HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

PLAINTIFF M1/2021
Plaintiff

and

MINISTER FOR HOME AFFAIRS
Defendant

PLAINTIFF'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. A delegate of the defendant, the Minister for Home Affairs, made a decision under s 501(3A) of the *Migration Act 1958* (Cth) to cancel the plaintiff's Refugee and Humanitarian (Class XB) visa, subclass 202 (Global Special Humanitarian).

3. Pursuant to s 501CA(4) of the Migration Act, the Minister may revoke such a cancellation decision if: the person whose visa was cancelled makes representations to the Minister; and the Minister is satisfied that either the person passes the "character test" (as defined in s 501(6)) or there is "another reason" why the original cancellation decision should be revoked.

4. The Minister invited the plaintiff to make representations about why the decision to cancel his visa should be revoked, and the plaintiff took up that invitation. The plaintiff's representations included, in substance, that returning him to his country of citizenship, South Sudan, would expose him to persecution, torture and death and would contravene international non-refoulement obligations owed to him.

5. A delegate of the Minister decided not to revoke the original decision to cancel the plaintiff's visa. In considering whether there was "another reason" for revocation,

the delegate said that the plaintiff's circumstances "may give rise to international non-refoulement obligations" and acknowledged that the plaintiff had raised the issue of non-refoulement obligations being owed to him. The delegate stated, however, that it was "unnecessary to determine" whether non-refoulement obligations were owed to the plaintiff, because the plaintiff could make an application for a protection visa, at which time the existence or otherwise of international non-refoulement obligations would be "fully considered".

6. The central substantive issue presented by the questions of law in the Special Case is whether, by the delegate proceeding in that manner, the non-revocation decision is affected by jurisdictional error (Question 3). Other constituent issues that arise are:

(a) whether the delegate was required to consider those of the plaintiff's representations in which the plaintiff raised a potential breach of Australia's international non-refoulement obligations, in circumstances where the plaintiff remained free to apply for a protection visa (Question 1);

(b) whether the delegate:

(i) failed to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act (Question 2(a));

(ii) denied the plaintiff procedural fairness (Question 2(b));

(iii) misunderstood the Migration Act and its operation (Question 2(c)).

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

7. It is not necessary to give notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Judgments below

8. No court has reviewed the delegate's non-revocation decision.

Part V: Facts

9. The facts are set out in the Special Case and the documents annexed thereto. The following matters are emphasised.

10. Section 501CA of the Migration Act relevantly provides as follows:

> **501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**
>
> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
>
> (2) For the purposes of this section, ***relevant information*** is information (other than non-disclosable information) that the Minister considers:
>
> (a) would be the reason, or a part of the reason, for making the original decision; and
>
> (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
>
> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
>
> (ii) particulars of the relevant information; and
>
> (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
>
> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.
>
> (5) If the Minister revokes the original decision, the original decision is taken not to have been made.
>
> …

11. In response to an invitation to make representations about revocation of the decision to cancel his visa, the plaintiff made various representations to the Minister,[1] including that:

(a) "We left South Sudan as refugees because as citizens of the Denka tribe we were being hunted by the much larger and more powerful Nual tribe, and because my father was amongst the first of us to be killed we had no protection whatsoever";[2]

(b) the plaintiff was a part of a tribe that was "both peaceful and a minority" and was among the "targets of everyone else";[3]

10 (c) if returned to South Sudan, the plaintiff would face persecution, torture and death;[4]

(d) "Sending me back to South Sudan is sentencing me to the same fate as my father";[5]

(e) if returned to South Sudan, the plaintiff "might be tortured before being killed by the Nual or ISIS";[6]

(f) "… forcing me to return without any political or military alliances, affiliations or aspirations is exactly the same as sentencing me to death";[7] and

(g) "… due to 'non-refoulment obligations', I didn't think it was possible to force me back to South Sudan … I spoke to my mother last night, and she tells me

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1 Special Case filed on 28 April 2021, [10]-[14] (**SCB 71-72**). All references to page numbers in the special case book are references to page numbers at the top of the page.

