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 OUTLINE OF ORAL ARGUMENT

The appellant certifies that this outline of oral argument is in a form suitable for publication on the internet.

A. The nature of the statutory power under section 501CA and its place in the Act

1. The section creates a broad power to revoke a "*mandatory*" cancellation of a visa that arises from the operation of section 501(3A). The discretion is enlivened on the making of representations and allows for revocation if there is "*another reason why the original decision should be revoked.*" The power applies to any visa type. The matters that can be taken into account in exercising the discretion are unconstrained except by the generality and breadth of the expression "*another reason*".
2. A statutory obligation to consider the representations "*is necessarily implicit in the statutory regime*" and *"requires the Minister to engage in an active intellectual process with reference to those representations.*[1] This extends to any "*significant and clearly expressed relevant representations made in support of a revocation request.*"[2]

B. The representations (the Appellant is a refugee and told the Respondent that he was)

3. The Appellant's traumatic and tragic background were set out by Greenwood J below[3]. The Appellant was brought to Australia by the Australian Government (his visa was "*funded*" see RWS at [12]) from a refugee camp in Hong Kong. This occurred after the *Comprehensive Plan of Action* ("CPA", FM111) was agreed, as part of an international effort to deal with such Vietnamese refugees. The Appellant was one of the cohort identified in the CPA as "*long stayers*", who were

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[1] *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [36.d.] JBA vol 5 Tab 22, *Tickner v Chapman* (1995) 57 FCR 451 at 476 – 477, 495).

[2] *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [37] JBA vol 5 Tab 22

[3] Core Appeal Book 44 [21]-[22]. Charlesworth and O'Callaghan JJ adopted Greenwood J's recitation of the background facts: Core Appeal Book 77 [152].

assigned refugee status under that agreement (and by the signatories to that agreement) within meaning of Article 1A of the Refugees Convention (FM114 line 32, FM115 line 33, 50). The Respondent is imputed to be aware of these facts.[4] The CPA is referenced in the Act: Subdivision AI, ss91A-91G.

4. The materials before the Respondent were replete with references to the Appellant being a refugee (See Appellant's first representation to the Respondent at FM48 line 20, FM50 line 38, FM50 line 48, FM52 line 16; second representation to the Respondent at FM58 line 20, FM58 line 48, FM59 lines 1 – 22; Internal Departmental submission to the Respondent at FM66 line 12, FM66 line 32, FM67 line 15 – 28, FM69 line 38, FM70 line 25; and the international obligations assessment at FM78).[5]
5. There is no evidence that the cessation provisions have ever been applied to the Appellant.

C. The failure to consider and the reason for it (the compartmentalisation of non-refoulement)

6. The Respondent failed to consider the Appellant's refugee status, a matter that was "*significant and clearly expressed*".[6] The most obvious explanation is that the Respondent decided international non-refoulment obligations should be deferred to a future potential protection visa process. This erroneously assumed a synchronicity between such obligations and the matters that could be considered under section 36.
7. In Ministerial Direction No 65 (FM5) the Minister stated (FM24 line 40) that where a person can apply for a protection visa it is "*unnecessary*" to determine whether non refoulement obligations are owed. The Appellant was instructed to make any submission in accordance with the direction.[7] The Appellant followed the instructions.
8. The Ministerial Submission (FM61) advised the Minister in respect of international non-refoulement only that, (FM70 line 25), "*Mr [S270] arrived in Australia as the holder of a Funded Special Humanitarian (subclass K4B12) visa. In 2006 the department found that Australia did not owe*

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[4] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 per Gibbs CJ at [30] to [31].

[5] The Appellant was likely brought to Australia on a *Code 200 Refugee Visa* (Respondent's Submissions at [12]). The Respondent and his officers wrongly understood him to have arrived in Australia on a *Funded Special Humanitarian (subclass K4B12)* visa (FM 63 at 25, FM 79 at 15). As a matter of law such a visa did not exist at the time. If the Minister had correctly understood the Appellant had arrived on a "*Code 200 Refugee Visa")* his non refoulement claim would have been all the more obvious.

[6] *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [37]- JBA vol 5 Tab 22

[7] The letter serving the direction on the Respondent (FM39) advised the Appellant to, (FM41 line 25) make a submission, "*in accordance with the instructions outlined below",* with those instructions including to, (FM41 line 40), *"address each part in Part C that is relevant to your circumstances".*

protection obligations to Mr [S270]. Mr [S270] Is not barred from applying for a protection visa Attachment K". Attachment K is then found at FM78.

9. The Minister's reasons are then silent on the question of non-refoulement, leading to the inference it was not considered.[8]
10. Section 36 is derivative and declaratory of refugee status. A refugee is someone who has been recognised as such, whether through the prism of the Act or otherwise. Assessment of the Appellant as a refugee would not have been done via visa criteria as that power at the time was non statutory.[9]
11. There is no basis to construe section 501CA to exclude matters that would otherwise engage obligations reflected in section 36 of the Act or for the assertion that the question of whether a person is a refugee is only relevant on the cancellation of a protection visa. The words of the section allow no such limitations.
12. The Ministerial direction interferes with the proper operation of the Act. It has led to a compartmentalisation of the Act and the reading of words into section 501CA so as to construe it to read, *"another reason (other than status of a refugee, except in cases of cancellation of a protection visa)".*

D. Impact of failing to consider the Appellant's status under the Refugee Convention

13. The Appellant is a refugee, or at least a serious question is raised as to whether he is one. Cessation has never been considered in respect of him and cannot occur in these proceedings. It is not in Australia's interest to breach the *Refugees Convention*. If consideration of this matter of international significance had occurred it may have led to a different decision. The Appellant lost the opportunity to have these matters considered in his interests including the opportunity to argue why the cessation provisions should not be engaged if that were to be the course proposed by the Minister.

Dated: 4 ~~August 2020~~ Amended 25/8/20 to include certificate for publication.

Shane Prince SC ***Indraveer Chatterjee*** ***Stephen Lawrence***

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[8] *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16 at [34].

[9] It, *"was a matter within the discretion of the Executive; by administrative arrangements responsibility had been allotted to the Minister for Immigration and Ethnic Affairs assisted by an Interdepartmental Committee" (NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [35].This is in This is in contrast with the factual situation considered in *Minister for Immigration & Multicultural & Indigenous Affairs v Huynh* [2004] FCAFC 47 which concerned a visa grant after commencement of the *Migration Amendment Act* (No 2) 1992 (No 84 of 1992) which "provided for the first time for a procedure under the Act for the determination of refugee status" (*Huynh* at [11] and [22])