the imposition of sanctions not just on particular individuals "but on numerous persons within a class, with a view to achieving a stronger and more pronounced public effect". The Minister submitted that "[a]n obligation to afford individual hearings would entirely frustrate these objects" because:

> (a) Australia could not announce sanctions prior to countermeasures. The advance notice to individuals (ex hypothesi supporting the foreign regime to be condemned) would likely result in the foreign regime responding with countermeasures, or public statements rebuking Australia, before sanctions were

announced or could take effect. This would fundamentally impair the effectiveness of the sanctions.

(b) Australia could not join in a coordinated response with like-minded countries. If hearings had to be provided in advance, the capacity to coordinate the timing of sanctions with other nations would be fundamentally impaired.

204 Mr Herzfeld SC emphasized at the hearing that a person affected by a designation had the ability to have it revoked under reg 11, and that the Minister had a duty to consider a revocation application when made. He submitted that "procedural fairness [was] afforded by means of the revocation application". That is, so he submitted, this case was not "an appeal case". Rather, so he submitted:

> [I]t's rather much more like other processes where the person has a single and full right to be heard, but after the decision is initially imposed. And, in fact, an obligation to hear from a person before they're sanctioned might be thought to be rather discordant with an obligation afterwards to hear their revocation application, because the latter would simply provide for a duplicative process expressly when the former has been implied.

205 In written submissions, the Minister submitted that "[t]he scheme for revocation provide[d] an express and tailored form of procedural fairness, which [was] indicative of the intention not to provide that hearing in advance". The Minister compared the provision for revocation with the fact that in *Plaintiff S10/2011* the Court considered it significant that the affected individuals would have been afforded procedural fairness in connection with other visa processes prior to the exercise of the challenged dispensation powers. Furthermore, citing *Day* and ***Carroll*** *v Sydney City Council* (1989) 15 NSWLR 541 at 548-9, the Minister argued that the revocation procedure was, first, distinguishable from provision for "appeal"; and, second, supported "the implication that procedural fairness [was] excluded in respect of the initial decision". The Minister submitted that:

> A revocation application would have limited utility if it followed an advance hearing by the same decision-maker on the same material.
>
> ...
>
> To return to the analogy of *ex parte* freezing orders, they are by definition made without notice, and have effect when made, but can be discharged in a contested hearing afterwards.

206 Also at the hearing, Mr Herzfeld SC contended that the applicant's submission that the Minister had a duty to give an opportunity to be heard to an individual who did not present a risk because that individual did not have assets in Australia should be rejected. Senior counsel noted that the distinction was unmaintainable because under the Sanctions Act, sanctions have extraterritorial effect, prohibiting dealings by Australian people or entities with assets outside

Australia. He submitted that the applicant sought to draw a distinction between those who were a frustration risk and those who were not. He submitted that this distinction was also unmaintainable because the Minister would need to form a view about the risk, and this might be a matter of degree. Senior Counsel submitted that:

> [T]his distinction would introduce into the scheme a wholly alien need for the Minister effectively to take a gamble on the efficacy of the sanctions against frustration. Further, actually finding out the information necessary to take that gamble will itself take time and therefore reduce the ability to act quickly and flexibly.

Furthermore, he submitted that such inquiries would not be straightforward and would take some time. He submitted that the nature of the decision and the location and nature of the people likely to be affected by it was quite different from the deportation decision challenged in *Kioa v West*.

Parties' submissions on the effect of Disorganized Developments Pty Ltd v South Australia

207 In ***Disorganized Developments*** *Pty Ltd v South Australia* [2023] HCA 22; 97 ALJR 575, the High Court decided in considered *obiter dicta* that a power under the *Criminal Law Consolidation Act 1935* (SA) to make regulations prescribing premises for the purpose of certain offence provisions was subject to an obligation to afford procedural fairness to the occupiers of the affected premises. The Court granted the parties leave to file submissions concerning this case.

208 The applicant submitted that *Disorganized Developments* supported his argument that his initial designation and declaration was invalid because he was not afforded procedural fairness. The applicant argued that *Disorganized Developments* at [41] confirmed that the broad scope of a power has no significance in determining whether "the presumptive obligation to afford procedural fairness" has been displaced.

209 Further, the applicant contended that his position was supported by the Court's statement that tabling and scrutiny requirements did not provide a sufficient basis to conclude that procedural fairness was excluded. Citing *Disorganized Developments* at [39] and [43], the applicant further submitted that the Court accepted that "the fact a power is capable of being described as "broad" and "political" was not inconsistent with an obligation to accord procedural fairness". The applicant added that:

> [A] decision to impose sanctions is not made "principally by reference to issues of general policy" but rather by reference to matters specific to the individual: namely, whether they fall within one or more of the categories in item 6A of the table to reg 6

> of the Regulations ... Put another way, the criteria in item 6A involve the application of policy, not the formulation of policy. *Disorganized Developments* makes clear that there is no reason that procedural fairness cannot apply in the former context.

210 The applicant further submitted that *Disorganized Developments* showed that the fact that a power was vested in a "political' repository" did not militate against a duty to afford procedural fairness.

211 The Minister submitted that the Court's conclusion in *Disorganized Developments* turned on features of the South Australian legislation that are very different from those in the legislative regime governing autonomous sanctions. The Minister argued that the Court's reasoning on those points of difference supported the Minister in the present case. The Minister noted that the Court rejected an argument that parliamentary oversight, and the possibility of disallowance, indicated an exclusion of procedural fairness. The Minister contended, however, that this reasoning indicated that, if there were an alternative source of procedural fairness, or consideration of matters that might be raised by an affected person, then procedural fairness by way of a prior hearing might not be required. The Minister submitted that the Court's approval of *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] AC 700 at [44] and [46]-[48] was consistent with this contention. The Minister argued that in the present case, reg 10 provided a full opportunity for an affected person to apply for revocation of their designation or declaration, a factor that distinguishes this case from *Disorganized Developments* "in a fundamental respect". Referring to *Disorganized Developments* at [36] and [78], the Minister submitted that a hearing after an exercise of power was "particularly justified" where an exercise of the power might be frustrated by advance notice of its potential exercise, as was the case here.

Consideration of the applicant's procedural fairness ground

212 Both parties accepted that the Minister could afford a person an opportunity to make representations about their designation or declaration if the Minister chose to do so in a particular case. Both agreed that subject to reg 11(3) of the Sanctions Regulations, the Minister was under a duty to consider an application for revocation of a designation made under reg 11. The issue in dispute was whether the Minister was under a **duty** to afford procedural fairness (and allow a potentially affected person to make representations) before making a decision under reg 6 and item 6A(a) of the table to designate or declare a person. For the reasons I am about to give, there was, in my opinion, no such duty.

213 Whether a power such as that conferred by reg 6 of the Sanctions Regulation is exercisable only in accordance with the principles of procedural fairness is a question of legislative construction: see, for example, *Disorganized Developments* at [32]; *Plaintiff S10/2011* at [71], [99]-[100]. I have already set out the key provisions of the Sanctions Act and the Sanctions Regulations: see [10]-[21] above. The Sanctions Act makes it clear that the imposition of autonomous sanctions is a mechanism to give effect to Australia's foreign policy: see, for example, ss 3, 4 (definition of autonomous sanction). The Act provides that autonomous sanctions may address such serious matters as threats to international peace and security and serious violations of international humanitarian law: see s 3(3). My earlier overview of the Sanctions Act makes it clear, however, that, as the Minister submitted, the Sanctions Act sets out the legislative scheme for the imposition of autonomous sanctions at a relatively high level. Although the Act provides for offences relating to sanctions, it leaves a very great deal of the detail to the Sanctions Regulations.

214 In substance, s 10 of the Sanctions Act contemplates that sanctions on persons or entities and related restrictions are to be imposed by regulations made under the Act. There is nothing in s 10 (or elsewhere in the Act) that expressly states whether the principles of procedural fairness were intended to apply to an exercise of power conferred by regulations made under s 10(1) and governed by s 10(3). For the reasons set out below, I have concluded that the subject-matter, scope and purpose of the Sanctions Act indicate that the Act authorises the exclusion of procedural fairness before a person is designated or declared pursuant to reg 6 of the Sanctions Regulations.

215 The REM to the 2010 Bill indicates that the Legislature adopted this legislative framework to allow the Executive Government to implement autonomous sanctions and thereby respond to situations of international concern in a timely and flexible way. The framework was designed to ensure that Australia's autonomous sanctions could "match the scope and extent of the measures implemented by like-minded countries. The REM explained that:

> Such measures – either supplementary to, or independent of, United Nations Security Council sanctions – are likely to play an increasing part in responses of like-minded countries to situations of international concern. Australia has actively applied autonomous sanctions as a foreign policy tool for a number of years, relying on existing instruments, intended for other purposes. To achieve more effectively the objectives underlying imposing autonomous sanctions, including the need to participate in concerted international action involving other, like-minded countries, the types of measures Australia would wish to implement are likely to go beyond the scope of these instruments.

...

> The Bill is modelled on the legislation with which Australia implements United Nations Security Council sanctions, the *Charter of the United Nations Act 1945*. It is intended to be a framework under which regulations are made, with each set of regulations containing the specific measures to be imposed in response to a particular situation of international concern. By providing for autonomous sanctions measures to be applied by regulation, rather than under the Bill itself, the Bill will allow the necessary flexibility for the Government to respond to international developments in a timely way.

Bearing this in mind, it may be inferred from the subject-matter, scope and purpose of the Sanctions Act and the nature of the regulation-making power conferred by s 10, that the Act authorised the exclusion of procedural fairness obligations in making provision for the prescription of persons, as in reg 6.

216 Certain other considerations confirm this conclusion, including that s 10(1) and (6) of the Sanctions Act contemplate that the regulations under the Sanctions Act may confer on the Minister a personal, non-delegable power to proscribe persons or entities by legislative instrument. The personal and non-delegable nature of this power is indicative of an absence of a requirement to afford procedural fairness before designating or declaring a person under reg 6: compare *Plaintiff S10* at [99(i)-(ii)].

217 Further, pursuant to s 10(6), the Minister is made accountable to Parliament when exercising power of this kind by virtue of the tabling requirement in s 36 of the Legislation Act. This is not to say that a tabling requirement and Parliamentary scrutiny are equivalent to, or can take the place of, an opportunity to be heard before a decision is made: compare *Disorganised Developments* at [38]-[42]. Rather, it is consistent with the fact that, in conferring a personal and non-delegable power on the Minister, which may not attract a duty to afford procedural fairness, s 10(6) of the Sanctions Act has provided for a level of accountability through Parliamentary scrutiny and the possibility of disallowance.

