HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ENT19
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

DEFENDANTS' SUBMISSIONS

PART I: Certification

1. These submissions are suitable for publication on the internet.

PART II: Concise statement of the issues

2. The defendants agree with the statement set out at [2]-[3] of the plaintiff's submissions dated 7 October 2022 (**PS**) as to the issues arising from the **Decision** of the first defendant (the **Minister**) to refuse, on 27 June 2022, the plaintiff's application for a Safe Haven Enterprise (Class XE) Subclass 790 Visa (the **visa**).

PART III: Section 78B notices

3. The plaintiff issued a s 78B notice in this matter on 4 July 2022 (**AB 22-26**).

PART IV: Statement of material facts

4. The statement of relevant facts set out at **PS [6]-[18]** repeatedly refers to an affidavit of Ziaullah Zarifi affirmed on 5 July 2022 (the **Zarifi Affidavit**). The Zarifi Affidavit does not form part of the bundle of relevant documents agreed between the parties and set out at pages 27 to 562 of the 28 September 2022 Application Book (**AB**).[1]

5. The defendants accept that the plaintiff's application for the visa has had a long history. That ought not distract from this Court's focus on the constitutional and legal validity of the Decision to refuse the visa. The Minister refused the visa because she was not satisfied that the grant of the visa was in the national interest. As such, that the plaintiff did not satisfy the criterion in cl 790.227 of Sched 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**),[2] and visa refusal was required pursuant to s 65(1)(b) of the *Migration Act 1958* (Cth) (the **Act**). The defendants accept that the plaintiff has been found to engage Australia's protection obligations, and that, as at 27 June 2022, all criteria for the grant of the visa save for cl 790.227 of the Regulations were satisfied.

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[1] The defendants note that the Zarifi Affidavit does not reproduce the attachments to the Decision in full (affidavit of Jonathon Charles Hutton affirmed 3 August 2022 at [2]). The complete attachments are at **AB 72-526.**

[2] Clause 790.227 is in the following terms: "The Minister is satisfied that the grant of the visa is in the national interest."

6. The plaintiff's statement at **PS [6]-[18]** contains several factual inaccuracies. *First,* as he has elsewhere acknowledged,[3] the plaintiff arrived in Australia on 14 December 2013, not on 9 December 2013.[4] The plaintiff's criminal sentence was backdated to 10 December 2013,[5] which is the date his vessel was first intercepted by the Australian navy.[6] *Secondly,* the plaintiff was first charged with a people smuggling offence on 21 February 2014, not on 20 February 2014.[7]

7. *Thirdly,* the plaintiff was sentenced to 8 years' imprisonment for a people smuggling offence on 19 October 2017, not on 13 October 2017.[8] The sentencing remarks of Judge AC Scotting at **AB 73** record a "decision date" and "date of orders" of 19 October 2017, with 13 October 2017 recorded as a "hearing date". The 19 October 2017 sentencing date is further confirmed by two media reports published on 20 October 2017 which refer to the sentencing as having occurred "yesterday" (at **AB 252** and **AB 253**).

8. *Fourthly,* it follows that news articles from 19 and 20 October 2017 reporting the plaintiff's conviction[9] were published the same day, or the day after, he was sentenced, rather than a week later (*contra* **PS [11]**). Further, this Court cannot safely infer that those publications were "a direct consequence" of a 19 October 2017 media release from the office of the former Minister sent to a mailing list of journalists at 3:40pm on 19 October 2017 and published online a short time later.[10] A copy of the media release as sent at 3:40pm is at **AB 561-562**. The media release was not before the Minister at the time of the Decision, and the defendants do not accept that it is relevant to the issues for determination by this Court.

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3 See the Further Amended Application at [7] (**AB 8**); the Notice of Constitutional Matter at [3] (**AB 22**); and the Statement of the plaintiff dated 1 February 2017 at [11] (**AB 187**).

