HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

DQU16
First Appellant

DQV16
Second Appellant

DQW16
Third Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. The first respondent (**Minister**) agrees with the appellants' statement of the issues that arise for consideration in this appeal.

Part III: Notices

3. The Minister has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and considers s 78B to be inapplicable in this matter.

Part IV: Contested material facts

4. The Minister does not take issue with the broad summary of the facts in Part V of the appellants' submissions (**AS**). However, in view of the appellants' reliance on particular aspects of the first appellant's claims in Part VI of the submissions, it is necessary to supplement the description of the findings and reasons of the second respondent (**Authority**) in a number of respects.

5. The appellants submit that the first appellant "has repeatedly expressed an intention to resume the activity which gave rise to the risk of significant harm, and was accepted by the Authority as having expressed that intention" (AS [40]). The Authority also noted, however, that in the course of his TPV interview the first appellant said that he had decided to quit selling alcohol (at [36], CAB 11). The Authority returned to this equivocation in the section of its reasons dealing with s 5J(3) of the Act (at [37], CAB 11).

6. The reason the first appellant decided to quit selling alcohol was because the Shia militia he claimed were interested in him could find him; this is a claim on which the appellants continue to rely (AS [53]). The Authority, however, did not accept that underlying claim, and expressly rejected that the first appellant "is or was of interest to JAM [Mahdi Army], Suyuf al-Haq, militias, the authorities or anyone for reasons relating to selling alcohol" (at [29], CAB 10).

7. The appellants' submissions at [52] rest on the same factual premise. Contrary to that premise, the Authority did not accept any of the claims the first appellant advanced as to the incidents he alleged had occurred in Iraq as a result of selling alcohol. His claims in this regard included (as summarised by the Authority) being "followed by JAM, militiamen; chased by car or motorbike; shot at or that he made complaints to the police; that he was hiding in Baghdad or fled Iraq due to fear of harm arising from these incidents" (at [29], CAB 10; see also [20]-[28], CAB 8-9).

8. As to the appellants' submission that the first appellant's claims of his family's home being raided in 2013 and 2014 (after he left Australia) should have been taken into account in assessing the consequences of his removal (AS [56]), the Authority also rejected that claim. The Authority did not accept that "after the [first appellant] arrived in Australia, JAM, the militias, or anyone has approached his family home to search for alcohol, inquired about him, or threatened his family to tell them his whereabouts" (at [29], CAB 10).

9. The Authority concluded "that the [first appellant] and his family do not face a real chance of harm on these bases now or in the reasonably foreseeable future" (at [29], CAB 10). The Authority was also not satisfied, on the information before it, that the first appellant would face a real chance of harm (at [33], CAB 10-11):

> …because he sold alcohol in the past, that he was targeted or of interest to any militant groups, the police or the authorities, for reasons relating to selling alcohol, including being perceived as 'un-Islamic' or engaged in 'immoral

behaviour', or any claimed membership of particular social group such as alcohol sellers in Iraq; or that he is currently of interest to anyone for these reasons".

10. The assessment the Authority conducted, as to whether the first appellant would continue to sell alcohol on his return, proceeded on the basis of findings that the JAM prohibited the sale and consumption of alcohol in his local area; that his cousins were beaten and whipped by members of JAM when they were found drinking; and that a friend of his who worked in the field was injured by JAM. The Authority was also prepared to accept that the prohibition on alcohol in Iraq made its sale "a viable business from a monetary perspective" (at [17], CAB 8). It did not accept, however, that the first appellant had suffered any specific incidents of harm by reason of his having sold alcohol, or that he would be harmed on his return for having sold alcohol in the past. In finding that it was "not persuaded that he would continue to sell alcohol upon return" (at [38], CAB 11), the Authority noted, inter alia, the first appellant's relatively good education and his diverse skills which would enable him to find alternate employment. The Authority placed particular reliance on the changed circumstances since the claimed (but rejected) incidents, which included the first appellant's marriage, shortly before leaving Iraq, to a woman who worked as a hairdresser right up until their departure, and their having had a child in Australia (at [38], CAB 11).

11. The Authority's conclusion that the first appellant would not engage in selling alcohol given the risks associated with selling liquor out of concern about his own safety and that of his wife and child (at [39], CAB 11-12), on which the appellants rely (AS [53]), should be viewed in the context of the above findings.