218 Assuming, therefore, that the Sanctions Act permitted reg 6 to operate independently of the principles of procedural fairness, did reg 6 in fact do so? As we have seen, the applicant focussed on the effect of designation on the designated person in support of his submission that he was entitled to an opportunity to be heard before the designation was made. The authorities establish that a duty to accord procedural fairness will be presumed where a statute or subordinate legislation empowers or authorises a decision-maker to affect adversely and directly a person's rights and interests, as an individual rather than as a member of the public. See, for example, *Twist* at 109; *Kioa v West* at 584, 612, 632; *Haoucher* at 652; *Harvey* at

[109]; and *Disorganized Developments* at [33]. I accept that designation and declaration under reg 6 had the capacity to affect the applicant's rights or interests adversely and directly and that in many cases this characteristic would have been sufficient to attract the principles of procedural fairness.

219 In the present case, however, the nature of the power to designate and declare pursuant to reg 6 and item 6A(a) of the table in reg 6 precludes this implication: cf: *CPCF* at [368]. It must be borne in mind that the imposition of autonomous sanctions is designed to support or implement an aspect of Australia's foreign policy: cf; Sanctions Act, s 3. By definition, autonomous sanctions are intended to influence a foreign government, a member of a foreign government, or a person or entity outside Australia in accordance with Australian Government policy: see s 4, definition of "autonomous sanctions". A decision to impose sanctions under reg 6 and item 6A(a) of the table is not made solely by reference to matters specific to the individual but requires consideration of information of very different kinds. While the Minister had to consider information about an activity or function pertaining to the applicant, the Minister had also to consider whether any one or more of the applicant's activities or functions are "of economic or strategic significance to Russia". The nature of this information will not be personal. There are also likely to be different kinds of matters relevant to the exercise of her discretion. Some may be personal or particular to the person whose designation or declaration is under consideration, while others may have an entirely different quality. It follows, it seems to me, that a decision pursuant to reg 6, in conjunction with item 6A of the table, will be "multifactorial", as the Minister submitted. In considering the exercise of her discretion, the Minister may take into account what might be fairly called "political" considerations touching Australia's relations with other countries and Australia's foreign policy. A decision of this kind has been said to be a decision to which a duty of procedural fairness does not apply: cf *Harvey* at [108].

220 While the rationale for procedural fairness lies in notions of what is fair and just to a **person** who may be adversely affected by the decision (cf: *Haoucher* at 652 (Deane J)), procedural fairness is inapposite in the context of a power such as this, which is primarily intended to give effect to Australia's foreign policy. It is inapt to condition a power with this objective by a duty to afford a person an opportunity to be heard before the power is exercised, even though the exercise of the power may affect him adversely. This is because sanctions are essentially a sensitive and political tool for the promotion of Australia's foreign policy. The effect on the designated person is subordinate to this primary purpose. This consideration is analogous to

the public interest criterion that weighed in favour of excluding procedural fairness in *Plaintiff S10/2011* at [99(iv)-(v)].

221 Other considerations militate against a duty to afford an opportunity to be heard prior to making a decision under reg 6 to designate or declare a person. This includes the possibility that the advance notice may also provide an opportunity to that person to remove their assets from the purview of sanctions. This is reflected in the Explanatory Statement for the Russia Regulations, which, as noted above, introduced item 6A into the table in reg 6 in response to Russia's invasion of Ukraine. It said (at 7):

> When considering whether to continue a listing, the Minister invites submissions from the listed person or entity, or their authorised representatives. The Minister does not consult a person or entity in advance of listing them for the first time, which would put the person or entity on notice that they may be listed, providing an opportunity for them to remove assets from Australian jurisdiction and rendering any listing less effective.

222 There also seems to be no reason why, in the same way, advance notice that designation was under consideration would not provide an opportunity to a person to move assets that are outside Australia to reduce the effectiveness of any sanction. In respect of the applicant's argument that he had no assets in Australia, I accept that, as the Minister submitted, the distinction between assets within the jurisdiction and outside it is inapposite. This is because the Sanctions Regulations have extraterritorial effect, prohibiting dealings by Australian people or entities with "controlled assets" outside Australia.

223 The Explanatory Statement for the First Designation Instrument also referred to the risk attached to wider consultation, stating, at p 2:

> In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the Instrument, the Minister is satisfied that wider consultations beyond those already undertaken would not be appropriate or practicable (subsections 17(1) and (2) of the *Legislation Act 2003*). Consultation is not appropriate in the circumstances in order to enable Australia to act swiftly in response to threats to the sovereignty and territorial integrity of Ukraine and strengthen the impact of sanctions on Russia. Additionally, consultation would risk alerting persons to the impending sanctions and enabling capital flight before assets can be frozen

224 The possibility that a hearing before designation might frustrate the designation, if made, cannot be ignored. The fact that there may be minimal risk in a particular case is not to the point. One may reasonably assume that, generally speaking, the Minister cannot know the extent of such a risk without inquiry. The Sanctions Regulations not only fail to provide for an inquiry, but also the need to make inquiry is inconsistent with the legislative object of enabling

autonomous sanctions to be used as a timely and flexible instrument of Australian foreign policy. The nature of the power in reg 6 and the decision to be made under it are relevantly different from the power to make a deportation order and the decision to deport under consideration in *Kioa v West*, and reference to that case does not assist the applicant here.

225 The need for co-ordinated action with other countries in serious situations, including in response to instances of aggression threatening global security, is a further consideration that weighs against a duty to provide an opportunity to be heard before designation. This feature speaks to more than a need for urgency on a particular occasion, where the content of procedural fairness can be modified to meet the exigencies of the situation: contrast *Marine Hull* at 241; *Day* at [105]-[107]; *Saeed* at [47]; and *Nikolic* at [94]. Rather, the feature underpins the entire legislative regime on autonomous sanctions: cf: *CPCF* at [368]-[369].

226 One may accept that there will be occasions when the object of sanctions would be defeated without their immediate imposition, including as part of co-ordinated action with other countries of a kind contemplated in the Explanatory Statement for the Russia Regulations. As the Explanatory Statement said, autonomous sanctions are "a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern". This is apposite to the introduction of item 6A of the table in reg 6. According to the Explanatory Statement, the object of this item was to enable the Australian Government to respond to Russia's "significantly elevated threat to Ukraine's sovereignty and territorial integrity", which presented "a serious threat to the international rules-based order which underpins global security".

227 As the Russia and Ukraine List 2014 demonstrates, the legislative regime for autonomous sanctions enables the imposition of sanctions not only on one but on many people, often "within a class", with a view to furthering Australia's foreign policy in accordance with the Sanctions Act. One may accept that, as the Minister submitted, if there were a duty to afford an opportunity to be heard to every affected person before the Minister designated or declared them under reg 6, the efficacy of their designation and declaration would be significantly reduced, and the objects of the legislative regime confounded.

228 I reject the suggestion implicit in some of the Minister's submissions that, in affording a person who has been designated or declared the opportunity to apply to the Minister for revocation under reg 11 of the Sanctions Regulations, the scheme provided a form of procedural fairness. Procedural fairness addresses the situation before a decision directly and adversely affecting a

person is made. I accept, however, that reg 11 (and reg 10 conferring a revocation power on the Minister) served the interests of fairness respecting a designated or declared person who has not been heard in advance of their designation or declaration. Having regard to the considerations that weigh against a hearing in advance, I accept that the duty to afford an opportunity to an affected person to be heard on revocation subsequent to their designation or declaration is a legislative attempt to provide the next best thing in circumstances where an advance hearing would frustrate or confound the object of the sanctions. The provision of this opportunity in this legislative context supports the Minister's contention that there was, for the reasons already mentioned, no duty to provide such a hearing in advance: cf *Carroll* at 548-9; *Day* at [104]; and *Zhao* at [17] (reaching contrary conclusions in the context of decisions of an entirely different kind).

229 As this case illustrates, a person can make an application for revocation as soon they become aware of their designation and/or declaration. In most, if not all cases, the kind of material presented in opposition to designation or declaration in advance of the Minister deciding whether to do so will be the same kind of material presented in support of a revocation application. In substance, reg 10 provided a full opportunity for an affected person to have their designation or declaration ended. This consideration distinguishes this case from *Disorganized Developments*. Further, I accept that, as the Minister submitted, the revocation procedure is distinguishable from provision for an "appeal", and cases such as *Twist* and *Ex parte Miah* concerning "appeals".

230 For the foregoing reasons, there was no duty to afford procedural fairness before a decision to designate and declare the applicant was made, and this ground does not succeed.

SECOND DESIGNATION INSTRUMENT

The applicant's ground 7 – Not open to reconsider and redesignate Mr Abramov

231 Ground 7 of the applicant's amended originating application was seemingly that the Minister's subsequent revocation and re-designation decisions were invalid, because they were made on the basis the Minister's earlier designation was valid. The applicant's argument in written submissions and at the hearing in support of this ground was, in substance, that the Sanctions Regulations did not empower the Minister to resolve the applicant's revocation application by revoking his designation and declaration and simultaneously re-designating and re-declaring him.

232 The applicant submitted that his revocation application "enlivened the Minister's power to revoke under reg 10(1) and (3)" of the Sanctions Regulations, with the consequence that his application established the parameters for the exercise of the Minister's power to revoke. The applicant submitted that the Minister had exceeded the parameters set by the "premise" of his application that he "should not be designated or declared at all" (emphasis original). The result was, so the applicant contended, that the Minister had only two options, either to accept his revocation application (and revoke his designation and declaration); or to reject his application (and leave the designation and declaration in place). The applicant submitted that it was not open to the Minister to make an "entirely different inquiry", involving "a reconsideration and updating of the factual basis of the designation and declaration". In doing this, so the applicant submitted, the Minister acted beyond the authority conferred by the Sanctions Regulations in respect of an application for revocation.

233 The applicant further contended that, regardless of the basis for making a revocation application, the Regulations did not authorise the Minister to reconsider and revoke his existing designation and declaration for the purpose of re-designating and re-declaring him. The applicant argued that the remedial purpose of the revocation power confined its operation. Referring to reg 11 and reg 10(3), the applicant argued that the purpose of the revocation power was to revoke a designation and/or declaration that did not satisfy the relevant criterion. The applicant contended that related considerations informed the discretion conferred by reg 10, such as the remedial purpose of the power. The applicant contended that the revocation power could not be used "for the purpose of clearing the way for the re-imposition of an assertedly warranted designation and/or declaration", because this would transform a remedial power into one "for the benefit of the Minister". The applicant submitted that, by revoking his designation and declaration for the purpose of re-designating and re-declaring him, the Minister "applied 'a wrong and inadmissible test'" and constructively failed to exercise her jurisdiction.

234 In response, the Minister submitted that reg 10(1) was the source of her revocation power. The Minister submitted that sub-regs 10(2) and (3) simply outlined the circumstances enlivening the revocation power. It followed, so the Minister said, that the applicant's revocation application could not define the power. The Minister's written submissions contended:

> The Minister was correctly instructed that she could revoke a designation on her own initiative. She was also correctly instructed that she could revoke a designation on application. The Applicant relies on the phrasing of the instruction, "or, as is the case here, on application". That reliance is misplaced. The additional reference was not, and could not have been limiting. ... In particular, the Minister was not obliged to revoke

only if satisfied that the Applicant should not be designated at all.

