HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **PLAINTIFF M1/2021**

Plaintiff

AND: **MINISTER FOR HOME AFFAIRS**

Defendant

DEFENDANT'S AMENDED SUBMISSIONS

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. On 28 April 2021, the parties agreed, pursuant to r 27.08 of the *High Court Rules 2004* (Cth), to state the following questions of law for the opinion of the Full Court:

> 1. In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the Migration Act, which raised a potential breach of Australia's international non-*refoulement* obligations, where the plaintiff remained free to apply for a protection visa under the Migration Act?
>
> 2. In making the Non-Revocation Decision:
>
> a. did the Delegate fail to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act?
>
> b. did the Delegate deny the plaintiff procedural fairness?

c. did the Delegate misunderstand the Migration Act and its operation?

3. Is the Non-Revocation Decision affected by jurisdictional error?

4. Should the period of time fixed by s 486A(1) of the Migration Act and rr 25.02.1 and 25.02.2 of the *High Court Rules 2004* (Cth) within which to make the Application be extended to 5 January 2021?

5. What, if any, relief should be granted?

6. Who should pay the costs of, and incidental to, the Special Case?

3. Other than question 4 (as to which see [48]-[50] below), the questions stated for the opinion of the Full Court should be answered as follows:

10 1. No.

2a, 2b, 2c. No.

3. No.

5. The plaintiff's application filed on 5 January 2021 be dismissed.

6. The plaintiff.

4. Contrary to [6] of the plaintiff's submissions filed on 4 May 2021 (**PS**), the "central substantive issue" presented by this Special Case is not whether the decision of the delegate of the Minister (**Delegate**) made under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) (**Act**) was affected by jurisdictional error; it is whether s 501CA(4)(b)(ii) requires consideration by a decision-maker of representations about revocation which
20 raise a potential breach of Australia's international non-*refoulement* obligations where the former visa holder is able to make a valid application for a protection visa. The Minister submits that it does not. From that critical conclusion, it necessarily follows that the Delegate's reasoning displayed no jurisdictional error as alleged.

PART III SECTION 78B NOTICES

5. The Minister has considered whether any notices under s 78B of the *Judiciary Act 1903* (Cth) are required to be issued, and has determined that no such notice is required.

PART IV FACTS

6. The facts are stated in [4]-[27] of the Special Case and the documents annexed to it. They may be summarised as follows.

7. On 27 October 2017, a delegate of the Minister made a decision (**cancellation decision**), under s 501(3A) of the Act, to cancel the plaintiff's Subclass 202 Global Special Humanitarian visa.[1]

8. The plaintiff was notified of the cancellation decision on 1 November 2017.[2]

9. On 26 November 2017 and 11 May 2018, the plaintiff made representations to the Minister about revocation of the cancellation decision.[3] While the plaintiff did not identify any particular international instrument to which Australia is a party,[4] his representations included statements to the effect that he was a person in respect of whom Australia owed international non-*refoulement* obligations. Contrary to PS [17], the plaintiff did not assert that, "absent revocation, he faced removal to South Sudan, contrary to international non-refoulement obligations owed to him". Not only was removal not the legal consequence of any decision not to revoke the cancellation decision,[5] but no determination had been made by any decision-maker at the time that the plaintiff made his representations to the Minister that non-*refoulement* obligations were "owed to him".

10. On 9 August 2018, the Delegate made a decision, pursuant to s 501CA(4)(b)(ii) of the Act, not to revoke the cancellation decision (**non-revocation decision**).[6]

11. On 5 January 2020, the plaintiff filed an application in this Court for an extension of time within which to seek review of the non-revocation decision.[7]

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1 Special Case Book (**SCB**) 71 [9], 80.

2 SCB 71 [11].

3 SCB 72 [14], 90-116.

4 Such as the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951 as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967; the *International Covenant on Civil and Political Rights*; or the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 10 December 1984.

5 See *AZAFQ v Minister for Immigration and Border Protection* (2016) 243 FCR 451 at 473 [70] per Allsop CJ, Robertson and Griffiths JJ.