4 Affidavit of Chelsea Marie Wood affirmed 29 July 2022 (the **Wood Affidavit**) at [12(b)] (**AB 30**).

5 Sentencing remarks of Judge AC Scotting at [163] (the **sentencing remarks**) (**AB 73** and **99**).

6 Protection Visa Decision Record dated 28 May 2018 (later set aside) at **AB 219**.

7 Wood Affidavit at [12(e)] (**AB 30**).

8 The sentencing remarks at **AB 73;** Wood Affidavit at [12(g)] (**AB 30**). The defendants note that 13 October 2017 is erroneously recorded as the plaintiff's conviction date in some of the visa decision records and departmental communications relating to him (at **AB 59** at [4]-[5]; **AB 114-115; AB 538**), though others record the correct date (see **AB 103**; **AB 219**; **AB 229-230**). The plaintiff had pleaded guilty in April 2017: **AB 252, 557**.

9 See the bundle of articles which were before the Minister at the time of the Decision at **AB 252-259**.

10 Affidavit of Tigiilagi Eteuati affirmed on 19 September 2022 (the **Eteuati Affidavit**) at [3]-[5] (**AB 553-554**). Contrary to fn 9 to PS [11], the Eteuati Affidavit does not establish the "direct consequence" asserted.

9. In any case, the ABC published a detailed article at 4:09pm on 19 October 2017, less than half an hour after the media release was emailed, and before it was published online (see **AB 254-255**). The ABC article made no reference to the media release. Further, both the ABC article and the other media articles included details which were not included in the media release, but were included in the sentencing remarks, such as the plaintiff's age,[11] his non-parole period and when he would be eligible for parole,[12] the name of the sentencing judge,[13] the plaintiff's specific role in the people smuggling operation in Indonesia,[14] and the court's findings concerning his motivations.[15]

10. *Fifthly,* at **PS [13]**, submissions are made concerning a prior decision of a former Minister in relation to the plaintiff on 13 May 2020. A copy of the 13 May 2020 decision is at **AB 538-540**. The final sentence of **PS [13]** contains an unsupported and irrelevant assertion that prior to this decision, the Minister had never previously acted personally pursuant to s 65 of the Act to refuse the grant of a visa. Ostensibly in support, **fn 13 to PS [13]** refers to evidence given before Raper J in June 2022 which is not before this Court and which is not a sound basis for the assertion.[16] Regardless, the 13 May 2020 decision was not before the Minister when she made the Decision on 27 June 2022, and the rarity or otherwise of the Minister acting as she did is irrelevant to the validity of the Decision.

11. *Sixthly,* the 14 October 2019 decision concerning the visa, and the orders of Perry J quashing that decision (both referred to at **PS [14]**) were referred to by the Minister at [25] of the Decision (**AB 63**).[17] PS [14] is incorrect to say that the Minister thereby accepted in the Decision that the plaintiff "posed and poses no risk to the Australian community". Her finding was limited to the risk of further people-smuggling offending, and was in the following terms:

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[11] See **AB 252, 253, 254-255, 256-258** and the sentencing remarks at [155] (**AB 97**).

[12] See **AB 252, 253, 254-255, 256-258** and the sentencing remarks at [164] (**AB 99**).

[13] See **AB 253, 254-255, 256-258** and the sentencing remarks at **AB 73**.

[14] See **AB 253, 254-255, 256-258** and, for example, the sentencing remarks in relation to finding accommodation for asylum-seekers in Indonesia at [28], [41], [143]-[144] (**AB 77, 79, 94**).

[15] See **AB 254-255, 256-258, 259** and the sentencing remarks at [148] (**AB 96**).

[16] There is also no statement to that effect in Raper J's reasons: *ENT19 v Minister for Home Affairs* [2022] FCA 694.