Part V: First respondent's argument

12. The sole ground of appeal alleges that the Federal Court erred in failing to find that the Authority committed jurisdictional error in failing to apply the principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (***Appellant S395***) when considering the complementary protection criterion under s 36(2)(aa) of the Act.

13. The appellants' argument that the reasoning in *Appellant S395* applies to consideration of s 36(2)(aa) rests on:

    a. the protective objective behind the provision and the absolute nature of the international obligations to which it gives effect, placing primary reliance

on the Explanatory Memorandum to the legislation pursuant to which it was inserted (AS [31(c)]-[31(d)]); together with

b. similarities between s 36(2)(a) and s 36(2)(aa) in terms of the standard of risk, or chance, of harm as to which the Minister must be satisfied (AS [31(e)]-[31(g)]).

14. The appellants' reliance on the above matters do not bring to account fundamental differences in the construction and application of the criterion in s 36(2)(aa) of the Act and the criterion in s 36(2)(a). The Minister contends that both as a matter of text and, significantly, context (as supported by the legislative history), the mandatory application of the principles in *Appellant S395* in considering s 36(2)(a) of the Act (as modified by s 5J since the time of that decision) is not similarly prescribed in relation to the complementary protection criterion in s 36(2)(aa).

Section 36(2)(a) of the Act and *Appellant S395*

15. At the time of this Court's decision in *Appellant S395*, s 36(2)(a) of the Act provided that a non-citizen qualified for the grant of a protection visa if, among other matters, the person was a person to whom Australia owed protection obligations under the *Convention Relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees 1967* (**Convention**). Article 1A(2) of the Convention provides that for the purposes of the Convention, a person is a refugee who:

> …owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…

16. The definition of refugee in the Convention contains four cumulative elements.[1] Relevantly for present purposes, the second of those elements is that the persecution feared must be "<u>for reasons of</u> race, religion, nationality, membership of a particular social group or political opinion" (emphasis added); and the third element is that the fear of persecution "<u>for one or more of those Convention reasons</u> must be 'well-founded'" (emphasis added). Those elements, subjective and objective respectively, reflect the purpose of the Convention to "protect the individuals of every country from persecution on the grounds identified in the

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1 *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45; (2014) 254 CLR 317 at [35] (Gageler J). His Honour was in dissent as to the outcome but this aspect of his Honour's reasoning is not controversial.

Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution".[2] As McHugh and Kirby JJ observed in *Appellant S395*, the object of the signatories to the Convention was "to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them".[3]

17. The third element of the definition, which is objective, "requires the decision-maker to decide what may happen if the applicant returns to the country of nationality". That task entails, in turn, consideration of the situation of a particular applicant and "identification of the relevant Convention reasons that the applicant has for fearing persecution".[4] The fallacy that the members of the Court forming the majority in *Appellant S395* identified in the Refugee Review Tribunal's approach in that case was its reasoning that because a person has not been persecuted in the past, he or she will not be persecuted in the future.

18. Justices McHugh and Kirby described the Tribunal's approach as fallacious because it assumed "that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted".[5] The reality of the situation was often, if not mostly, quite different. In particular, the applicant may act in a particular way "only because of the *threat* of harm"; and it is the threat of serious harm that constitutes the persecutory conduct.[6] It followed, in their Honours' opinion, that determining the issue of real chance without determining whether the modified conduct was influenced by the threat of harm was to fail to consider that issue properly.[7]

19. Justices Gummow and Hayne JJ identified the fundamental question for consideration as whether the applicant has a well-founded fear of persecution. To address the question by reference to what an individual is entitled to do, as distinct from what the individual will do, led, in their Honours' opinion, to considerations of what modifications of behaviour it was reasonable to require an individual to make without entrenching on the right. Their Honours considered that type of reasoning to distract from the fundamental question, and of relevance to whether an

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2 *Appellant S395* at 489 [40] (McHugh and Kirby JJ).
3 *Appellant S395* at 489 [41] (McHugh and Kirby JJ).
4 *Appellant S395* at 499 [73] (Gummow and Hayne JJ).
5 Emphasis in original.
6 Emphasis in original.
7 *Appellant S395* at 490-481 [43].

applicant had a well-founded fear of persecution for a Convention reason "only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged".[8]

