

THE 'FATAL CONUNDRUM' OF 'NO-CONSIDERATION' CLAUSES AFTER *PLAINTIFF M61*

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I INTRODUCTION

In *Plaintiff M61/2010E v Commonwealth* ('*Plaintiff M61*'),¹ the High Court held in a unanimous joint judgment that the plaintiff asylum seekers on Christmas Island were entitled to procedural fairness and to have their claims for refugee status determined according to law. This decision has significant ramifications for the government's asylum seeker policy, and it has already been the subject of academic commentary from an immigration perspective.² The case also has broader doctrinal significance because it is only the second time that the full bench has considered what this article will call a 'no-consideration' clause.³ The Court held that the legislature can validly confer a power on a decision-maker and at the same time provide that the decision-maker has no duty to consider exercising it. However, on the facts before it, the Minister had decided to consider all requests for asylum and thus had moved beyond the protection of the no-consideration clause. Moreover, declaratory relief was appropriate even though the constitutional writs were unavailable. This handling of the no-consideration clause reveals a concern to safeguard judicial review from legislative intrusion. This article explores the use of 'no-consideration' clauses to restrict judicial review and the Court's approach to such clauses in *Plaintiff M61*.

Part II of this article reviews the legislative history of 'no-consideration' clauses and the early case law on how they operated. Part III then examines the High Court's approach to such clauses in *Plaintiff M61*. Part IV uses a hypothetical set of facts to further explore how the Court's reasoning operates to maintain judicial review in the face of a no-consideration clause.

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¹ (2010) 85 ALJR 133.

² See Mary Crock and Daniel Ghezelbash, 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101.

³ See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

II THE HISTORY OF NO-CONSIDERATION CLAUSES

The legislative introduction of no-consideration clauses

'No-consideration' clauses provide that a decision-maker 'does not have a duty to consider whether to exercise' a particular statutory power, whether the decision-maker is requested to do so 'or in any other circumstances'. These clauses rebut the ordinary presumption that a statutory conferral of power is coupled with an enforceable duty to consider exercising it.⁴ This kind of provision first appeared in the *Migration Legislation Amendment Act 1989* (Cth). Section 61 of the *Migration Act 1958* (Cth) ('*Migration Act*'), as amended, empowered the Minister to set aside decisions made by an internal review officer. Section 61(10) was the no-consideration clause:

The Minister does not have a duty to consider whether to exercise the power [to set aside a decision by an internal review officer] in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

Section 64U was similarly phrased and it both empowered the Minister to set aside certain decisions of the Immigration Review Tribunal and also provided that the Minister had no duty to consider exercising that power.

These no-consideration clauses were inserted into the *Migration Legislation Amendment Act 1989* (Cth) by the *Migration Legislation Amendment Act (No 2) 1989* (Cth). According to the Explanatory Memorandum:

This provision provides that the Minister is not under a duty to consider whether to exercise his or her power to substitute a decision. Where the Minister decides not to exercise his power, that decision is not subject to judicial review by the Federal Court on the grounds that there has been a failure to make a decision pursuant to section 7 of the *Administrative Decisions (Judicial Review) Act 1977*.⁵

The parliamentary debates shed further light on their intended operation. According to the second reading speech of the then Minister Assisting the Minister for Immigration, Local Government and Ethnic Affairs:

To remove confusion as to the operation of the *Administrative Decisions (Judicial Review) Act 1977* in relation to the Minister's powers after each tier of review, provisions have been inserted which provide that there is no duty on the Minister to exercise the power in individual cases.⁶

Dr Theophanous, the chair of the Joint Select Committee on Migration Regulations that was involved in the amendments, added:

Of course, much depends on the Minister's desire to exercise the amendments to section 64U. If a Minister does not feel like exercising that power very much, that Minister will look at only a small number of cases. On the other hand, a Minister who feels like exercising that power comprehensively may desire to look at a very large number of cases. The situation is left in the hands of the Minister. There is no requirement ... for the Minister to look at cases if he does not feel that the compassionate circumstances warrant anything more than a cursory glance. In other words, the Minister can decide to use his

⁴ See *Murphyores Inc Pty Ltd v Commonwealth* (1975) 136 CLR 1, 17-18 (Mason J).

⁵ Explanatory Memorandum, Migration Legislation Amendment Bill (No 2) 1989 (Cth) 2 [6] (s 61(10)), 3 [11] (s 64U(6)).

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3458 (Allan Holding).

own system for determining which of those cases will come to his attention and how to deal with them.⁷

Since 1989, almost 30 no-consideration clauses have been enacted across the Australian jurisdictions, although they are mostly to be found in the *Migration Act*.⁸ The secondary materials accompanying these newer provisions do not shed much light on their intended operation. For example, in relation to sch 1 s 357-70 of the *Taxation Administration Act 1953* (Cth), the Explanatory Memorandum simply stated that 'the Commissioner does not have a duty to consider the ruling at the time of processing the taxpayer's self assessment.'⁹ Somewhat more usefully, the Explanatory Memorandum accompanying the Australian Citizenship Bill 2005 (Cth) explains:

The purpose of [the no-consideration clause now found in s 48(4) of the *Australian Citizenship Act 2007* (Cth)] is to put beyond doubt that this is a discretionary provision which may be exercised by the Minister. The Minister cannot be required to exercise such power, irrespective of who makes such request.¹⁰

Previous case law

To better understand *Plaintiff M61*, this section reviews the case law as it stood prior to that case. The focus is on two issues: the effect of no-consideration clauses on judicial review, and the reach of such clauses.

The effect of no-consideration clauses: what remedies are available?

Some cases have treated no-consideration clauses in a manner that gives effect to the legislative purpose, evident in the early extrinsic material, of excluding judicial review on the grounds that the decision-maker had failed to make a decision. In *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Raikua*'),¹¹ Lindgren J held that a decision not to consider exercising power under s 417(1) of the *Migration Act* 'cannot be' vitiated for jurisdictional error because, under s 417(7), 'the Minister does not, in any circumstances, have a duty to consider whether to exercise the power under s 417(1).'¹² In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Gogna* ('*Gogna*'), Gaudron J noted (in chambers) that the Minister 'does not even "have a duty to consider". So, what error can you point to that would entitle this Court to intervene or any court to intervene?'¹³ This treatment of no-consideration

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3465 (Andrew Theophanous).

⁸ See, eg, *Australian Citizenship Act 2007* (Cth) s 48(4); *Australian Crime Commission Act 2002* (Cth) s 9(10); *Competition and Consumer Act 2010* (Cth) s 152BCN(5); *Migration Act 1958* (Cth) ss 37A(6), 46A(7), 46B(7), 48B(6), 91F(6), 91L(6), 91Q(7), 137N(4), 195A(4), 197AE, 351(7), 391(7), 417(7), 454(7) 495B(2), 501A(6), 501J(8).

⁹ Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 40 [3.29]. See also Explanatory Memorandum, Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999 (Cth) 5 [14], 6 [23], in relation to ss 37A and 91L of the *Migration Act*.

¹⁰ Explanatory Memorandum, Australian Citizenship Bill 2005 (Cth) 64 (emphasis in original).

¹¹ (2007) 158 FCR 510.

¹² *Ibid* 522 [61].

¹³ [2002] HCATrans 503 (17 October 2002) 80-5. See also Transcript of Proceedings, *Re Ruddock; Ex parte Gomez-Rios* (High Court of Australia, No S6 of 2000, Kirby J, 28 March 2000).

clauses is consistent with the logic of *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁴ In that case, the Court held that whether or not the breach of a statutory requirement resulted in a jurisdictional error depends on statutory interpretation. On this view, the presence of a no-consideration clause renders, through statutory interpretation, any error non-jurisdictional and in this way restricts judicial review.¹⁵ Such an interpretational approach based upon jurisdictional error is open, but it is not the approach that the case law has tended to take. The more established explanation is that no-consideration clauses operate to remove a precondition for obtaining mandamus and in this way prevent certain remedies from being issued against the decision-maker. This remedy-focused interpretation of no-consideration clauses has been adopted in a number of other cases,¹⁶ including the two High Court cases *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* ('*Applicants S134*')¹⁷ and *Plaintiff M61*.¹⁸

Before *Plaintiff M61*, the only High Court authority on no-consideration clauses was *Applicants S134*.¹⁹ In this case, the applicants asked the Minister to exercise his power under s 417(1) to set aside the Refugee Review Tribunal's decision and to substitute a more favourable one in its place. Section 417(7) was a no-consideration clause in the usual terms. The Minister refused the request, and the applicants sought prohibition, mandamus, certiorari and an injunction against the Tribunal and the Minister. The whole Court agreed on the impact of s 417(7). According to Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ:

On the footing that prohibition or injunction and certiorari issue, directed to the Minister, the prosecutors seek mandamus requiring the Minister to reconsider the exercise of his power under s 417(1). However, s 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s 417(1). That gives rise to a fatal conundrum. In the express absence of a duty, mandamus would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there

¹⁴ (1998) 194 CLR 355.

