HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

PLAINTIFF M1/2021
Plaintiff

and

MINISTER FOR HOME AFFAIRS
Defendant

PLAINTIFF'S REPLY

Part I: Publication

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

2. In deciding not to revoke the cancellation of the plaintiff's visa, the Minister's delegate expressly refused to deal with a substantial, clearly articulated representation made by the plaintiff — finding it "unnecessary to determine" whether non-refoulement obligations were owed to the plaintiff [Reasons, [48] (**SCB 125**)]. That was a refusal to consider the plaintiff's representation, a denial of procedural fairness, and a failure to perform the statutory task required by s 501CA(4). In his submissions, the Minister does not grapple with this basal proposition at the heart of the plaintiff's case. Rather, the Minister seeks to avoid it, including by mischaracterising the plaintiff's case.

3. **First**, the Minister seeks to mount a response to a case that international non-refoulement obligations are a mandatory relevant consideration for decision-making under s 501CA(4) [see, eg, DS, [12], [20]-[22], [25]-[26]]. But that is not the plaintiff's case. Indeed, the plaintiff's position on this issue has, at all times in this proceeding, been clear.[1]

4. Starting from this false premise, the Minister asserts that the plaintiff has sought to derive an obligation to take into account international non-refoulement obligations "via an indirect route" [DS, [13]]. The plaintiff's case on the statutory scheme takes no "indirect route". As the plaintiff has explained [PS, [20]-[28]], the decision-making

[1] See, eg, the plaintiff's reply filed on 16 February 2021, [11] (**SCB 63**).

power in s 501CA(4) is conditioned upon the making of representations by the person the subject of a decision. Accordingly, substantial, clearly articulated representations must be considered. That is the only sensible way to read s 501CA(4), particularly where the provision empowers the Minister to prejudice or destroy a person's rights or interests, with potentially devastating consequences.

5. In connection with the strawman mandatory relevant considerations case, the Minister seeks to rely, heavily, upon the decision of the High Court in *Applicant S270/2019 v Minister for Immigration and Border Protection*[2] [DS, [17]-[27]].[3] The questions of law raised by the Special Case now before the Court were not addressed in that decision. *Applicant S270/2019* concerned the question of whether, where the issue of non-refoulement is not raised in representations in support of revocation, non-refoulement obligations are nevertheless a mandatory relevant consideration for decision-making under s 501CA. The *ratio decidendi* of *Applicant S270/2019* is best summarised in the following sentence of the plurality's reasoning at [36]: "If *no* non-refoulement claim is made — as in this case — non-refoulement does not need to be considered in the abstract". The Minister's assertion that "the reasoning of the majority was expressed in terms which indicate that it was not confined to that factual scenario" [DS, [19]] is wrong.

6. **Second**, in attempting to avoid the delegate's express refusal to deal with the plaintiff's representations, the Minister seeks to mischaracterise the plaintiff's case as a complaint about a failure to give weight to particular representations [DS, [14], [17], [33], [39]]. This is not a case about the weight to be given to a particular representation. The plaintiff's case is that the delegate failed to conform to the statute by expressly declining to consider so much of the plaintiff's representations that

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2 (2020) 94 ALJR 897.

3 The Minister submits that the plaintiff has said nothing of *Applicant S270/2019* [DS, [27]]. That case was dealt with, at the outset, in the plaintiff's application for a constitutional or other writ filed on 5 January 2021 (see [9] and [45] (**SCB 6 and 15**)) and in his reply filed on 16 February 2021 (see [14] (**SCB 64-65**)). The case is inapposite. Further, insofar as it is said that *Ali v Minister for Home Affairs* (2020) 380 ALR 393 is "inconsistent with the reasoning of the majority in *Applicant S270/2019*" [DS, [30]], that submission fails to appreciate the crucial difference between the two cases. In *Ali* there was a representation, made for the purposes of s 501CA, concerning the existence of non-refoulement obligations. In *Applicant S270/2019* there was no such representation.

concerned non-refoulement obligations. The plaintiff's position on this issue has also, at all times in this proceeding, been clear.[4]

7. The Minister cites the reasons of Colvin J in *Viane v Minister for Immigration and Border Protection*[5] for the proposition that the statute "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 under s 501CA(4)" [DS, [14]]. As just noted, the plaintiff's argument has never rested on the existence of an obligation to give weight to particular representations. Rather, and indeed as Colvin J put it in the passages cited by the Minister, the plaintiff says that, in making a decision under s 501CA, "the Minister must not overlook the representations" and "[a] state of satisfaction that is formed without considering the representations is not a state of satisfaction of a kind that the *Migration Act* requires". As Colvin J further explained, the obligation "to consider" is not met by having regard to "only some of the significant matters raised in the representations"[6] and "the obligation to consider extends to significant matters being those that may with other matters carry sufficient weight or significance to satisfy the Minister to revoke the cancellation".[7]

8. **Third**, the Minister seeks to downplay the significance of the plaintiff's representation about non-refoulement obligations, asserting that "removal [was] not the legal consequence of any decision not to revoke the cancellation decision" and "no determination had been made … that non-*refoulement* obligations were 'owed to him'" [DS, [9]]. Those matters were beside the point.[8] The plaintiff squarely raised his concern that if the cancellation decision were not revoked, he would be persecuted, tortured and killed, and that "due to 'non-refoulment obligations', I didn't think it was possible to force me back to South Sudan" [see PS, [11]]. That representation also needed to be understood in the context of his previous visa, granted to him as a member

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4 See, eg, the plaintiff's reply filed on 16 February 2021, [9] (**SCB 63**).