[17] A copy of Perry J's orders was before the Minister at the time of the Decision and is at **AB 260.**

> As part of that decision, the then Minister made a concession that there was no probative basis to support a finding that the applicant had an 'on-going risk' of reoffending in considering whether he posed 'an unacceptable risk of harm to the Australian community'. I accept that this matter means that he may not commit further people smuggling offences in the future.

PART V: Argument

The "constitutional issue" / the "not authorised by the Act issue"

12. These issues are dealt with together at **PS [19]-[37]**. Importantly, the plaintiff does not challenge the validity of any provision of the Act, or the Regulations (**PS [30]**). That is, he does not contend that s 65 of the Act, or cl 790.227 of the Regulations, are penal or punitive in character. Rather, he challenges only the Decision itself. In circumstances where there is no constitutional challenge to any of the relevant provisions, the only question is whether the Decision was authorised by the statute.[18]

13. The defendants accept that neither s 65 of the Act nor cl 790.227 of the Regulations gave the Minister the power to inflict upon the plaintiff further punishment for his criminal conduct (that is, consequences that are penal or punitive in character). That is because the Act does not authorise a purported exercise of the exclusively judicial function of the adjudgment and punishment of criminal guilt.[19] The power to cancel or refuse a visa to a non-citizen, however, is "not to be regarded as punitive in character merely because exercise of the power involves interference with the liberty of the individual or imposes what the individual may see as sanctions consequential on his criminal connections" (*Djalic* at [66]). Something more is required, such as the exercise of power to "punish the non-citizen and not for protection of the Australian community or some other legitimate objective" (*Djalic* at [66]).

14. At **PS [23]**, the plaintiff articulates his central contention as being that an "administrative decision by a Commonwealth officer" will unconstitutionally infringe the "the principle of separation of powers" if it is "made for the sole or substantial purpose of general

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[18] *Commonwealth of Australia v AJL20* (2021) 95 ALJR 567 at [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

[19] ***Chu Kheng Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also ***Djalic*** *v Minister for Immigration and Indigenous Affairs* (2004) 139 FCR 292 at [66] (Tamberlin, Sackville and Stone JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [15] (Kiefel CJ, Bell, Keane and Edelman JJ); and ***Alexander*** *v Minister for Home Affairs* (2022) 96 ALJR 560 at [67] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing).

deterrence" in circumstances where "the effects of that decision… can fairly be described as punishment". The plaintiff claims that the Decision falls into this category. The defendants understand the plaintiff to contend that the Decision is invalid either because it is itself unconstitutional, or because it is *ultra vires* the Act (see **PS [36]**).[20] There are at least five factual and legal flaws that mean this Court should reject the plaintiff's argument.

15. *First*, the authorities do not support the plaintiff's contention that an administrative decision made for the sole or substantial purpose of general deterrence "infringes the principle of separation of powers" because it is punitive. The plaintiff's argument assumes, rather than demonstrates, that the deterrent effect of a visa refusal amounts to the imposition of punishment by reason of the non-citizen's criminal conduct (cf *Djalic* at [75]).

16. Though deterrence is a factor in criminal sentencing, it is not unique to that context. Analogously, both protection of the Australian community and expectations of the Australian community are relevant considerations in criminal sentencing[21] yet are not inherently punitive. As such, an intent of deterrence is not itself indicative of a penal or punitive purpose. Indeed, deterrence is "squarely concerned with the protection of the Australian community", rather than punishment (cf *Djalic* at [74]-[75]). Courts have "recognised on many occasions that the seriousness of the applicant's crime may be sufficient to justify a decision to refuse a visa (having regard to the national interest)".[22]

17. The plaintiff's submission that a decision made for the purpose of general deterrence is inherently punitive is inconsistent with this Court's well-settled approach to civil penalties. This Court has repeatedly held that the purpose of civil penalties is "primarily, if not solely,

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[20] While not articulated by the plaintiff in these terms, see the analogous discussion of the "appropriate level of analysis" when particular administrative actions are challenged on constitutional grounds in *Palmer v Western Australia* (2021) 95 ALJR 229 at [63]-[68] (Kiefel CJ and Keane J) and [117]-[128] (Gageler J) (which concerned s 92 of the Constitution). See also *Wotton v Queensland* (2012) 246 CLR 1 at [10], [21], [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ) and [74] (Kiefel J). At PS [35], the plaintiff appears to advance an additional *ultra vires* argument.