(emphasis original)

235 The Minister submitted that to describe the revocation power as "remedial" was to give insufficient weight to the fact that the Minister could revoke on her own initiative. The Minister submitted that:

> The statutory context is that sanctions can be imposed on individuals in response to highly fluid situations of international concern. There is no reason to think that the Minister is disabled from revisiting designation in light of new or newly appreciated facts, particularly if action is taken at one point in time without the possibility for a full appreciation of the facts ...

236 At the hearing Mr Herzfeld SC submitted that in a case of this kind:

> It must be possible for the Minister ... to decide that the thing which justifies the maintenance of sanctions is the new material put before her, and to give effect to that determination by revoking the previous instrument made on different and earlier material ... so that the new instrument is supported by ... the new material ...

237 To conclude otherwise would, so the Minister said, impose limitations of a "most uncertain ambit" upon an exercise of the power to designate or declare.

Consideration of the applicant's ground 7 – Not open to reconsider and redesignate

238 The source of the Minister's revocation power is, in terms, reg 10(1) of the Sanctions Regulations. Regulation 10(1) relevantly provides:

> The Minister may, by legislative instrument, revoke:
>
> (a) a designation made under paragraph 6(a) ...; or
>
> (b) a declaration made under paragraph 6(b) ...

That is, reg 10(1) expressly confers on the Minister a discretionary power to revoke a designation or declaration under reg 6(a) or reg 6(b) and provides that the power is to be exercised by legislative instrument. It is equally clear that the power may be exercised, relevantly here, either "on the Minister's initiative" or "on application by the person or entity to which the designation or declaration" under reg 6(a) or (b) relates: see sub-regs 10(2) and (3).

239 As we have seen, the Minister may exercise the revocation power in reg 10(1) on the applicant's own revocation application **and** on the Minister's own initiative. One may infer from this that the making of an application does not relevantly limit the exercise of the revocation power. More particularly, it does not limit the purpose for which the power is exercisable. It was open, of course, to the applicant to seek revocation of his designation for his own benefit, and for the

Minister to determine to revoke his designation, without more, as he sought. In such a case, from the applicant's perspective, the Minister would exercise the relevant power for a remedial purpose. It is clear enough, however, that, the applicant's perspective in not the only relevant perspective in the context of reg 10. Since the Minister could exercise the power on her own initiative, it was open to her to revoke the applicant's designation for her own reasons, including because that the designation was made on out-of-date, inadequate or even wrong information. Equally, it was open to the Minister, if relevantly satisfied, to exercise the power conferred on her by reg 6 and, in the exercise of her discretion, to determine to make a fresh designation on more up-to-date, complete, or reliable material. The fact that the applicant had provided this information is immaterial. So too is the fact that this outcome did not serve the applicant's interest.

240 At a number of points, including with respect to this ground, the applicant's challenge to the Second Designation Instrument depended on treating the revocation and second designation as one and the same, when they were not. I reject Mr Merkel KC's submission that the revocation and re-designation decisions were "two sides of the same coin" in the sense that:

> There's no distinction or line that can be drawn between them ... The outcome of the revocation was going to determine the outcome of the redesignation. It was one decision.

241 While the revocation decision is made under reg 10, in exercise of the power in sub-reg10(1), the designation decision will be made in exercise of a different power, in this case, the power conferred by reg 6. The considerations referable to the exercise of these different powers are not identical. For example, the Minister may treat the out-of-date and incomplete nature of information referable to a designation as sufficient to warrant its revocation; and treat the up-to-date nature of the information about the person's activity and its economic or strategic significance to Russia as supportive of a fresh designation. These considerations lead me to conclude that the Minister's decision to revoke a person's designation (and, as in this case, declaration) is relevantly separate and distinct from any subsequent decision to designate or declare the same person again.

242 For the reasons stated, this ground does not succeed.

The applicant's ground 5 – Departure from procedural representation

243 The applicant contended that the Minister was under a duty to afford him procedural fairness in making the Second Designation Instrument, and in determining his revocation application.

In consequence, so the applicant submitted, the Minister was under a duty to give him an opportunity to be heard before she departed from a representation about the particular procedure she would follow in making these decisions. The applicant referred to numerous cases in this context, including *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 and *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326. The applicant contended that he was disadvantaged in presenting his case because the Minister departed from the representation she had made about the procedure she would follow, without informing him that she was going to do so.

244 The applicant relied on the letter of 29 July 2022, in which the Minister's solicitors stated that in considering the applicant's revocation application, the Minister would provide him with "an opportunity to comment on material (other than the revocation application itself) that will be before [her] in her consideration of the revocation application": see [32] above. The applicant contended that this statement conveyed the "clear impression" that he would be given an opportunity "to comment on all material that would be before the Minister in making her decisions". The applicant submitted that the letter of 12 August 2022 ([33] above) confirmed this impression. In particular, the applicant relied on the following statements in that letter:

> 5. In making a decision with respect to your client's Revocation Application, the Minister will consider:
>
> 5.1 the Revocation Application;
>
> 5.2 the statutory declaration of your client made on 21 July 2022;
>
> 5.3 the exhibit to that statutory declaration marked 'AA-1'; and
>
> 5.4 further information or submissions you provide in response to this letter.
>
> 6. The Minister may also consider:
>
> 6.1 the information contained in Attachments 1 to 29 of this letter; and
>
> 6.2 specifically, the following factual matters, largely drawn from those documents.

As already stated, the 12 August 2022 letter identified potentially relevant documents (including the 29 attachments) and referenced factual propositions about the Evraz group, Mr Abramov's role in Evraz and predecessor companies, Skoltech, and the RGS.

245 In submissions at the hearing, Mr Merkel KC further submitted that the impression that the Minister would in fact provide the applicant with the whole of the material before her was

further confirmed by the final paragraph of the Department's subsequent letter to the applicant's solicitor dated 31 August 2022. This paragraph read:

> Our letter [of 12 August 2022] was accompanied by a number of attachments. The Department proposes to put before the Minister only those pages of the attachments specifically referred to in the footnotes to our letter. We invite you to comment on whether there are any other specific pages from those attachments that Mr Abramov wishes to rely on.

246 The applicant contended that the Minister departed from her representation in this correspondence by failing to give him an opportunity to comment on the Second Departmental Submission and its accompanying statement of case, a Departmental submission sent to the Minister's office on 26 July 2022, and her solicitors' legal advice about the Minister's prospects of success in this proceeding. The focus of the applicant's argument was, however, the statement of case accompanying the Second Departmental Submission. At the hearing, the applicant's claims touching the contents of the other documents fell away.

247 The applicant submitted that the Minister denied him an opportunity to present his case because he was unable to respond to the "tendentious and partisan presentation" of his revocation application in the statement of case, including factual matters not specifically mentioned in the 12 August 2022 letter. In the latter regard, the applicant referred to the assertion that he could influence Evraz as a "substantial indirect minority shareholder"; the reference to his RGS award; and the conclusion (contrary to his submission) that it was "unlikely" that he had no personal or political connection to the Russian Government. Mr Merkel KC submitted that the Minister's departure from the assurances the applicant had been given deprived the applicant of the opportunity to respond to adverse material in the statement of case accompanying the Second Departmental Submission, which reflected on his credit. Senior counsel submitted that this deprived the applicant of an opportunity to respond to credible, adverse and relevant material, and resulted in a denial of procedural fairness.

248 The applicant contended that he had "proceeded on the basis that the 12 August letter contained the entirety of the material that the Minister might consider" and he had therefore "only addressed the factual material and possible inferences adverted to, or obviously arising from, that letter". The applicant contended that his response to the Minister's letter of 12 August 2022 could reasonably be expected to have differed in its coverage, detail and emphasis had he known that the Minister would have material before her on which he would not be given an opportunity to comment. The applicant submitted that the Court could comfortably infer that

the Minister's failure to afford him procedural fairness deprived him of the possibility of a successful outcome.

249 The applicant's reply submissions sought to answer the Minister's submissions as set out below. It is, however, unnecessary to summarise them. This is because the arguments in those submissions would fail for the reasons given at [260] and [261]. I would also note that at least one of the arguments (at [20] of the reply submissions) was an argument raised for the first time in reply.

250 In substance, the Minister contended that the letter of 29 July 2022 did not represent that the opportunity to comment extended to the Second Departmental Submission and its accompanying statement of case, the earlier Departmental submission of 26 July 2022, or her solicitors' legal advice as to her prospects of success. The statement in the letter of 29 July 2022 did not, so the Minister submitted, "convey that literally all of the material that would be before the Minister, in the precise form that it would be before the Minister, would be provided to the Applicant for advance comment". The Minister submitted that:

> No reasonable person (certainly no reasonable person represented by a firm of solicitors and senior and junior counsel), could have thought that the opportunity would extend to documents which, in the ordinary course of public administration are created ***after*** representations have been made. It was obvious, following the Applicant's comments, the Minister's department would prepare a briefing for the Minister which took into account the Applicant's representations – i.e. the Ministerial submission and accompanying Statement of Case.
>
> (emphasis original)

The Minister contended that it was "also obvious" that she was not undertaking to provide material subject to any claim of legal professional privilege.

251 Respecting the earlier Departmental submission of 26 July 2022, the Minister submitted that:

> [This submission] concerned the entirely procedural decision as to the basis on which the revocation application would be considered so that instructions could be given as to the Applicant's application for expedition in this Court. It was immaterial to the decision to re-designate, save that it recorded the Minister's procedural decision to proceed in a particular way, which was advised to the Applicant in the 12 August letter.

252 The Minister further contended that the form and content of the 12 August 2022 letter "could not possibly have founded a reasonable belief that the Applicant was being given the precise documentation ultimately to be briefed to the Minister". The Minister added that the letter described "material and facts that may be considered by the Minister" and "the key issues that may be considered by the Minister".

253 The Minister further contended that the applicant had not shown that he lost any realistic opportunity to advance his case. The Minister submitted that the 12 August 2022 letter had informed the applicant of all the key issues that the Minister would consider, including the applicant's continuing ability to influence Evraz and his receipt of the RGS award. The Minister noted that, in his own written submissions, the applicant had made extensive representations about his lack of connection to the Russian Government. The Minister submitted that the applicant did not lose any opportunity to "respond" to the prospects advice because a decision-maker can have regard to privileged advice without thereby waiving privilege.

254 The Minister submitted that there was no denial of procedural fairness merely because the statement of case advised the Minister that it was open to her to reach conclusions adverse to the applicant. Nor, so the Minister submitted, was there unfairness in informing the Minister that the applicant's net worth was, according to Forbes, USD $6.4B, bearing in mind there was evidently an issue as to whether the applicant was among an economic elite.