6 SCB 72 [15], 118-127.

7 SCB 4-17.

PART V ARGUMENT

Nature of the power conferred by s 501CA(4)(b)(ii)

12. Section 501CA(4)(b)(ii) of the Act confers a wide discretionary power[8] on a decision-maker to revoke a decision to cancel a visa held by a non-citizen if satisfied that there is another reason why that decision should be revoked. The text does not expressly require the Minister to consider any particular matters (only that she or he reaches the state of satisfaction specified in sub-para (b)(ii)). While mandatory relevant considerations can, of course, be identified by reference to the subject-matter, scope or purpose of a statute, there is nothing in either the text of s 501CA, or its subject-matter or purpose,[9] that requires the Minister to take account of Australia's international non-*refoulement* obligations when deciding whether to revoke cancellation of any visa that is not a protection visa (as is established by the authority referred to at [18]-[21] and [25] below).

13. The plaintiff nevertheless seeks to derive such an obligation via an indirect route – asserting that the representations made by him concerning a potential breach of Australia's international non-*refoulement* obligations were required to be considered by the Minister. It is convenient to say something further about the place of representations within the statutory scheme, before turning to the plaintiff's particular argument.

14. It can be accepted that s 501CA(4)(b)(ii) (read with s 501CA(3)(b)) requires the Minister to engage intellectually with a former visa holder's representations "as a whole".[10] However, there is nothing in the text or context to suggest that the state of satisfaction as to whether there is "another reason" why the cancellation decision should be revoked must be formed by reference to "any particular statement in the representations"[11]

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8 As to the breadth of matters that may properly fall within "another reason", see *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 (***BCR16***) at 462 [24] per Bromberg and Mortimer JJ; *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548 at 555-556 [32] per Collier J (with whom Logan J and Murphy J agreed); *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121 at 136 [67] per McKerracher J, 163 [179] per Colvin J; *Ali v Minister for Home Affairs* (2020) 380 ALR 393 (***Ali***) at [110] per Collier, Reeves and Derrington JJ.

9 *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24 at 40 per Mason J.

10 *Goundar v Minister for Immigration and Border Protection* (2016) 160 ALD 123 (***Goundar***) at [56] per Robertson J.

11 *Goundar* (2016) 160 ALD 123 at [56]. *Goundar* was followed in *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 331 [41] per Besanko, Barker and Bromwich JJ; *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 at 653 [41] per Rares and Robertson JJ, 657 [62] per Flick J; *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492 at 502 [47] per Jagot, Rangiah

(*cf* PS [22], [24]). Put another way, the duty to engage intellectually with representations made in accordance with an invitation issued under s 501CA(3)(b) does not entail a duty to treat each integer of those representations as a relevant factor and thus give each weight in exercising the power in s 501CA(4) (*cf* PS [26]).[12]

15. Section 501CA(3) is a statutory mechanism which provides an opportunity for a former visa holder to satisfy the Minister that there is another reason why the cancellation decision should be revoked. That is the only point that emerges from the extrinsic materials extracted by the plaintiff at PS [23] [13]

16. Contrary to what is seemingly asserted at PS [22], it does not logically follow from the existence of a statutory mechanism providing for that opportunity that the Minister comes under some form of reflexive duty to take into account every contention advanced by the former visa holder.[14] That would potentially open the Minister up to a "fire hydrant" approach to the framing of representations, which cannot have been the statutory intention given the object identified in *Minister for Immigration and Border Protection v EFX17*,[15] by reference to the extrinsic materials (ensuring that the government can move quickly to take action against non-citizens who pose a risk to the Australian community).

17. Rather, the decision-maker retains a degree of decisional freedom to find that any particular representation is irrelevant to the decision to be made and accord it no weight in making a decision whether or not to revoke a cancellation decision.[16] Indeed, so much appears to be ultimately accepted by the plaintiff at PS [37] and [40].[17] The outer boundary of that area of decisional freedom falls to be determined by reference to the

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and Banks-Smith JJ; *Hong v Minister for Immigration and Border Protection* (2019) 269 FCR 47 at 66 [67] per Bromwich and Wheelahan JJ; and *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at 603 [34(e)] per Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ.

12 *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at 546-547 [67], [69]-[70] per Colvin J.

13 Referring to [92] of the Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

14 See the authorities referred to in footnote 11 above.

15 (2021) 95 ALJR 342 at 349 [28] per Kiefel CJ, Gageler, Keane, Edelman and Steward JJ, referring to the Minister's Second Reading Speech to the Bill that introduced s 501CA(3): Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2014 at 10327.

16 Compare *Tickner v Chapman* (1995) 57 FCR 451 (***Tickner***) at 495 per Kiefel J (as her Honour then was): "… the Minister might sift them, attributing whatever weight or persuasive authority is thought appropriate."