2 Annexure D to the Special Case (**SCB 101, 106**).

3 Annexure D to the Special Case (**SCB 97, 111**).

4 Annexure D to the Special Case (**SCB 104, 113**).

5 Annexure D to the Special Case (**SCB 98, 113**).

6 Annexure D to the Special Case (**SCB 100, 113**).

7 Annexure D to the Special Case (**SCB 101, 106**). See also **SCB 104**. The plaintiff also referred to his possible removal to South Sudan as sending him to a "premature death" (**SCB 96**, **101**, **106, 111**), and said that the threat of being removed caused him to face his own mortality (**SCB 100, 114**).

that the situation in regards to my tribe, Dinka, remains fundamentally unchanged to the killing since we fled there just over 20 years ago … I'm outright scared about the prospect of being forced back to South Sudan".[8]

12. The plaintiff squarely raised, in his representations about revocation, the prospect that any removal of him to South Sudan would expose him to serious harm and even death and would contravene international non-refoulement obligations owed to him. Those representations advanced a substantial, clearly articulated argument as to "another reason" why the original cancellation decision should be revoked.

13. On 9 August 2018, a delegate of the Minister decided, purportedly pursuant to s 501CA(4) of the Migration Act, not to revoke the cancellation of the plaintiff's visa, and gave reasons for that decision.[9]

14. The delegate was not satisfied that the plaintiff passed the character test.[10] It was not in dispute that the plaintiff had been sentenced to an aggregate term of 12 months' imprisonment.[11]

15. The delegate was also not satisfied that there was "another reason" why the original cancellation decision should be revoked.[12] In so finding, the delegate stated, among other things, that:[13]

International non-refoulement obligations

46. [The plaintiff] arrived in Australia on a Class XB Subclass 202 Global Special Humanitarian visa, and as such, his circumstances may give rise to international non-refoulement obligations and I note that he submits that he does not think it is possible that he will be sent back to South Sudan because of 'non-refoulement obligations'.

47. I note that [the plaintiff] states that he might be captured, tortured and killed by the Nual tribe or ISIS if he returns to South Sudan. [The plaintiff] belongs to the Denka tribe which is hunted by the

8 Annexure E to the Special Case (**SCB 116**).

9 See Annexure F to the Special Case (**Reasons**) (**SCB 118-127**).

10 Reasons, [9] (**SCB 120**).

11 Reasons, [8] (**SCB 119**).

12 Reasons, [69] (**SCB 127**).

13 Reasons, [46]-[50] (**SCB 125**) (emphasis added). See also Reasons, [45] (**SCB 125**).

much larger and more powerful Nual tribe in South Sudan; he states that his father was killed because of the conflict. They may use his capture to pressure his family in Australia for money or something worse. He stated that sending him back would be sending him to a premature death.

48. I consider that it is unnecessary to determine whether non-refoulement obligations are owed in respect of [the plaintiff] for the purposes of the present decision as he is able to make a valid application for a Protection visa, in which case the existence or otherwise of non-refoulement obligations would be fully considered in the course of processing that application.

49. A protection visa application is the key mechanism provided for by the Act for considering claims by a non-citizen that they would suffer harm if returned to their home country. Further, I am aware that the Department's practice in processing Protection visa applications is to consider the application of protection-specific criteria before proceeding with any consideration of other criteria, including character-related criteria. To reinforce this practice, the Minister has given a direction under s499 of the Act (Direction 75) which, among other things, requires that decision-makers who are considering an application for a Protection visa must first assess whether the refugee and complementary protection criteria are met before considering ineligibility criteria, or referring the application for consideration under s501 of the Act. I am therefore confident that [the plaintiff] would have the opportunity to have his protection claims fully assessed in the course of an application for a Protection visa.

50. I have also considered [the plaintiff's] claim of harm upon return to Sudan outside the concept of non-refoulement and the international obligations framework. I accept that regardless of whether [the plaintiff's] claims are such as to engage non-refoulement obligations, [the plaintiff] would face hardship arising from tribal conflicts were he to return to Sudan.