20. Justice Gageler subsequently encapsulated the principle in *Appellant S395* as being that "a fear of persecution, if it is otherwise well-founded, remains well-founded even if the person concerned would or could be expected to hide his or her race, religion, nationality, membership of a particular social group, or political opinion by reason of that fear and thereby to avoid a real chance of persecution".[9] The principle "directs attention to why the person would or could be expected to hide or change behaviour that is the manifestation of a Convention characteristic" (emphasis added).[10] The concluding words of this latter statement, which was made in the context of a caution that the principle in *Appellant S395* "should not be extended beyond its rationale", highlight that central to the principle in *Appellant S395* is the causative formulation of the definition of refugee in the Convention. As Gageler J further observed, by reference to an extract from the reasons of Dyson JSC in *HJ (Iran) v Secretary of State for the Home Department*, the need for a person to conceal his or her race, religion, nationality, membership of a social group or political opinion in order to avoid persecution involves the "surrender" of "the very protection that the Convention is intended to secure for him".[11]

21. Section 36 of the Act has been amended since *Appellant S395* was handed down, inter alia as part of a suite of substantial amendments introduced by the *Migration and Maritime Power Legislation Amendment (Resolving the Legacy Caseload) Act 2014* (Cth) (**2014 amendments**). Section 5H of the Act now provides a definition of 'refugee', and s 5J provides a definition of 'well-founded fear', largely codifying the definition of 'refugee' under the Convention. Of particular relevance for present purposes, s 5J(3) now provides for exceptions to what constitutes a well-founded fear, and applies "if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country" (apart from a set of listed modifications relating to fundamental, innate or immutable characteristics).

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8 *Appellant S395* at 501 [82]-[83].
9 *SZSCA* at 330 [36].
10 *SZSCA* at 330 [37].
11 *SZSCA* at 330 [36], citing *HJ (Iran) v Secretary of State for the Home Department* [2011] AC 569 at 656 [110].

22. In *AWL17 v Minister for Immigration and Border Protection* [2018] FCA 570 at [41], Bromwich J said of s 5J(3) that it operates "so that modification of conduct can be required if it does not go so far as to compromise the essential terms of the Refugees Convention, now set out in s 5H". It followed that, pursuant to the provision, a person could not claim to have a well-founded fear of persecution "if reasonable steps could be taken to avoid a real chance of that persecution by modifying their behaviour, provided that the modification does not entail any of the matters listed in s 5J(3)(a), (b) or (c)".

23. Notwithstanding the 2014 amendments, the principles enunciated in *Appellant S395* may still have work to do in matters involving the determination of whether a person is a 'refugee' as defined in s 5H of the Act.[12] What is significant for present purposes is that while Parliament enacted s 5J(3) in relation to the criterion in s 36(2)(a), it has not made amendments of a similar nature in relation to the complementary protection criterion in s 36(2)(aa), to which we will now turn.

Section 36(2)(aa) of the Act

24. Section 36(2)(aa) was inserted into the Act by the *Migration Amendment (Complementary Protection) Act 2011* (Cth), which came into effect on 24 March 2012, several years after the Court's decision in *Appellant S395*. Section 36(2)(aa) of the Act provides an additional basis for the grant of a protection visa, in circumstances where the applicant does not fall within s 36(2)(a) because he or she is not a person about whom the Minister is satisfied that Australia has protection obligations because the person is a refugee.[13]

25. Read with the chapeau, s 36(2)(aa) provides:

> A criterion for a protection visa is that the applicant for the visa is:
>
> …
>
> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

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12 See *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111; [2017] FCAFC 176, [82].

13 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 (***SZTAL***) at 365 [1] (Kiefel, Nettle and Gordon JJ); 384-385 [69]-[73] (Edelman J).

26. The circumstances in which a non-citizen will suffer "significant harm" are identified in s 36(2A). The terms in s 36(2A) are, in turn, defined in a manner that is intended to facilitate Australia's compliance with its non-refoulement obligations under the *International Covenant on Civil and Political Rights* (the **ICCPR**) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the **CAT**). In *Minister for Immigration and Citizenship v MZYYL*, the Full Court of the Federal Court described the complementary protection scheme for which s 36(2)(aa) makes provision as being in the nature of a code, albeit one that did not precisely replicate Australia's obligations under the relevant international instruments.[14]

27. One feature of the regime to which the Full Court referred in this respect was that the relevant criteria and obligations are defined as part of the Act, rather than incorporating the definitions from the international instruments: see, by way of example, the definitions in s 5(1) of the Act of "torture" and "cruel or inhuman treatment or punishment".[15] So much is also apparent from s 36(2C) of the Act, which excludes from the application of the regime a number of circumstances in which Australia may have non-refoulement obligations.