17 By reference to *Ali* (2020) 380 ALR 393 at [110] per Collier, Reeves and Derrington JJ.

proper construction of the Act.[18] That includes, of particular relevance to this matter, the express statutory mechanism for considering issues involving Australia's non-*refoulement* obligations. That mechanism and its consequences for the proper construction of s 501CA(4) arose for consideration in *Applicant S270/2019 v Minister for Immigration and Border Protection*[19] to which we now turn.

Non-*refoulement* was not required to be considered, notwithstanding the plaintiff's representations

18. The reasoning of the majority in *Applicant S270/2019* supports the proposition that, where Australia's international non-*refoulement* obligations feature in a former visa holder's representations about revocation, a decision-maker is not required[20] to consider those representations in the exercise of power under s 501CA(4), at least in circumstances where the former visa holder is able to make a valid application for a protection visa in accordance with ss 45 and 46 of the Act.

19. In *Applicant S270/2019*, the Court concluded that the appellant's representations made in accordance with an invitation issued to him under s 501CA(3)(b) did not include a contention to the effect that the decision to cancel his visa should be revoked because he was a person in respect of whom Australia owed non-*refoulement* obligations. However, the reasoning of the majority was expressed in terms which indicate that it was not confined to that factual scenario.

20. At 902 [33], the majority said that there is nothing in the text or subject matter of s 501CA to indicate that the existence of non-*refoulement* obligations is a mandatory consideration in the exercise of the power in s 501CA(4). That conclusion was said, at 902 [34]-[35], to be reinforced by the existence elsewhere in the Act of an express mechanism for dealing with non-*refoulement* claims; so that, at least where no express claim was made in representations seeking revocation, there was no error in not considering that question. The majority noted (at 902 [34]) that it was unnecessary to decide whether consideration of an express non-*refoulement* claim could properly be deferred (and thus not be

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18 See eg *Minister for Immigration v Li* (2013) 249 CLR 332 at 350-351 [28] per French CJ.

19 (2020) 94 ALJR 897 (***Applicant S270/2019***).

20 Of course, given the breadth of the phrase "another reason" in s 501CA(4), it can accommodate non-*refoulement* as a permissive consideration.

considered in the course of deciding a revocation application), but then observed (at 902 [35]) (emphasis added):

> Put in different terms, it is through express provisions in the Act that Australia's non-refoulement obligations under international law have been implemented in Australian domestic law [referring to, inter alia, *Lam*[21]]; and, *if a non-citizen affected by cancellation seeks to have the Minister consider non-refoulement and remains free to apply under those express provisions for a protection visa, the Minister is not required to consider non-refoulement unless a claim for a protection visa is made.*

21. As is apparent from the preceding paragraph,[22] the express provisions implementing Australia's international non-*refoulement* obligations to which their Honours there referred were the provisions concerning the grant of protection visas (being a class of visa created specifically to allow decision-makers to grant visas to persons who cannot be removed from Australia consistently with its non-*refoulement* obligations under international law),[23] and provisions specifically addressing non-*refoulement* in the context of removal.[24] The point is that, where the Act deals specifically with that subject matter and does so in that particular way, other, more general provisions in the Act (such as s 501CA(4) – dealing with the revocation of mandatory cancellations of visas of all kinds) should not be read as requiring a decision-maker to have regard to the very same subject matter.[25] As is also plain, the majority in *Applicant S270/2019* was of the view that that proposition held true even though the person "seeks to have the Minister consider non-

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21 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at 33 [101] per McHugh and Gummow JJ. Reference was also made to *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (***CPCF***) at 627 [385] per Gageler J, 650-651 [490]-[491] per Keane J.

22 (2020) 94 ALJR 897 at 902 [34] (footnotes 10 and 11).

23 Referring to ss 5H, 5J, 35A, 36, 37A and 91A-91X of the Act.

24 Section 197C of the Act. On 24 May 2021, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Act No. 35 of 2021) (**Clarifying International Obligations Act**) received Royal Assent, and commenced 25 May 2021. It amends the Act so that decision-makers are required to consider a protection visa applicant's protection claims before addressing any other criteria for the grant of that visa (see the proposed new s 36A) and to make clear that, despite ss 197C(1) and (2), s 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if she or he is a person in respect of whom Australia owes non-*refoulement* obligations (subject to presently immaterial exceptions).