[21] See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act 1991* (Vic), s 5; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [38] (Kiefel CJ, Bell, Keane and Steward JJ).

[22] *CKL21 v Minister for Home Affairs* (2022) 401 ALR 647 at [69] (Moshinsky, O'Bryan and Cheeseman JJ) and the cases there cited.

the promotion of the public interest… by deterrence of further contraventions".[23] Despite that, civil penalties have been firmly held to sit outside the criminal law, such that there are "basic differences",[24] including that "[r]etribution, denunciation and rehabilitation have no part to play" in civil penalty regimes.[25]

18. The older authorities relied on at **PS [26]-[28]**,[26] including two decisions of the Administrative Appeals Tribunal, which predate *Chu Kheng Lim*, also do not make good the plaintiff's contention.

19. Each of those cases concerned the cancellation of a visa held by a person, rather than a visa refusal. Although not necessary for this Court to determine given the terms and purpose of the Decision (see [23]-[29] below), it is appropriate to draw a distinction between the case of refusal of a visa to a non-citizen who has never lawfully resided in Australia, and the cancellation of a visa held by a non-citizen lawfully residing in the community. Even if the cancellation of a visa for the sole purpose of deterrence could be punitive, the refusal of a visa for that purpose cannot be so characterised.[27]

20. Both *Re Sergi* (at 230-231) and *Tuncok* (at [44]**)** expressly accepted that it was proper for a decision-maker to take into account the general deterrent effect of deciding to cancel a visa. Further, though those cases suggested that a visa cancellation decision made for the sole or substantial purpose of deterrence may be punitive, none made a finding to that effect. Next, those cases concerned individuals who had long been part of the Australian community.[28] *Re Sergi* even described the relevant individual's absorption in that regard as so "complete"

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[23] *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 96 ALJR 426 at [9], [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[24] *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [51] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

[25] *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 264 FCR 155 at [19] (Allsop CJ, White and O'Callaghan JJ); *Pattinson* at [15]-[16].

[26] ***Re Sergi*** *and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224 at 231 (Davies J) and ***Re Gungor*** *and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 at 232 (Smithers J); ***Tuncok*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 (Moore, Branson and Emmett JJ).

[27] See *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100 at [154] (Wheelahan J, Collier J agreeing at [1]).

[28] 27 years in *Re Sergi*, 8 years in *Re Gugnor*; and 32 years in *Tuncok*.

that he was "no longer an immigrant for the purposes of the Migration Act" (at 227). That does not reflect the plaintiff's situation. In addition, those cases did not concern the constitutional arguments agitated by the plaintiff in this case. Rather, the issue was that a punitive purpose in cancelling a visa might be an irrelevant consideration or involve double punishment (*Tuncok* at [42]; *Re Gugnor* at 232; *Re Sergi* at 231).

21. Lastly, these older authorities must be understood in light of *Djalic* at [75], where the Full Court held that "the very point of taking account of general deterrence as a factor in making a cancellation decision is to enhance the safety and well-being of the Australian community by discouraging non-citizens from engaging in criminal conduct." The Full Court then
10 expressly reserved, at [76], the question of whether a cancellation decision made for the sole or substantial purpose of deterring others could be regarded as punitive, while saying nothing about visa refusals. As noted, that question does not arise in this case.

22. Contrary to the unexplained assertion at **PS [29]**, the plaintiff's contention also does not follow from the principles more recently articulated by this Court in *Chu Kheng Lim* and *Alexander*. Those cases provide no basis for the claim that a substantial purpose of general deterrence is punitive. They do affirm, however, the basic proposition that "executive powers to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport, is not punitive in nature, and not part of the judicial power of the Commonwealth".[29] Consistent with that, the Decision was not punitive.