255 Mr Herzfeld SC submitted at the hearing that, because the power to designate and declare in reg 6 of the Sanctions Regulations was not subject to the duty to accord procedural fairness, this ground could only vitiate the Minister's revocation decision, and not the Second Designation Instrument. He further submitted that the foundation of the applicant's submissions in support of this ground fell away because:

> [I]t must have been obvious in the context of those two letters that, with the benefit of the applicant's submissions, the department would put together a brief for the Minister seeking to, first of all, just collate the material, but, secondly, seeking to synthesise and summarise that material and to provide advice to the Minister about it. It could not reasonably have been thought that there would be a morass of material provided to the Minister for Foreign Affairs under cover of a document that said, "see attached".
>
> It couldn't possibly therefore have been doubted that there would be a departmental submission which sought to synthesise and analyse the material, and indeed, one would end up in a never-ending loop if it was thought that there was a promise to allow the applicant to comment on such a thing because once the submission was prepared, there would have to be an opportunity for the applicant to comment on it, and then there would be some comments, and then presumably there would have to be another submission prepared, commenting on the applicant's comments, but that submission would have to be provided to the applicant for comment. So it could never have been thought that the thing that the applicant would be entitled to comment on – the things – would include the departmental submission.

256 Referring to *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 274 CLR 398 at [32], Mr Herzfeld SC further submitted that:

> [I]nsofar as there were then in the statement of case matters of analysis or comment, those matters were all in the nature of processes of reasoning on the material which it was said that it would be open to the Minister to adopt. And it's well established that procedural fairness doesn't require a decision-maker to give a person an opportunity to comment on their potential reasoning about material as opposed to the material itself.

257 Senior counsel submitted that the applicant had not identified any matter that he did not actually have the opportunity to address that might have attracted an entitlement to procedural fairness, and that there was none.

Consideration of the applicant's ground 5 – Departure from procedural representation

258 The specific paragraph of the 29 July 2022 letter relevant to this ground read as follows:

> We are instructed that your client will be provided with an opportunity to comment on material (other than the revocation application itself) that will be before the Minister in her consideration of the revocation application. ... [W]e anticipate that we will be in a position to put that material to your client by 12 August 2022.

259 As indicated at [33] above, in [3]-[6] of the 12 August 2022 letter, the Department invited the applicant to comment on the key issues; the material, facts and discretionary considerations; and the appropriate procedure relevant to the Minister's decision-making. In the same letter, the Department identified numerous potentially relevant documents (including the 29 attachments) and referenced factual propositions about the Evraz group, Mr Abramov's role in Evraz plc and in predecessor companies, as well as in Skoltech, and the RGS.

260 I reject the applicant's submission in so far as he sought to maintain it that the Minister's representation in this correspondence and the letter of 31 August 2022 (see [245] above) could reasonably be understood as including legal advice to the Minister (as to her prospects of success in this proceeding) or the Departmental submission of 26 July 2022. There was nothing in any of the letters to indicate that the Minister was proposing to waive legal processional privilege in respect of her lawyers' legal advice. Equally, there was nothing in this correspondence to indicate that the Minister was proposing to disclose an earlier Departmental submission of 26 July 2022 about a procedural issue relevant to the Minister's conduct of the proceeding. In any event, the Minister notified the applicant of her proposed procedure in the 12 August 2022 letter. Further, to the extent relevant, I accept that a decision-maker may have regard to privileged advice without thereby waiving privilege: see *Commissioner of Taxation v Rio Tinto Limited* [2006] FCAFC 86; 151 FCR 341at [67].

261 Further, I reject the applicant's submission that, individually or collectively, the items of correspondence on which the applicant relied represented that, before making any decision, the

Minister would disclose the Second Departmental Submission and/or the accompanying statement of case to the applicant to afford him an opportunity to comment. First, the Minister's statement in the 29 July letter that the applicant would be given an opportunity to comment on "material" before her in her consideration of the applicant's revocation application did not proffer an opportunity to comment on "all the material" before Minister (whatever this might have meant). While the use of the word "material" was imprecise, the substance of the representation was clear enough, because the letter further stated that the Department anticipated that it would be able to "put that material" to the applicant by 12 August 2022. This necessarily excluded the Second Departmental Submission and statement of case, which could not have been "put" to the applicant by that time. In this context too, the reference to "material" would naturally signify factual material bearing on the applicant, which the Department considered might be relevant to the Minister's determination about her state of satisfaction and/or the exercise of discretion under reg 6 of the Sanctions Regulations. The 12 August 2022 letter in substance confirmed that this is what the Department intended, because (at [3.1]) the Department invited the applicant to comment, relevantly, on "the material and facts that may be considered by the Minister". Further, under the heading "Material and facts that may be considered by the Minister", the 12 August 2022 letter identified the sources of "information" and "the factual matters, drawn from that information" that the Minister "may consider". As already noted, the same letter set out numerous factual propositions about the Evraz group, Mr Abramov's role in Evraz and in predecessor companies, as well as in Skoltech, and the RGS, and included 29 attachments relating to these factual matters, all of which the applicant was invited to address in one way or another.

262 Apart from this, the statement in the 29 July 2022 letter that the applicant would be given an opportunity to comment on material (other than the revocation application itself) that would be before the Minister in her consideration of the revocation application was made in the context of the well-accepted relationship between a Minister and the Minister's Department. As part of this relationship, a Minister of the Crown looks for and can properly expect to receive advice from officers of the Minister's Department relating to decisions to be made in the course of discharging Ministerial duties. Regarding decisions that have yet to be made, it is again well-accepted that the Departmental advice (including assessments and evaluations relevant to the decision-making) provided by Departmental officers to the Minister is given on a confidential basis. This is necessarily the case: the convention is there to ensure the Minister receives full, frank and timely advice in the interest of good government. It can thus reasonably be assumed

that the applicant's lawyers (to whom these letters were written) would have understood all that was said to them in the context of these well-accepted conventions. It can also reasonably be assumed that the applicant's lawyers were aware that, in the ordinary course of public administration, the Department would advise the Minister by creating confidential advice in the nature of the Second Departmental Submission and its accompanying statement of case. In this context, it would have been obvious, as the Minister submitted, that the Minister was not proposing to disclose these documents to the applicant before she made her decision.

263 In any event, assuming that a duty of procedural fairness was owed in making the revocation decision, I accept the Minister's submission that the applicant has not demonstrated that he lost an opportunity to advance his case. The 12 August 2022 letter informed the applicant of the key issues to be considered by the Minister, including the extent of the applicant's personal contribution to Evraz, his ongoing role through Abiglaze, and his potential influential role in Evaz even though no longer Chairman nor director. It also drew attention to his relationship with Skoltech and the RGS award. In this context, the letter expressed the opinion that it was open to the Minister to reach conclusions adverse to the applicant. Furthermore, the applicant made his own extensive representations about his lack of connection to the Russian Government, and allied matters. The statement of case did not raise any matters that were not raised with the applicant in the 12 August 2022 letter. Considering the process as a whole, I cannot discern any proper basis to conclude there was a breach of the requirements of procedural fairness.

264 There is one last matter. As it may be noted, the alleged representation related to the applicant's revocation application; but the applicant does not challenge the Revocation Instrument. There is no duty of procedural fairness owed by the Minister in making a decision under reg 6 of the Sanctions Regulations: see [212]-[230] above. I therefore accept the Minister's contention that this ground, even if made out could not vitiate the Second Designation Instrument.

265 I should perhaps add that, in the event that the decision-making processes for the Revocation Instrument and the Second Designation Instrument were properly considered as one, then it might be said that this ground, if made out, was capable of vitiating both Instruments. For the reasons stated already at [260]-[262], however, this ground is not made out.

The applicant's ground 4 – Failure to consider the revocation application

266 The applicant contended that the Minister was obliged to consider personally his revocation application, having regard to the material on which he relied. The applicant submitted that this

material was his revocation application, his first statutory declaration, his 29 August 2022 response, his 4 September 2022 response and his second statutory declaration. The applicant might also have added to this list the statutory declaration made by a former director of Evraz. Mr Herzfeld SC, for the Minister, accepted that the Minister was under a duty to consider personally the applicant's revocation application, and that in consequence the Minister was required to afford procedural fairness and "to give active intellectual engagement" to the material the applicant put before her in relation to this application.

267 It was common ground that the Department did not give the Minister a copy of the first statutory declaration to consider in determining whether to exercise the power to revoke conferred by reg 10(1) (and, it would follow, whether to designate and declare the applicant again under reg 6). The applicant contended that the Minister did not discharge her duty to consider his revocation application personally by failing personally to consider his first statutory declaration, and relying instead on a Departmental summary of it. The applicant submitted that his first statutory declaration was "an elaborate, carefully calibrated response to the suggestions being made that he could be sanctioned or was sanctioned because of his association with Russia or Evraz". The applicant submitted that this declaration "really needed to be read as a whole to negative on the various ways possible each of the pathways leading to adverse conclusions". He submitted that "the 104 paragraphs and 24 pages (excluding exhibits) comprising the first statutory declaration ... could not be ... adequately or fairly summarised in the 32 paragraphs and 9 pages of the Statement of Case that purported to summarise the facts".

268 The applicant submitted that an application for revocation was "an exercise in persuasion" directed towards removing the sanctions imposed on him. The applicant contended that, in this case, the statutory task was "governed" by the Minister's state of mind about the persuasiveness of the revocation application, but the Departmental summary did not "convey the persuasive content" of the first statutory declaration. In support of these submissions, the applicant relied on *McQueen v Minister for Immigration, Citizenship and Multicultural Affairs (No 3)* [2022] FCA 258 (***McQueen (first instance)***) and, subsequently, *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* [2022] FCAFC 199; 292 FCR 595 *(**McQueen (appeal)**)*.

269 Further, the applicant submitted that even if, contrary to his submissions, the Minister could rely on the Departmental summary, being the statement of case accompanying the Second Departmental Submission, this summary was materially deficient in the sense used in ***Carrascalao** v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR

352 at [61(a)]. The applicant contended that the summary omitted significant matters and that no other material before the Minister remedied these omissions. These omissions included that there was no reference to the applicant's declaration that Evraz had complied with the UK Corporate Governance Code (except where otherwise stated in its annual reports) and that a 2003 article published by the *Financial Times* had stated that the applicant, in contrast to other "politically connected oligarchs", did not benefit from Russia's privatisation of state-owned enterprises in the 1990s. The first omission was, so the applicant submitted, important because the fact was relevant to whether the applicant's functions as a former non-executive Chairman of Evraz and an indirect minority shareholder were of economic or strategic significance to Russia as at the date of the Minister's decision. In the applicant's submission, this circumstance weighed against the exercise of the Minister's discretion to re-designate and re-declare because it suggested that any influence the applicant exercised over Evraz was limited. The applicant submitted that the second omission was relevant to the same issues and led the Minister to overlook the fact that he (and Evraz) had achieved commercial success without the assistance of political or governmental connections.

270 The applicant submitted that the consequence was a constructive failure to exercise the power in reg 10 of the Sanctions Regulations. The applicant also submitted that the Minister's failure to consider the first statutory declaration as she was required to do was material to her decision "to re-designate and re-declare" him. Also in support of this submission, the applicant relied on a table detailing other instances where he claimed that the full force of the applicant's statutory declaration was not sufficiently captured by the Departmental summary or any other document before the Minister. The applicant provided the Court and the Minister with a table of these instances on the afternoon of the first day of the hearing. I shall refer to the table as the **Omissions Table**.