25 *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1980) 44 FLR 455 at 464, 467-469 per Deane J. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-587 [54] per Gummow and Hayne JJ.

refoulement", which could only be a reference to seeking to do so via representations made in accordance with an invitation under s 501CA(3)(b).

22. The reference made by the majority in *Applicant S270/2019* (at 902 [34]) to *Lam* warrants further attention. In the passage cited from *Lam,*[26] McHugh and Gummow JJ made this important point (emphasis added):

> … [I]n the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in *Teoh*[27] accepted the established doctrine that *such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error*.

23. That proposition rests upon a deeper point of constitutional principle. As Keane J noted (in a passage from *CPCF*[28] to which the majority in *Applicant S270/2019* also referred[29]), "[i]n point of constitutional principle, an international treaty made by the executive Government can operate as a source of rights and obligations under our municipal law *only if, and to the extent that, it has been enacted by the Parliament*", for "[i]t is only the Parliament that may make and alter our municipal law"[30] (emphasis added). At odds with that statement of principle, the effect of the plaintiff's argument must be that the Executive does retain the power to alter the statutory design carefully wrought by Parliament. The plaintiff's construction renders the valid exercise of power under s 501CA(4) contingent upon whether, for example, the Executive expands or disclaims international non-*refoulement* obligations from time-to-time, and also upon the manner in which those obligations are interpreted from time-to-time in international law. In a scheme which deals with those matters with some precision, specifically eschewing international law interpretation of those obligations in certain respects,[31] that resulting uncertainty cannot have been intended. The Act itself both prescribes and limits the "normative effect" of those obligations.

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26 (2003) 214 CLR 1 at 33 [101].

27 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

28 (2015) 255 CLR 514 at 650-651 [490]. See also at 627 [385] per Gageler J.

29 (2020) 94 ALJR 897 at 902 [35] (footnote 13).

30 His Honour referred to *Simsek v Macphee* (1982) 148 CLR 636 at 641-642 per Stephen J.

31 For example, ss 5(1) (definitions of "cruel or inhuman treatment or punishment", "degrading treatment or punishment" and "torture"), 36(2)(aa) and 36(2A). See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

24. Even putting those (considerable) difficulties to one side, the plaintiff's proposed construction will unduly strain the Act in its day to day operations. For example, let it be assumed that a non-citizen applies for, and is granted, a protection visa. In making a decision on the protection visa application under s 65, the Minister (or a delegate) will have assessed the non-citizen against the criteria for the grant of that visa in ss 5H, 5J and 36. Those criteria are, as the plaintiff correctly accepts (PS [38]), narrower than Australia's non-*refoulement* obligations under the various international instruments to which it is a party. Let it be further assumed that the non-citizen's protection visa is later cancelled by the Minister (or a delegate) under s 501(3A). On the plaintiff's suggested construction of s 501CA(4), at the point of considering whether or not to revoke the cancellation decision the decision-maker would be required to take into account those of Australia's international non-*refoulement* obligations that are not otherwise reflected or implemented in the Act and which formed no part of the criteria for the grant of the original visa. That would undermine the deliberate choice made by the Parliament to incorporate into Australian municipal law only *some* of Australia's international non-*refoulement* obligations.[32] That cannot be correct.

25. The observations made by the majority in *Applicant S270/2019* cohere with earlier observations made by a Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh*.[33] That case involved cancellation of a visa under s 501(2). A question arose as to whether, in exercising power under that sub-section, the Minister was required to take into account the fact that the visa holder might be a person in respect of whom Australia owed non-*refoulement* obligations. In circumstances where no claim to engage those obligations had been made, the Full Court resolved that question in the negative. However, their Honours went on to observe that the Act – in particular, ss 501E(2) and 501F – demonstrated "a clear legislative intention, where the visa the cancellation of which is under consideration is not a protection visa, to divorce issues relating to protection from the factors required to be considered for the purpose of making a decision under s 501".[34] The Full Court went on to say that, where

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32 Confirmed by the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) at 9-12.

33 [2004] FCAFC 47. See also *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56 (***Le***) at 65 [41], 72 [65] per Allsop CJ, Griffiths and Wigney JJ (cited in *Applicant S270/2019* (2020) 94 ALJR 897 at 902 [33]); *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at 523-524 [74]-[76] per Kiefel and Bennett JJ.

34 [2004] FCAFC 47 at [28].

the visa that has been cancelled or refused is not a protection visa, a decision-maker need not have regard to the possibility that the visa holder may be a person in respect of whom non-*refoulement* obligations are owed.