20 23. *Secondly,* the plaintiff mischaracterises the purposes for which the Decision was in fact made. In particular, the Decision was not made for the sole or substantial purpose of general deterrence (c*ontra* **PS [19]**).

24. The purpose of the Decision is to be discerned in the context of the relevant statutory scheme, and from the Visa Decision Record at **AB 59-67** (with its attachments from **AB 72-526**). At **PS [21]**, the plaintiff also seeks to rely on the submission to the Minister (at **AB 529-537**), which she signed, and the Minister's 12 July 2022 Statement of Reasons for issuing a conclusive certificate in relation to the Decision (at **AB 547-551**). The former was

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[29] *Alexander* at [76] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing), citing *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; at [20]-[21] (Gleeson CJ).

before the Minister when she made the Decision but is not a substitute for the reasons set out in the Visa Decision Record. The latter post-dates the Decision and should be given limited if any weight.[30] In any case, the plaintiff points to no feature of either document which goes beyond the content of the Visa Decision Record to suggest a punitive purpose.

25. As regards the statutory scheme, the Minister was required to refuse the visa under s 65 of the Act because she was not satisfied that the grant of the visa to a person convicted of a serious people smuggling offence was in the national interest, such that the plaintiff did not satisfy the criterion in cl 790.227 of the Regulations. Footnote 28 to **PS [22]** recognises that the very object of the Act is to "regulate, in the national interest, the coming into, and the presence in, Australia of non-citizens" (s 4(1)). The existence of the cl 790.227 criterion for the grant of a SHEV, which is a protection visa, means that the statutory scheme expressly contemplates that visas may be refused on national interest grounds to persons who otherwise engage Australia's protection obligations. As such, a decision to refuse a visa on national interest grounds is not necessarily punitive merely because the plaintiff applied for a protection visa or engages Australia's protection obligations (*contra* **PS [20]**).

26. The concept of the "national interest" is "largely a political question",[31] which is "of considerable breadth [and] entrusted to the Minister".[32] There can be no constitutional difficulty with a Minister's assessment of the national interest so long as it is not "divorced from any relationship to protection of the Australian community".[33]

27. At [22]-[23] of the Decision, the Minister identified two considerations that led her to conclude that the grant of the visa would not be in the national interest. The first was the importance of "protecting and safeguarding Australia's territorial and border integrity". The second was the importance of maintaining "the confidence of the Australian community in

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[30] Contrary to **PS [22]**, whether the Minister continues to hold certain views is irrelevant to the validity of the Decision.

[31] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40].

[32] *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [158] (Griffiths, White and Bromwich JJ); see also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [330]-[331] (Kirby J); *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at [74] (Kiefel and Bennett JJ); *Jione v Minister for Immigration & Border Protection* (2015) 232 FCR 120 at [17] (Buchanan J).

[33] *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424 at [151] (Mortimer J).

the protection visa program". Those were legitimate, non-punitive objectives (cf *Djalic* at [66]). They cannot be said to be divorced from protecting the Australian community.

28. These parts of the reasoning in the Decision are very similar to the reasoning in the previous decision of the then-Minister in relation to the plaintiff on 13 May 2020 (at **AB 538-540**), which was quashed on another ground by the Full Court in *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100. At [154], the majority of the Full Court rejected an argument that general deterrence was the Minister's substantial purpose. Their reasoning for doing so was correct and applies equally to the Decision.

