HIGH COURT OF AUSTRALIA

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Details of Filing

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HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DQU16, DQV16 & DQW16**

Appellants

and

MINISTER FOR HOME AFFAIRS

First Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I: Certification

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

PART II: Outline

Factual background to the ground of appeal (RS [4]-[11])

2. The facts found by the Immigration Assessment Authority, in assessing the first appellant's claims against the criteria in ss 36(2)(a) and 36(2)(aa) of the *Migration Act 1958* (Cth), provide an instructive context for the issue of statutory construction that arises in the present case.

    - Decision and reasons of the Authority (Core Appeal Book 5) at [9], [13], [35]-[42], [57]-[62]

3. On the basis of the Authority's finding, made in the context of assessing s 36(2)(a), that the first appellant would not sell alcohol on his removal to the receiving country, the Authority concluded that there were not substantial grounds for believing that as a necessary and foreseeable consequence of being removed the first appellant would suffer significant harm as defined.

4. The appellants' contention, that the Authority needed to undertake a further inquiry under s 36(2)(aa), as to why the first appellant would not engage in that behaviour, is not supported by the terms of s 36(2)(aa), nor is it consistent with the purpose of the provision.

Construction of s 36(2)(aa) of the Migration Act

5. Section 36(2)(aa) applies where an applicant for a protection visa does not satisfy s 36(2)(a).

6. Read with other provisions in s 36, in particular subsections (2A) and (2B), s 36(2)(aa) provides a further basis for protection, which engages with Australia's non-refoulement obligations under other international instruments, primarily the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**). [RS [24], [26]]

10 7. The non-refoulement obligations in the ICCPR and the CAT to which s 36(2)(aa) gives statutory force are concerned with whether a person can be removed to a particular State without suffering identified forms of harm. Consistently with those obligations (albeit in modified terms), s 36(2)(aa) is framed by reference to the risk of a non-citizen suffering specified harms as a necessary and foreseeable consequence of removal to a receiving country. [RS [29], [30]]

8. Assessing the risk that a non-citizen will suffer significant harm as defined involves focusing on the individual circumstances of the non-citizen, and the basis on which he or she claims that those circumstances give rise to the requisite degree of risk as a necessary and foreseeable consequence of removal. [RS [31]]

20 9. In some, perhaps many, cases in which the criterion in s 36(2)(aa) may be satisfied, the basis for the risk of significant harm will be inherent to the non-citizen. But there may also be cases, of which the present is one, where on the findings of the decision-maker a non-citizen is in a position to, and would on their removal to the receiving country, behave in a manner that is different from when he or she was there previously and in doing so avoid the harm in question. [RS [32]]

10. Such difference in behaviour does not operate as a trigger for a further inquiry under s 36(2)(aa) into the reasons for the difference. There is no express requirement of that nature in the text of s 36(2)(aa), and it does not arise as a matter of necessary implication having regard to the purpose of the criterion. [RS [32]]

30 11. The appellants' contention to the contrary does not recognise the fundamental differences between s 36(2)(a) and s 36(2)(aa), both in their terms and in the

underlying obligations to which they give effect. It relies primarily on the reasoning in *Appellant S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (***Appellant S395***) (Authorities Bundle V5 Tab 6) when that reasoning is not transferable to the inquiry in s 36(2)(aa). [RS [33]]

- *Appellant S395* at 489-490 [40]-[43] (Authorities Bundle 1231 ff) (McHugh and Kirby JJ); at 500 [80]ff (Authorities Bundle 1242 ff) (Gummow and Hayne JJ
- *Minister for Immigration v SZSCA* (2014) 254 CLR 317 at 330 [36] (Authorities Bundle V5 Tab 8 p 1417) (Gageler J)

10 12. Looking at the present case, the Authority focused on what the first appellant would do on removal. Why he would do what the Authority found he would do, and whether or not that was to avoid the risk of harm he advanced as a basis for his claim for complementary protection, does not form part of the assessment that s 36(2)(aa) of the Migration Act requires.

- See, by analogy, *CRI026 v Republic of Nauru* (2018) HCA 19; 92 ALJR 529 at 541 [41]-[46] (Authorities Bundle V6 Tab 15 p 1579)

Dated: 4 February 2021

A. Mitchelmore.

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Anna Mitchelmore

Greg Johnson