271 By reference to the Omissions Table, the applicant contended that although the statement of case and other material before the Minister did contain a number of references to the factual matters in the first statutory declaration, these references did not fairly convey the import of those matters. The applicant submitted that these deficiencies were relevant to whether the applicant met the criterion in item 6A(a) of the table in reg 6 and the exercise of discretion in reg 6. Citing *Nathanson* at [32]-[33], the applicant further submitted that had the Minister personally considered the statutory declaration she might "as a matter of reasonable conjecture" have arrived at a different decision.

272 Further, referring to ***Gardiner v Taungurung*** *Land and Waters Council* [2021] FCA 80 at [271], the applicant submitted that neither the Departmental summary nor any other document conveyed the solemnity of the applicant having made a statutory declaration about the matters on which he relied. The applicant submitted that there was a "level of seriousness" in making a statutory declaration as opposed to a mere written statement, as shown by the fact that the making of a false statement in a statutory declaration is an offence punishable by four years' imprisonment. In the applicant's submission, the language in the statement of case, referring to "claims" or "assertions" made by him, also undermined the cogency of his account.

273 In response to the applicant, the Minister submitted that her duty to consider the applicant's representations, including his first statutory declaration, was referable only to the exercise of the revocation power conferred by reg 10(1) of the Sanctions Regulations. The Minister submitted that no such duty arose in exercising the power in reg 6, because an exercise of that power did not attract the principles of procedural fairness. In consequence, so the Minister submitted, she had no duty to afford the applicant an opportunity to be heard, and therefore no duty to consider the applicant's representations in his first statutory declaration. The outcome was, so the Minister submitted, that this ground, if made out, could only result in the invalidity of the Revocation Instrument.

274 The Minister submitted that the Full Court's decision in the *McQueen* case did not assist the applicant in this case. The Minister submitted that the Full Court's decision in the *McQueen appeal* was explicable by reference to features of s 501CA of the *Migration Act 1958* (Cth) that are not present in the statutory scheme governing the imposition of autonomous sanctions. The Minister contended that, in giving its reasons, the Full Court emphasised that s 501CA permits the Minister to exercise the power in s 501CA personally or by a delegate. The Minister submitted that that there was no relevant power to delegate in the case of reg 10 (or reg 6) of the Sanctions Regulations. The Minister drew particular attention to the Full Court's emphasis on the "peculiar persuasive exercise for which s 501CA provides". In this context, the Minister emphasised that the making of representations by a person who has a "significant persuasive burden" and whose liberty is at stake expressly conditioned by that power. The Minister submitted that these features were absent from the power at issue in this case. The Minister contended that the Court's focus on these features of the power in s 501CA meant that its reasoning was confined to cases concerning s 501CA, or cases concerning powers exhibiting similar features.

275 Referring to *Carrascalao*, the Minister submitted that she was entitled to obtain assistance from her Departmental officers, including by having them prepare summaries of the information she was to consider in making her decision. The Minister submitted that none of the three qualifications identified in *Carrascalao* at [61] applied in this case. The Minister submitted that the applicant's contention that the Departmental summary (i.e., the statement of case) was "materially deficient" (the first qualification in *Carrascalao*) should be rejected. The Minister noted (and it was not in dispute) that, at the time of her decision-making, she had before her the applicant's revocation application, his 29 August 2022 response, his 4 September 2022 response, and the statutory declaration of a former director of Evraz. The Minister drew attention to the statement in the applicant's revocation application (at [2]) that the application "will be supported by a statutory declaration [which] will depose to the facts that are relevant to this Application". The Minister submitted that the applicant's revocation application and the 29 August 2022 response (which also referred (at [2]) to the first statutory declaration) in fact set out all salient matters of fact, which were also the salient matters of fact set forth in the applicant's first statutory declaration. Mr Herzfeld SC submitted:

> [R]elevantly for present purposes, the applicant had the opportunity and took up the opportunity to draw to the Minister's attention matters in the first statutory declaration which he considered were of significance. And again, he didn't do that by saying, "I've addressed this in my first statutory declaration". He did it by substantively stating the points he wished to make.

276 As for the two matters that, according to the applicant, were omitted from the statement of case and not canvassed in other material before the Minister, the Minister submitted that:

> Evraz's asserted compliance with the UK Corporate Governance Code was addressed in the Statement of Case. It was specifically referred to in connection with summarising the Applicant's assertions about the role of Chairman and the composition of the Board.
>
> Further, the assertion of compliance was contained in the Applicant's submissions. It was addressed in the Applicant's Second Statutory Declaration. It was further addressed in the Statutory Declaration … [of] a former director of Evraz. Each of these documents was briefed to the Minister.
>
> ...
>
> The Applicant's submission appears to be that what was missing was "reference to Mr Abramov's sworn declaration that Evraz has complied". The additional feature of Mr Abramov's "sworn declaration" was apparent from the references to his statutory declarations. But in any event that additional feature was not material because there was no suggestion that Evraz did not comply. The issue for the Minister was as to the weight or significance, if any, to be attached to the facts (the Chairman's role and Board composition) flowing from the effect of the Code.
>
> ...

277 Similarly, the Minister submitted that the proposition contained in the *Financial Times* article to the effect that the applicant did not owe any of his success to political or governmental beneficence was also contained in the applicant's submissions. The 29 August 2022 response, which was before the Minister, specifically stated that "Mr Abramov's success as a businessman has been as a result of his own skill, expertise and business acumen ... rather than as a result of any connection with President Putin or the Russian government".

278 The Minister contended that the substance of each of the factual matters identified in the applicant's Omissions Table was adequately reflected in the statement of case. The Minister submitted that any deficiency was immaterial because the Minister was also briefed with the applicant's submissions, which themselves drew attention to the salient aspects of the applicant's first statutory declaration.

279 The Minister contended, in effect, that the function of the first statutory declaration was "to have a signed statement on behalf of the applicant" to support the matters set out in the applicant's other written representations to the Minister, all of which were in fact before her. Mr Herzfeld SC submitted that:

> [T]he point that I'm seeking to make is th[e] document which was before the Minister put the matters that the applicant sought to emphasise in terms and footnoted the first statutory declaration, but put the propositions that needed, according to the applicant, to be put.

280 Respecting the statement of case that accompanied the Second Departmental Submission, Mr Herzfeld SC submitted that:

> It ... picked out significant parts of the submissions, including by reference to the first statutory declaration. ... And so the context of the first statutory declaration not being before the Minister is that all of this material was before the Minister and didn't simply make elliptical references to the first statutory declaration but picked up its content and relevantly, for the purposes of a challenge, the applicant had an opportunity to, and did, pick up its content in terms.

281 The Minister submitted that second qualification in *Carrascalao* that reliance on a summary may not be appropriate "for a substantive argument (as opposed to an assertion of fact)" did not assist the applicant in this case, given that the statutory declaration contained only assertions of fact. The Minister submitted that the third qualification, which depended on the terms of the relevant Departmental summary, did not arise in this case because the case stated did not include the relevant language.

282 In response to the applicant's submissions concerning the solemnity of statutory declarations, the Minister submitted that the Departmental summary (or statement of case) clearly described the applicant's factual claims as being made in statutory declarations. The Minister relied on the fact that the statement of case distinguished between "factual assertions averred to in a statutory declaration from those merely asserted in submissions". The Minister submitted that:

> [T]he solemnity of the Applicant's First Statutory Declaration could not have been lost on the Minister, even though the document itself was not briefed personally to her.

The Minister contended that, in any event, a statutory declaration could not be equated with an affidavit because the *Statutory Declaration Act 1959* (Cth) did not require declarations to be made by oath or affirmation. The Minister submitted that any penalties under that Act attaching to false declarations would be of little moment to the applicant as he resided in Switzerland such that any penalties under the Act "would be of at least doubtful significance to him". The Minister also submitted that the applicant had not established that any difference in weight was sufficiently significant to raise a realistic possibility that the Minister may have arrived at a different decision.

Consideration of the applicant's ground 4 – Failure to consider the revocation application

283 As the parties' submissions indicate, the authorities assist in answering the question whether it was open to the Minister to rely on a Departmental summary of the first statutory declaration. As one might expect, the authorities do not support the proposition that, in making a decision under statute, a Minister cannot in any circumstances rely on a summary prepared by Departmental officers but must personally read the entirety of a representation in order to fulfil an obligation to consider its contents. What is and is not acceptable in the particular case depends on the pertinent circumstances.

284 In *Tickner v Chapman* [1995] FCA 987; 55 FCR 316, a Full Court of this Court considered whether the appellant Minister had complied with s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which required him to consider a report and any representations attached to the report. The Court held that the Minister's Department could assist the Minster in various ways, including by preparing summaries of a representation. The Full Court held the Minister was not necessarily required to read every representation himself, notwithstanding that he had an express statutory obligation to consider representations personally.

285 While Black CJ observed (at 464) that the Minister "must personally consider the representations and… not another document which is thought by someone else 'adequately to reflect' the representations", his Honour explained that this did not prevent the Minster relying on an effective Departmental summary. His Honour said:

> This does not mean that the Minister is denied the assistance of a staff member in the process of considering the representations. A staff member might, for example, sort the representations into categories. He or she might put together all the representations that are in common form so that they can be considered together. In some cases, a summary of technical supporting material, such as legal and financial documents, might be provided and it would certainly be in order, in my view, for a competent staff member to assist the Minister by making sure that supporting technical documents were what they purported to be. I would not rule out the possibility of some representations being quite capable of effective summary, yet there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it.

286 Burchett J, at 476-477, reached a similar conclusion:

> What is it to "consider" material such as a report or representations? In my opinion, the Minister is required to apply his own mind to the issues raised by these documents. To do that, he must obtain an understanding of the facts and circumstances set out in them, and of the contentions they urge based on those facts and circumstances. Although he cannot delegate his function and duty under s 10, he can be assisted in ascertaining the facts and contentions contained in the material. But he must ascertain them. He cannot simply rely on an assessment of their worth made by others: cf. *Jeffs v. New Zealand Dairy Production and Marketing Board* (1967) 1 AC 551 at 568-569. It is *his* task to evaluate them, a task he can only perform after he knows what they actually are. [] When Gibbs CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 30-31 conceded that the Minister, in the circumstances of that case, was not obliged "to read for himself all the relevant papers", and that it "would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department", he also made it plain that the summary must "bring to his attention" all material facts "which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial". That was in the context of legislation expressly empowering the Minister, as Mason J pointed out at 46, to delegate his powers and to refer matters to another authority.

287 Kiefel J, at 497, also reached a like conclusion:

> I have earlier said that the Minister may seek the assistance of his staff. A "consideration" of the representations does not in my view require him to personally read each representation. But it may be as well for him to do so, for if his staff are to convey what is contained within them, they must do so in a way which provides a full account of what is in them. If they do not, the Minister will not have considered something he is obliged to, and in this respect the observations of Gibbs CJ in *Peko-Wallsend* at 30 as to what results are apposite. It may vitiate his decision

288 It is true that the Court in *Tickner v Chapman* cautioned that reliance on a summary **may** result in a failure to discharge the obligation to consider the representation personally, but the Court

made it clear that there could be no hard and fast rule. Rather, as Black CJ explained, much would depend on the nature of the representations, and whether they were capable of being (and in fact had been) effectively summarised.

