HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 May 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S47/2020
File Title:	Applicant S270/2019 v. Minister for Immigration and Border P
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	11 May 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY No. **S47 of 2020**

BETWEEN: **S270**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Respondent

APPELLANT'S AMENDED SUBMISSIONS

Part I: Internet certification

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues arising in this appeal

2. Did the Respondent misunderstand the *Migration Act 1958* (Cth) ("the Act"), or otherwise err, when exercising the discretion created by section 501CA(4) of the Act, by deferring consideration of any non-refoulement related reasons for revoking the cancellation of the Appellant's visa, on the basis that the Appellant could make a protection visa application?
3. Was any such error material and therefore jurisdictional?

Part III: Section 78B of the *Judiciary Act 1903*

4. Notice under section 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

5. This is an appeal from the whole of the judgment of Justices Charlesworth and O'Callaghan (Greenwood J in dissent) in [2019] FCAFC 126 (7 August 2019).[1]

[1] CAB35

PURCELL LAWYERS Level 1, 299 Elizabeth Street Sydney NSW 2000
Tel: (02) 8251 0019 Fax: (02) 8251 0017
Ref: Penelope Purcell
Email: ppurcell@purcell-lawyers.com.au

The decision of the Full Court was on appeal from a judgment of the Federal Court of Australia (Bromwich J) in [2018] FCA 342 (19 March 2018).[2]

Part V: Facts

6. The following information in paragraphs [8] to [12] was raised before the Respondent by the Appellant in his submissions made for the purposes of s501CA(4) of the Act.
7. On 30 April 1975 the Vietnam War concluded.
8. On 2 April 1975 the Appellant was born in North Vietnam.[3]
9. Sometime in 1982 the eight-year-old Appellant and his 15-year-old brother left Vietnam on a fishing boat bound for Hong Kong.[4]
10. Their departure as asylum seekers was arranged by their own parents, apparently on account of, "*post war terrors*".[5]
11. The Appellant remained in a refugee camp in Hong Kong for eight years until his arrival in Australia in 1990.[6]
12. The Appellant met his wife in a refugee camp in Hong Kong where she was also a Vietnamese refugee.[7]
13. The following information in paragraphs [14] to [22] was actually or constructively known to the Respondent[8] at the time he made his decision under s501CA(4) of the Act.
14. On 13 and 14 June 1989 Australia attended the '*International Conference on Indo-Chinese Refugees*' in Geneva along with 75 other states.[9]
15. The purpose of the conference was to agree a plan to deal with the problem of Indo-Chinese Refugees.[10]
16. At the conference on 14 June 1989 the '*Comprehensive Plan of Action'* ("CPA") was agreed.[11]

---

[2] CAB 19
[3] CAB 15
[4] CAB 15 and FM 4
[5] FM 58
[6] FM 63
[7] FM66
[8] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 per Gibbs CJ at [30] to [31].
[9] FM 105
[10] FM 102
[11] FM 111

17. Under the CPA it was agreed by all parties to introduce individual status determination mechanisms end the previous practice of treating Indo-Chinese asylum seekers as *prima facie* refugees.[12]
18. It was further agreed that those who arrived in receiving jurisdictions (including Hong Kong) after "*the appropriate cut off date*" would be subjected to individual refugee status assessment.[13]
19. In respect of Hong Kong the cut-off date was 16 June 1988, (many years after the Appellant's arrival).[14]
20. A central concern of the CPA was dealing with those people (such as the then 14-year-old Appellant) already resident in camps in various parts of Asia.[15]
21. In Part E the CPA states: "*Continued resettlement of Vietnamese refugees benefiting from temporary refuge in South-east Asia is a vital component of the Comprehensive Plan of Action".*[16]
22. Further, at E(1) it states that the "*long stayers resettlement program*" provisions were to apply to (our emphasis): "*all individuals who arrived in temporary asylum camps prior to the appropriate cutoff date"* and included: "*a call to the international community to respond to the need for resettlement in particular through the participation by an expanded number of countries, beyond those few currently active in refugee resettlement. The expanded number of countries could include, among others, the following: Australia, Austria, Belgium, Canada, Denmark, Germany, Federal Republic of , Finland, France, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of*

---

[12] FM 114 and see also the 'Opening Statement by Mr. Jean-Pierre Hocké, United Nations High Commissioner for Refugees', at the International Conference on Indo-Chinese Refugees, Geneva, 13 June 1989. (available online at https://www.unhcr.org/en-au/admin/hcspeeches/3ae68faf30/statement-mr-jean-pierre-hocke-united-nations-high-commissioner-refugees.html) and the 'Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General' (available online at https://www.refworld.org/docid/3ae68f420.html).