26. If, as the majority observed in *Applicant S270/2019*, analysis of the text, subject-matter, scope and purpose is inconsistent with the proposition that Australia's international non-*refoulement* obligations must be considered in the exercise of the power to revoke a cancellation decision, two important consequences follow.

(a) ***First***, there is no obligation on the Minister to take into account any potential breach of Australia's international non-*refoulement* obligations in the exercise of that power (and that is so regardless of whether any asserted obligation to do so is put on the basis of the statutory mechanism in s 501CA(4)(b) or as an incident of the natural justice hearing rule[35]).

(b) ***Secondly***, and although it was not necessary to decide the issue in *Applicant S270/2019* (see at 902 [34]), the further necessary and logical consequence of the reasoning of the majority must be that it is permissible to defer consideration of such matters to be addressed within the purpose-built mechanisms provided for by Parliament.[36] Indeed, s 501E(2) points directly to that statutory pathway in relaxing the statutory prohibition on applying for a visa which would otherwise apply following a cancellation under s 501(3A) which had not been revoked under s 501CA(4): see ss 501E(1)(a) and (b). It does so by reference to applications for particular types of visas, expressly including a "protection visa".

<u>The authorities on which the plaintiff relies do not lead to any different result</u>

27. Notably, the plaintiff has said nothing of the reasoning in *Applicant S270/2019*. Nothing in the cases to which the plaintiff refers at PS [26] undermines that reasoning or the

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35 In so far as the right to have one's submissions considered is a corollary of the right to be heard: *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088 at 1092 [24] per Gummow and Callinan JJ. See also *Wiseman v Bornemann* [1971] AC 297 at 315 per Lord Donovan.

36 See *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at 519 [19] per Flick, Griffiths and Perry JJ, referred to with apparent approval in *Le* (2016) 244 FCR 56 at 65-66 [43]-[45] and 71 [62].

construction of s 501CA(4) for which the Minister contends. Each needs to be understood in its proper statutory and factual context.

28. *Tickner* was a case in which the complaint against the decision-maker was that he had not personally considered a factor that was required to be taken into account in making a decision under s 10(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The oft-repeated expression "active intellectual process"[37], therefore, originated in a case that concerned not whether the decision-maker had considered a mandatory relevant factor at a particular level of detail, but, rather, whether the factor had been given personal consideration. More fundamentally, the scheme in issue there did not contain an express mechanism by which the subject matter of the relevant representations were to be considered. That is critical to the issue that arises here.

29. In *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[38] a Full Court of the Federal Court held that the Administrative Appeals Tribunal (**Tribunal**) had failed to have regard to the appellant's representations about non-*refoulement* and thereby denied him procedural fairness by disbelieving those representations.[39] Importantly, the Full Court "acknowledge[d] that the Tribunal would have been free to reason that it did not need to consider international non-refoulement obligations at all because this would be considered if the appellant applied for a protection visa", and, on that basis, "the Tribunal was not bound to make findings about the appellant's claims".[40]

30. In so far as *Ali* supports the proposition that a failure by a decision-maker to consider non-*refoulement* obligations in exercising the power conferred by s 501CA(4) is capable of giving rise to jurisdictional error where the former visa holder is free to make a valid application for a protection visa,[41] it is inconsistent with the reasoning of the majority in

37 (1995) 57 FCR 451 at 462-464 per Black CJ.
38 [2020] FCAFC 215.
39 [2020] FCAFC 215 at [24]-[25] per Jagot, Kerr and Anastassiou JJ.
40 [2020] FCAFC 215 at [27].
41 (2020) 380 ALR 393 at [99]-[103].

Applicant S270/2019,[42] or otherwise wrong as it is at odds with the scheme of the Act identified above.

Answers to Questions 1, 2(a), 2(b) and 3

31. For the foregoing reasons, the Delegate was not required to have regard to those of the plaintiff's representations that raised a potential breach of Australia's international non-*refoulement* obligations. Consequently, the Delegate did not fail to exercise the jurisdiction conferred by s 501CA(4) of the Act or deny the plaintiff procedural fairness.

32. Accordingly, each of Questions 1, 2(a), 2(b) and 3 (to the extent that jurisdictional error is asserted by the plaintiff by reason of a failure to consider the representations and/or a denial of procedural fairness) should be answered "no".