¹⁵ Another possibility is that the presence of the no-consideration clause means that there could be no error at all. This is not a very likely interpretation, however. The fact that a decision-maker does not have a duty to consider exercising a power does not mean that an error cannot be made in the course of decision-making. The non-existence of such a duty more readily speaks to the consequences or significance of such an error.

¹⁶ See Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant M198/2004* [2004] HCATrans 568 (13 December 2004); *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341, 344 (Gleeson CJ); *NAGQ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1016 (12 August 2002) [6] (Branson J); *Kolotau v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1145 (5 September 2002) [8] (Hely J); *Tavalu v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1027 (15 August 2002) [4]–[5] (Moore J); *Tavalu v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 419 (5 December 2002) [5] (Wilcox J); *Applicant NAGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 395 (5 December 2002) [9] (Sackville, Allsop and Jacobson JJ); *Egounova v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 49 (2 February 2004) [14] (Branson J). See also Kevin Boreham, "'Wide and Unmanageable Discretions': The Migration Amendment (Detention Arrangements) Act 2005 (Cth)" (2006) 17 *Public Law Review* 16, 21.

¹⁷ (2003) 211 CLR 441.

¹⁸ See below n 77 below and accompanying text.

¹⁹ (2003) 211 CLR 441.

would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.²⁰

Gaudron and Kirby JJ agreed:

Given that there is no duty on the Minister to consider an application that he substitute a more favourable decision under s 417(1) of the Act, mandamus cannot issue to compel consideration of the application made on behalf of the prosecutors even if the Minister's earlier refusal is set aside. Even if it could be said that the Minister's refusal to exercise his power under s 417(1) of the Act involved jurisdictional error – a matter on which we express no opinion – such that prohibition or certiorari might issue in respect of it, it may be that those remedies would serve no useful purpose. That is because mandamus cannot issue and, absent relief by way of mandamus, the prosecutors' only right is to have their visa applications determined by the Tribunal in accordance with law, which right is secured by the relief with respect to the Tribunal's decision.²¹

The logic of these passages is that for mandamus to issue, there must exist a public duty. No-consideration clauses provide that there is no such duty, and so mandamus cannot issue. Without mandamus, prohibition and certiorari would be futile, with the result that prohibition and certiorari cannot issue either.

The above passages did not explicitly consider injunctions or declaratory relief, but it is implicit in the case law that these too are precluded by the no-consideration clause. In none of the cases prior to *Plaintiff M61* was an injunction or declaration made, even though they were sought by at least some of the applicants. Indeed, the availability of a declaration to remedy non-consideration by a Minister was explicitly rejected in *Minister for Immigration and Multicultural Affairs v Ozmanian* ('*Ozmanian*').²² At trial, Merkel J acknowledged that the no-consideration clause in s 417(7) prevented mandamus from issuing, but nonetheless made the following declaration:

Declare that a breach of the rules of natural justice has occurred in connection with the conduct engaged in for the purpose of the making of a decision, by the first respondent or by the second respondent on behalf of the first respondent, under s 417 of the *Migration Act 1958* in relation to the applicant.²³

Merkel J's decision was overturned unanimously on appeal to the Full Court of the Federal Court. Kiefel J (with whom the rest of the Court agreed on this point) disagreed with Merkel J's use of 'a bare declaration, not declaratory of any present right, and amounting only to an acknowledgment of past infringement of a right to procedural fairness.'²⁴ She observed that a declaration 'must be productive of some effect before it could be said to be warranted',²⁵ keeping in mind that 'any consequences could not be brought about by the declaration itself, as might occur where there is a pronouncement of the parties' rights.'²⁶ Kiefel J concluded that a declaration should not have been made because it 'could in no way redress [the decision] save for some ill-defined prospect that the Minister might be moved to

²⁰ Ibid 461.

²¹ Ibid 474.

²² (1996) 71 FCR 1.

²³ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103, 137.

²⁴ *Ozmanian* (1996) 71 FCR 1, 31.

²⁵ Ibid 32.

²⁶ Ibid.

consider it.¹²⁷ The 'possibility that a valid decision might be made at some time in the future' was insufficient,²⁸ and the Minister had not indicated that he would act upon any declaration.²⁹ Moreover, a declaration would not mitigate any damage to the applicant's reputation or business interests.³⁰ At most, it might assist in establishing an issue estoppel for future litigation.³¹ She concluded that '[i]n my respectful opinion it will be a rare case where a bare declaration will be seen to be justified and the present is not such a case.'³² As discussed below, *Plaintiff M61* adopts an approach much more similar to that of Merkel J.

It is now possible to distinguish no-consideration clauses from other legislative mechanisms for restricting judicial review. One such mechanism is the so-called 'no-invalidity' clause. Section 175 of the *Income Tax Assessment Act 1936* (Cth), for example, provides that '[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.' As Leighton McDonald has explained, no-invalidity clauses restrict judicial review by converting, through the exercise of statutory interpretation, jurisdictional errors into non-jurisdictional errors and thus preventing the courts from providing the usual judicial review remedies, which, for the most part, depend on the existence of jurisdictional error.³³ The approach to no-consideration clauses evident in *Raikua* and *Gogna* employs this same sort of error-focused reasoning, whereas the more accepted interpretation treats the no-consideration clause as directly limiting the remedies available. On this latter interpretation, no-consideration clauses might thus be viewed as a form of privative clause, which sometimes explicitly preclude the courts from issuing certain remedies. For example, s 474 of the *Migration Act* formerly provided that a decision made under the Act 'is final and conclusive' and 'must not be challenged, appealed against, reviewed, quashed or called in question in any court' and 'is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'. The point of distinction between traditional privative clauses and no-consideration clauses is the judiciary's approach to the two. As is well-known, the courts have long refused to interpret privative clauses literally.³⁴ In contrast, until *Plaintiff M61*, the courts had been willing to accept that a no-consideration clause operates strictly to limit significantly the scope for judicial review, despite acknowledgments that it is a 'curious provision'³⁵ involving a 'fatal conundrum'.³⁶

27 Ibid.

28 Ibid.

29 Ibid.

30 Ibid 33. Cf *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

31 *Ozmanian* (1996) 71 FCR 1, 33 (Kiefel J).

32 Ibid.

33 See Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

34 See *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

35 Transcript of Proceedings, *Applicant S1083 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCATrans 15 (3 February 2006) 320–5 (Kirby J). See also Transcript of Proceedings, *Re Ruddock; Ex parte Gomez-Rios* (High Court of Australia, No S6 of 2000, Kirby J, 28 March 2000).

36 *Applicants S134* (2003) 211 CLR 441, 461 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

The 'reach' of no-consideration clauses: when does 'consideration' begin?

The second issue is the 'reach'³⁷ of no-consideration clauses; that is, at what point can it be said that the decision-maker has begun to consider exercising a power, such that they move beyond the protection of the no-consideration clause precisely because they did consider exercising the statutory power. This issue is ultimately of secondary importance to the question of available relief discussed above. Whether the decision under challenge is characterised as a decision not to consider a request or whether it is characterised as a decision not to exercise the substantive statutory power, the early cases establish that no remedy will be available either way. Nonetheless, the distinction has importance because it frames the inquiry into grounds of review. It will invariably be more difficult to challenge a decision not to consider exercising a power than to challenge a decision not to exercise that power. It therefore remains useful to consider how the cases dealt with the 'reach' of no-consideration clauses.

In *Morato v Minister for Immigration, Local Government and Ethnic Affairs* ('*Morato*'),³⁸ the appellant applied for and was refused refugee status by a review officer. The appellant then requested the Minister to exercise his power under s 115(5) of the *Migration Act* to substitute a more favourable decision for the officer's decision where the Minister considered it to be in the public interest to do so. The no-consideration clause was in s 115(10). The Minister advised that he did not wish to exercise that power by a memorandum in the following terms:

I have not considered these cases. I understand from staff in my office that the departmental decision [sic] maker has rejected their refugee claims. I do not wish to exercise my Section 115 powers in either case ...³⁹

The appellant sought judicial review of the Minister's and the officer's decisions, but he was unsuccessful at trial and again on appeal. Lockhart J (with whom Black CJ and French J agreed on this point) rejected the submission that the no-consideration clause was only engaged after the Minister made a determination 'as to the public interest'. Rather, the no-consideration clause applied to the whole of sub-s (5).⁴⁰ In relation to the Minister's memorandum, Lockhart J explained that 'he was simply indicating ... that he did not propose to consider whether to exercise his powers under s 115.'⁴¹ Significantly, Lockhart J concluded:

Plainly the Minister had received (and I assume examined) the various minutes which were written to him and to which reference was made earlier, in particular those of 6 and 7 November 1991; and doubtless he examined them, if only briefly, to decide if it was a case where he would embark upon the exercise of considering whether he should exercise the power under subs (5) or not. The evidence does not establish that the Minister's consideration had reached the point where he had embarked upon the task of undertaking that consideration. If he had done so then different arguments might have been available to the appellant.⁴²

³⁷ See *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ); McDonald, above n 33, 22.