[13] FM 114-115 and '*The History of the Comprehensive Plan of Action'*. Sten Bronee. *'International Journal of Refugee Law'* Vol. 5 No. 4.
[14] 'Australian Foreign Affairs and Trade Monthly Record'. Volume 60. Department of Foreign Affairs and Trade. 1989. Page 289.
[15] FM 115
[16] Ibid

America". A further provision stated*: "refugees will be advised that they do not have the option of refusing offers of resettlement, as this would exclude them from further resettlement consideration".*[17]

23. These historical facts were recognized judicially in *SZEGG v Minister for Immigration and Multicultural Affairs* [2006] FCA 775. Stone J was concerned with judicial review proceedings in respect of a refusal to grant a protection visa to a Vietnamese asylum seeker who had arrived in Australia from the Philippines in February 1989 and recited the following unchallenged factual findings of the court below at [2]: "*In those days, all Vietnamese asylum seekers were regarded en masse as* prima facie *refugees and offered by UNHCR for resettlement in third countries, in an arguably pragmatic exercise that ended in the late 1980s. Under what came to be known as the Comprehensive Plan of Action (CPA), all asylum seekers who arrived in Hong Kong after 16 June 1988 and in other southeast Asian countries after 14 March 1989 were required to undergo case-by-case screening of their refugee claims".*

24. In 1994 the *Migration Legislation Amendment Act (No. 4) 1994 (Cth)* introduced Subdivision A1 of Part 2 of the Act, which contains legislative recognition of the CPA, including section 91B which states,*"'"CPA" means the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989".*

25. Section 91A states: "*This subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8".*

26. In the First Reading Speech in the Senate of the Australian Parliament the following was said by Senator Crowley the Minister for Family Services: *"It is worth reviewing the history of this issue in the region, which provides context for the bill. Until 1989, the international response to the problem of*

[17] Ibid

Indo-Chinese asylum seekers had been a combination of temporary asylum in countries in the region, and international resettlement. Increasingly, the reasons given by those fleeing related to poverty, rather than persecution. In 1989, the UNHCR sponsored CPA, in which Australia has been a major participant, constituted a new framework to safeguard the protection of refugees. Under the CPA, those screened in as refugees are offered third country resettlement. Those screened out are required to return to Vietnam under arrangements monitored by the UNHCR. The CPA also provides a framework for orderly migration from Vietnam. A crucial part of the CPA has been the establishment of refugee status determination procedures in countries of first asylum such as Indonesia. These processes are conducted in association with the UNHCR and according to the UN Convention definition of "refugee". They include both primary and secondary levels of assessment. The 17 Vietnamese boat people who arrived in Broome on 7 July 1994 had been assessed under these UNHCR sponsored processes in Indonesia and had been found not to be refugees. From July 1989 to July 1994, Australia has resettled 17,600 Vietnamese and Laotian refugees under the CPA, with about 1,400 expected to arrive during 1994-95. Our effort has been, and continues to be exemplary".[18]

27. After eight years in a refugee camp and 15 years of age, the Appellant arrived in Australia on 7 June 1990 on a Funded Special Humanitarian (subclass K4B12) visa.[19]

28. The visa class did not have as a criterion that the Appellant was entitled to protection under the *Convention Relating to the Status* of *Refugees*[20] as amended by the *Protocol Relating to the Status of Refugees*[21] ("the *Refugees Convention*")

29. The Special Humanitarian Program, "*provides entry for individuals (who may or may not be refugees) who are 'subject to substantial discrimination in [their] home*

---

[18] Hansard (Senate) 21.09.1994 page 1067.
[19] FM 63
[20] Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 Entry into force: 22 April 1954, in accordance with article 43

[21] Done at New York on 31 January 1967.Entry into force 4 October 1967 in accordance with article 8.

country amounting to a gross violation of [their] human rights' and proposed for the visa by someone (usually a family member) already in Australia" [22]

30. Holders of the K4B12 visa sub class have been treated for the purposes of Commonwealth law as refugees,[23] as have generally persons admitted under the broad range of special humanitarian programs. See for example section 995 of the *Social Security Act 1991* (Cth) and its definition of a 'child refugee', which includes a young person, *"admitted into Australia in accordance with the terms of a special humanitarian program of the Australian Government that has been approved by the Minister for the purposes of this definition*".