16. Following receipt of the non-revocation decision, the plaintiff applied for a protection visa. That application was refused about two years later.[14] On that application, the Minister's delegate was satisfied that the plaintiff is a refugee and would face a real risk of significant harm throughout South Sudan, but was not

[14] Annexure G to the Special Case (**SCB 129-176**).

satisfied that the plaintiff met the requirements of ss 36(1C) and (2C) of the Migration Act.[15]

Part VI: Argument

17. There can be no dispute that the plaintiff represented to the Minister, as "another reason" why the original cancellation decision should be revoked, that, absent revocation, he faced removal to South Sudan, contrary to international non-refoulement obligations owed to him. In finding that this matter was "unnecessary to determine", the delegate failed to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act and denied the plaintiff procedural fairness. On either basis, the non-revocation decision is affected by jurisdictional error. Further, the reason why the delegate proceeded in this way was the delegate's misunderstanding of the Migration Act and its operation — including the nature of the statutory task required by s 501CA(4). That misunderstanding also discloses jurisdictional errors affecting the non-revocation decision.

The proper construction of s 501CA(4)

18. The legislative scheme provides a structured, sequential process for determination of the visa status of a person who does not pass the "character test" in the Migration Act. It first sets out circumstances in which the Minister may refuse to grant a visa to a person or cancel a visa that has been granted to a person.[16] It then sets out, in s 501(3A), particular circumstances in which the Minister must cancel a person's visa. In those particular circumstances, the cancellation of a person's visa is mandatory: the person has no opportunity to be heard before visa cancellation.[17]

19. Where, as here, a mandatory visa cancellation has occurred, s 501CA provides the process by which the original cancellation decision can be revoked. A number of features of s 501CA are noteworthy.

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15 **SCB 129, 152, 154, 175-176**.

16 *Migration Act 1958* (Cth), ss 501(1)-(3).

17 *Migration Act 1958* (Cth), ss 501(3A) and (5).

20. **First**, the section provides a person whose visa has been compulsorily cancelled with an opportunity to be heard on revocation of the cancellation. Section 501CA(3) requires that the Minister give such a person notice of the original decision and particulars of "relevant information" (as defined in s 501(2)), and invite the person to make representations to the Minister about revocation of that decision. This is the only opportunity for a person to challenge the mandatory visa cancellation, and it only arises after the cancellation has occurred.

21. **Second**, the power to revoke a cancellation decision, conferred on the Minister[18] by s 501CA(4),[19] is expressly conditioned upon two matters:

10 (a) representations about revocation having been made in accordance with the invitation; and

(b) the Minister's state of satisfaction that either (i) the person passes the character test, or (ii) there is "another reason" why the decision should be revoked.

22. It is implicit in the first of these matters that the Minister must, in exercising the power under s 501CA(4), in fact consider the representations. If that were not the case, the requirement in s 501CA(3) to give a person an opportunity to make representations would be inutile. It is improbable that the framers of the legislation could have intended to insert a provision which would have virtually no practical

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18 Or the Minister's delegate. See *Migration Act 1958* (Cth), s 496.

19 That power is expressed in terms that the Minister "may revoke the original decision if…". Properly construed, the word "may" means "must" in the context of s 501CA. See, for example, *Leach v The Queen* (2007) 230 CLR 1, [38] (Gummow, Hayne, Heydon and Crennan JJ). It would be surprising if, for instance, the Minister was satisfied that a person passed the character test (and, therefore, the basis for visa cancellation did not exist), but the Minister still possessed a residual discretion whether or not to revoke. See also *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [74]-[75] (Colvin J); *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320, [21] (Besanko, Barker and Bromwich JJ); *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1313, [80] (Katzmann J). And, here, even if the word "may" does not mean "must", the non-revocation decision is still affected by jurisdictional error.

effect.[20] And the text of s 501CA(4)(a) confirms the obligation to afford a person with an opportunity to be heard.

23. So much is further confirmed by the relevant extrinsic material.[21] The Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, which was enacted and introduced s 501CA into the Migration Act,[22] stated at [92] that:

> The requirement to give notice to the person and invite the person to make representations about revocation of the decision to cancel allows the person the opportunity to satisfy the Minister or delegate that the person passes the character test, or that there is another reason why the original decision should be revoked.

24. If s 501CA were construed so as to permit the Minister to refuse to consider a person's representations, the person would not have a real "opportunity to satisfy the Minister" of the matters set out in s 501CA(4)(b). To construe s 501CA in this way would render the statutory entitlement to make representations inutile and collide with the manifest purpose of ss 501CA(3) and (4)(a)[23] (that is, to give a person an opportunity to be heard). Accordingly, consideration of the matters raised in the representations is a condition on the exercise of the power in s 501CA(4), material breach of which gives rise to jurisdictional error.[24]

25. **Third**, this implicit condition on the exercise of the s 501CA(4) power is protective of the rights of persons who have had their visas cancelled. "[W]here non-

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20 *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565, 574 (Gummow J, with whom Hill and Cooper JJ agreed). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 195 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ).