³⁸ (1992) 39 FCR 401.

³⁹ *Ibid* 417-18.

⁴⁰ *Ibid* 417. See also *Bedlington v Chong* (1998) 87 FCR 75.

⁴¹ *Morato* (1992) 39 FCR 401, 417-18.

⁴² *Ibid* 418.

Morato therefore suggests that a decision-maker can give some consideration to exercising his or her statutory power without necessarily moving beyond the initial protection of the no-consideration clause. A similar approach was taken by Kirby J (in chambers) in *Re Ruddock; Ex parte Gomez-Rios*.⁴³ In that case, the Minister refused to consider exercising his power in favour of a Columbian citizen. The Minister wrote:

Thank you for the letter of 2 June 1999 requesting that I consider exercising my ministerial discretion under section 417 of the *Migration Act* 1958. Under this section of the Act, I may substitute for a decision of the Refugee Review Tribunal, a decision which is more favourable to the applicant if I think it is in the public interest to do so. Your request for the exercise of my power under section 417 was referred to me. However, I have decided not to consider exercising my power in your case.⁴⁴

In refusing the application, Kirby J concluded that 'having regard to the terms of the section, the Minister did not proceed to the point of exercising the discretion which is conferred upon him. He decided, in terms of the section, not to consider exercising his power.'⁴⁵ This approach — that a decision-maker can consider an application in order to decide not to consider exercising his or her statutory power — is consistent with the Department's own understanding⁴⁶ and Dr Theophanous' discussion of s 64U(6) during the parliamentary debates in 1989.

A different perspective on the engagement question is provided by a number of cases where a request from an applicant has not even been forwarded to the Minister for consideration. In these cases, applications for judicial review have always failed. The main authority is *Bedlington v Chong*.⁴⁷ Ms Chong applied for refugee status but was refused by the Minister's delegate. After the Refugee Review Tribunal affirmed that decision, Ms Chong's solicitors wrote to the Minister to ask him to exercise his powers under s 48B(1) of the *Migration Act* to allow her to lodge an application under s 48A. She received the following reply from the Department Secretary:

Your request that the Minister determine that a further application for a protection visa be permitted in this case has been examined against the Minister's guidelines on further applications. Ms Enciso Chong's case falls outside the scope of the guidelines and it has not been referred to the Minister.⁴⁸

Ms Chong sought mandamus against the Secretary to bring her request to the Minister, and mandamus and prohibition against the Minister to determine whether or not to consider the request and to stop him from acting on the Secretary's initial advice. The Full Court of the Federal Court held that the Minister could 'lay down guidelines for the assistance and guidance of departmental officers, such as the Secretary, indicating the circumstances in which he was prepared to consider the exercise of the power conferred by s 48B(1).'⁴⁹ Their Honours characterised the guidelines as follows:

⁴³ (High Court of Australia, No S6 of 2000, Kirby J, 28 March 2000).

⁴⁴ *Ibid* 575–90.

⁴⁵ *Ibid* 685–95.

⁴⁶ 'If a case is brought to the Minister's attention, the Minister may first consider whether or not he wishes to consider substituting a more favourable decision in the case': Senate Select Committee on Ministerial Discretion in Migration Matters, *Senate, Report* (2004) Appendix 5, 12 [3.7.2] (Migration Series Instruction 387).

⁴⁷ (1998) 87 FCR 75.

⁴⁸ *Ibid* 77.

⁴⁹ *Ibid* 80.

The guidelines constitute the Minister's determination, in advance, of the circumstances in which he would consider exercising the power. By the guidelines, the Minister was, in effect, saying: 'Notwithstanding that I have no duty to consider the exercise of the power conferred by section 48B(1), I am prepared to consider exercising that power in the circumstances set out in the Guidelines.'⁵⁰

According to *Bedlington v Chong*, then, a decision-maker can set down guidelines in advance as to when they will or will not exercise their discretion whether or not to consider exercising their statutory power. In *Raikua*, another non-referral under guidelines case, Lindgren J confirmed that 'it was permissible for the Minister [to] take the decision not to consider exercising his power under s 417(1) by laying down guidelines as to the classes of case that were not to be referred to him'.⁵¹ Guidelines 'constitute a determination by the Minister, in advance, of the circumstances in which he will consider exercising the power'.⁵²

Having reviewed the legislative and judicial history of no-consideration clauses, it is now possible to consider *Plaintiff M61*.

III PLAINTIFF M61

Background and decision

The plaintiffs (M61 and M69), both Sri Lankan citizens, arrived at Christmas Island by boat and were detained on their arrival. They both claimed to be refugees under s 36(2)(a) of the *Migration Act*. However, because Christmas Island is an 'excised offshore place' under the Act, the plaintiffs could not apply for a visa without the Minister's permission.⁵³ While they were detained, a 'Refugee Status Assessment' or 'RSA' was conducted by the Department of Immigration and Citizenship. The RSAs concluded that each plaintiff did not satisfy s 36(2)(a), and this conclusion was affirmed on review in an 'Independent Merits Review' or 'IMR'. The plaintiffs then each instituted proceedings in the original jurisdiction of the High Court claiming relief by way of injunction, certiorari, mandamus and, for Plaintiff M69, declaration. The proceedings were heard together.

The case turned on two key statutory provisions. Section 46A relevantly provided:

- (1) An application for a visa is not a valid application if it is made by an offshore entry person who:
 - (a) is in Australia; and
 - (b) is an unlawful non-citizen.
 - (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
 - (3) The power under subsection (2) may only be exercised by the Minister personally.
- ...

⁵⁰ Ibid.

⁵¹ (2007) 158 FCR 510, 522-3.

⁵² Ibid 523.

⁵³ *Migration Act 1958* (Cth) s 46A.

- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

Section 195A was similarly phrased. It both empowered the Minister to grant a visa whether or not the person applied for it and also provided that the Minister had no duty to consider exercising that power.

The Court, in a unanimous joint judgment, declared that the plaintiffs had been denied procedural fairness and that their claims had been determined otherwise than according to law. In summary form,⁵⁴ their reasoning proceeded as follows. First, section 46A(7) – the no-consideration clause – was constitutionally valid.⁵⁵ Secondly, the Minister had decided to consider all applications despite not having a duty to do so, and the RSA and IMR were undertaken to assist him in determining whether to exercise his statutory powers.⁵⁶ Thirdly, the plaintiffs were entitled to procedural fairness because the statutory processes affected their rights and interests.⁵⁷ Fourthly, the processes had neither been procedurally fair nor undertaken according to law.⁵⁸ Fifthly, although the constitutional writs were not available, a declaration was an appropriate remedy.⁵⁹ For present purposes, the first, second and fifth steps are the most significant.⁶⁰ The next section address the second, fifth and first steps in that order, on the basis that it is necessary to understand how the clause operates before it is possible to assess its constitutional validity.⁶¹

Implications for no-consideration clauses

When does 'consideration' begin

The first consequence of *Plaintiff M61* relates to the proper approach to the 'reach' of no-consideration clauses. The Court interpreted the facts of the case as revealing that 'the Minister has decided to consider exercising power under either s 46A or s 195A of the *Migration Act* in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations'.⁶² It reached this conclusion for the following reasons. First, the government had announced that it would not remove offshore entry persons from Australia to a declared country under s 198A of the *Migration Act*.⁶³ Accordingly, the only way for the government to act consistently with

⁵⁴ Note that this summary is formulated differently from the Court's own summary: see *Plaintiff M61* (2010) 85 ALJR 133, 137 [9] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁵⁵ *Ibid* 144–5 [53]–[61].

⁵⁶ *Ibid* 145–7 [62]–[71].

⁵⁷ *Ibid* 147–9 [63]–[79].

⁵⁸ *Ibid* 149–51 [80]–[98].

⁵⁹ *Ibid* 151–2 [99]–[104].