31. On 27 August 2004 the Appellant was sentenced at the Sydney District Court (DCJ Berman) for five offences including 'Aggravated Break and Enter with Intent' and received various sentences of imprisonment including three years and six months, with a non-parole period of 18 months.[24]

32. On 13 September 2013 the Appellant was sentenced at the Sydney District Court (DCJ Woods) for an offence of 'Aggravated Break and Enter with Intent in Company' (which occurred on 10 December 2010) and received a sentence of imprisonment of six years, with a non-parole period of three years and six months.[25]

33. Despite his criminal offending (from a young age following his arrival in Sydney) and its sequela of imprisonment the Appellant has built a meaningful life in Australia that meant he could advance a range of substantial reasons to revoke the decision to cancel his visa.[26]

34. On 10 December 2014 the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) came into force introducing changes to the Act

---

[22] Policy Brief 7. '*Special Humanitarian intakes: Enhancing Protection Through Targeted Refugee Resettlement'*. December 2018. Tamara Wood and Claire Higgins. Kaldor Centre for International Refugee Law. University of New South Wales, page 11.

[23] See for example section 5C(4) of the *Veterans Entitlement Act 1986* (Cth) and the discussion in the departmental instruction found here: http://clik.dva.gov.au/compensation-and-support-reference-library/departmental-instructions/1995/b041995-service-pension-removal-ten-10-year-residency-rule-refugees)

[24] FM 73

[25] Ibid

[26] He is married to an Australian citizen (a fellow refugee he met as a child in the Hong Kong camp – FM 66). They have three Australian children, two of them under the age of 18 (FM 64-65). The eldest child is attending university in Sydney (FM 66), all the children are said to be academically gifted (FM 64). The Appellant and his wife have operated a small business and the Appellant has been employed in various positions (FM 51).

including the insertion of s 501(3A) which requires mandatory cancellation in certain circumstances.[27]

35. On 22 December 2014 the Minister for Immigration and Border Protection promulgated *Ministerial Direction No 65*[28] under section 499 of the Act.[29]

36. Part C of the direction give guidance to decision makers as to how to exercise the discretion in section 501CA(4) as to whether to revoke mandatory cancellations that had occurred under section 501(3A) of the Act.

37. At 14.1(1) Part C stated: *"A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm".*

38. At 14.1(4) Part C stated: *"Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked".*

39. At 14.1(6) (in respect of persons who would not be eligible to make a protection visa application), Part C states (our emphasis): *"any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizens criminal offending or other serious conduct in deciding whether or not the non-citizen should have their via reinstated. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non refoulement obligations the operation of sections 189 and 196 of the Act means*

---

[27] Section 501(3A) states, "*The Minister must cancel a visa that has been granted to a person if: (a) the Minister is satisfied that the person does not pass the character test because of the operation of: (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or (ii) paragraph (6)(e) (sexually based offences involving a child); and (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory".*

[28] Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA'. On 28 February 2019 Ministerial Direction No. 79 ('Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA') came into force and revoked Ministerial Direction No. 65. Part C remained unchanged in the respects discussed above.

[29] FM 5

that, if the persons protection visa remains cancelled, they would gave the prospect of indefinite immigration detention".

40. On 26 April 2016 the Appellant's visa was cancelled under the mandatory provisions of section 501(3A) of the Act as a consequence of the sentence of imprisonment imposed by DCJ Woods for the offence of 'Aggravated Break and Enter with Intent in Company'.[30]

41. On 26 April 2016 the Appellant was sent the decision to cancel his visa and a copy of Ministerial Direction No 65.[31] The accompanying letter stated (our emphasis), *"you are hereby invited to make representations to the Minister about revoking the decision to cancel your visa. The representations must be made in accordance with the instructions below*". The 'instructions below' included (our emphasis), "*you should address each paragraph in Part C of the Direction that is relevant to your circumstances*".