21 See also *Acts Interpretation Act 1901* (Cth), s 15AB.

22 See *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), schedule 1, item 18.

23 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 195 CLR 355, [93] (McHugh, Gummow, Kirby and Hayne JJ).

24 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [23] (Gageler and Keane JJ). See also *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [75]-[76] (Colvin J). (Another constructional approach is to regard the Minister's state of satisfaction as a "subjective jurisdictional fact", which was vitiated, with the subsequent purported exercise of power necessarily being affected by jurisdictional error. See, for example, *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [42]-[45] (Collier, Reeves and Derrington JJ).)

observance of a condition bearing upon the exercise of a statutory power would work to the material disadvantage of individuals for whose protection the condition exists, considerations of justice and convenience tell strongly in favour of the holding invalid acts done in neglect of the condition".[25]

26. **Fourth**, what is required by the Minister's "consideration" of the representations is an engagement by the Minister in an active intellectual process with respect to significant, clearly expressed representations made by the person.[26] That is the only type of consideration of a person's representations that would serve the statutory purpose, and give ss 501CA(3) and (4)(a) meaningful work to do. That is especially so where decisions under s 501CA(4) "might have devastating consequences visited upon people".[27] Accordingly, consideration of those consequences is not achieved through "decisional checklists", or "[m]echanical formulaic expression", which "hide a lack of the necessary reflection upon the whole consideration of the human consequences involved".[28] The "[g]enuine consideration of the human consequences … 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".[29]

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25 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, [85] (Kiefel CJ, Bell, Gageler and Keane JJ).

26 See, for example, *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 215, [20] (Jagot, Kerr and Anastassiou JJ); *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [44]-[45] (Collier, Reeves and Derrington JJ). See also *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ) ("Consideration of a document such as a representation or a submission … involves an active intellectual process directed to that representation or submission."), 476 (Burchett J) ("What is it to 'consider' material such as a report or representations? In my opinion, the Minister is required to apply his own mind to the issues raised by these documents."), 495 (Kiefel J) ("To 'consider' is a word having a definite meaning in the judicial context. The intellectual process preceding the decision of which s 10(1)(c) [of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)] speaks is not different. It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward …").

27 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, [3] (Allsop CJ, with whom Markovic J agreed). See also *Minister for Home Affairs v Omar* (2019) 272 FCR 589, [37]-[41] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

28 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, [3] (Allsop CJ, with whom Markovic J agreed).

29 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, [3] (Allsop CJ, with whom Markovic J agreed).

27. **Fifth**, it follows that a state of satisfaction, purportedly formed for the purpose of s 501CA(4)(b)(ii), but reached without consideration of the person's representations, is not the state of satisfaction required by the Migration Act.[30] It is a failure to conform to the statutory conditions upon the exercise of the power, and thus a failure to carry out the statutory task.

28. **Sixth**, and even putting the foregoing aside, there will usually be implied, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the outcome of the exercise of that power.[31] Where, as here, the statute confers a power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of the power.[32] Accordingly, the Minister fails to exercise the power in s 501CA(4) according to law if the Minister does not consider a substantial and clearly articulated argument advanced by the person in support of revocation.[33]

The non-revocation decision

29. The delegate noted the plaintiff's representations that he feared torture and death upon any return to South Sudan and that returning him there would contravene non-refoulement obligations owed to him. But having acknowledged those representations, the delegate expressly refused to deal with them, finding it

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30 *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [45] (Collier, Reeves and Derrington JJ).

31 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 256 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, [9] (Bell, Gageler and Keane JJ).

32 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [11]-[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

33 See, for example, *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, [24] (Gummow and Callinan JJ, with whom Hayne J agreed); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, [13] (Bell, Gageler and Keane JJ). See also *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [77] (Colvin J).

"unnecessary to determine whether non-refoulement obligations are owed in respect of [the plaintiff] for the purposes of the present decision".