⁶⁰ For a wider discussion of the case, see Crock and Ghezelbash, above n 2.

⁶¹ See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 662 [20] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁶² *Plaintiff M61* (2010) 85 ALJR 133, 137 [9] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also at 147 [71], 148 [78].

⁶³ *Ibid* 142 [40].

its international obligations was to consider in every case exercising power under s 46A or s 195A.⁶⁴ Secondly, the government had announced that it would strengthen the RSA process,⁶⁵ and pursuant to that Ministerial directive the RSA and IMR procedures as they applied to the plaintiffs were implemented.⁶⁶ The internal manuals for these procedures

were cast in terms that made plain that the processes for which each provided were to be applied to *all* unlawful non-citizens who entered Australia at an excised offshore place and who, as the RSA Manual said, raised 'claims or information which prima facie may engage Australia's protection obligations'.⁶⁷

Thirdly, and most significantly, the continued detention of the plaintiffs while the RSA and IMR procedures were carried out were only lawful because they were undertaken to help the Minister to decide whether to exercise his powers under s 46A or s 195A.⁶⁸ Otherwise, it would potentially contravene the constitutional restraints on detention at the behest of the executive.⁶⁹

As a factual analysis, the above reasoning is intuitive. The Court interpreted the facts as showing that the Minister had decided to consider exercising his powers, and that the RSA and IMR regimes were intended to assist him in deciding whether ultimately to exercise his power. Although intuitive, this interpretation suggests a departure from the factual analysis typical in the earlier no-consideration clause cases.⁷⁰ In those cases, the courts had treated department guidelines and review regimes as going to the question of whether the decision-maker would *consider* exercising his or her powers. Particularly where the request was referred to the Minister (as opposed to being refused under the guidelines by a delegate), this factual analysis led to the proposition that the Minister could consider a request and then make his or her decision on the basis that he or she has refused to consider the request. Without citing this previous case law, the Court took a different approach on the facts before it. The Court explained that '[e]xercise of the powers given by ss 46A and 195A is constituted by two distinct steps: first, the decision to *consider* exercising the power to lift the bar or grant a visa and second, the decision whether to lift the bar or grant a visa.'⁷¹ It then later added that the disposition of the case was to be

founded upon the taking of the first step towards the exercise of those statutory powers: the decision to consider their exercise. It is not founded upon necessarily uncertain prognostications about whether exercise of the available powers will ever be considered.⁷²

⁶⁴ Ibid 142 [40], 147 [70].

⁶⁵ Ibid 141 [37].

⁶⁶ Ibid 141 [38], 146 [66].

⁶⁷ Ibid 142 [39].

⁶⁸ Ibid 145 [63], 146 [66].

⁶⁹ Ibid 145–6 [64]. Cf *Al Kateb v Godwin* (2004) 219 CLR 562. See generally Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 282–91.

⁷⁰ See above nn 38–52 and accompanying text.

⁷¹ *Plaintiff M61* (2010) 85 ALJR 133, 147 [70] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (emphasis in original).

⁷² Ibid 147 [71].

The Court in *Plaintiff M61* thus limited the 'reach' of no-consideration clauses⁷³ in a manner that reflects its general approach to privative clauses and no-invalidity clauses. In relation to privative clauses, it is now clear that a decision vitiated by jurisdictional error will not be a 'decision' and thus does not engage the privative clause.⁷⁴ In relation to no-invalidity clauses, the Court in *Federal Commissioner of Taxation v Futuris Corporation Ltd* contemplated that 'conscious maladministration of the assessment process' would not result in an 'assessment' for the purposes of the no-invalidity clause in s 175 of the *Income Tax Assessment Act 1936* (Cth).⁷⁵ In *Plaintiff M61*, the Minister was not permitted to claim that he had decided not to consider exercising the power. Such a claim is not illogical. For example, a decision-maker 'may pick up a red herring, turn it over and examine it, and then put it down, so long as he does not allow it to affect his decision',⁷⁶ without thereby taking into account an irrelevant consideration. However, this is an imperfect analogy for present purposes. A decision-maker can consider an irrelevant matter to dismiss it as a forbidden consideration because the inquiry is whether he or she has committed an error of law. Hence, Burchett J's last phrase 'so long as he does not allow it to affect his decision'. In contrast, the issue in the present context is whether, as a question of fact, the decision-maker considered the request at all. A claim that a decision-maker has considered a request to decide not to consider it is counterintuitive and leads to 'necessarily uncertain prognostications' about whether or not consideration has commenced. The Court adopted a more straightforward approach: the decision-maker can be said to have considered the request (the first distinct step), but he or she decided not to exercise the power in that case (the second distinct step).

An immediate question raised is whether this approach can be generalised to other situations involving a no-consideration clause. The answer to this question is unclear. On the one hand, the Court's distaste for 'necessarily uncertain prognostications' about whether a decision-maker has decided to consider exercising a power suggests that, in general, it would be inclined to conclude that a decision-maker has decided to consider a request and to focus attention instead on the validity of the subsequent decision whether or not to exercise the statutory power. On the other hand, the Court expressly recognised that a no-consideration clause involves two steps: a decision whether to consider exercising the power, and a subsequent decision whether to exercise that power. If even a modicum of consideration by a decision-maker establishes that he or she took the first step, then that first step would have no real operation in the majority of cases. *Plaintiff M61* does not solve this conundrum because it turned on very particular facts about Australia's commitment to its international obligations and the probable impermissibility of continued executive detention. At least where the decision-maker has set up a regime for considering requests to exercise a statutory power protected by a no-consideration clause rather than examining requests on an ad hoc basis, the High Court's approach in *Plaintiff M61* may be applicable.

⁷³ Cf David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) 106, 113.

⁷⁴ See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

⁷⁵ (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

⁷⁶ *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127, 135 (Burchett J). See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 287 [5.45].

Available relief

Plaintiff M61 confirms the remedies-focused analysis of *Applicants S134* that '[b]ecause the Minister is not bound to consider exercising either of the relevant powers, mandamus will not issue to compel consideration, and certiorari would have no practical utility.'⁷⁷ *Plaintiff M61* also establishes that no-consideration clauses do not necessarily prevent the making of a declaration.⁷⁸ The Court made a declaration that the third defendant had made an error of law and failed to observe the requirements of procedural fairness.⁷⁹ It will be recalled that a Full Court of the Federal Court in *Ozmanian*⁸⁰ held that a declaration should not be made in almost identical circumstances, and other authorities also appeared to rule out declaratory relief. It is necessary to trace the history and development of declaratory relief in order to assess whether *Plaintiff M61* significantly extends the availability of declaratory relief, or whether it simply brings the prior law on no-consideration clauses into line with current administrative law doctrine.

Historically, courts had adopted a restrictive approach to declaratory relief.⁸¹ As P W Young has summarised:

In essence, the judges of the mid-19th century were convinced that there was no power to make a declaration without statutory authority ... After the Judicature Act, the declaratory procedure was available but did not take on [until the early 20th century].⁸²

The early statutory provisions empowering the courts to make declarations were interpreted narrowly in England and initially also in Australia.⁸³ However, at least since the 1970s, Australian courts have taken a more liberal approach to making declarations. Thus, by 1972, Gibbs J observed that '[i]t is neither possible nor desirable to fetter [declaratory relief] by laying down rules as to the manner of its exercise'.⁸⁴ The contemporary academic literature is now filled with observations that declaratory

⁷⁷ *Plaintiff M61* (2010) 85 ALJR 133, 137 [9], 151-2 [99]-[100] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁷⁸ The Court in *Plaintiff M61* did not necessarily exclude the possibility of an injunction either: 'There being no present threat to remove either plaintiff without a further RSA being undertaken, in which the law would be correctly applied and procedural fairness afforded, it is not now necessary to consider granting an injunction': *ibid* 137 [8] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). However, in *Plaintiffs M168/10, M170/10, M172/10 and M174/10 v Commonwealth* (2011) 85 ALJR 790, 796 [37], Crennan J observed that 'the Court would lack the power to issue interlocutory mandatory injunctions compelling the Minister to consider exercising those powers.'

⁷⁹ *Plaintiff M61* (2010) 85 ALJR 133, 152-3 [105] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁸⁰ (1996) 71 FCR 1.

⁸¹ See Anthony E Cassimatis, 'Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England' (2010) 34 *Melbourne University Law Review* 1, 30-2.

⁸² P W Young, *Declaratory Orders* (Butterworths, 2nd ed, 1984) 7 [107].

⁸³ See Wayne Martin, 'Declaratory Relief Since the 1970s' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2009) 8, 12-13.