Non-*refoulement* was considered in any event

33. Even if, contrary to the foregoing submissions, the Delegate was required to consider those of the plaintiff's representations that raised a potential breach of Australia's international non-*refoulement* obligations, the Delegate did so in the manner required by the Act (*cf* PS [29]-[32]). As discussed above at [12] and [14], the requirement in s 501CA(4) to consider a former visa holder's representations does not require the decision-maker to take any particular statement in those representations into account in the sense of giving weight to it.

34. In the present case, the Delegate accurately summarised the plaintiff's representations,[43] but said that it was unnecessary to determine whether non-*refoulement* obligations were owed in respect of him because he was able to make a valid application for a protection visa, "in which case the existence or otherwise of non-*refoulement* obligations would be fully considered in the course of processing that application".[44] The Delegate decided not to bring the plaintiff's representations in relation to non-*refoulement* to account in making the non-revocation decision because a protection visa application was "the key mechanism provided for by the Act for considering claims by a non-citizen that they

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42 See also *Drame v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] HCATrans 207 at 249-250, where Bell J said that *Ali* was "not easily reconciled" with *Applicant S270/2019*. That observation, while *obiter*, casts doubt on the correctness of *Ali*.

43 SCB 125 [46]-[47]. See also at SCB 120 [11]-[12].

44 SCB 125 [48]. Indeed, that is what occurred in this case: SCB 132-154.

would suffer harm if returned to their home country".[45] For the reasons given above, it was open to the Delegate to reason in this way.

35. At PS [30], the plaintiff appears to be suggesting that the Delegate failed to engage intellectually with his representations because she or he adopted "*pro forma* reasons for decision". There is nothing in the Delegate's reasons to suggest that she or he did not turn her or his mind to the matters discussed in SCB [46]-[49]. The reasons emanated from the Delegate. The fact that those reasons might be similar to those of other decision-makers who have exercised the power in s 501CA(4) does not betray ignorance of their contents,[46] particularly when regard is had to the decision making context.[47]

36. If, as the Minister submits, the Delegate considered the plaintiff's representations on non-*refoulement*, it follows that he was not denied procedural fairness.

37. For these additional reasons, Questions 2(a) and 2(b) should be answered "no".

The Delegate did not misunderstand the operation of the Act

38. The plaintiff asserts that the Delegate's statement, at SCB [48], that it was unnecessary to determine whether non-*refoulement* obligations were owed in respect of him because he could make an application for a protection visa, "in which case the existence or otherwise of non-*refoulement* obligations would be fully considered in the course of processing that application", is affected by two legal errors. The *first* error is said to be an erroneous assumption about the manner in which non-*refoulement* obligations would be considered under two different statutory processes. The *second* is said to be an erroneous assumption about the extent to which those obligations would be considered under the two processes (PS [35]).

39. Neither error was made by the Delegate. The impugned statement at SCB [48] does not assert, or convey any assumption, that non-*refoulement* obligations would be considered in the same manner, or to the same extent, as would be called for by a direct application of the relevant international instruments to which Australia is a party. Rather, the

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45 SCB 125 [49].

46 See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 266 per Brennan CJ, Toohey, McHugh and Gummow JJ.

47 *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223 at 237-238 [44]-[45] per Rares and Jagot JJ.

statement conveys that non-*refoulement* obligations would be considered to an extent and in a manner that the Minister considered appropriate, and sufficiently to deal with the issue in so far as it would otherwise be regarded as relevant to the decision to be made under s 65. The Delegate's reasons at SCB [48]-[49] reveal that she or he was aware that the Act created a specific mechanism for responding to protection claims (in the form of protection visas) and was taking the view, in substance, that any claims concerning non-*refoulement* obligations should be dealt with by, and according to the procedures and criteria governing, that mechanism. That understanding is consistent with the reasoning in *Applicant S270/2019* (see above at [18]-[21]), and provided a rational justification for not giving weight to potential non-*refoulement* obligations as a reason for not revoking the cancellation decision.