30. The verbal formula adopted by the delegate in this case is relevantly identical to that adopted in other cases where a person seeking revocation has represented that removal from Australia to the person's country of nationality would contravene non-refoulement obligations.[34] It has been noted by the Full Federal Court that the Minister's Department has relevantly adopted *pro forma* reasons for decision.[35] It can safely and reasonably be inferred that, in the present case, the delegate's reasons relating to representations about non-refoulement obligations are also the product of such template reasoning. The use of such template reasoning diminishes the likelihood of active intellectual engagement by a decision-maker.

31. In any event, putting the use of *pro forma* words to one side, the reasons in the non-revocation decision are clear: the delegate did not consider the issue of non-refoulement obligations, beyond noting it, and expressly finding it "unnecessary to determine". The delegate proceeded in this way because of an assumption that the issue of non-refoulement obligations would be "fully considered" if the plaintiff were to make a protection visa application. In that regard, the delegate's reasoning disclosed further errors (explained at [34]-[40] below). But putting aside those further errors at this point, the lawful exercise of power under s 501CA(4) is conditioned on the consideration of representations and the obligation to afford procedural fairness. That there might be another process available to a person, such as the making of a protection visa application, to ventilate elsewhere a particular issue raised in representations about revocation is simply not to the point.

32. The delegate's refusal to consider the issue of non-refoulement obligations, as raised by the plaintiff's representations, constituted both a failure to satisfy the statutory condition upon the power conferred by s 501CA(4) — consideration of representations — as well as a denial of procedural fairness.

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[34] See, for example, *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [6]-[7] (Collier, Reeves and Derrington JJ).

[35] See, for example, *Guclukol v Minister for Home Affairs* [2020] FCAFC 148, [27]-[28] (Katzmann, O'Callaghan and Derrington JJ).

33. Questions 1, 2(a) and 2(b) in the Special Case should each be answered "Yes".

The delegate misunderstood the Migration Act

34. The delegate was obliged to reach the state of satisfaction required by s 501CA(4) on a correct understanding of the law.[36] But the delegate's reasons disclose that the delegate proceeded on the basis of misunderstandings about the s 501CA(4) power.

35. The delegate considered that it was "unnecessary to determine" whether non-refoulement obligations were owed to the plaintiff because the plaintiff could make an application for a protection visa, "in which case the existence or otherwise of non-refoulement obligations would be fully considered in the course of processing that application". That reasoning discloses two legal errors: **first**, an erroneous assumption about the manner in which non-refoulement obligations would be considered under two different statutory processes, and **second**, an erroneous assumption about the extent to which those obligations would be considered under the two processes.

36. Section 65(1) of the Migration Act relevantly provides that the Minister, if satisfied that the relevant criteria for the grant of a visa have been satisfied, "is to grant the visa" to the visa applicant and, if not so satisfied, "is to refuse to grant the visa". The protection visa criteria include, among others, a criterion that the applicant is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because "the person is a refugee" (s 36(2)(a)) or 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" (s 36(2)(aa)). The protection visa criteria also include a criterion that the applicant is not a person whom the Minister considers, on reasonable grounds, is a danger to

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[36] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [33] (Gageler and Keane JJ).

Australia's security or, having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community (s 36(1C)).[37]

37. As can be seen from the terms of s 65(1), on a protection visa application, a decision-maker is constrained by the dichotomous operation of the applicable visa criteria. Either the Minister is satisfied that those visa criteria are satisfied or the Minister is not so satisfied. If satisfied, the Minister must grant the visa. If not, the Minister must refuse to grant the visa. Section 65(1) can be contrasted with s 501CA(4), which confers power on the Minister to revoke the cancellation of a person's visa if satisfied that there is "another reason" to do so. The decision-maker is given a degree of "decisional freedom" not enjoyed by a decision-maker on an application for a protection visa.[38] In the exercise of the s 501CA(4) power, the issue of non-refoulement obligations, where relevant, can be weighed in the balance against other factors. Consideration of the issue may lead the Minister to decide to revoke the cancellation — unlike consideration of whether to grant a protection visa, there is no rigid criterion or rule one way or another. But here the delegate erroneously proceeded on the basis that the plaintiff's representations about non-refoulement obligations would be considered in a like manner under the two different statutory processes. In that way, the delegate misconstrued the statute which was the source of the delegate's power.[39]

38. Further, the delegate assumed that relevant issues concerning Australia's non-refoulement obligations to the plaintiff would be "fully considered" in the determination of any protection visa application. That is not so. Sections 36 and 65 make no mention of non-refoulement obligations.[40] While there is overlap between the protection visa criteria in the Migration Act and international non-refoulement obligations, it has been observed that the scope of persons who may

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37 See also *Migration Act 1958* (Cth), s 36(2C)(b).