⁸⁴ *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 (Gibbs J), approved in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-2 (Mason CJ, Dawson, Toohey and Gaudron JJ).

relief is more commonly given by the courts.⁸⁵ *Plaintiff M61* sits comfortably within this modern trend.

Despite this liberalisation, it is accepted that there are some limits to declaratory relief. These limitations can be grouped together in a number of ways for analytical purposes.⁸⁶ According to *Meagher, Gummow and Lehane*, 'the only real limitation on the court's jurisdiction to make declarations arises where a statute expressly, or by necessary implication, ousts the court's jurisdiction.'⁸⁷ A no-consideration clause does not expressly oust declaratory relief, but does it necessarily exclude it by removing any public duty enforceable by mandamus and supported by certiorari and prohibition? The courts in the early cases on no-consideration clauses seemed to think so, dismissing declaratory relief out of hand. (The only exception to this is *Ozmanian*, in which the Federal Court ultimately refused a declaration on other grounds considered below.) However, this early approach is out of step with contemporary administrative law doctrine. Several cases have found that 'no certiorari' clauses do not exclude the possibility of declaratory relief.⁸⁸ Moreover, it is well accepted that the equitable remedies of injunction and declaration have developed to ameliorate the deficiencies of the constitutional writs. Accordingly, the availability of the former should not be tied to the availability of the latter. As Gaudron J has explained:

equitable remedies have long had a role to play in public law. And, because of the limitations and technicalities which beset the prerogative writs, that role is a continuing and important one. Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs. Thus ... it is not incongruous that equitable relief should be available although prerogative relief is not. What is incongruous is the notion that equitable remedies should be subject to the same or similar limitations which beset the prerogative writs.⁸⁹

Additionally, Walsh J has observed that if a decision is 'immune from any review by means of any of the prerogative writs, that might be a ground for concluding, in some cases, that [the Court] ought to intervene by means of a declaration'.⁹⁰ Finally, if there were no remedy at all, there would be no 'matter' under Ch III of the *Constitution*.⁹¹ To this extent, the Court in *Plaintiff M61* was simply correcting error rather than trailblazing a new path.

⁸⁵ See, eg, Martin, above n 83, 8, 14, 24; E M Heenan, 'History of Declaratory Relief - A Distinct Remedy Beyond Equitable Affiliations' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2009) 51, 52, 74.

⁸⁶ See, eg, Aronson, Dyer and Groves, above n 76, 901 [15.05].

⁸⁷ RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 624 [19-105], quoted in Martin, above n 83, 14.

⁸⁸ See *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 436; P W Young, above n 82, 131-2 [1410].

⁸⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157-8 [57]-[58].

⁹⁰ *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 428.

⁹¹ *Abebe v Commonwealth* (1999) 197 CLR 510, 527 [31] (Gleeson CJ and McHugh J).

In addition to any statutory limits, declaratory relief is limited by certain 'discretionary considerations'.⁹² Lockhart J has summarised these considerations as follows:

The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies ... The answer to the question must produce some real consequences for the parties.

The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' ... or if the Court's declaration will produce no foreseeable consequences for the parties ...

The party seeking declaratory relief must have a real interest to raise it ...

Generally there must be a proper contradictor ...⁹³

These considerations are concerned with the practicality, including the practical utility, of making a declaration.⁹⁴ These sorts of factors motivated the Federal Court in *Ozmanian* to refuse declaratory relief and were also taken into account by the High Court in *Plaintiff M61*. First, the High Court stated that 'it cannot be said that a declaratory order by the Court will produce no foreseeable consequences for the parties.'⁹⁵ Secondly, a declaration 'is directed here to determining a legal controversy; it is not directed to answering some abstract or hypothetical question.'⁹⁶ Thirdly, '[e]ach plaintiff has a "real interest" in raising the questions to which the declaration would go.'⁹⁷ Fourthly, the impugned procedures 'were conducted for the purpose of informing the Minister of matters directly bearing upon the exercise of power to avoid breach by Australia of its international obligations.'⁹⁸ This was significant because the statutory and historical context of the Act revealed the importance associated with complying with such obligations, and more generally, 'there is a considerable public

⁹² *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 [58] (Gaudron J).

⁹³ *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, 414. See also Aronson, Dyer and Groves, above n 76, 901 [15.05].

⁹⁴ See also Richard Hooker, 'Commentary on Chapters by Daryl Williams QC and Grant Donaldson SC' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2009) 155, 159-60; Justice Michelle Gordon, 'Declaratory Relief - The Same Yesterday, Today and Tomorrow?' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2009) 178, 206-7.

⁹⁵ *Plaintiff M61* (2010) 85 ALJR 133, 152 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), citing *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69 (Mason J), 71 (Aickin J).

⁹⁶ *Plaintiff M61* (2010) 85 ALJR 133, 152 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), citing *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355-6 [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁹⁷ *Plaintiff M61* (2010) 85 ALJR 133, 152 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), citing *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448 (Lord Dunedin) ('it is a matter of real importance to the respondents, as guiding their rule of conduct') and *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437-8.

⁹⁸ *Plaintiff M61* (2010) 85 ALJR 133, 152 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

interest in the observance of the requirements of procedural fairness in the exercise of the relevant powers.⁹⁹

A number of observations can be made about this reasoning. First, and perhaps because the reasoning is not greatly particularised to the facts, it is difficult to see why the factors applicable to the plaintiffs in *Plaintiff M61* would not also apply in most public law cases. Secondly, and more importantly, the Court did not grapple with the key obstacle presented by no-consideration clauses for declaratory relief. In the absence of the constitutional writs to compel the Minister to consider a decision afresh, would declaratory relief be pointless?

The judgment provides clues as to how the Court may have answered this futility objection. Before explaining why a declaration was appropriate in the present circumstances, the Court noted, referring to *Ainsworth v Criminal Justice Commission*,¹⁰⁰ that 'it is a form of relief that is confined by considerations which mark out the boundaries of judicial power.'¹⁰¹ The Court also cited *Pape v Federal Commissioner of Taxation* ('*Pape*'), where Gummow, Crennan and Bell JJ observed, consistently with past authority,¹⁰² that standing to seek a declaration in federal jurisdiction is 'subsumed within the constitutional requirement of a "matter".'¹⁰³ Additionally, earlier in the Court's reasons in *Plaintiff M61*, it noted that '[t]he reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the rule of law under the *Constitution*.'¹⁰⁴ The Court again cited *Pape*.¹⁰⁵ In that case, the Court held that the plaintiff had standing to seek a declaration that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was invalid, even though part of the Act did not apply to him. The Court in *Plaintiff M61* cited the following passage:

The disposition of the controversy between the plaintiff and the Commissioner and the Commonwealth does not turn solely upon facts or circumstances unique to the plaintiff. If the plaintiff succeeds in establishing, as a necessary step in making out his case for relief, that the Bonus Act is invalid, then the reasoning of the Court upon the issue of invalidity would be of binding force in subsequent adjudications of other disputes. Hence the very great utility in granting declaratory relief in the plaintiff's action. In this way the resolution pursuant to Ch III of the *Constitution* of the plaintiff's particular controversy acquires a permanent, larger, and general dimension. The declaration would vindicate

⁹⁹ Ibid 152 [103], citing *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120, 134 [25] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) ('considerable public interest in the observance of due process by law enforcement authorities' by settling questions of statutory interpretation).

¹⁰⁰ (1992) 175 CLR 564, 582.

¹⁰¹ *Plaintiff M61* (2010) 85 ALJR 133, 152 [102]. See generally Neil J Young, 'Declarations and Other Remedies in Administrative Law' (2004) 12 *Australian Journal of Administrative Law* 35, 46-9; Heenan, above n 85, 73-4.

¹⁰² See *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ); *Pape* (2009) 238 CLR 1, 35 [50]-[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ), 99 [273] (Hayne and Kiefel JJ).

¹⁰³ (2009) 238 CLR 1, 68 [152].