29. While deterring people smugglers may be one way to protect Australia's border integrity (the first consideration), the Minister did not indicate that was her purpose. Rather, the Minister's assessment was that the national interest requires protection of Australia's border integrity, including strong measures to combat people smuggling. One aspect of that is signalling to show that people smugglers do not achieve the migration outcome of a protection visa grant. Removing that incentive is different to deterrence. Even if deterrence were an element of the Minister's purpose, it could not be said to be the sole or substantial purpose. Further, neither of the Minister's considerations were directed to the plaintiff as an individual. The reasons make plain that the Minister was not trying to further punish the appellant but rather acting in accordance with her conception of the national interest by seeking to ensure the efficacy of Australia's border protection regime and policies and by protecting public confidence in the protection visa program.

30. *Thirdly,* the plaintiff's submissions, particularly at **PS [25]** and **[35]**, conflate the purpose of the Decision with its effects. As accepted at **PS [20]**, the Minister was aware that the immediate consequence of refusing the visa would be the plaintiff's continuing immigration detention, pending his removal from Australia (see [34]-[37] of the Decision at **AB 65-66**). That is because it is accepted that the plaintiff engages Australia's protection obligations. But that does not mean that the purpose of the Decision was to detain or otherwise punish the plaintiff (*contra* **PS [25(f)]/[35(i)]**). Rather, his detention is the necessary consequence under the Act of him remaining an unlawful non-citizen, and the fact that he has not yet been removed from Australia.

31. In this regard, in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, this Court held that s 501(3A) of the Act did not authorise or require the detention of the plaintiff – the exercise of that power simply changed Mr Falzon's legal status to that of an unlawful non-citizen (at [63] (Kiefel CJ, Bell, Keane and Edelman JJ), see also [69], [84]-[85] (Gageler and Gordon JJ), and [96] (Nettle J)). In the present case, the refusal of the visa under s 65 simply meant that the plaintiff *continued* to have the legal status of an unlawful non-citizen, who was liable to be detained for the purpose of his removal (having been detained for the purpose of determining his application prior to the Decision).

32. The plaintiff's subjective experience of the effects of the Decision upon him is also irrelevant to discerning the Minister's purpose. Not "all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described".[34] That is equally true of non-citizens. In particular, the effects of detention on a non-citizen do not displace the non-punitive purpose of that non-citizen's detention.[35] Instead, any punitive purpose must be discovered from either the legislative regime, or by way of evidence of the decision-maker's actual purpose.[36]

33. As noted above, the Minister had no such purpose, and the other matters set out at **PS [25]** do not indicate one. As noted at [11] above, it is not accepted that the plaintiff poses no risk to the community (see **PS [25(a)]**). The facts that the plaintiff engages Australia's protection obligations and has completed his people smuggling sentence are irrelevant to whether his present detention is punitive (*contra* **PS [25(b)-(c)]**). The assertion that refusal of the plaintiff's visa could have "no deterrent effect" on "typical people smugglers" (see **PS [25(d)-(e)]**) is contentious, and irrelevant to the Minister's national interest

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[34] *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 at [17] (Gleeson CJ), cited with approval in *Pollentine v Bleijie* (2014) 253 CLR 629 at [70] (Gageler J) and *Minogue v Victoria* (2019) 268 CLR 1 at [31] (Gageler J).

[35] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [207] (Kiefel and Keane JJ); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [41] 10 (Kiefel CJ, Bell, Keane and Steward JJ); ***NAMU** of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 589 at 597 (Black CJ, Sundberg and Weinberg JJ).

[36] *Djalic* at [64]-[65]; *NAMU* at 597; *Luu v Minister for Immigration and Multicultural Affairs* (2002) 127 FCR 24 at 36 (Gray, North and Mansfield JJ).

considerations in the Decision. Nor is it apparent how any of these matters, repeated at **PS [35]**, could make the Decision *ultra vires* the Act.

34. *Fourthly*, the plaintiff, in any case, mischaracterises the effects of the Decision upon him. As a non-citizen, the plaintiff's rights to enter and remain in Australia depend on his holding a visa under the Act. He has never held such a visa. In that sense, the Decision did not "deprive" the Plaintiff of anything (*contra* the plaintiff's repeated assertions in the PS).