42. On 12 May 2016 the Appellant sent a representation to department officials seeking revocation of the cancellation that mirrored in structure the applicable portions of Ministerial Direction No 65 and accordingly did not reference non-refoulement obligations.[32]

43. Those representations made references to the Appellant and his wife's status as refugees relevantly stating: "*His Honour also referred to the traumatic experience of me being a refugee in a Hong Kong refugee camp for a number of years at such a young age"*[33] *My wife was also a refugee having fled Vietnam to Hong Kong and then to Australia*".[34] *"I first met her when we were in the refugee centre in Hong Kong, she was also a refugee from Vietnam",*[35] *"I came to Australia with my brother. My parents arranged for me and my brother to flee Vietnam to Hong Kong as refugee. I was 8 years old at that time. At the age of 15 when I arrived in Australia my only relatives in Australia at that time was my brother".*[36] "

44. On 2 December 2016 the Appellant sent a further submission stating: "*My wife like me escaped Vietnam as a child fleeing the post war terrors. She also spent years in*

---

[30] CAB 7
[31] FM 39
[32] FM 45
[33] FM 48
[34] FM 50
[35] FM 52
[36] FM 50-51

the refugee camp in Hong Kong and I could never ask her to retrace that dreadful history be returning to the place of her fear".[37]

45. An undated departmental submission (with draft reasons for decision) was subsequently presented to the Respondent to assist him to exercise the section 501CA(4) discretion.[38]

46. It stated: "*Mr. [The Appellant] arrived in Australia as the holder of a Funded Special Humanitarian (subclass K4B12) visa. In 2006 the department found that Australia did not owe protection obligations to Mr. [The Appellant]. Mr. [The Appellant] is not bared (sic) from applying for a protection visa Attachment K".*

47. Attachment L to the submission to the Respondent was a submission dated 10 April 2006 the Appellant had previously made to the department when visa cancellation was considered at an earlier point. It stated: *"I left Vietnam at seven years old and I spent the next eight years living in a refugee camp in Hong Kong, before coming to Australia as a refugee in 1990*".[39]

48. The departmental submission did not contradict the Appellant's claim to be a refugee who had been bought to Australia as a child from a refugee camp in Hong Kong and presented it as an uncontroversial proposition in the following ways (our emphasis): *"31. Mr. [The Appellant] has been married to Ms Thi Hong Le (an Australian citizen) for over 22 years. They met in a refugee camp in Hong Kong more than 27 years ago" "36. Mr. [The Appellant] states that his wife, like him, left Vietnam as a child, 'fleeing the post-war terrors'. She also spent years in the refugee camp in Hong Kong. Mr. [The Appellant] states, 'I could never ask her to retrace that dreadful history by returning to the place of her fear'" "43. Mr. [The Appellant] was born into rural poverty in North Vietnam. His parents arranged for him to flee Vietnam when he was eight with his 15 year old brother leaving their parents and other siblings behind. He spent the next eight years in a refugee camp in Hong Kong. The refugee camp gave them food and shelter and taught them 'very little basic English' but had no schooling or other support""45. Mr. [The Appellant] states that he does not want to make excuses 'especially when Australia was so welcoming and comforting for me after eight years growing up in a refugee*

[37] FM 58
[38] FM 61
[39] FM 99

camp', however, he has been encouraged to explain some things he has experienced Attachment N. Mr. [The Appellant] states 'now I understand the meaning of mental health and trauma, I see why I turned to drugs to cope with those years Attachment N", "70. The 2013 Sentencing Judge stated, 'I take particular note of the fact that his background included the traumatic experience of having been a refugee in a Hong Kong refugee camp for a number of years. There can be few experiences for anybody more likely to be damaging to a person's conception about proper conduct that being dislocated and placed in the difficult circumstances of a refugee camp' Attachment C".[40]