¹⁰⁴ *Plaintiff M61* (2010) 85 ALJR 133, 150 [87] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁰⁵ Ibid.

the rule of law under the *Constitution*. The fundamental considerations at stake here were recently affirmed and explained in *Plaintiff S157/2002 v The Commonwealth*.¹⁰⁶

Drawing these strands together, a declaration would state the law as it should apply in like cases and dispose of the whole 'matter' as that term is used in Ch III of the *Constitution*. This reasoning was picked up again in *Rowe v Electoral Commissioner* ('*Rowe*'),¹⁰⁷ where Gummow and Bell JJ noted that a bare declaration of invalidity was sufficient without ordering mandamus against the Commissioner because, in part, '[t]he reasoning of this Court upon the issue of invalidity has binding force in the general sense described in *Pape v Federal Commissioner of Taxation*.'¹⁰⁸

Taking into account the statements in *Pape* and *Rowe*, it is possible to discern how the Court may have answered the proposition that declaratory relief is pointless without the constitutional writs. Declaratory relief would not simply record a past contravention without any hope of future consequences. Due to the rule of law, and the principle that like cases be treated alike, a declaration will have utility because it declares how the law should have been applied in this case and so how it should be applied in future like cases. In this sense, declaratory relief would have 'binding force'. If this analysis is correct, leaving aside truly exceptional cases, it is difficult to see how a declaration could ever be without future consequence. The second answer lies within the Court's acknowledgment that in federal jurisdiction, standing (including for declaratory relief) is subsumed within the constitutional requirement of a 'matter'.¹⁰⁹ For a 'matter' to exist, there must be 'some immediate right, duty or liability to be established by the determination of the Court.'¹¹⁰ Although declarations are traditionally viewed as non-coercive, they must have enough binding force as between the parties such that it can be said that the constitutional 'matter' has been quelled by the operation of judicial power. To this end, cases have held that a declaration could be enforced through subsequent court orders.¹¹¹ If this analysis is correct, a declaration

¹⁰⁶ *Pape* (2009) 238 CLR 1, 69 [158] (Gummow, Crennan and Bell JJ). See also at 34 [46], 36 [52] (French CJ), 99 [273]–[274] (Hayne and Kiefel JJ), 138 [401] (Heydon J).

¹⁰⁷ (2010) 85 ALJR 213.

¹⁰⁸ *Ibid* 247 [168]. See further at 234 [87]. Additionally, the Commissioner had undertaken to add and transfer names in the event of invalidity.

¹⁰⁹ See also the Court's citation of *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69 (Mason J) *ibid* 152 [103] n 50. According to Mason J, '[a]ll that was suggested was that the Executive might in some undefined way initiate administrative or legislative action which would improve the lot of the appellants and persons in the appellants' position.' By implication, the Court in *Plaintiff M61* may have considered that a declaration would lead to greater consequences than envisaged by Mason J in *Gardner*.

¹¹⁰ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377–8 [7]–[8] (Gleeson CJ and McHugh J); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 458–9 [242] (Hayne J). See generally James Stellios, *The Federal Judicature – Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 119–32, 309–10.

¹¹¹ See NW McKerracher, 'Commentary on the Chapters of Chief Justice Martin, Justice French and Justice Heenan' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2009) 89, 111, discussing *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249; Aronson, Dyer and Groves, above n 76, 923–4 [15.115].

would rarely be pointless because it could be enforced against the relevant defendant.¹¹²

It appears, however, that these rule of law and 'binding force' rationales are not enough to justify declaratory relief on their own. These rationales would presumably apply in most if not all public law cases, yet the Court acknowledged that '[i]n many cases, the conclusion that certiorari and mandamus do not lie would require the further conclusion that no declaration of right should be made.'¹¹³ Therefore, it seems that courts must continue to consider other discretionary factors weighing in favour and against declaratory relief.¹¹⁴ The interaction between these discretionary factors and these rule of law rationales awaits further clarification. However, at a minimum, *Plaintiff M61* appears to have further liberalised the scope of declaratory relief or at least broadened the context within which the utility of such relief should be considered. This liberal approach stands in contrast to *Griffith University v Tang*,¹¹⁵ where Gummow, Callinan and Heydon JJ appeared to suggest that declaratory relief is limited to situations in which legal rights and obligations, but not 'interests', are at stake.¹¹⁶ In that case, their Honours relied on the constitutional requirement of a 'matter' to support their conclusion that the University's decision was not 'made ... under an enactment'.¹¹⁷ Ms Tang's relationship with the University was merely 'consensual' and did not involve any legal rights or obligations.¹¹⁸ There is an evident difference in tone towards declaratory relief when these two cases are compared, but *Plaintiff M61* does not conclusively rule out the possibility that declaratory relief is limited to the vindication of legal rights and not interests. Although an offshore entry person was said to have no right to a particular outcome, the Court concluded that the RSA and IMR did affect the plaintiffs' rights, specifically, their right to liberty.¹¹⁹ Therefore, the Court did not have to confront the possible consequences of its reasoning in *Griffith University v Tang*.

Validity

The Court summarised Plaintiff M69's argument for invalidity as follows. At base, the submission was that s 46A was invalid because it conferred 'an effectively unfettered and unreviewable statutory power to decide whether or not to exercise the power in sub-s (2)'.¹²⁰ The starting point was the Court's comments in *Bodruddaza v Minister for Immigration and Multicultural Affairs* ('*Bodruddaza*') that '[a]n essential characteristic of

¹¹² Cf Aronson, Dyer and Groves, above n 76, 923 [15.115].

¹¹³ *Plaintiff M61* (2010) 85 ALJR 133, 152 [101] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹¹⁴ See, eg, *Direct Share Purchasing Corporation Pty Ltd v LM Investment Management Limited* 82 ACSR 249, 257-8 [38]-[41] (Gordon J); *Edwards v Santos* (2011) 85 ALJR 464, 473-4 [36]-[39] (Heydon J).

¹¹⁵ (2005) 221 CLR 99. My thanks to Professor Mark Aronson for bringing this to my attention.

¹¹⁶ See Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 15-17. See also Graeme Hill, '*Griffith University v Tang* - Comparison with *Neat Domestic*, and the Relevance of Constitutional Factors' [2005] (47) *AIAL Forum* 6, 11-13.

¹¹⁷ *Griffith University v Tang* (2005) 221 CLR 99, 131 [90].

¹¹⁸ *Ibid* 131 [91].

¹¹⁹ *Plaintiff M61* (2010) 85 ALJR 133, 148 [77] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also at 152 [100].

¹²⁰ *Ibid* 138 [16].

the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers.¹²¹ Because there must be enforceable limits on power, it meant that a no-consideration clause is invalid because it would confer 'an arbitrary power' contrary to s 75(v) of the *Constitution*.¹²² 'Further support'¹²³ was said to derive from Dixon J's observation in *Australian Communist Party v Commonwealth* that the *Constitution* is framed in accordance with the rule of law,¹²⁴ the Court's warning in *Kirk v Industrial Relations Commission of New South Wales* that the legislature cannot 'create islands of power immune from supervision and restraint',¹²⁵ and the principle that 'a non-judicial body cannot determine the limits of its own power'.¹²⁶ Finally, the no-consideration clause was said to contravene the rule of law by preventing the court from exercising its jurisdiction under s 75(v).¹²⁷

The Court rejected these submissions. Their Honours held that a no-consideration clause is not so devoid of content that it could not be a 'law' at all. 'The relevant content of the provision is readily expressed: "the Minister may ... but need not consider whether to ..."'.¹²⁸ (A number of commentators had noted, building on observations in *Plaintiff S157*, that a broadly framed privative or no-invalidity clause might be invalid on this basis.¹²⁹) The Court then held that the no-consideration clause does not contravene s 75(v) of the *Constitution*. As the Court explained:

Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise. Yet it was one or other of these propositions which underpinned the arguments for invalidity.¹³⁰

Moreover, s 46A 'does not prevent any exercise of jurisdiction under s 75(v)'.¹³¹

If the power is exercised, s 75(v) can be engaged to enforce those limits. No 'island of power' is created. Rather, what s 46A(7) does is provide that the repository of the relevant power need not consider whether to exercise it. That is, there being no duty to exercise the power, mandamus will not go to compel its exercise. But that does no more than deny that the particular grant of power entails a duty to consider its exercise.¹³²

The conclusion that s 46A(7) is constitutionally valid follows naturally from the Court's interpretation of the clause. As discussed above, the Court appears to have

¹²¹ (2007) 228 CLR 651, 668 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

¹²² *Plaintiff M61* (2010) 85 ALJR 133, 144 [54] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹²³ *Ibid.*

¹²⁴ (1951) 83 CLR 1, 193.

¹²⁵ (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹²⁶ *Plaintiff M61* (2010) 85 ALJR 133, 144 [54] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹²⁷ *Ibid* 145 [58].

¹²⁸ *Ibid* 144 [56].

¹²⁹ See, eg, Walter Sofronoff, 'Constitutional Writs' (2007) 14 *Australian Journal of Administrative Law* 145, 155; McDonald, above n 33, 19.

¹³⁰ *Plaintiff M61* (2010) 85 ALJR 133, 144-5 [57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹³¹ *Ibid* 145 [58].