35. The plaintiff remains in immigration detention because he is not presently willing to voluntarily return to Iran, and the protection finding made for him with respect to Iran, combined with s 197C(3) of the Act, mean that his involuntary removal to Iran is neither required nor authorised by the Act. As a result, his immigration detention has no defined end date, and is in that sense indefinite, until a country willing to receive him is identified. Contrary to **PS [20]** and **[25(f)]**, that does not mean the plaintiff will be detained for the rest of his life.

36. There are a number of circumstances that may bring an end to his held detention, such as the exercise of the powers in ss 195A or 197AB of the Act. Contrary to **fn 25 to PS [20]**, those possibilities are not "a mirage" simply because the visa has been refused, or because the plaintiff was notified in February 2022 that, at that time, his case did not meet the relevant guidelines for referral to the Minister. The position in that regard may change, for example, if the plaintiff has no outstanding primary or merits review processes in relation to his visa application, if the Minister considers it is in the public interest to grant the plaintiff another kind of visa under s 195A, or if "Ministers change [or] Ministers change their minds".[37] There may be a future decision by the Minister pursuant to s 197D of the Act that the plaintiff is no longer a person in respect of whom a protection finding would be made. A third country willing to receive him may be identified. Further, the plaintiff's release from detention is not at the "unconfined discretion of the executive".[38] Should the

[37] See *BNGP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 878 at [42] (Jagot J).

[38] Cf *Pollentine v Bleijie* (2014) 253 CLR 629 at [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

plaintiff later become willing to return to Iran, perhaps due to changes in that country, he is free to do so.

37. *Finally*, the plaintiff's submissions conflate the purpose of the Decision (at least as he seeks to characterise it) with the purpose of the plaintiff's ongoing immigration detention. Since the refusal of the visa, the plaintiff has been detained for the purpose of removing him from Australia. That is so notwithstanding the complications arising from the fact that the plaintiff engages Australia's protection obligations. Even if the Decision was invalid due to being actuated by a purpose not authorised by the Act, the plaintiff's detention would always have been valid, and as an unlawful non-citizen he would continue to be required to be detained under s 189.[39] The plaintiff's submissions at **PS [31]-[34]** are dealt with more fully at [55]-[59] below, which address why the plaintiff is consequently not entitled to *habeas corpus.*

The "misunderstanding of the law issue"

38. Contrary to **PS [38]-[41]**, the Minister did not proceed on a misunderstanding of the law by reason of her not being advised by the Department that she could not, acting personally, grant a visa to the plaintiff. In the Ministerial Submission, the Department set out two options.[40] The first option was "to take no further action in this case" and the plaintiff's application would be referred to a delegate for decision (**AB 533, [17]**). The Department advised that "[i]f all remaining criteria under Schedule 2 of the Regulations are considered to be met, the application will proceed to 'grant'." The second option was to make a personal decision to refuse the visa on the basis that the grant of the visa was not in the national interest (**AB 533, [19]**).

39. The Minister's power to grant or to refuse a visa is so fundamental to the scheme of the Act, and so plain from the terms of s 65, that the Court should be very reluctant to accept that the Minister misunderstood that she could not grant a visa in the absence of a positive statement or indication to that effect from her Department. As this Court held in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, "[t]he

[39] *Commonwealth of Australia v AJL20* (2021) 95 ALJR 567 at [61].

[40] There was a third option, but it was described in the heading as "not viable".

decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts" (at [34]). It is very unlikely that the Minister did not understand this binary choice.[41] Relatedly, and contrary to **PS [41(a)]**, the Minister did not do a "limited amount" in making the Decision. She reviewed and considered the submission and its attachments for three hours (**AB 67**).