49. Attachment K to the submission to the Respondent was a document entitled 'International Obligations and Humanitarian Concerns Assessment' that was prepared on 28 December 2006 (in respect of an earlier proposed cancellation). (This document was never put to the Appellant for his comment as part of the decision not to revoke the cancellation of the Appellant's visa).[41] In a 'tick box' questionnaire it was positively indicated that the Appellant was a person who had never been held to fall within section 33(1) of the *Refugee Convention* because his visa in 1990 did not have such status as a criteria and because he was assessed in 2006 as not being owed protection obligations. An explanatory note to that answer stated: *"Mr. [The Appellant] arrived in Australia as the holder of a Funded Special Humanitarian (subclass K4B12) visa. The criteria for that visa did not require an assessment under the Refugees Convention. Accordingly, Mr. [The Appellant] has never been assessed in respect of Article 33(1) of the Refugees Convention prior to 19 December 2006, when a Protections Obligation Assessment was undertaken by a Protection visa delegate in the NSW Office in response to a request by NSW compliance Cancellations/refusals, Sydney office. That assessment found that Mr. [The Appellant did not fall within Article 33(1)".*[42]

50. On 17 January 2017 the Respondent declined to revoke the earlier cancellation.[43]

51. The Respondent's reasons contained references to the Appellant's assertions he was a refugee but were silent as to any consideration of international non-refoulment obligations or Australia's obligations arising under the *Refugee Convention* in

---

[40] FM 61-71
[41] FM 78
[42] FM 85
[43] CAB 6

relation to the Appellant given his status as a refugee and the practical effect that the decision would have in revoking the determination of the Appellant as a refugee within meaning of Article 1A of the *Refugee Convention* without reference to the cessation provisions in the *Convention*, and in particular Article 1C(5).

Part VI: Argument

52. Special leave was granted in relation to the present ground of appeal notwithstanding that it was not before the Court below where the Appellant was unrepresented.

Was deferring consideration of non-refoulment obligations an error?

53. The material before the Respondent, the nature of the visa held by the Appellant and the circumstances of its grant, taken together with the repeated references in the Appellant's material, the submission to the Respondent, and his own reasons for decision, describing the Appellant as a "*refugee*" must be taken to have placed the Respondent on notice that the Appellant was (or might have been) assessed *prima facie* as a refugee within the meaning of Article 1A of the *Refugee Convention*.

54. The Respondent elected to defer the consideration of protection issues and related international obligations on the basis that the Appellant could make a protection visa application. That 'deferral' of "*non-refoulement obligations*" must be taken to be a deferral of any considerations relevant to, or arising from Australia's international obligations to the Appellant as a signatory to relevantly the *Refugee Convention*, the *International Covenant on Civil and Political Rights*[44], the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[45], or, "*any obligations accorded by customary international law that are of a similar kind*".[46]

55. The conclusion that the Respondent did so follows from (i) consideration of the contents of the submission to the Respondent, (ii) the letter to the Appellant sent on 26 April 2016, (iii) the terms of Ministerial Direction No 65 (iv) the Appellant's submissions that squarely raised his refugee status (v) the failure to put to the

---

[44] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

[45] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)

[46] See definition of "*non-refoulement obligations*", section 5 of the Act.

Appellant for comment Attachment K to the submission to the Respondent (the document entitled 'International Obligations and Humanitarian Concerns Assessment' that was prepared on 28 December 2006 in respect of an earlier proposed cancellation), (vi) the fact that the reasons of the Respondent evidence no consideration of the question of non-refoulement obligations and the meaning of "*non-refoulement obligations*" as defined in the Act.

56. This deferral was based on a number of erroneous assumptions that constitute a misunderstanding of the *Refugee Convention* and the Act and jurisdictional error.

57. **The first miscarriage of statutory jurisdiction** was that the deferral was predicated on an ignoring or misunderstanding of how *Refugee Convention* obligations accrue and can be ceased.

58. Australia recognized the Appellant as a refugee and accrued obligations under the *Refugee Convention* to him when they granted him a visa to live in Australia after becoming signatory to the CPA and recognizing the refugee status of the 'long stayers'.

59. The Appellant's K4B12 visa criteria did not require satisfaction of *Refugee Convention* Criteria because he was a member of group who Australia recognised *en masse* as *prima facie* refugees.

60. The non-refoulement assessment conducted in 2006 (and attached to the submission to the Respondent but never put to the Appellant for comment as part of the section 501CA(4) process) was predicated on the erroneous assumption that refugee status is determined by visa criteria.

61. As Mortimer J stated in *Omar v Minister for Home Affairs* [2019] FCA 279 at [59]: **"***Critically, what matters for the exercise of the s 501CA(4) discretion is not the consideration of a visa criterion which might have similar content (in some respects) to Australia's non-refoulement obligations: it is whether Australia's non-refoulement obligations are engaged in respect of a particular individual***"**.