38 See *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [110] (Collier, Reeves and Derrington JJ).

39 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ); *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338, 350 (Wilson, Deane and Gaudron JJ).

40 Cf. *Migration Act 1958* (Cth), ss 5 (definition of the term "non-refoulement obligations") and 197C.

meet the protection visa criteria is narrower than the scope of those who would be regarded as refugees owed non-refoulement obligations under international law.[41]

39. And there are myriad ways in which non-refoulement obligations might be considered in the making of a decision under s 501CA(4). For example, the Minister might form the view that the person is owed non-refoulement obligations. The Minister might, accordingly, consider the possibility that Australia would not fulfil its obligations, and might weigh not only the potentially devastating effect on the individual concerned, but also the effect on Australia's international reputation.[42] Conversely, the Minister may consider that Australia will comply with its obligations, but that that the individual may then face the prospect of prolonged, or indeed indefinite, detention.[43] None of these matters could be considered in the determination of a protection visa application. The delegate's misapprehension about the extent to which non-refoulement obligations would be considered on any protection visa application bespeaks further error.

40. These errors expose the delegate's misunderstanding of the statutory power conferred by s 501CA(4). The delegate misunderstood the law under which the delegate purported to act,[44] failing to appreciate the nature of the s 501CA(4) power and the decisional freedom that section affords. As a direct consequence, the delegate failed to consider the plaintiff's representations concerning non-refoulement obligations. The delegate's purported state of satisfaction was one

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41 See, for example, *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12, [87]-[112] (White, Perry and Charlesworth JJ); *DGI19 v Minister for Home Affairs* [2019] FCA 1867, [84] (Moshinsky J), referring to *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [4]-[5] (Kiefel CJ, Nettle and Gordon JJ); *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [114] (Collier, Reeves and Derrington JJ). The breadth of international non-refoulement obligations that might be considered under s 501CA(4) is reinforced by Direction No. 65 issued by the Minister under s 499 of the Migration Act ("Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA"), cl 14.1(1) ("International non-refoulement obligations"). To the extent that cl 14.4(4) of Direction No. 65 requires a delegate not to consider non-refoulement obligations where a person may make an application for a protection visa, the Direction is contrary to the Migration Act and beyond power.

42 *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [90]-[91], [117] (Collier, Reeves and Derrington JJ).

43 *Omar v Minister for Home Affairs* [2019] FCA 279, [57] (Mortimer J); *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55, [136] (Kenny and Mortimer JJ).

44 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ).

reached on an incorrect understanding of the law. The resulting decision was not a valid exercise of power.[45]

41. Question 2(c) in the Special Case should be answered "Yes".

Materiality

42. Each of the delegate's errors was material for the same reason. If the delegate had considered the plaintiff's representations about international non-refoulement obligations, there would have been a realistic possibility of a different result.

43. The delegate might have found — as was found in the determination of the plaintiff's protection visa application — that the plaintiff was a refugee owed non-refoulement obligations, who would face a real chance of serious or significant harm upon any return to South Sudan. If the delegate had made such a finding, the delegate might then have considered whether the plaintiff would, despite being owed non-refoulement obligations, be unsuccessful on any future protection visa application due to the ineligibility provisions in ss 36(1C) and (2C) (as indeed occurred). The delegate might also have considered whether, if the visa cancellation decision were not revoked, the plaintiff would ultimately be refouled to South Sudan despite being owed non-refoulement obligations. (Indeed, s 197C of the Migration Act requires that for the purposes of s 198 — which concerns removal of an unlawful non-citizen — "it is irrelevant whether Australia has non-refoulement obligations in respect of the unlawful non-citizen".[46]) Or the delegate might have considered the risk that the plaintiff would be consigned to prolonged or indefinite detention as a result of Australia complying with non-refoulement obligations owed to the plaintiff.[47] These matters plainly could have affected the result in this case.

