HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M1/2021
File Title:	Plaintiff M1/2021 v. Minister for Home Affairs
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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M1/2021

BETWEEN: **PLAINTIFF M1/2021**
PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS
DEFENDANT

PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. The plaintiff was born in Sudan, is a citizen of South Sudan, and was the holder of a refugee and humanitarian visa from 2006 [**SCB 70-71 [4]-[6]**]. That visa was cancelled in 2017 and he was invited to make representations about revocation of the cancellation decision [**SCB 71 [8]-[10]**].

3. The plaintiff requested that the Minister revoke the cancellation decision [**SCB 72 [13]**], and made representations [**SCB 72 [13]-[14]**]. His representations included that any removal of him to South Sudan would expose him to serious harm, and even death, on account of his race and his membership of a particular social group [**SCB 96, 97, 100, 101, 104, 106, 113, 114**], and would contravene international non-refoulement obligations [**SCB 116**].

4. These representations went to "another reason" why the cancellation decision should be revoked. There was nothing cryptic, irrelevant or trifling about the representations.

5. The Minister's delegate refused to revoke the cancellation decision and gave reasons [**SCB 117-127**]. At [46]-[47] of that decision [**SCB 125**], the delegate accepted that the plaintiff's circumstances "may give rise to international non-refoulement obligations", and noted the plaintiff's representations about non-refoulement obligations. Having acknowledged the representations, the delegate expressly refused to consider them, saying at [48] [**SCB 125**] that "it is <u>unnecessary to determine</u> whether non-refoulement obligations are owed to [the plaintiff] for the purposes of the present decision as he is able to make a valid application for a Protection visa, in which case the existence or otherwise of non-refoulement obligations would be <u>fully considered</u> …" (emphasis added).

6. Questions 1 to 3 of the Special Case go to whether, having regard to [48] of the delegate's decision, the delegate erred. For the following reasons, such error is made out.

7. **First**, on the proper construction of s 501CA(4), the Minister must <u>in fact</u> consider representations made in accordance with the invitation. That requires active, intellectual engagement with substantial, clearly articulated representations as to "another reason" why the cancellation decision should be revoked. Failure to do so is a failure to conform to the statutory condition on the exercise of the s 501CA(4) power [**PS [18]-[27]**]. Further, principles of natural justice condition the statutory power and the Minister fails

to accord natural justice if the Minister does not consider a substantial, clearly articulated argument advanced by a person seeking revocation [**PS [28]**].

8. The delegate's reasons at [48] disclose an express refusal to consider certain representations made by the plaintiff about revocation [**PS [29]-[32]**]. This was a failure to conform to a condition on the exercise of power, and a denial of procedural fairness.

9. The Minister seeks to argue that the delegate did consider the representations, but failed to attribute any weight to them [**DS [14], [17], [33], [39]**]. That characterisation of the delegate's reasons is not open; indeed, it is contrary to the delegate's express words [**PSR [6]**]. The words at [48] can be compared with words used elsewhere in the reasons where, for example, the delegate noted whether weight was or was not being attributed to a particular matter: see, for instance, [63], [68] [**SCB 127**]. Read fairly and as a whole, the reasons demonstrate a refusal to consider so much of the representations that concerned non-refoulement obligations. The statutory obligation to consider matters the subject of representations is anterior to, and informs, the question of the weight to be assigned to them: *Tickner v Chapman* (1995) 57 FCR 451, 495G [**JBA, vol 4, tab 57**].

10. The Court in *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 [**JBA, vol 4, tab 30**] did not address the issues raised by this Special Case and that case does not support the contention now advanced by the Minister [**PSR [5]**; cf **DS [17]-[27]**].

11. **Second**, and in any event, the delegate misunderstood the *Migration Act 1958* (Cth) and its operation, and specifically the power under which the delegate purported to act. The reasons at [48] disclose two errors: a misunderstanding about the manner in which, and a misunderstanding about the extent to which, non-refoulement obligations may be considered under s 501CA(4), compared with s 65(1) [**PS [34]-[35]**].

    (a) Section 65 constrains the decision-maker to a dichotomous assessment of satisfaction of applicable visa criteria. For a protection visa, there are disqualifying criteria which, if not met, preclude the grant of a visa under s 65. By contrast, s 501CA(4) affords the Minister decisional freedom to weigh non-refoulement obligations in the balance. By, in effect, conflating the two powers, the delegate misconstrued the statute which was the source of the delegate's power. This was the first misunderstanding, and it discloses error [**PS [34], [36]-[37], [40]; PSR [13]**].

(b) International non-refoulement obligations would not be, and are not, "fully considered" on a protection visa application [**PS [38]-[39]**]. That was the second misunderstanding, and discloses a further misconstruction of the power under which the delegate purported to act [**PS [40]; PSR [13]**].

12. **Third**, each of these errors was material to the delegate's decision, and accordingly the errors were jurisdictional. But for each of these errors, there was a realistic possibility of a different result [**PS [42]-[43]**].

13. **Finally**, having regard to the particular circumstances of this matter, the extension of time should be granted. Those circumstances include that [**PS [46]-[50]**]:

10 (a) the plaintiff has been of limited means and in prison or immigration detention at all times, had no legal representation, and his English language skills were poor [**SCB 71-72 [11]-[12], [17]**]. The advice given to him, by a fellow inmate upon reading the delegate's reasons, was that the plaintiff would need to apply for a protection visa in order to remain in Australia. He promptly acted on that advice. He did not understand that there was any other process available to him to challenge or appeal the delegate's decision [**SCB 72 [17]-[18]**];

(b) the application raises a matter of public importance;

(c) the application is meritorious;

(d) the Minister does not point to any prejudice; and

20 (e) the likely consequence to the plaintiff, if time is not extended, is prolonged or indefinite detention.

14. The plaintiff submits that Questions 1, 2(a), 2(b), 2(c), 3 and 4, set out in the Special Case at **SCB 73 [28]**, should each be answered "Yes". Question 5 should be answered by granting the plaintiff the relief described in paragraphs 2 and 3 of the orders sought in his application for a constitutional or other writ [**SCB 5**]. Question 6 should be answered "the defendant".

Dated: 30 November 2021

Richard Knowles **Colette Mintz**

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