28. The appellants' reliance in this regard on general statements in the extrinsic material as to legislative intention (AS [34]) should be approached with the usual caution that reading such material "is much less helpful than reading the legislation itself".[16] The description in the Explanatory Memorandum of Australia's non-refoulement obligations under the ICCPR and the CAT, as "absolute and cannot be derogated from",[17] says nothing about the scope of protection that the Act affords in relation to those obligations. Indeed, it is apparent from the following sentence in the Explanatory Memorandum, in particular the qualifying "even if a non-citizen is considered ineligible to be granted a protection visa", that the complementary protection regime in the Act and Australia's non-refoulement obligations under the international agreements may not be coincident. The description in the Explanatory Memorandum of Australia's non-refoulement obligations also says nothing about

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14 [2012] FCAFC 147 at [18].

15 *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147 at [18]-[20]; see also *SZTAL* at [1]-[5].

16 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 277 [74]; see also *Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue* (2009) 239 CLR 27 at 47 [47].

17 Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, p 3.5.

the transposition of inquiries necessarily at play in the context of the Convention to the complementary protection regime.

29. The question s 36(2)(aa) asks is whether there is a real risk that a person will suffer significant harm, as defined in s 36(2A) and subject to the matters in ss 36(2B) and 36(2C), as a "necessary and foreseeable consequence" of the person's return to the receiving country. The standard imposed by a "necessary and foreseeable consequence" is a high one.[18]

30. The term "significant harm" is exhaustively defined by reference to a range of conduct that a person may suffer. In order to fall within the terms of paragraphs (d) or (e) in s 36(2A), the acts or omissions constituting the conduct the subject of those paragraphs must be considered against Article 7 of the ICCPR.[19] The decision-maker must also consider, in the context of those paragraphs and paragraph (c), whether the acts or omissions in question arise from, or are inherent or incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR.[20]

31. By contradistinction with s 36(2)(a) of the Act, the harm to which s 36(2)(aa) refers is not formulated by reference to a person's inherent and immutable beliefs, attributes, characteristics, or membership of particular groups. Nor does it entail finding a nexus between the harm feared and those beliefs, attributes, characteristics or membership.

32. Having regard to an applicant's particular circumstances, in considering the criterion in s 36(2)(aa) a decision-maker may find that the applicant would modify his or her conduct on return to the receiving country, and in doing so avoid the relevant "significant harm" such that it would not be the necessary and foreseeable consequence of removal to that country. In some cases modification of conduct may not be possible – for example, an applicant may already have committed an offence for which he or she will receive the death penalty if returned to the receiving country. Where modification is possible, however, the terms of s 36(2)(aa) of the Act do not require the decision-maker to consider the rationale for any such modification. By contrast with the inquiry posed by Article 1A(2) of the Refugees Convention, which was the relevant inquiry under s 36(2)(a) at the

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18 *CRI026 v Republic of Nauru* (2018) 355 ALR 216; [2018] HCA 19 at [24].

19 See the definitions of "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s 5(1) of the Act.

20 See the definition of "torture" in s 5(1) of the Act.

time of the decision in *Appellant S395*, future behaviour on the part of an applicant that is responsive to a possibility of significant harm, as defined, does not itself involve a manifestation of the harm at which the criterion in s 36(2)(aa) is directed, such that the underlying motivation is required to be considered.

33. The decision in *Appellant S395* does not call for a contrary conclusion. The reasoning in that case squarely derives from the statutory text in issue, and in particular the adoption in the Act of the specific terms of the Convention. The rationale for the principle the Court developed in that case does not have work to do in the context of a provision that requires an assessment of the necessary and foreseeable consequences of a person's return to the receiving country. As Gageler J stated in *SZSCA* (emphasis added):[21]

> The principle has no application to a person who would or could be expected to hide or change such behaviour in any event for some reason other than a fear of persecution.
>
> The *S395* principle similarly has no application to a person who would or could be expected to hide or change behaviour that is not the manifestation of a Convention characteristic. That is so even if the person would or could be expected to change that behaviour in order to avoid a real chance of persecution by reason of the perpetrators of persecution wrongly imputing a Convention characteristic to the person. <u>The price that the person would be paying to avoid persecution in such a case would not be the sacrifice of an attribute of his or her identity that is protected by the Convention</u>. As Downes J succinctly put it in *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs*, the principle has no application to a case which 'does not contemplate changed behaviour to avoid persecution but to avoid creating a wrongful perception of membership of a protected class'.