289 *Carrascalao* confirmed this approach. *Carrascalao* concerned an exercise of the Minister's power under s 501(3) of the *Migration Act 1958* (Cth) to cancel a visa where the Minister reasonably suspected that the person did not pass the character test and was satisfied that visa cancellation was in the national interest. The respondent Minister argued that he was entitled to rely on the Department's summaries of the material relevant to the exercise of that power in respect of the applicant. The Court, constituted by three Justices, heard two applications for judicial review in the Court's original jurisdiction. As to the present issue, the Court stated (at [61]):

> [I]t may be accepted that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including have them prepare summaries of information for review by him. There are, however, at least three qualifications to that proposition:
>
> (a) any such summary which is materially deficient may give rise to an inference that the decision-making process was not properly conducted by the Minister ...;
>
> (b) the use of a departmental summary may not be appropriate when what is sought to be summarised is a substantive argument (as opposed to an assertion of fact). Attempts to summarise material of this kind may be fraught, because the manner of the summary may cause some of the substantive force which the document may otherwise have had to be lost; and
>
> (c) the Minister's entitlement to have regard to a summary or submission prepared by his Department must take into account any statement or indication in such a document which advises the Minister of the need for him or her personally to consider relevant information in a document which is summarised, as is the case here in respect of the Department's submissions concerning both Mr Taulahi and Mr Carra scalao.

290 *Carrascalao* expressly recognises the "entitlement" of a Minister to obtain assistance from his Department and his private staff, subject to some qualifications. Those qualifications, which were consonant with those expressed in *Tickner v Chapman,* acknowledge that there may be circumstances in which Ministerial reliance upon a summary results in a failure to consider personally that which is required to be considered.

291 At the hearing, the applicant relied heavily on Colvin J's statement at [73] in *McQueen (first instance)* that:

> … where the Minister's task requires the consideration of representations made, the Minister must consider the representations personally and in most instances that will require a consideration of the representations themselves (either because the deliberative obligation requires their personal consideration or because the detail and nuance of such representations is apt to be lost through any attempt to summarise them with the consequence that the Minister would not be personally informed by the actual content of the representations in undertaking the required deliberation).

292 His Honour made this statement in the course of "[d]rawing… together" the authorities concerning whether a Minister's reliance on a summary prepared by another person could satisfy an obligation personally to consider that which has been summarised. Those authorities included *Tickner v Chapman* and *Carrascalao,* both of which Colvin J discussed at some length. His Honour was clearly not seeking to depart from the principles that these cases set down.

293 After reserving judgment in this matter, the Full Court delivered its judgment and reasons in the *McQueen appeal* and the Court later gave leave to the parties to file further submissions on that case. (I note that the Minister applied to the High Court for special leave to appeal from the Full Court's judgment, and that this application has been referred for hearing by that Court as if on appeal.)

294 The *McQueen Case* concerned an exercise of the Minister's power under s 501CA(4) of the *Migration Act 1958* (Cth) to revoke a mandatory cancellation of a person's visa under s 501(3A), if the Minister were satisfied that there was "another reason" why the cancellation should be revoked and the person made representations to the Minister to this effect. The Minister had declined to revoke Mr McQueen's visa, a decision that was set aside at first instance. On appeal, the Full Court upheld the primary judge's conclusion that the Minister was not entitled to rely solely on a summary of Mr McQueen's representations, consideration of which conditioned the exercise of the power under s 501CA(4).

295 The Court's holding depended on a close analysis of s 501CA of the Migration Act. The Court emphasised that: (1) the Act gave the Minister a choice as to whether to exercise the power personally or to delegate it; (2) where the Minister exercised the power personally, the applicant lost a right to merits review; (3) an exercise of the power affected the applicant's personal liberty; (4) the power was one of last resort; and (5) the only chance for a person to avoid these consequences was to persuade the Minister by the person's representations to undo the effect of the visa cancellation mandated by s 501(3A). At [89]-90], the Court said:

> Parliament has given the Minister a choice as to whether to exercise the power personally or delegate it, and has attached different consequences – in terms of merits

> review – depending on the choice made. A decision by the Minister personally to exercise the s 501CA(4) power deprives a person of a right to merits review (see s 501CA(7), and cf s 500(1)(ba)), deprives them of a hearing and of a fresh decision on possibly different material. It means the representations cannot be added to, or explained, or emphasised; they stand or fall as they are.
>
> Further, the statutory power in s 501CA(4) affects liberty. It also affects a person's ability to remain lawfully in Australia. These are the most profound of consequences for an individual. The occasion for the exercise of the power is a "last resort" situation, where a person's visa has already been cancelled, without notice or natural justice. Parliament had identified the satisfaction of the repository of the power as the condition upon which the revocation power should be exercised, and the only opportunity the affected individual has to persuade the Ministerial repository of the power to exercise it favourably is through the representations they have been invited to make.

296 The Court distinguished *Tickner v Chapman*, *Carrascalao* and other authorities, which did not "address the point" raised in the case before it: see especially [84], [89]-[106]. The Court evidently did not seek to depart from the principles in those cases; and certainly did not overrule those authorities.

297 *Tickner v Chapman* and *Carrascalao* remain authoritative (and binding on a single judge) where they are applicable. The features of s 501CA mentioned at [295] above, and which led the Court to conclude that it was not open to the Minister in the *McQueen appeal* to rely on a Departmental summary, are absent from that part of the autonomous sanctions regime with which the present case is concerned. The representations in that case could not "be added to, or explained, or emphasised" and had to "stand or fall as they are", with an adverse outcome potentially causing the applicant long-term, irreparable hardship (see [89]); but in this case a designated or declared person may apply for revocation of their designation or declaration whenever they wish, subject only to the constraint in reg 11(3).

298 Having regard to the above-mentioned considerations, I reject the applicant's implicit submission that the power at issue in this case is sufficiently analogous to the power at issue in the *McQueen appeal* to lead to the conclusion that it was not open to the Minister here to rely on the Departmental summary, in the form of the statement of case.

299 This is not, of course, the end of the matter, because, relevantly here, a materially deficient summary may give rise to the inference that the Minister's decision-making process was fatally flawed. That is, the Minister did not give the consideration he or she was required to give to making the decision in question. Similarly, a Departmental attempt to summarise a substantive argument may fail because the summary loses the substantive force that it might otherwise have had. See *Carrascalao* at [61], quoted at [289] above.

300 As we have seen, the applicant submitted, and the Minister accepted, that even if the Minister were entitled to rely on a summary of the first statutory declaration in the statement of case, she could not rely on a summary which was "materially deficient" or incomplete. Since the Minister in fact had before her a number of documents that the applicant had provided (see [38]-[39] & [54] above), the applicant was also required to establish that any deficiencies in the statement of case were not remedied by these other documents. This was not a case like *McQueen (first instance), Carrascalao* or *Tickner v Chapman,* where the question of whether the Minister had considered representations turned exclusively on whether those representations had been effectively summarised in the relevant Departmental summary.

301 Having read the applicant's Omissions Table and the Minister's response, I do not accept that there were any material elements of the applicant's first statutory declaration that were not adequately conveyed to the Minister by either the statement of case or the other material before the Minister. I propose to explain this conclusion by reference to some of the allegedly missing elements of the first statutory declaration that the applicant's submissions emphasised as being particularly significant.

302 I commence with the applicant's submission that an element of his first statutory declaration was his statement that he had no relevant political connections and had never received any preferential treatment from the Russian government. The applicant contended that no other material before the Minister adequately conveyed this statement to her.

303 The precise terms of the first statutory declaration relevant to this issue (as set out in the applicant's Omissions Table) were as follows:

> 19. I decided to leave the research institute at which I was working and go into business due to a lack of state funding for research institutes. In 1992, I co-founded EvrazMetall together with several business partners.
>
> 20. As the 2003 FT Article states, I did not have (and do not have) any political connections with or receive preferential treatment from the Russian government (or any other government). Nor did any of the other co founders of EvrazMetall. Further, EvrazMetall did not, and I personally did not, purchase any Russian government assets that were privatised during the 1990s.
>
> 21. EvrazMetall, Evraz Group SA (SA) and Evraz did not acquire assets that were privatised by the Russian government. The success of those companies was not a result of any political connections held by me, or preferential treatment from the Russian government (or any other government). Rather, the success of those companies was entirely a result of the expertise, skill and business acumen held by me and others who held roles in those companies.
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> []

> 68. I have never had any personal relationship with the President or his predecessors. Nor I have ever had any one-on-one interactions with the President of Russia or his predecessor.
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> 69. I have met the President of Russia on occasion in the course of hosting visits by dignitaries to the operations of EvrazMetall, SA and Evraz. That hosting was no different to my hosting of visits by other heads of state to the operations of EvrazMetall, SA and Evraz in their respective countries. My hosting of the President of Russia on such visits did not involve any personal connection with him.
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> []
>
> 75. I do not have any other personal or political connection with the President of Russia or with the Russian regime. I have never had any such personal or political connection. EvrazMetall, SA and Evraz have never benefited from any preferential treatment as a result of such connections held by any person associated with those companies. Rather, as explained at paragraph 20 above and in the 2003 FT Article, the success of those companies was a function of the skill, expertise and business acumen of its Board members and employees.

304 The applicant evidently relied on a copy of an article published by the *Financial Times* on 27 August 2003 titled "The science of forging a steel empire" to support these statements. The applicant referred expressly to the article at [17] of his first statutory declaration. The applicant confirmed that the contents of the article were "accurate" and that it was an exhibit to the first statutory declaration. The passages of the article relevant to the applicant's lack of political connections with, or preferential treatment from, the Russian government are set out below:

> EvrazHolding is a product of Russia's growth since the 1998 financial crisis and Mr Abramov is representative of the second wave of Russian magnates who went into business after the best assets had been taken.
>
> Unlike the first wave of politically connected "oligarchs", such as Mikhail Khodorkovsky and Vladimir Potanin, Mr Abramov had neither political leverage nor financial resources to help him benefit from Russia's chaotic privatisation of the 1990s: "I did not believe privatisation was irreversible in this country and did not want to be part of it".
>
> []
>
> While the first wave of Russian oligarchs grabbed whatever assets they could, Mr Abramov acquired them in a much more focused way.

305 It is then necessary to compare the contents of the first statutory declaration, including the article exhibited to it, with the material that was before the Minister. I turn first to the applicant's revocation application.

306 Under [4] of "A. Summary", the applicant's revocation application stated the following in respect of this issue:

> (4) That criterion is not met. Mr Abramov is not, and has not been, engaging in an

activity or performing a function that is of economic or strategic significance to Russia. That is because, in summary:

[]

(f) at no time has Mr Abramov had any material connection to the Russian government or the Russian President, Vladimir Putin.