¹³² *Ibid* 145 [59].

narrowed the reach of no-consideration clauses and their impact on what remedies can be obtained. It is therefore unsurprising that the Court concluded that its jurisdiction under s 75(v) remains sufficiently intact, although it does depart from a position tentatively expressed in *Combet v Commonwealth*.¹³³ In that case, Gummow, Hayne, Callinan and Heydon JJ observed that 'there are evident difficulties in making a declaration in a proceeding brought under s 75(v) of the *Constitution* without granting relief under s 75(v).'¹³⁴ Reliance on declaratory relief to support a conclusion that s 75(v) remains intact also requires further elaboration as to how declaratory relief can do so, given that it is not expressly a constitutional remedy.¹³⁵ Ultimately, the case for invalidity was strongest under the case law as it stood before *Plaintiff M61*, when no-consideration clauses were understood to have a broad reach and to result in no remedy being available at all.

An immediate question raised by *Plaintiff M61* is whether there are any constitutional limits on the parliament's ability to enact no-consideration clauses. One possibility, for example, is that only certain statutory powers can be protected by a no-consideration clause. However, it is difficult to envisage how one might go about categorising powers to this end,¹³⁶ and the Court in *Plaintiff M61* gave no hint that it envisaged any such divisions. *Bodruddaza* provides a starting point. Legislation will be valid

if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure.¹³⁷

Yet stating the principle does not progress matters much further, and the Court provided no guidance on this point in *Plaintiff M61*,¹³⁸ beyond leaving for another day

¹³³ (2005) 224 CLR 494.

¹³⁴ *Ibid* 579 [165].

¹³⁵ Injunctions are mentioned in s 75(v), and the Court in *Plaintiff M61* appeared to envisage that injunctive relief was not excluded by a no-consideration clause, although Crennan J has since observed that the Court could not issue an interlocutory mandatory injunction either: see above n 78. Declaratory relief may not, therefore, bear the burden of maintaining s 75(v) alone. However, the Court in *Plaintiff M61* was more concerned with declaratory relief than with injunctive relief, giving the impression that it considered the availability of the former to be sufficient on its own to protect s 75(v).

¹³⁶ For the purposes of considering whether the RSAs and IMRs were an exercise of statutory or non-statutory executive power, attention was drawn during oral argument to the fact that ss 46A and 195A regulated an applicant's first interaction with the Australian legal system. It might be possible to divide statutory powers into those that affect people wishing to enter Australia (for example, asylum seekers) and those that affect the rights of people already in Australia (for example, Australian citizens). Especially given Australia has a very thin legal concept of citizenship, it is doubtful that this sort of distinction has any constitutional relevance.

¹³⁷ *Bodruddaza* (2007) 228 CLR 651, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

¹³⁸ One reason for this may be that, unlike no-invalidity and privative clauses, a no-consideration clause cannot depart much from the standard formulation. If it did so, presumably the Court could find such a clause invalid for the same sorts of reasons that have been mooted with respect to overly adventurous privative and no-invalidity clauses.

the proposition that 'there cannot be a valid grant of power without enforceable limits.'¹³⁹

Other sorts of qualifications might be grounded in administrative law doctrines. For example, the Court left for another day the unsettled limits of the *Carltona* principle.¹⁴⁰ The Court may find, as a matter of statutory interpretation, that a power protected by a no-consideration clause must be exercised personally unless the statute specifically provides for its delegation, on the basis that the legislature should be presumed to intend that only decision-making at the highest level be protected by a no-consideration clause.¹⁴¹ Should the legislature fill the *Migration Act* with no-consideration clauses, there would then be a difficult issue as to how to reconcile, on the one hand, a recognition that administrative necessity often requires a Minister to authorise others to make decisions as his or her agent,¹⁴² and, on the other hand, an interpretation that powers protected by a no-consideration clause be exercised personally. If the courts were to conclude that such powers must be exercised personally unless a specific power of delegation exists – despite any perceived administrative necessity – this might discourage the legislature from enacting no-consideration clauses everywhere, to avoid the impractical situation where a Minister must decide everything personally.

IV EXPLORING NO-CONSIDERATION CLAUSES POST-PLAINTIFF M61: THE CASE OF DIPLOMATIC PROTECTION

The above analysis of *Plaintiff M61* reveals a fine balancing act between parliamentary sovereignty and the maintenance of a minimum level of judicial review. On the one hand, the High Court upheld the validity of no-consideration clauses without clearly identifying any constitutional limitations on such clauses. On the other hand, the Court's approach to applying the no-consideration clause drew many of its teeth. There is thus a level of continuity in the Court's approach to privative clauses, no-invalidity clauses and no-consideration clauses.

This Part briefly explores the reasoning in *Plaintiff M61* by testing its flexibilities – the broad interpretation of when consideration begins and the liberal use of declarations – against a completely different factual scenario. This Part will consider how a no-consideration clause might apply to prevent Australian citizens from challenging a decision refusing to provide them with diplomatic protection. Although there is no suggestion that such a no-consideration clause would be enacted, there is little reason why the Commonwealth cannot and should not now enact no-consideration clauses everywhere out of abundant caution. The government's obligations to citizens abroad are prime candidates for such a clause, given the increasing scrutiny afforded the subject in the wake of the Julian Assange and Mamdouh Habib controversies.¹⁴³ Additionally, it is not far-fetched to postulate the Commonwealth government placing diplomatic protection on a statutory basis. An

¹³⁹ *Plaintiff M61* (2010) 85 ALJR 133, 144 [55] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁴⁰ *Ibid* 146 [69]. See *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

¹⁴¹ Cf *Tickner v Chapman* (1995) 57 FCR 451.

¹⁴² See *O'Reilly v The Commissioners of the State Bank of Victoria* (1983) 153 CLR 1.

¹⁴³ See 'Developments' (2011) 22 *Public Law Review* 75, 76.

attempt to do so has been made in Australia,¹⁴⁴ and it has a statutory basis elsewhere in the world.¹⁴⁵ This factual scenario at least sheets home that *Plaintiff M61* has direct relevance to Australian citizens, beyond any general public interest in the treatment of asylum seekers.

Assume Person X, an Australian citizen, lives in Country A. The government of Country A physically detains Person X and she is subjected to inhumane treatment. She unsuccessfully seeks local judicial remedies as the local courts are corrupt. She asks the Australian government for assistance.

In this hypothetical situation, the Department of Foreign Affairs and Trade will arrange consular assistance as a matter of right.¹⁴⁶ However, consular officials 'have a duty not to interfere in the internal affairs of that [foreign] State'.¹⁴⁷ If Person X alleges mistreatment by the foreign government, consular officials can do no more than assist her to challenge the foreign government's actions herself. The Australian government can also intervene through what is known in international law as 'diplomatic protection'. The government can make representations to Country A's government through diplomatic demarches, exercise diplomatic pressure through international organisations, or – in more extreme cases – sever diplomatic ties, impose economic sanctions, or bring a claim before an international tribunal.¹⁴⁸ Such actions elevate an individual's claim to the inter-state level.¹⁴⁹ International law gives states the *right* to provide diplomatic protection where certain prerequisites are satisfied, but it imposes on states no duty to do so.¹⁵⁰ However, international law recognises that domestic law systems can impose such a duty.¹⁵¹ Historically, most domestic systems have not done so, but this is slowly changing.

In Australia, the power to provide diplomatic protection has no statutory basis. Instead, the power is sourced in s 61 of the *Constitution*. Whether, as a matter of Australian public law, the Australian government has a duty to consider exercising that power is unsettled. The key case on this question remains *Hicks v Ruddock*, where Tamberlin J held that it was 'arguable' that such a duty to consider providing diplomatic protection exists.¹⁵² I have argued elsewhere that such a duty does exist.¹⁵³ My argument was that a decision whether to provide diplomatic protection necessarily affects the 'rights, interests or legitimate expectations' of that citizen. Accordingly, when the government receives a request for diplomatic protection, it must afford him

¹⁴⁴ Albeit with benevolent intentions: see Repatriation of Citizens Bill 2007 [2008] (Cth), discussed in Christopher Tran, 'Government Duties to Provide Diplomatic Protection in a Comparative Perspective' (2011) 85 *Australian Law Journal* 300, 303.

¹⁴⁵ See, eg, *Hostage Act*, 22 USC § 1732 (1868).

¹⁴⁶ See generally Australian Government, Department of Foreign Affairs and Trade, *Consular Services Charter* <http://www.smartraveller.gov.au/consular_charter/index.html>.

¹⁴⁷ *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 55.

¹⁴⁸ See John Dugard, *First Report on Diplomatic Protection*, UN GAOR, UN Doc A/CN.4/506 (7 March 2000) 15 [43].

¹⁴⁹ *Ibid* 10 [31]–[32].

¹⁵⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 44 [78]–[79].