62. The question of whether the Appellant continued to be a refugee at the time of the decision of the Respondent required consideration of both his original status (and whether it has ceased under the *Refugees Convention*) and if necessary his current status (i.e. whether he had a well-founded fear of persecution in Vietnam or could engage complementary protection).

63. Recognised refugee status under the *Refugees Convention* could only relevantly cease in two ways.

64. Firstly if the cessation provisions in Article 1C were satisfied, which state that the Convention shall cease to apply to a person: *"who can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality".*

65. Alternatively, if the provisions of Article 33(2) could be invoked, where it could be shown that the Appellant was a person: *"who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country"*[47].

66. Neither test has ever been applied to the Appellant and are different to the test which was applied under the provisions of the Act to cancel the Appellant's visa and then to determine his application to revoke that cancellation.

67. The effect of the Respondent's decision was to finally revoke the Appellant's status as a refugee or might so have had that effect. This is because the effect of the decision was to affirm the cancellation of the Appellant's visa and restrict his ability to apply for any other visa apart from protection visas. Any such future application for a protection visa could not take into account the Appellant's prior status determination as a refugee within the meaning of Article 1A as the Appellant would in that process be required to demonstrate afresh eligibility for the visa by reference to the criteria set out in section 36 of the Act.

68. Under the *Refugee Convention*, the Appellant as a refugee within the meaning of Article 1A accrued certain rights including relevantly rights to obtain from Australia consular assistance (Article 25), identity (Article 27) and travel documents (Article 28), and the right to protection from expulsion from Australia's borders except where such expulsion was necessary for reason of national security or public order (Article 32). Further under Article 32, the Appellant was entitled to

procedural fairness in any such determination that his expulsion was warranted, and the right to seek assistance to obtain legal admission in an alternate country.

69. Finally the Appellant was entitled to maintenance of his status as a refugee even where "*the circumstances in connexion with which he has been recognized as a refugee have ceased to exist*" if he was able to demonstrate "*compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of* [his] *nationality*" (Article 1C).

70. The protection from expulsion in particular falls precisely within the "non-refoulement obligations" the consideration of which was either deferred by the Respondent or not considered. While Article 32 refers in terms to "expulsion" and Article 33 refers to "expulsion or return ('refoulement')", "*the difference in this respect between Article 3 (1) of the 1933 Convention and Article 32 (1) of the 1951 Convention is more apparent than real* … as … *the omission of the word 'refoulement' in Article 32 does not in any way restrict the scope of that Article, which clearly must be understood in the sense that 'expulsion' is the only way by which a refugee 'lawfully in the territory' may be removed from the territory of a Contracting State*."[48]

71. Thus the overlap between Articles 32 and 33 is apparent in that if a: "*Contracting State desires to send a refugee to a country of persecution, and that refugee is 'lawfully in the territory' of the Contracting State, it may only do so in accordance with the provisions of Article 32*."[49]

72. That the Respondent's decision revoked any refugee status determination without reference the cessation provisions in the *Refugee Convention* is uncontroversial – no reference was made in any manner to the relevant clauses.

73. "*Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses. This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review*

---

[48] See commentary on Article 32 at comment (2), *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, Grahl-Madsen, A., Published by the Division of International Protection of the United Nations High Commissioner for Refugees (1997) accessible at https://www.unhcr.org/3d4ab5fb9.pdf

[49] See commentary on Article 32 at comment (2), *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, Grahl-Madsen, A., Published by the Division of International Protection of the United Nations High Commissioner for Refugees (1997) accessible at https://www.unhcr.org/3d4ab5fb9.pdf

in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin."[50]

74. The material before the Respondent provided an ample basis for a potential conclusion of compelling circumstances. Factors relevant to compelling reasons might include his decades of residence in Australia as a consequence of being a child refugee, his three Australian children, his wife being resident in Australia and perhaps most importantly the trauma and dislocation of his life flowing from the post war events in Vietnam. The history that led the Appellant to write of his wife: "*I could never ask her to retrace that dreadful history by returning to the place of her fear".*