The revocation application went on to say:

79. It has not been suggested by the Minister that Mr Abramov has any personal connection with the Russian government or President Putin. Nonetheless, for the avoidance of doubt, it should be noted that Mr Abramov has no such connection.

80. Mr Abramov has met President Putin in the course of hosting visits by dignitaries to the operations of EvrazMetall, SA and Evraz. Those encounters were no different from Mr Abramov's hosting of visits by other heads of state in connection with his roles in EvrazMetall, SA and Evraz.

81. Mr Abramov has never had any personal relationship, or any one-on-one interactions, with President Putin or his predecessors.

82. While Mr Abramov received two awards from the Russian government in 2016, those awards were bestowed in recognition of Mr Abramov's public work and charitable activities. President Putin was not present at either of the ceremonies at which Mr Abramov received those awards.

83. In 2017, a group of people, including Mr Abramov, were presented with awards by the Russian Geographical Society. Mr Abramov received his award in recognition of his philanthropic work. The awards were presented by President Putin in his capacity as the Chairman of the Society's Board of Trustees. However, the awards were not bestowed by or on behalf of the Russian government.

84. Mr Abramov does not have any other personal or political connection with President Putin or the Russian government. In particular, as noted above, EvrazMetall, SA and Evraz have succeeded as a result of the skill, expertise and business acumen of their Board members and employees, rather than because of political connections held by Mr Abramov or any other person associated with them. None of EvrazMetall, SA or Evraz has purchased assets that were privatised by the Russian government.

307 Furthermore, in his 29 August 2022 response to the letter from the Minister's Department of 12 August 2022, the applicant stated in relation to this issue that:

108. That [foreign policy] objective would not be advanced at all by declining to revoke the Decisions, given that:

[]

(3) Mr Abramov has no material connection to the Russian government or to President Putin;[125]

(4) Mr Abramov's success as a businessman has been as a result of his own skill, expertise and business acumen (and those of his employees and board members of Evraz and its predecessors), rather than as a

result of any connection with President Putin or the Russian government;[126]

125 Revocation Application at [79]-[83].

126 Revocation Application at [84].

308 Regarding this issue, the statement of case also informed the Minister as follows:

42.2. Abramov has personally made a significant contribution to the growth and success of Evraz through his performance of numerous high-level roles within the group over an extended period, including in particular his roles as co-founder and General Director of EvrazMetall from its inception in 1992, CEO and Chairman of Evraz Group SA from December 2004 until January 2006, and Chairman of Evraz Group SA and then Evraz plc from December 2008 to April 2022. To these roles Abramov brought "extensive experience and expertise on the [Evraz] Group's key markets",[79] and Abramov himself attributes the success of those companies to "the skill, expertise and business acumen of [their] Board members and employees".[80]

[]

52. Abramov claims that he has no personal or political connections to the Russian government or President Putin. The Department assesses it is unlikely that a businessman of Abramov's standing – with a net worth of US$6.4B (according to Forbes) – and with over 30 years in the steel and coal industry in Russia has no personal or political connection to the Russia Government.

79 Evraz Annual Report 2021 (**Attachment 1**), page 114; Abramov's First Statutory Declaration, [61.a]. These matters led Evraz plc to decide that Abramov could serve as Chairman notwithstanding his lack of independence, and beyond the 9 year maximum term specified in the UK Corporate Governence [sic] Code.

126 Abramov's First Statutory Declaration, [75].

309 I accept that, as the Minister submitted, the substance of the applicant's case on this issue, as set out in his first statutory declaration, was contained in his revocation application, and would have been evident to the reader. The revocation application expressly stated that "[the Applicant] does not have any other personal or political connection with President Putin or the Russian government". It also stated, "EvrazMetall, SA and Evraz have succeeded as a result of the skill, expertise and business acumen of their Board members and employees, rather than because of political connections held by Mr Abramov or any other person associated with them". The revocation application affirmed, "[n]one of EvrazMetall, SA or Evraz has purchased assets that were privatised by the Russian government". The statement of case similarly advised the Minister that the applicant attributed the success of Evraz and its predecessors to the skill, expertise and business acumen of their Board members and employees and drew the Minister's attention to the applicant's claim "that he has no personal or political

connections to the Russian Government or President Putin". It cannot be said that the Minister did not have before her all the applicant wished to say on this issue.

310 In the Omissions Table, the applicant attempted to highlight a number of points of difference between the way he addressed this issue in his first statutory declaration and the way the issue was put in the statement of case and other material before the Minister. First, the applicant observed that the statement at [42.2] of the statement of case that "[the applicant] himself attributes the success of those companies to 'the skill, expertise and business acumen of [their] Board members and employees'" omits the word "entirely", which was included in the almost identical statement at [21] of the first statutory declaration. Mr Merkel KC, for the applicant, submitted that this omission was important because "the word 'entirely' puts a very significantly different complexion on what's said there" because it "negatives influence or connection" and is "part of a total picture sought to be presented" in that it establishes that "there was no connection … no influence, both in respect of continuing influence and connection with Evraz or the Russian Government".

311 It seems to me that the applicant overstates the significance of the absence of the word "entirely" from the statement of case. In any event, though it does not use the word "entirely", the revocation application clearly stated that the applicant had no personal or political connections to Russia's President or its government. It affirmed unequivocally that the success of Evraz and its predecessors was attributable to the "skill, expertise and business acumen of their Board members and employees" and not "political connections". The applicant's 29 August 2022 response to the Department's letter of 12 August 2022 repeated the very same point. Thus, the point that the applicant sought to make – that his success and Evraz's success were in no way attributable to any connections with, or preferential treatment from, the Russian government – was plainly made in the material before the Minister.

312 The applicant also took issue with the fact that the statement of case referred to his statement that he has no personal or political connections to the Russian Government or President Putin as a "claim", and instructed the Minister that the claim was "unlikely", thereby casting doubt on his credit. The difficulty with this submission is that it fails to take account of the relationship between the Minister and her Department. As I have already explained, the Minister can properly look for, and expect to receive, advice from her Departmental officers relating to a decision of this kind. In this context, Departmental officers were obliged to advise the Minister that the applicant's account was not consistent with their knowledge and

experience, as they did here. It was, of course, for the Minister to reach her own decision. The use of the word "claim" in the context of this Departmental advice does not detract from the fact that the applicant's position on the issue was clearly before the Minister. The applicant put the same submission a little differently on other occasions (referring to descriptions of his factual contentions in the statement of case as "submissions" or "assertions") but none of these versions overcame this difficulty.

313 As already noted, in this context, the applicant also submitted that the material before the Minister failed to disclose that, in making the first statutory declaration, the applicant had "sworn" to the truth of the relevant fact that he had no political connections with, and had not received preferential treatment from, the Russian Government or the Russian President. This submission was an aspect of the applicant's broader submission that the Departmental summary omitted to disclose the solemnity or seriousness with which he put forward the facts and circumstances set out in his first statutory declaration. By analogy with *Gardiner*, the consequence was, so the applicant submitted, that the Minister could not have appreciated the seriousness of the matters sworn by him in his first statutory declaration.

314 I do not accept the premise of the applicant's argument that the material before the Minister did not disclose that the applicant's statutory declaration supported the facts and circumstances on which he relied. First, the applicant's revocation application would not only have alerted the Minister to the existence of a forthcoming statutory declaration, but would also have put the Minister on notice that **all** the factual propositions on which the applicant relied would be supported by a statutory declaration. This was because the application, which was before the Minister, expressly stated that the application "will be supported by a statutory declaration that will be filed within the next 7 days" that "will depose to the facts that are relevant to this Application". The application made it clear that one of the facts that the applicant regarded as relevant to this application was that he had no relevant connections with, and had received no preferential treatment from, the Russian Government. It would have been clear from the many references to the first statutory declaration in the footnotes in the statement of case that the applicant had in fact made such a statutory declaration. It is immaterial that the statement of case might have added more footnotes to the first statutory declaration with reference to other statements. This is because the material that was in fact before the Minister clearly conveyed that the applicant intended to make a statutory declaration in support of all the relevant facts (as he saw them) and he had done so.

315 Since I do not accept the premise to the applicant's argument on this issue, this argument fails. It is unnecessary to consider the Minister's further submission that, because a statutory declaration is made under the *Statutory Declarations Act 1959* (Cth) and not "sworn" in the sense of an oath (or affirmed as for an affirmation), the reasoning in *Gardiner* is inapplicable

316 The applicant's submissions also identified a second significant element of the first statutory declaration that the other material before her did not reveal. This was the matter of Evraz's compliance with the Listing Rules of the UK Financial Conduct Authority. The parts of the first statutory declaration relevant to this issue (as set out in the applicant's Omissions Table) were as follows:

> 39. Evraz was admitted to trading on the London Stock Exchange Main Market on 7 November 2011: 2011 Annual Report at p 32. Its listing on the London Stock Exchange is in accordance with the Listing Rules of the UK Financial Conduct Authority (the Listing Rules). The current version of the Listing Rules dated May 2022 is publicly available, and may be found at <https://www.handbook.fca.org.uk/handbook/LR.pdf>. An extract of the Listing Rules dated May 2022 is exhibited at AA-1 at pages 28 to 36.
>
> []
>
> 41. Section 6.5 of the Listing Rules contains additional requirements for "premium listing" on the London Stock Exchange. Evraz was a premium listed company. Section 6.5.1 provides that an applicant for listing with a controlling shareholder must demonstrate that, despite having a controlling shareholder, the applicant is able to carry on an independent business as its main activity. Section 6.5.4 provides that an applicant for listing with a controlling shareholder upon admission must have in place a written and legally binding agreement with its controlling shareholder which is intended to ensure that the controlling shareholder complies with undertakings that:
>
> a. transactions and arrangements with the controlling shareholder (and/ or any of its associates) will be conducted at arm's length and on normal commercial terms;
>
> b. neither the controlling shareholder nor any of its associates will take any action that would have the effect of preventing the applicant from complying with its obligations under the Listing Rules; and
>
> c. neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution which is intended or appears to be intended to circumvent the proper application of the Listing Rules.

317 Of the materials before the Minister, only the revocation application referred to the Listing Rules. Under the heading "A. Summary", the revocation application stated (at [4(4)(d)and (e)]):

> (4) That criterion is not met. Mr Abramov is not, and has not been, engaging in an activity or performing a function that is of economic or strategic significance to Russia. That is because, in summary:

[]

(d) Mr Abramov's indirect minority shareholding did not, and does not currently, give him control over Evraz or the capacity to influence any aspect of the business carried on by Evraz;

(e) relatedly, Evraz and its other major shareholders are and were at all material times subject to the highest standards of governance, transparency and information disclosure, set out in the Listing Rules of the UK Financial Conduct Authority (the **Listing Rules**) and the UK Corporate Governance Code (the **Code**), which ensure that Evraz has been and remains independent of Mr Abramov or any other person;

318 The revocation application went on to state:

64. Evraz was admitted to trading on the London Stock Exchange Main Market on 7 November 2011. As a result, Evraz committed itself to complying with the highest standards of governance, transparency and information disclosure, set out in the Listing Rules and the Code. As discussed further below, those standards ensure that Evraz has been and remains independent of Mr Abramov or any other person.