40. Contrary to PS [37], there is nothing in the Delegate's reasons to suggest that she or he misunderstood the potential role of international non-*refoulement* obligations in the exercise of the power under s 501CA(4). The Delegate plainly understood that ss 5H, 5J, 36 and 65 did not apply to the decision not to revoke the cancellation decision; that the power in s 501CA(4) was enlivened upon the making of representations in the manner specified in s 501CA(4)(a) and satisfaction as to one the matters specified in ss 501CA(b)(i) and (ii);[48] and that the process of ascertaining whether there existed another reason to revoke the cancellation decision involved the weighing of factors for and against revocation.[49]

41. Nor, contrary to PS [38]-[39], did the Delegate assume that all of Australia's international non-*refoulement* obligations (both those that have and have not been incorporated into municipal law) would be considered in the course of determining a protection visa application under s 65 of the Act. Having referred, on numerous occasions, to Direction No 65,[50] it can be inferred that the Delegate understood that Australia's international non-*refoulement* obligations were broader than those obligations as incorporated into the Act (*cf* PS [38] (footnote 41)). What the Delegate envisaged being "fully considered"[51] or

48 SCB 119 [2].
49 SCB 120 [14], 126 [61], 127 [69].
50 SCB 118, 120 [12]-[13], 125 [45], 126 [61], 127 [69].
51 SCB 125 [48].

"fully assessed"[52] in the context of an application for a protection visa were the plaintiff's "claims"[53] in relation to non-*refoulement*, which included the issues of fact presented by those claims. The Delegate was aware of the practice of the Minister's Department to consider protection-specific criteria before having regard to any other criteria, including character-related criteria.[54] That practice was "reinforce[d]", but not replaced, by Direction No 75.[55]

42. At PS [38] (footnote 41), the plaintiff submits that, "[t]o the extent that cl 14.4(4) [*sic*] of Direction No 65 requires a delegate not to consider non-*refoulement* obligations where a person may make an application for a protection visa, the Direction is contrary to the … Act and beyond power". Not only does this issue not arise on any of the questions of law stated for the opinion of the Full Court, but the plaintiff's contention is also misconceived. Nothing in the Delegate's reasons suggests that the plaintiff's representations as to non-*refoulement* were not given weight in making a decision under s 501CA(4)(b)(ii) because the Delegate thought that Direction No 65 operated to prevent him or her from doing so.

43. For the foregoing reasons, the Delegate did not misunderstand the operation of the Act. Question 2(c) should be answered "no".

No jurisdictional error

44. Even if the Delegate misunderstood the operation of the Act as alleged by the plaintiff, that could only give rise to jurisdictional error in the non-revocation decision if the Delegate contravened an inviolable restraint on the exercise of the power in s 501CA(4).[56]

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52 SCB 125 [49].

53 SCB 125 [49].

54 SCB 125 [49].

55 SCB 125 [49]. As explained in footnote 24 above, the Act has been amended so that this practice is now law: see s 36A of the Clarifying International Obligations Act.

56 On the analysis exposed in *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 (***Wei***) at 32-33 [23]-[25] per Gageler and Keane JJ; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132-133 [23]-[24] per Kiefel CJ, Gageler and Keane JJ and *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [28]-[31] per Kiefel CJ, Gageler, Keane and Gleeson JJ. Similar formulations of jurisdiction and jurisdictional error can be found in other cases decided by this Court in the last 30 years: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J (as his Honour then was); *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163] per Hayne J; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571 [66] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Minister for Immigration and Border*

However, those restraints do not include a requirement to consider or appreciate – in the course of a decision about whether to revoke the cancellation of visas of any class or sub-class (most of which have nothing to do with protection obligations) – the differences between non-*refoulement* under international law and the modified and codified test for refugee status under s 36(2) of the Act. Nor do they require a delegate to understand that the place of non-*refoulement* in the exercise of the power in s 501CA(4) is different from its place in s 65 (*cf* PS [34], [37], [40]). For that reason, even if the Delegate did not appreciate these matters, that cannot have constituted a jurisdictional error.

45. The plaintiff's reliance on statements made by this Court to the effect that decision-makers must exercise powers "on a correct understanding of the law" (PS [34], [37], [40]) does not advance matters.[57] Considerable care needs to be exercised in taking the propositions of law enunciated in the cases to which the plaintiff refers, each of which was decided in a particular statutory context on a particular set of facts, and applying them to the circumstances of the present case. Read in context, statements about acting on a correct understanding of the law must be understood as referring to "the law applicable to the decision to be made"[58] or "the law under which [the decision-maker] acts",[59] and not, as in the present case, the effect of other aspects of the Act or other bodies of law that might be more or less relevant to the facts of the particular case. There is no at-large jurisdictional requirement not to make errors of law. Such a proposition would be too broad and contrary to authority.[60]

Protection v SZMTA (2019) 264 CLR 421 at 444 [44] per Bell, Gageler and Keane JJ, 455-456 [81]-[83], 457 [86], 458 [88]-[89] per Nettle and Gordon JJ.

