HIGH COURT OF AUSTRALIA

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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 REPLY

Part I: Internet certification

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

Part II: Submissions in reply

2. The supposed controversies of fact enumerated at paragraph five of the Respondent's written submissions (RWS) and the attempt to obfuscate the Appellant's status as a refugee arising from the unique, clear, notorious and closed historical circumstances of his arrival in Australia, should be rejected. The Appellant was a refugee from the aftermath of the Vietnam war, brought to Australia by the Australian Government from a refugee camp in Hong Kong as part of an international effort to deal with such Vietnamese refugees. The salient facts in this case are simple and agreed, only their legal characterization is disputed.[1]

3. The Minister's attempt to generate a factual controversy that does not exist arises from the persistent misconception that the only refugee of relevance is one who has been given a visa which expressly references the *Refugees Convention*. Such a misconception is consistent with Ministerial Direction No 65[2] ("MD65") and the Minister's reasoning that obligations arising from the *Refugees Convention* must only be considered through the prism of s36 of the Act, where it is available. This compartmentalization involves jurisdictional error because it constricts consideration of the broad range of matters relevant to the s501CA discretion, by carving out any matter which could otherwise be considered under s36 of the Act.

[1] Even if these facts could not be found by this court, the Appellant had a viable case for their acceptance that needed to be considered and renders the errors of jurisdiction material.

[2] FM5

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4. MD65 states that claims "*which may give rise*"[3] to obligations to not return, deport or expel are relevant to the s501CA discretion. The direction then however divides people who make claims "*which may give rise*" to obligations to not forcibly return, deport or expel them into two types:
    a. Those who are eligible to make a protection visa application (for whom these matters are not be considered under s501CA) [4];
    b. Those who are not eligible to make a protection visa application (for whom these matters should be weighed carefully against the criminal conduct)[5].
5. The issue then is whether this carve out is consistent with the breadth of considerations encompassed by s501CA.
6. The Appellant's repeated representations to the Respondent to have been a Vietnamese refugee brought to Australia by the Australian Government in the late 1980s having escaped the 'post-war terrors' of Vietnam via a refugee camp is a claim which "*may give rise"* to an obligation on Australia to not forcibly return, deport or expel him from Australia. True it is that MD65 did not bind the Respondent, however it was authorized by him as reflecting a view of the Act. There further is no evidence that the Respondent adopted a different approach to the scope of the discretion under s501CA in this case, nor is there likely to be given the presumption of regularity. The briefing note that accompanied the prepared reasons for decision advised the Respondent (under the heading 'international non-refoulment obligations'): *"Mr. Tran is not bared (sic) from applying for a protection visa".* The combination of this advice and the silence of the reasons on non-refoulement speaks to the error.
7. This court would conclude: "*the appellant had been "prima facie" recognized by Australia as a refugee within the meaning of the Refugees Convention, with the result that Australia had 'accrued obligations'"* under the *Refugees Convention* (RWS at [5(a)]) because a textual analysis of the CPA[6] reveals the signatory states did not assign the 'long stayers' some lesser status than the relevant legal status referred to in the agreement and entrenched in international law.[7]

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[3] MD65 at 14.1 (3) Part C
[4] MD65 at 14.1 (4) Part C
[5] MD65 at 14.1 (6) Part C
[6] FM 111
[7] The reference in Part E(1)(b) of the CPA to "*refugees*" is clearly a reference to the status referred to earlier in Part D of the agreement, i.e. *Refugees Convention* status. Noting also that (our emphasis), "*The draft Comprehensive Plan of Action aimed to cover the various aspects of the Indo-Chinese refugee problem, including*

8. The CPA, the date of the Appellant's arrival in Hong Kong and Australia's subsequent resettlement of the Appellant (according to the Respondent pursuant to a "*Code 200 Refugee Visa"*[8]) puts beyond doubt that he was accorded refugee status and the Respondent is deemed to be aware of that fact.[9] The assessments referred to at RWS [17] were expressly premised on the fact that the visa criteria for subclass K4B12 visa, *"did not require an assessment under the Refugees Convention"*. The assessments in that sense misdirected the Respondent that whether the Appellant as a matter of international obligation was a refugee when he arrived in Australia was determined by the criteria of the visa he was granted.[10] The fact the Appellant's visa class status changed at some point is not determinative of the question of his refugee status.[11]

9. The Respondent could not exercise the discretionary statutory power created by s501CA(4) against a person who asserts they are a refugee (as the Appellant did albeit without legal precision), without a) considering whether that status exists b) understanding and considering what consequences will likely flow from permanent revocation of an existing right of residency and c) considering whether such consequences will put the Commonwealth at risk of breaching its *Refugees Convention* obligations. The Act requires such matters be considered because of: "*the Minister's obligation to engage in an active intellectual process with significant and clearly expressed relevant representations made in support of a revocation request".*[12] It can scarcely be supposed that a representation by a person who came to Australia as an unaccompanied child that they came as a 'refugee' is not a significant matter in the

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the question of clandestine departures, regular departure programmes, reception of new arrivals, refugee status and the promotion and implementation of durable solutions, notably resettlement and repatriation". See FM 103

[8] RWS at [12].