¹⁵¹ *Ibid* 44 [78].

¹⁵² (2007) 156 FCR 574, 593 [62].

¹⁵³ See Tran, above n 144, 314–19.

or her procedural fairness (which at least involves considering the request) and it must consider the request according to correct legal principles. The courts can enforce this duty through the usual judicial review remedies. Such a duty, being a duty to consider, appears peculiarly vulnerable to a no-consideration clause (at least if it were interpreted literally).

Assume now that the Foreign Minister receives Person X's request but refuses it after a cursory glance. Moreover, the government has just enacted the *Diplomatic Protection Act 2011* (Cth). That Act places diplomatic protection on a statutory foundation and also enacts a no-consideration clause in the usual form. Assume also that judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is excluded. How might this Act operate in the hypothetical?

Following *Plaintiff M61*, the *Diplomatic Protection Act 2011* (Cth) is valid. It does not depart from ss 46A and 195A of the *Migration Act*, and there is no constitutional principle underlying a duty to consider providing diplomatic protection.¹⁵⁴

Does the no-consideration clause 'reach' the Minister's refusal to consider Person X's request? *Plaintiff M61* is distinguishable. The Minister has not established any guidelines or review schemes similar to the RSA and IMR, which could otherwise be construed as supplying information to the Minister for the purpose of deciding whether to exercise the power to give diplomatic protection. Moreover, unlike the circumstances in *Plaintiff M61*, none of Australia's international obligations are at risk if the Minister does not consider the request. Finally, Person X's detention is not at the behest of the Australian executive, and so there is no reason to construe the facts as requiring that the Minister decide to at least consider the request. It is at least arguable that the no-consideration clause 'reaches' the Minister's decision. The level of the Minister's involvement is no different to *Morato*.

This hypothetical involves a one-off ad hoc decision protected by a no-consideration clause – exactly the sort of decision that remains a conundrum after *Plaintiff M61*. One possible conclusion is that the Minister *has* considered the request, and so the decision under review is his decision to refuse diplomatic protection. This conclusion avoids 'necessarily uncertain prognostications'¹⁵⁵ about whether consideration has taken place, and it focuses attention on the decision not to give diplomatic protection, which is the decision that ultimately affects Person X. Additionally, consideration is a question of fact. On this view, notwithstanding that the Minister does not have a duty to consider giving diplomatic protection, he has in fact considered the request and so should be taken to have decided to consider it. There is much to be said for this view, but the better conclusion is that the Minister can decide not to consider the request even after considering it. This approach gives full effect to the Court's observation in *Plaintiff M61* that a no-consideration clause involves two steps; the difficulty of identifying when consideration has occurred is not a sufficient reason to focus on the second step without a sufficient evidentiary basis for concluding that the first step has been taken. Moreover, the conclusion that a decision-maker can consider a request to decide not to consider it acknowledges the need to identify a 'decision'. In a different context, French J has explained that 'a decision is more than

¹⁵⁴ Cf Germany (see *Hess* BVerfGE 55, 349 (1980); 90 ILR 387) and South Africa (*Kaunda v President of the Republic of South Africa* [2005] 4 SA 235).

¹⁵⁵ *Plaintiff M61* (2010) 85 ALJR 133, 147 [71] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

thought, consideration or conclusion. It must be manifested in some way which emanates from an authoritative or responsible source.¹⁵⁶ Considering a request does not necessarily mean that the decision-maker has made a *decision* to consider it, although it may form the basis for inferring that such a decision has been made. Ultimately, it is a question of fact and degree whether a decision to consider or not to consider a request has been made.

Assuming that the Minister's decision (whether it be a decision not to consider giving diplomatic protection or whether it be a decision not to give diplomatic protection) is vitiated for jurisdictional error, the no-consideration clause prevents mandamus, prohibition and certiorari from being issued in the absence of a public duty. If the Minister intends to act on his decision (for example, by giving support to the foreign government) it might be open for the Court to issue an injunction, although this is not without some doubt.¹⁵⁷ In any event, a declaration appears appropriate in this case. Declaratory relief will produce foreseeable consequences for Person X because it will have some binding effect on the Minister, befitting the fact that the case involves a constitutional 'matter' to be finally determined by the Court. Secondly, the declaration is directed to a legal controversy, being the treatment of Person X by the Minister. Thirdly, because her liberty is at stake, she has a 'real interest' in the question. Fourthly, it could be said that there is 'considerable public interest' in the observance of procedural fairness by the Minister, particularly in the context of breaches of human rights norms by foreign governments. Finally, a declaration would state the law as it should apply to other persons in like circumstances to Person X and so would not be pointless. It would have 'binding force' in the sense highlighted in *Pape* and *Rowe*. A declaration concerning the errors made by the Minister should thus be made.

This simple hypothetical suggests that the Court's approach to no-consideration clauses in *Plaintiff M61* provides sufficient resources to maintain judicial supervision of executive decision-making. Whether declaratory relief turns out to be an *adequate* remedy for those affected by statutory powers covered by a no-consideration clause is another matter.¹⁵⁸ Indeed, cases from other jurisdictions suggest that declaratory relief in these circumstances will be symbolic at best. In South Africa, the High Court of Gauteng held that the South African government failed to consider von Abo's request for diplomatic protection rationally.¹⁵⁹ The Court ordered the government, within 60 days, to take all necessary steps to uphold von Abo's constitutional rights. When the government failed to do so, the Court subsequently ordered it to pay constitutional damages. Both orders were set aside on appeal to the Supreme Court of Appeal, which limited von Abo's remedy to a declaration that the government had contravened its constitutional duty. Tellingly, the Supreme Court of Appeal gave this declaration even though the Court recognised 'that it is of theoretical value only.'¹⁶⁰ News reports state

¹⁵⁶ *A-G (Cth) v Queensland* (1990) 25 FCR 125, 142. See also *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533, 542-3 (Higgins J).

¹⁵⁷ See n 78.

¹⁵⁸ See, eg, Lorna McGregor, 'Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of *Khadr v Canada*' (2010) 10 *Human Rights Law Review* 487.

¹⁵⁹ See *Von Abo v Government of the Republic of South Africa* [2009] 2 SA 526; *Von Abo v Government of the Republic of South Africa* [2010] 3 SA 269. See generally Tran, above n 144, 307, 320.

¹⁶⁰ *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65 (4 April 2011) [42].

that the Constitutional Court has dismissed von Abo's application to appeal because it had no reasonable prospect of success.¹⁶¹

V CONCLUSION

The High Court's decision in *Plaintiff M61* clearly has significance for immigration policy. On 7 January 2011, the Commonwealth government announced its response to the Court's decision.¹⁶² The government has begun to allow asylum seekers to respond to certain adverse information. Additionally, the government has introduced, effective from 1 March 2011, a 'new model' for the refugee assessment process that combines RSAs and IMRs into a new 'Protection Obligations Determination'. Finally, the government announced the appointment of two new Federal Magistrates focusing on asylum seeker cases, and the appointment of Professor John McMillan AO 'to examine options to ensure that this litigation will be dealt with expeditiously.' It remains to be seen whether a no-consideration clause will form a part of the new reforms. Legislative mechanisms for restricting judicial review – be they privative clauses, no-invalidity clauses, time limits, or no-consideration clauses – are sometimes introduced under the cover of seemingly benevolent attempts to facilitate the timely resolution of disputes.

Leaving to one side this policy context, the Court's treatment of ss 46A and 195A of the *Migration Act* has broader doctrinal significance. Such no-consideration clauses are beginning to appear more frequently in legislation, and parliament may take heart from the Court's conclusion that s 46A is constitutionally valid. Whether the legislature gains much from such clauses, however, is now questionable. *Plaintiff M61* has significantly reduced the impact of no-consideration clauses upon judicial review. The Court held that on these facts, the Minister had decided to consider exercising his statutory powers (as opposed to the less straightforward conclusion that he had considered the request to decide not to consider exercising his statutory powers). The Court also held that declaratory relief can (and perhaps invariably should) be available in respect of powers covered by a no-consideration clause. These conclusions alleviate much, but not all, of the 'fatal conundrum' of no-consideration clauses.

¹⁶¹ See 'Court Ends Von Abo Bid for Compensation for Lost Farms', *Legalbrief Today* (online), 24 May 2011 <<http://www.legalbrief.co.za/article.php?story=20110524101913151>>.

¹⁶² See Chris Bowen, 'Government Response to High Court Decision Regarding Judicial Review for Asylum Seekers who Arrive on an Offshore Excised Place, Indonesian and Australian Cooperation on People Smuggling Issues, Wikileaks' (Press Conference, Sydney, 7 January 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb157099.htm>>.