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45 See *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [33] (Gageler and Keane JJ).

46 See *MNLR v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2021] FCAFC 35, [90] (Wigney J).

47 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55, [123] (Kenny and Mortimer JJ).

44. In the circumstances, each identified error was material and, therefore, jurisdictional.

45. Question 3 in the Special Case should be answered "Yes".

Extension of time

46. The application was made out of time and the plaintiff therefore seeks an order to extend time. The particular circumstances of this case, taken cumulatively, make it appropriate and necessary in the interests of the administration of justice for an extension of time to be granted.[48]

47. **First**, at all relevant times, the plaintiff was imprisoned or held in immigration detention, was of limited means, had no legal representation, and his ability to read, write and understanding English was poor.[49] He had no independent understanding of the non-revocation decision or the reasons given for it, and was assisted by a fellow inmate, who explained to the plaintiff that he would need to apply for a protection visa in order to remain in Australia. The plaintiff did not understand that there was a process available for him to challenge or appeal the non-revocation decision.[50] He acted on the advice given to him by his fellow inmate and applied for a protection visa. That was also the course urged upon the plaintiff in the reasons given by the delegate in the non-revocation decision. In the circumstances, it should not be understood that the plaintiff rested on his rights (as he understood them). Rather, he took action promptly; but it was the wrong action, owing to a combination of his circumstances and, it is to be inferred, the delegate's (erroneous) reasons in the non-revocation decision.

48. **Second**, the plaintiff's application is meritorious and raises matters of public importance. Among other things, there have been a number of judicial review proceedings relating to decisions, purportedly made under s 501CA(4), employing

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48 *Migration Act 1958* (Cth), s 486A.

49 Special Case, [9]-[11], [17] (**SCB 71**, **72**).

50 Special Case, [17] (**SCB 72**).

the same or similar reasoning about the issue of non-refoulement obligations.[51] The plaintiff's case therefore has a relevant "public interest dimension"[52] supporting an order to extend time. The important question of principle raised by the plaintiff's application was conceded by the Minister at an early stage in the proceeding[53] (as was, implicitly, the merit of the application[54]).

49. **Third**, the Minister has at no stage asserted that any prejudice would be occasioned by the grant of an extension of time.

50. In those unique circumstances, an extension of time is necessary and appropriate. Question 4 in the Special Case should be answered "Yes".

Part VII: Orders sought

51. The plaintiff seeks that the High Court make the following orders:

1. The time for filing an application for constitutional writs be extended to 5 January 2021.

2. A writ of certiorari issue to quash the decision made on 9 August 2018 by a delegate of the defendant, purportedly pursuant to s 501CA(4) of the *Migration Act 1958* (Cth), not to revoke the decision made on 27 October 2017 to cancel the plaintiff's Refugee and Humanitarian (Class XB) visa, subclass 202 (Global Special Humanitarian).

3. A writ of mandamus, alternatively an injunction, issue to compel the defendant to exercise the power under s 501CA(4) of the Migration Act according to law.

4. The defendant pay the plaintiff's costs.

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51 See [30] above. See also, for example, *Ali v Minister for Home Affairs* (2020) 380 ALR 393, [2] (Collier, Reeves and Derrington JJ), where the Full Federal Court referred to an "explosion" of judicial decisions on the issues the subject of this case.

52 *Plaintiff M168/2010 v Commonwealth* (2011) 85 ALJR 790, [12] (Crennan J).

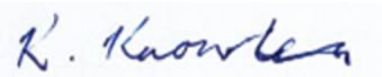
53 See Minister's response dated 9 February 2021, [10] (**SCB 42-43**).

54 Minister's response dated 9 February 2021, [10] (**SCB 42-43**); Plaintiff's reply dated 16 February 2021, [2] (**SCB 61**).

Part VIII: Time estimate

52. It is estimated that two hours will be required for the presentation of the oral argument of the plaintiff.

Dated: 4 May 2021



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ANNEXURE

List of constitutional provisions, statutes and statutory instruments referred to in submissions

1. *Acts Interpretation Act 1901* (Cth), s 15AB (current).

2. *Migration Act 1958* (Cth), ss 5, 36, 65, 197C, 198, 486A, 496, 499, 501, 501CA (compilation at 9 August 2018).

3. *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), schedule 1, item 18.