[9] The *Refugees Convention*, "*says nothing about procedures for determining refugee status, and leaves to states the choice of means as to implementation at the national level"* ('The Refugee in International Law' (Third Edition) Guy s. Goodwin-Gill and Jane McAdam) pg 54) and the practise of states (and the UNHCR) of according refugee status on a group prima facie basis is common and indeed the majority of the world's refugees are recognised in such a manner. Such recognition is permanent and, "*once refugee status has been determined on a prima facie basis, it remains valid in that country unless the conditions for cessation are met, or their status is otherwise cancelled or revoked"*. See United Nations High Commissioner for Refugees. 'Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status' at [1] to [3] and [7] (available online at https://www.unhcr.org/558a62299.html) and The Refugee in International Law' (Third Edition) Guy s. Goodwin-Gill and Jane McAdam) pg 53.

[10] 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***"**.

[11] Contrary to RWS at [20](a).

[12] *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [37]

context of the subject matter, scope and purpose of the Act. Refugee status engages Australia's international legal obligations, but its continuance or cessation also has human consequences. As Allsop CJ states in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [3] (with whom Markovic and Steward JJ agreed): "*Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament".* The failure to engage with the Appellant's assertion of legal status denied the Appellant of a potentially persuasive reason to maintain his current life and family in Australia and risked Australia breaching its international legal obligations.

10. The submission that: "*the appellant's submissions to this Court also make the contradictory claim that the appellant "(despite being told not [sic] in the correspondence of 26 April 2016) squarely submitted to the Respondent that he was a refugee" (*RWS [10(c)]) well demonstrates the human significance of refugee status. Despite not expressly addressing non refoulement the Appellant was unable to explain his circumstances without referring continually to a status that reflected his key personal narrative and identity; flight and sanctuary as a refugee. The Respondent was required to engage with this.[13]

11. *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120 (relied upon by the Respondent at RWS at [26]) was concerned with s501(2) of the Act[14] and premised upon the fact that the Appellant in that matter could apply for a protection visa: (our emphasis) *"at which point the Minister would be obliged to consider <u>any</u> non-refoulement obligations <u>as well as the prospect of indefinite detention should it arise</u>".*[15] In contrast the Appellant contends that the question of whether he already has refugee status under the *Refugees Convention* will not be able to be considered under s36 should be apply for a protection visa.

12. It is accepted that the Attachment K was put to the Appellant with other material that the Department proposed to put before the Respondent. This in no way dilutes the inference

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[13] *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [53] – [54]
[14] S501(2) does not pose the questions posed by s501CA(4) as to whether the Minister is satisfied upon the representations made that there was "*another reason why the original decision should be revoked*" in the context of a requirement to consider representations see *Minister for Home Affairs v Omar* [2019] FCAFC 188 *at* [67]
[15] *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120 at [44].

that arises that the Respondent failed to deal with the non-refoulement question in exercising the statutory discretion and signaled his intention to do so to the Appellant.

13. A finding that: "*the appellant refrained from referring to his alleged non-refoulement fears in his submissions to the Minister because of the terms of Direction No. 65"* (RWS at [5(c)]) is not necessary to the Appellant's argument. The Appellant relies upon those documents primarily as indicating the compartmentalized approach of the Respondent.[16]

14. The Respondent's invitation[17] to engage in a merits analysis (clothed in a submission as to materiality) should be rejected as baseless. Only the executive can make a determination under Article 1C(5) of the *Refugees Convention* stripping the Appellant of his status as a refugee and to date this has not occurred. Within this invitation is an erroneous claim that there is "*no evidence*" of the Appellant ever being persecuted in Vietnam: *"the appellant's claim at its highest being to have suffered trauma and dislocation in the refugee camp in Hong Kong*" (RWS at [38]). This overlooks the Appellant's claim, (our emphasis) "*my wife, <u>like me</u>, escaped Vietnam as a child <u>fleeing the post war terrors</u>*",[18] the salient fact the Appellant's parents put their unaccompanied children on a fishing boat to Hong Kong and the conclusive circumstance that Australia signed the CPA (within whose terms the Appellant fell as a refugee under the *Refugees Convention*) and then afforded him protection. The aspersion (also put by the Respondent during the hearing of the special leave application[19]) that the Appellant would somehow be regarded by this Court as an economic migrant should be rejected as supported by no evidence.

Dated: 26 June 2020

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

To: The Respondent

[16] See AWS at [35] to [39], [41] – [42] and [55]
[17] RWS [36] to [39]
[18] FM 58
[19] Where it was said by counsel, " *Secondly, the trauma that he experienced that is referred to in the material arises from his eight years in a refugee camp in Hong Kong, after he was sent there by his parents in about 1982, away from poverty in Vietnam".*