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

RESPONSE BY THE APPELLANT TO A NOTE FROM THE COURT[1]

1. The Court by note has asked the following question:

> *"It is the appellant's sole ground of appeal that the respondent fell into jurisdictional error in not considering whether any non-refoulement obligations were owed to the appellant in connection with the Minister's decision not to revoke the cancellation of the appellant's visa. The respondent argues that even if it be accepted (contrary to the respondent's submissions) that there was an obligation (howsoever arising) on the part of the Minister to consider the issue of non-refoulement, a consideration of it was bound to result in the same conclusion.*
>
> *The parties have put their submissions on this issue of 'materiality'. The Court does not seek further submissions on that question. The Court seeks submissions only on the procedural question: if the respondent's argument is accepted, why special leave should not be revoked?"*

2. Special leave should not be revoked because the question of principle that was the reason for the grant of special leave still arises to be determined and arises no less squarely if it is considered by this Court that the exception to the 'cessation' clause in the *Refugees Convention* could never have been exercised in the Appellant's favour, even if that is accepted contrary to our submissions.[2]

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[1] The appellant certifies that this note is in a form suitable for publication on the internet.

[2] That having been the basis of the Respondent's submission as to materiality, see RWS paragraphs [36]-[39].

3. Materiality, logically and necessarily, can only arise as the last question when determining a contention of jurisdictional error, not as a threshold question leading to a summary outcome. It is essential that the nature of the decision maker's breach of an inviolable statutory limitation is clearly identified and considered before any question as to whether *that* error could not have made any difference to the ultimate performance of the statutory task.

4. Here any question of materiality should be considered only after the construction of section 501CA(4) is undertaken, because the nature of the error found (in this case the asserted error including the 'automatic' exclusion from consideration of non-refoulement related considerations) shapes the application of the materiality doctrine and that analysis must take place by reference to the particular requirements of the statutory framework[3].

5. Application of the materiality doctrine in this case (in the event error is otherwise found) is complicated by the fact that the alleged automatic failure to engage with non-refoulment stymied the process of factual consideration and impacted upon the reasons for decision and the evidence before the Minister.

6. What was described as "no easy task" in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at [145] becomes, in the Appellant's submission, impossible without first analysing and explaining the scope and nature of the statutory task in question (here a proper basis for special leave) and identifying the principles of materiality as they apply to the particular statutory matrix (also here a proper basis for special leave not being revoked).

7. This is an additional reason not to fully determine the matter on the basis of a pre-emptive application of the materiality doctrine.

8. The construction of section 501CA(4) in this matter involves significant questions of principle which are unaffected by the ultimate conclusion as to materiality.

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[3] *PQSM v Minister for Home Affairs* [2020] FCA 1540 at [140]-[141] per Banks-Smith and Jackson JJ referring to *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555 at [54].

9. Those questions of principle include:

   A. Can consideration of non-refoulment be deferred, i.e. be automatically treated as not constituting 'another reason' for the purposes of section 501CA (the position stated by the Minister in Ministerial Direction No 65), on the basis that a person is able to lodge a protection visa?

   B. Is such a deferral tantamount to a 'failure to consider' or is a different type of error involved when a matter is 'automatically' excluded from consideration?

   C. Are the Minister's obligations under section 501CA(4) shaped solely by the representations made, or can the 'another reason' arise from other facts known to the minister?

   D. If so, can such a reason arise from facts the Minister is imputed to have knowledge of, such as in this case the signing of the 'CPA' and the relocation of the appellant as a person covered by it pursuant to a funded refugee subclass 200 visa?

10. A further question of principle arises, do sections 91A to 91G of the *Migration Act 1958* (Cth) apply to non-citizens who were covered by the 'CPA' and subsequently granted a visa that was then cancelled?[4]

11. Further matters for consideration in the case involve consideration of international law principles. They include:

   A. How is a state party to the *Refugees Convention* considered to have accrued obligations under the Convention?

   B. Is it only matter of domestic law (as suggested by the Respondent) and therefore governed by visa criteria, or is the question one to which the

[4] This being the matter upon which the Minster was granted leave to file additional submissions (T43.1873-81).

application of international law is relevant to the conduct of a state? (The relevant asserted conduct in this matter being the signing of the 'CPA' that describes the long stayers as "refugees" and then funding the relocation of the child Appellant to Australia).

12. Finally there is a difference on a point of principle between the parties (which would tell against revocation of special leave) as to the meaning to be accorded to the phrase "compelling reasons *arising out of* previous persecution" in Article 1C of the *Refugees Convention*. The Respondent effectively contends the matters afflicting the Appellant in Australia and the magnitude of the consequences of his removal from Australia cannot be considered as compelling reasons arising from his persecution as a refugee for the purposes of Article 1C(5) (Respondent's Submissions at [10]; T61.2702-22); the Appellant contends to the contrary and ascribes a broader construction to the expression "*arising out of*"[5]. The revocation of special leave would result in that issue not being addressed.

13. For these reasons it is appropriate that the question of whether the Minister erred in the construction and application of the statutory task under s 501CA of the Migration Act should be determined to final judgment.

14. In each other case involving questions of materiality before this Court, those questions have been addressed by reference to the evidence after comprehensive analysis of the relevant statutory framework and determination that there had been a breach of an inviolable limitation of the Act. Special leave has not been revoked on this basis in any case that we have been able to locate. The course adopted in SZMTA, BEG15, CQZ15 and in Hossain by all members of the Court in each case, which considered the issue of materiality as the last step in the analysis, should also be followed in this case.

[5] T25 at [1085] - T26 [1109]

15. Assigning materiality its appropriate place in the consideration of an assertion of jurisdictional error maintains the jurisdiction of federal courts in supervising executive power.

16. No question of the expedient application of the Court's resources applies at this stage (as it might when considering the grant of special leave) as the matter has been fully argued.

25/8/20 AMENDED TO INCLUDE CERTIFICATION FOR PUBLICATION.

Dated: ~~14 August~~ 2020

Shane Prince SC
State Chambers

Indraveer Chatterjee
8 Garfield Barwick Chambers

Stephen Lawrence
Black Chambers

To: The Respondents