5 (2018) 263 FCR 531, [67], [69]-[70].

6 (2018) 263 FCR 531, [68].

7 (2018) 263 FCR 531, [68]. At [69]-[70], Colvin J explained the difference between this approach and the implication of a mandatory relevant consideration.

8 It is worth noting that the "legal consequence" to which the Minister refers came about by a statutory amendment which commenced on 25 May 2021, some two and a half years after the delegate's decision was made [see DS, fn 24].

of a family unit on humanitarian grounds, in circumstances where his family had fled human rights abuses in what is now South Sudan.

9. In this connection, although the Minister accepts that s 501CA(4)(b)(ii) "requires the Minister to engage intellectually with a former visa holder's representations 'as a whole'" [DS, [14]], he does not explain how the express refusal to deal with a significant part of the plaintiff's representations amounted to such engagement. Plainly, it did not.[9]

10. **Fourth**, nothing in the plaintiff's submissions suggests that the Minister would be subject to "a 'fire hydrant' approach to the framing of representations" [DS, [16]]. The Minister apparently seeks to argue that the plaintiff's case, if correct, would mean that s 501CA imposes an administrative burden on the Minister to respond to each and every representation made by a person.[10] That concern is not well founded. The plaintiff's case is that substantial, clearly articulated representations must be considered. (Indeed, this is a case in which the delegate expressly acknowledged the issue of non-refoulement obligations had been raised.) Trivial or cryptic or immaterial matters need not be considered. Properly construed in this way, s 501CA does not impose any undue administrative burden on the Minister.

11. **Fifth**, the Minister refers to what is said to be "the express statutory mechanism for considering issues involving Australia's non-*refoulement* obligations" [DS, [17]], submitting that the Migration Act deals specifically with non-refoulement obligations elsewhere, and that s 501CA(4) should not be read as requiring the decision-maker to have regard to that same subject matter [DS, [21]]. That submission is, again, one about mandatory relevant considerations and, as such, misdirected. Further, it misunderstands the Migration Act. The protection visa criteria overlap with, but are narrower than, non-refoulement obligations (see DS, [24]). Nothing in the text of s 501CA(4) — in particular, the power to revoke for "another reason" — suggests that

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9 See, eg, *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [72].

10 In this regard, that the Minister's reliance upon *Minister for Immigration and Border Protection v EFX17* (2021) 95 ALJR 342 (at [28]) is misplaced. That case concerned a quite different issue, that is, the way in which an invitation under s 501CA(3) must be given to a recipient. The passage cited by the Minister indicates that consideration of the extent of the recipient's capacity to understand the material provided with the invitation, identification of how limitations of the recipient could be overcome, and the taking of steps to overcome those limitations, would create administrative difficulties in tension with the goal expressed in the Second Reading Speech to the Bill introducing s 501CA(3). None of those matters has any bearing on this case.

the decision-making power under that section is confined by reference to what appears in ss 36 and 65.

12. Further, the suggestion that the plaintiff's construction is one 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" [DS, [24]] makes no sense. Parliament chose to incorporate some aspects of international law into the protection visa criteria. It separately chose, under s 501CA(4), to afford the Minister a wide power to revoke a cancellation decision for "another reason". Far from undermining any choice by Parliament, the plaintiff's case is consistent with the scope of the decision-maker's power under s 501CA(4).

13. **Sixth**, the Minister seeks to avoid the unmistakeable conclusion that the delegate misunderstood the Migration Act and its operation. For reasons that are not made clear, the Minister submits that the delegate's statement at [48] of the Reasons "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 instruments to which Australia is a party" [DS, [39]]. In this respect, the Minister ignores the words used by the delegate, namely that "the existence or otherwise of non-refoulement obligations would be fully considered in the course of processing that [protection visa] application". Indeed, the delegate's reasons indicate that he or she wrongly considered that protection visa obligations and non-refoulement obligations are identical, and that assessment of visa criteria under s 65 is equivalent to consideration of representations about "another reason" for revocation of visa cancellation under s 501CA [cf DS, [40]]. The delegate's errors, in this regard, convey misunderstandings of the s 501CA(4) power, under which the delegate purported to act [see PS, [34]; cf DS, [45]].

Dated: 1 June 2021

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