75. It is not clear that the Appellant's crimes would render applicable the Article 33(2) test. Finkelstein J in *Betkhoshabeh v Minister for Immigration & Multicultural Affairs* [1998] FCA 934 was concerned with a tribunal decision involving offences of aggravated burglary and five counts of threat to kill for which the Appellant had received a term of imprisonment of three years and six months and stated: "*On its proper construction, Article 33(2) does not contemplate that a crime will be characterised as particularly serious or not particularly serious merely by reference to the nature of the crime that has been committed although this may suffice in some cases. The reason is that there are very many crimes where it is just not possible to determine whether they are particularly serious without regard to the circumstances surrounding their commission".* Finkelstein J quashed the decision in which the offences had been found to meet the terms of the *Refugees Convention* on the basis the Tribunal had not properly considered the context of the offending.

76. At the very least, the Respondent never embarked on such an analysis of the exceptions to Article 33 (2) and thereby failed to attend to the issues that arose under s501CA(4) in the circumstances. Relief should be granted to ensure such matters are properly considered by the Respondent.

77. **The second miscarriage of statutory jurisdiction** was that the deferral was predicated on an assumption that *non-refoulment* obligations in the Appellant's

---

[50] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 at [112] (footnotes removed)

circumstances would be the same as the protection obligations reflected in section 36(2) of the Act.

78. While a person may have an ongoing right to refugee status subject only to the cessation provisions of the Convention the situation is different as a matter of domestic Australian law.[51]

79. The definition of '*non-refoulment obligations*' in section 5 of the Act states: "*"non-refoulement obligations" includes, but is not limited to: (a) non-refoulement obligations that may arise because Australia is a party to: (i) the Refugees Convention; or (ii) the Covenant; or (iii) the Convention Against Torture; and (b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a)".*

80. This encompasses a range of obligations not recognized in section 36(2) of the Act.[52]

81. Section 36(3) means protection obligations as a matter of domestic law cease to apply when a person's home country becomes no longer a place in respect of which they have a well-founded fear of persecution.[53]

82. A similar error was recognized by a Full Court in *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89 at 115, which was considered to be material error due to the different way in which the relocation principle is applied under the Act as opposed to international law and the question of non-refoulement obligations.[54]

83. Any residual entitlement to protection enjoyed by the Appellant on account of the cessation provisions in the *Refugees Convention* is not recognised in the Act.[55] Section 5H of the Act relevantly defines a 'refugee' for the purposes of section 36(2)(a) to be a person who, "*is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country*". This would not include the unusual

---

[51] *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 ALR 380; (2006) 81 ALJR 337 (15 November 2006) per Callinan, Heydon and Crennan JJ at [59] to [61].

[52] See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) HCA 53;

[53] Ibid.

potential situation of the Appellant, being a person entitled to protection because of a residual refugee status that has not ceased under the *Refugee Convention*.

84. **The third miscarriage of statutory jurisdiction** was that the deferral was predicated on an assumption that any risk of harm that might give rise to protection obligations would be considered in a protection visa application. This was a misunderstanding of the Act because at the time it would have been open to a delegate to decide any such application on the basis of character alone under section 65 of the Act.[56]

85. **The fourth miscarriage of statutory jurisdiction** was that the deferral was predicated on an erroneous assumption that protection related matters could be lawfully excised from the statutory discretion despite the Appellant squarely raising them.

86. The Appellant (despite being told not in the correspondence of 26 April 2016) squarely submitted to the Respondent that he was as a refugee. This was of obvious and protruding relevance to a decision to decline to revoke a visa cancellation and return him to Vietnam.

87. The decision of the Respondent in revoking the Appellant's refugee status determination in a manner inconsistent with the cessation provisions of the *Refugee Convention*, and thereby unilaterally depriving the Appellant of the rights enumerated above, resulted in Australia breaching its international treaty obligations, a matter readily capable of being a "reason" (within the meaning of section 501CA(4)(b)(ii)) for the revocation of the cancellation of the Appellant's visa. Further, in the Appellant's submission, the significance of the issue made it a mandatory relevant consideration.