57 *Wei* (2015) 257 CLR 22 at 35 [33], referring to *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137] per Gummow J, citing *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 (***Connell***) at 430 per Latham CJ and *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J (as his Honour then was). See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 455 [196] per Gummow and Hayne JJ; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 354 [78] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; and *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

58 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 30 [75], 31 [78], 32 [81] per Gageler J.

59 *Connell* (1944) 69 CLR 407 at 430.

60 See, for example, *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487 per Williams J; *Craig* (1995) 184 CLR 163 at 179; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 973 [21] per Gleeson CJ, 979 [56] per Gaudron J, 997 [182]-[183] per Gummow J, 1008-1009 [251] per Hayne J; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [70] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Snedden v Minister for Justice* (2014) 230 FCR 82 at 109 [153]-[154], 111 [164] per Middleton and Wigney JJ, 126 [242] per Pagone J.

46. To the extent that *Ali*[61] and the cases to which it refers[62] support the propositions that a failure by a decision-maker to appreciate that:

(a) Australia's international non-*refoulement* obligations are broader than those that have been enacted in provisions such as ss 5H, 5J and 36; or

(b) the place of international non-*refoulement* in the exercise of the discretionary power in s 501CA(4) is different from the analysis required of the decision-maker on a protection visa application,

is capable of giving rise to jurisdictional error in a decision made under s 501CA(4), notwithstanding the fact that the non-citizen is free to make a valid application for a protection visa, they are inconsistent with *Applicant S270/2019* or otherwise wrong. They ignore the choice made by the Parliament as to the extent to which Australia's international non-*refoulement* obligations were incorporated into the Act. They also fail to recognise or conform to the distinction in Australian administrative law between errors within, and errors going to, jurisdiction.

47. For these reasons, Question 3 (in so far as it is asserted by the plaintiff that the Delegate fell into jurisdictional error by misunderstanding the operation of the Act) should be answered "no".

Extension of time

48. The plaintiff requires an extension of time under s 486A of the Act and rr 25.02.1 and 25.02.2 of the Rules to bring these proceedings. Factors relevant to the exercise of the discretion to extend time include the merits of the proposed grounds of review; the length of, and reasons for, the delay; any prejudice to the defendant; and the wider public interest.[63]

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61 At [107]-[118].

62 Such as *BCR16* (2017) 248 FCR 456 and *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12.

63 See, for example, *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 (***Marks***) at 474 [13] and [15]-[16] per McHugh J; *Plaintiff M168/10 v Commonwealth* (2011) 85 ALJR 790 at 792 [10]-[12]; *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89 (***Vella***) at 92 [20] per Gageler J.

49. The Minister accepts that the plaintiff's application discloses an arguable case.[64] It is also relevant that Question 1 of the Special Case raises an important question of statutory construction.

50. The primary issue for the Court to determine, therefore, is whether it is satisfied that an extension of time should be granted in the light of the plaintiff's delay. The Minister does not seek to be heard in relation to this issue other than to make the following submissions. On any view, the extension that the plaintiff seeks is lengthy: 845 days under s 486A of the Act; 824 days under r 25.02.1 of the Rules; and 712 days under r 25.02.2 of the Rules. Given the length of the delay, the plaintiff needs to persuade this Court that his case is "exceptional".[65] If the Court is so satisfied, it ought to grant an extension of time and answer Question 4 "yes".

Relief

51. The Court should order that the plaintiff's application filed on 5 January 2021 be dismissed. Question 5 should be answered accordingly.

Costs

52. Question 6 should be answered "the plaintiff".

PART VI ESTIMATE OF HOURS FOR ORAL ARGUMENT

53. The Minister anticipates that he will require up to 1.5 hours for the presentation of his oral argument.

Dated: 26 May 2021

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64 Cf *Marks* (2000) 75 ALJR 470 at 474 [14].
65 *Marks* (2000) 75 ALJR 470 at 473-474 [13], [16]; *Vella* (2015) 90 ALJR 89 at 90 [3].

ANNEXURE

List of constitutional provisions, statutes and statutory instruments referred to in submissions

1. *Migration Act 1958* (Cth), ss 5, 5H, 5J, 36, 65, 197C, 198, 486A, 501, s 501E, s 501F and 501CA (as at 9 August 2018).

2. *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Act No. 35 of 2021), s 36A (current).