34. Additionally, having regard to 2014 amendments, which sought to give express statutory effect to the principles in *Appellant S395* (albeit in a confined way), the absence of any reference to such considerations in the context of the complementary protection criterion is consistent with a legislative intention that such considerations are not applicable in considering the criterion in s 36(2)(aa).

The appellants' contentions

35. The appellants submit that the considerations in *Appellant S395* should "apply with equal force" to a claim for complementary protection (AS [38]), without identifying

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[21] At [37]-[38].

a rationale that is grounded in the text of the Act or its context, consistently with generally accepted approaches to statutory construction.[22] The Federal Court authorities which the appellants canvass in the subsequent paragraphs (AS [40]-[43]) illustrate only that the issue that this case raises for resolution has not yet been determined.[23]

36. The appellants contend that the approach taken in *Appellant S395* as to how to consider modifications of behaviour in respect of determining whether a person faces a real chance of persecution applies to consideration of s 36(2)(aa) because the test for 'real risk' under s 36(2)(aa) is the same as that required for a 'real chance' under s 36(2)(a) (AS [31]).[24] That proposition does not follow from the statutory language that the appellants emphasise. The respective 'real chance' and 'real risk' aspects of s 36(2)(a) and s 36(2)(aa) are the standards by which the relevant decision-maker is required to consider the relevant risks of harm. That the standard of risk under s 36(2)(a) and s 36(2)(aa) might be said to be the same in this respect says nothing about the substance of the inquiry that the provisions respectively require.

37. Later in the submissions, the appellants contend that the task required by s 36(2)(aa) is to consider the question of "real risk"; and that in discharging that task the Authority may not repeat or rely on the same reasoning process as it did for s 36(2)(a) (AS [45]-[47]). Even if this proposition were accepted, it is not apparent what follows from it in so far as informing the proper construction of s 36(2)(aa) and, specifically, the application of *Appellant S395*.

38. In any event, the proposition is too broadly stated. Although an applicant's claims for protection under s 36(2)(a) and their claims for protection under s 36(2)(aa) may not wholly coincide, it has long been recognised that there may be a significant degree of overlap in terms of the factual substratum on which those

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22 *SZTAL* at 368 [14] (Kiefel CJ, Nettle and Gordon JJ), citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28 and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

23 Contrary to the suggestion in the appellants' submissions (AS [43]), the argument in *CTY15 v Minister for Immigration and Border Protection* [2019] FCA 197; (2019) 163 ALD 590 that Perry J considered involved the principles in *Appellant S395* related to the appellant's claim for protection as a refugee: see at [4]-[6], [47], [52]-[53].

24 *Minister for Immigration v SZQRB* (2013) 210 FCR 505 at 552 [246] (Lander and Gordon JJ); [2013] FCAFC 33.

claims are based.[25] To the extent of any overlap in the factual bases, the Authority is entitled to rely on its earlier factual findings, provided that it applies the correct legal test to them.[26]

The approach of the Authority in the present case

39. On the basis of the construction of s 36(2)(aa) for which the Minister contends, outlined above, the Authority's approach to determining that the first appellant did not satisfy s 36(2)(aa) was not attended by any error. It correctly identified the question it needed to ask (at [59], CAB 16). It found, as a fact, that the first appellant would not work as an alcohol seller upon return to Iraq (at [60], CAB 16).

40. For the reasons set out above, there was no additional requirement for the Authority to ask itself why the first appellant would cease selling alcohol, in considering whether the first appellant satisfied the criteria in s 36(2)(aa). That was not a question that the Authority needed to consider in determining whether there were substantial grounds for believing that as a necessary and foreseeable consequence of the first appellant being removed from Australia to Iraq, there was a real risk that he would suffer significant harm.

41. It follows that the judgment of the Federal Court of Australia, on the appeal from the Federal Circuit Court of Australia, was correct.

Part VI: Statement of respondent's argument on notice of contention or cross-appeal

42. Not applicable.

Part VII: Time estimate for oral argument

43. The Minister estimates that he will require one hour for the presentation of his oral argument.

Dated 25 November 2020

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25 See eg *BCX16 v Minister for Immigration and Border Protection* [2019] FCA 465 at [23] (Charlesworth J).

26 *Minister for Immigration and Citizenship v Applicant A125 of 2003* (2007) 163 FCR 285.