88. In addition, to lawfully exercise the discretion the Respondent needed to consider the representations made as to refugee status and decide whether they constituted a reason to revoke the cancellation. As a full court stated in *Minister for Home Affairs v Omar* [2019] FCAFC 188 (29 October 2019), *"For the reasons given above, even though there is no explicit statutory duty on the Minister under s 501CA(4) to "consider" representations made in support of a revocation request, it is necessarily implicit in the statutory regime that there is such an obligation. The*

[56] *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 (Bromberg and Mortimer JJ) at [68] to [69]).

discharge of that obligation requires the Minister to engage in an active intellectual process with reference to those representations, consistently with the Full Court's approach in Tickner (see also Navoto v Minister for Home Affairs [2019] FCAFC 135 at [86]- [89] per Middleton, Moshinsky and Anderson JJ)". As Finklestein J stated (in a different but analogous statutory context) in *Betkhoshabeh v Minister for Immigration & Multicultural Affairs* [1998] FCA 934: "*It is difficult to see how the power to deport a person who is a refugee within the meaning of the Convention and has been granted a visa under the Migration Act by reason of that status could properly be exercised without the decision-maker taking into account the obligations that Australia owes to such a person under the Convention*".

89. This was so in respect of assertions of international obligations but also in respect of any particular assertions as to harm. A ministerial decision maker exercising the section 501CA(4) discretion could give weight to international obligations (and the need to avoid breaching them) that a delegate exercising the section 36 visa power could not. This is because the delegate's power is limited to determining whether they are satisfied that statutory criteria concerned with a risk of harm are satisfied, whereas a Minister can consider both the issue of harm to an individual but also the political implications of not complying with international obligation.

90. **The fifth miscarriage of statutory jurisdiction** was that the deferral generated a failure to consider the two separate consequences of the decision. Firstly, that the decision resulted (or might result) in the revocation of the determination of the Appellant's status as a refugee within meaning of Article 1A of the *Refugee Convention*. Secondly, if the Appellant is unsuccessful in obtaining the revocation of the cancellation of his visa he faces the prospect of indefinite detention if he subsequently persuades the Respondent that (notwithstanding the provisions of section 197 of the Act) he should not be removed from Australia because he is still a refugee entitled to the protection of the *Refugee Convention,* despite not being entitled to a protection visa. The Respondent was required to consider the legal consequences of his decision and therefore must consider the prospect of indefinite detention where it is a possible consequence. [57]

[57] *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38 at [6]; *Omar v Minister for Home Affairs* [2019] FCA 279 at [56].

Materiality

91. For the Appellant to satisfy the requirement of materiality he must show that it is a 'reasonable possibility' that the error deprived him of a successful outcome.[58]
92. This requires the Appellant only to demonstrate that he might have been accorded status as a refugee (and therefore owed protection unless and until the cessation provisions are invoked) and that the Respondent might have accorded this weight but for the error. The Appellant has met his burden in both respects.
93. Alternatively, materiality is satisfied because of the possibility that the Appellant has a substantive protection claim that he was prevented from advancing by the Respondent's erroneous deferral of protection related issues.
94. The Appellant is a refugee who overcame a history of drug addiction[59] and incarceration.[60] It is now proposed to return him to a developing nation which is also a one-party communist state without consideration of the extent or existence of Australia's obligations to him under the *Refugee Convention* which issue clearly arose from the submissions he advanced for consideration under s 501(CA)(4).
95. These matters were clearly material to the exercise of the Respondent's decision under s 501 (CA)(4) and he did not attend to his statutory task to consider whether those matters which arose by reason of the Appellant's claimed status as a refugee would be "*another reason*" why the original decision should be revoked.

Conclusion

96. Both these circumstances could have weighed materially in the discretion and therefore the error was material, whether the Appellant's protection related claims were current or residual.

Part VII: Orders Sought

1. The Appellant seek the following orders.
2. The orders made by the Full Court of the Federal Court on 7 August 2019 are set aside.
3. The orders made by the Federal Court (Bromwich J) on 19 March 2018 are set aside

---

[58] *Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) at [45]; *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at [80].

[59] CAB 12

[60] FM 72

4. A writ of certiorari issue to bring the decision of the Respondent dated 17 January 2017 into this court to be quashed.
5. Costs

Part VIII: Time for oral argument

6. The Appellant estimates he will require 1.5 hours for oral argument.

Dated:

10

Shane Prince SC	**Indraveer Chatterjee**	**Stephen Lawrence**
State Chambers	8 Garfield Barwick Chambers	Black Chambers

To: The Respondents

20