[]

72. Since its incorporation, Evraz has had "relationship agreements" with its major shareholders. The relationship agreements are necessary for Evraz to comply with section 6.5 of the Listing Rules, which contains additional requirements for premium-listed companies, such as Evraz:

(1) Section 6.5.1 provides that an applicant for listing with a controlling shareholder must demonstrate that, despite having a controlling shareholder, the applicant is able to carry on an independent business as its main activity.

(2) Section 6.5.4 provides that an applicant for listing with a controlling shareholder upon admission must have in place a written and legally binding agreement with its controlling shareholder which is intended to ensure that the controlling shareholder complies with undertakings that:

(a) transactions and arrangements with the controlling shareholder (and/ or any of its associates) will be conducted at arm's length and on normal commercial terms;

(b) neither the controlling shareholder nor any of its associates will take any action that would have the effect of preventing the applicant from complying with its obligations under the listing rules; and

(c) neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution which is intended or appears to be intended to circumvent the proper application of the listing rules.

319 Plainly enough, the applicant's statements about this issue in his first statutory declaration and revocation application are to much the same effect. The only elements of the discussion of this

issue in first statutory declaration that are absent from the revocation application are the references to Evraz's Annual Report and the statement that "[i]ts listing on the London Stock Exchange is in accordance with the Listing Rules of the UK Financial Conduct Authority". The substance of this matter is addressed in [72] of the revocation application. The applicant did not make any submission to the effect that the omission of any elements of the discussion in the first statutory declaration resulted in the Minister failing to consider any part of the applicant's case on this issue.

320 In the Omissions Table, the applicant did submit, however, that parts of the first statutory declaration relevant to this issue were not adequately captured by the relevant parts of revocation application because those parts of the revocation application did not "refer to the First Statutory Declaration or otherwise indicate that [they were] based on [the Applicant's] sworn testimony". As explained at [314], the absence of any specific reference to the first statutory declaration in these parts of the revocation application was immaterial because the material actually before the Minister clearly conveyed that the applicant intended to make a statutory declaration in support of all the relevant facts (as he saw them) and that he had done so.

321 It will be clear from the Omissions Table that the applicant submitted that there were numerous other pertinent omissions resulting from the failure to provide the Minister with a copy of the first statutory declaration. I have examined each of them and, for reasons akin to those set out at [312], [314] and [320] above, there was no salient omission. Nor did the applicant identify why any difference in expression would result individually or cumulatively in a failure to consider the applicant's revocation application and the circumstances relied on to justify that application: cf. Sanctions Regulations, reg 11(2).

322 As already stated (at [241]), the revocation decision made under reg 10 was separate and distinct from the Minister's second decision to designate and declare the applicant under reg 6. If, however, these decisions are properly seen as part of the same decision-making process and in consequence a relevant error infects both decisions, for the reasons stated, the applicant would nonetheless fail to make out this ground.

323 Accordingly, for the reasons stated, the applicant's ground 4 cannot succeed.

Applicant's ground 6 – Unreasonable formation of state of satisfaction

324 In written submissions, the applicant contended that it was not open to the Minister, on the material before her, lawfully to form the requisite state of satisfaction to designate him for Russia under reg 6, in conjunction with item 6A(a) of the table. At the hearing, Mr Merkel KC, for the applicant, informed the Court that the applicant was not pursuing this ground.

EVIDENCE

325 The parties proceeded on the basis that the Designation Book (exhibit A1) contained the material before the Minister when she made the First Designation Instrument and the Re-Designation Book (exhibit A2) contained the material before the Minister when she made the Second Designation Instrument. The parties agreed that the two Books should be admitted into evidence on this basis. Similarly, the parties agreed that the transcript of the hearing on 26 August 2022 (exhibit A9) should form part of the evidence in the proceeding.

326 The applicant also tendered a number of affidavits. These affidavits included the affidavit of:

- Chrystalla Georgiou sworn on 1 August 2022 (with exhibit CG-3) (**Third Georgiou Affidavit**);
- Chrystalla Georgiou sworn on 9 September 2022 (with exhibit CG-4) (**Fourth Georgiou Affidavit**);
- Chrystalla Georgiou sworn on 12 September 2022 (with exhibit CG-5) (**Fifth Georgiou Affidavit**);
- Chrystalla Georgiou sworn on 7 October 2022 (with exhibit CG-6) (**Sixth Georgiou Affidavit**); and
- Geoffrey Hosking affirmed on 22 June 2022 (**Hosking Affidavit**).

327 The applicant also tendered an affidavit sworn by him on 12 September 2022 and an exhibit to it (**Applicant's Affidavit**). He relied on this affidavit to support a number of grounds in his review application.

328 The Minister objected to the admissibility of almost all these affidavits and their accompanying exhibits upon the basis that, with two exceptions, they were irrelevant to any properly formulated grounds of judicial review. Save for these exceptions and the applicant's own affidavit, the applicant did not advance any substantive argument to the contrary. The parties

accepted that whether the Minister's relevance objections were upheld would follow from the resolution of the substantive issues in the proceeding. It was on this basis that each of the affidavits was provisionally admitted into evidence at the hearing.

329 Having determined these issues, I now turn to the Minister's 'global' objection, which covered almost all of the affidavits that the applicant tendered, without distinguishing between any parts of any affidavit.

330 The Third Georgiou Affidavit (provisionally exhibit A3) was primarily tendered by the applicant on the basis that certain public statements made by the Minister on 7 April 2022 constituted the Minister's statement of reasons for making the First Designation Instrument. Since I have held that the statements did not bear this character, the evidence concerning them is irrelevant. There is nothing else in this affidavit that would appear to be relevant to any issue in dispute, and certainly none was suggested. This affidavit is therefore inadmissible.

331 The Fourth Georgiou Affidavit (provisionally exhibit A4) concerned the same public statements made the Minister, as well as public statements made by the Prime Minister. Essentially, for the reasons just stated, this part of the affidavit was therefore inadmissible. The remainder of the affidavit principally concerned the issue of whether the Minister had opened hyperlinked footnotes in the First Departmental Submission. This was not a live issue at the hearing, however, because both parties presented their submissions on the assumption that the Minister had not opened the hyperlinks. Hence, by the time of the hearing, the Fourth Georgiou Affidavit was not relevant to an issue in the proceeding, and was therefore inadmissible.

332 The Fifth Georgiou Affidavit (provisionally exhibit A5) was mentioned once in the applicant's submissions dated 12 September 2022, at footnote 17, where the applicant referred to a statement made by the Prime Minister at a press conference in Sydney. In these submissions, the applicant stated that the statement was made the day before item 6A was introduced into the table in reg 6 and was supportive of his construction of this provision. At the hearing, the Minister directly challenged the admissibility of this affidavit, and the applicant did not make any submissions in opposition on this point or otherwise refer to this affidavit. While the transcript of the press conference indicates that the Prime Minister referred to foreshadowed changes to "sanctions" that would "expand the scope of persons and ... entities, that Australia can list for targeted financial sanctions and travel bans" and would ensure that "we can target those who are particularly involved ...", the press statement suffers from deficiencies similar to those identified in [105]. It cannot support the applicant's submissions on construction. I would

therefore regard this affidavit and its exhibit as inadmissible. If I am wrong, however, I would, for reasons similar to those identified in [105], attribute little or no weight to the statements about the foreshadowed amendments made by the Prime Minister at the press conference.

333 The Sixth Georgiou Affidavit (provisionally exhibit A8) relates and exhibits correspondence between the applicant's solicitors and the Minister's solicitors in relation to the applicant's revocation application. In her written submissions, the Minister accepted that this affidavit "may be relevant to the Applicant's procedural challenges" to the Second Designation Instrument. No party sought to distinguish one item of correspondence from any other with respect to its relevance on this account. I accept that correspondence anterior to the Revocation Instrument and the Second Designation Instrument is relevant as it contains the "procedural representation" made by the Minister (relevant to ground 5) as well as the applicant's first statutory declaration (relevant to ground 4). This affidavit and Exhibit CG-6 is therefore admissible in relation to these grounds.

334 The Minister challenged the admissibility of the applicant's affidavit of 12 September 2022 (provisionally exhibit A6) on the same grounds as the affidavits to which I have already referred. For the reasons already stated at [151], I accept that the applicant's affidavit was not relevant to the unreasonableness ground advanced in support of his challenge to the First Designation Instrument. Both parties also relied on parts of this affidavit in support of, or in opposition to, the applicant's "erroneous findings of fact ground", a ground that, properly stated, was that the Minister failed to perform the function required by reg 6. Similarly, the affidavit was also relied on in support of the applicant's contention that the First Designation Instrument was vitiated by the Minister's constructive failure to exercise jurisdiction arising from the Minister's failure to appreciate that, once relevantly satisfied, she had still to consider whether it was appropriate in the exercise of her discretion to designate or declare him. To the extent that the parties relied on the affidavit in support of, or in opposition to, these grounds, it was relevant and therefore admissible. Further, the affidavit is also relevant and admissible to the extent that it was relied on by the applicant to support his submissions on procedural fairness.

335 The Hosking affidavit (provisionally exhibit A7) sets out the applicant's commercial affairs in New Zealand and describes how those interests have been adversely affected by his designation and declaration. The applicant relied on this affidavit to make the point that "autonomous sanctions are… punitive", in aid of his arguments that, properly construed, item 6A requires

that there be a "material nexus" and is conditioned by the requirements of procedural fairness. I reject the Minister's submission that this affidavit was entirely irrelevant. I accept that the affidavit is at least relevant to the applicant's procedural fairness ground in so far as it provides evidence about the nature of the injury that he was liable to suffer by his designation and declaration.

DISPOSITION

336 For the foregoing reasons, I would uphold the applicant's challenge to the First Designation Instrument on the ground that the Minister's failure to consider whether to exercise her discretion to designate or declare the applicant constituted a constructive failure to exercise jurisdiction. Regarding the First Designation Instrument, the applicant has not made out any other ground in support of his judicial review application. The applicant has not succeeded in establishing any of his grounds with respect to the Second Designation Instrument.

337 The orders that I would make are as follows:

(1) Unless a party notifies the Court in writing within 7 days of today that orders to give effect to these reasons have been agreed between them, then the parties are to file and serve submissions (limited to 2 pages) in support of such orders as they propose to give effect to these reasons, together with a minute of order, by 4 pm on 29 September 2023.

(2) Unless a party notifies the Court in writing within 7 days of today that an order as to costs has been agreed between them, then the parties are to file and serve submissions as to costs (limited to 3 pages) by 4.00 pm by 4 pm on 29 September 2023.

(3) The parties have liberty to apply on reasonable notice.

I certify that the preceding three hundred and thirty-seven (337) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kenny.

Associate: 

Dated: 15 September 2023