40. In any event, as a matter of substance, the selection of the first option would have been a decision to grant the visa. As **fn 21 to PS [20]** accepts, aside from the national interest criterion, the Minister was aware that the plaintiff satisfied all other criteria for the visa. The Ministerial Submission stated that the plaintiff was "on a notionally positive visa pathway" (**AB 533, [18]**] and that "it is likely that if a decision is made by a delegate, the SHEV will be granted as the other criteria for the grant have notionally been met" (**AB 534, [26]**). The Submission explained that the question whether the Minister wanted to refuse the visa on national interest grounds was being put to her because "[t]he national interest criterion is usually only considered in exceptional circumstances by the Minister, when the other criteria for the visa, including character and security requirements, have been met" (**AB 534, [25]**). Accordingly, if the Minister were minded to grant the visa, it was not necessary for her to make that decision personally – that decision could (and would) be made by a delegate. It was only if the Minister were minded to refuse the visa that, consistently with the "Commonwealth's long-standing position" (**AB 534, [26]**), she *as the Minister* could decide that it was not in the national interest to grant the visa.

41. In any event, even if the Minister had proceeded on a misunderstanding of the law, any such error was immaterial to the Decision she made. In this regard, **PS fn 45** misstates the relevant test. The question is not whether "the misunderstanding was in respect of some immaterial aspect of the decision". Rather, the question is whether there is a "realistic possibility that a different decision could have been made": *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 727 at [32] (Kiefel CJ, Keane and Gleeson JJ). In the present case, even if the Minister was advised that she could make a personal decision to grant the visa, there is no prospect that the Decision she made could have been different. It was the

[41] The Minister could also have chosen to refer the application to a delegate. This option was expressly brought to her attention (**AB 533, [17]**).

Minister's view that, having regard to the need to protect and safeguard Australia's territorial and border integrity and to maintain the confidence of the Australian community in the protection visa program, it was not in the national interest to grant a protection visa to the plaintiff.

The "procedural fairness issue"

42. The plaintiff submits that the Decision should be quashed because the Minister failed to afford procedural fairness and/or comply with s 57 of the Act (**PS [42]-[46]**). Section 57 forms part of Subdiv AB of Div 3 of the Act, which is "an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with" (s 51A(1)). Apart from s 57, the plaintiff does not identify any requirements which he contends applied to the Decision but with which there was not compliance.

43. Section 57 requires the Minister to provide "relevant information" to the applicant and to invite the applicant to comment on it. The term "relevant information" is defined in s 57(1), and relevantly includes information that the Minister considers "would be the reason, or part of the reason for refusing to grant a visa" and excludes information "given by the applicant for the purpose of the application". The term "information", in the context of Div 3 of the Act, has been held not to extend "beyond knowledge of facts or circumstances relating to material or documentation of an evidentiary nature": *MIBP v CED16* (2020) 94 ALJR 706 at [21] (Gageler, Keane, Nettle and Gordon JJ).

44. The contention by the plaintiff focuses on a single sentence at [24] of the Decision record, which states: "I note the considerable media coverage of [the plaintiff's] conviction for people smuggling" (**AB 63, [24]**). That comment was made in the context of concluding that "it is unrealistic to think that" the grant of a visa to the plaintiff could not become publicly known. Attachment 6 to the Decision was a set of media articles concerning the plaintiff's conviction (**AB 252-259**). Accordingly, the "information" relevant to this claim is the fact that there had been media coverage of the plaintiff's conviction.

45. This Court considered the obligation imposed by s 57 of the Act in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217. In relation to the requirement that the information "be the reason, or part of the reason for refusing to grant a visa", Gageler, Keane and Nettle JJ (Edelman J agreeing) said (at [9], citations omitted):

> Whether or not that condition is met, it has been held in this Court in respect of a materially identical provision, "is to be determined in advance – and independently – of the [Minister's] particular reasoning on the facts of the case". For the condition to be met, it has again been held in this Court in respect of a materially identical provision, the information in question "should in its terms contain a 'rejection, denial or undermining' of the review applicant's claim". That is to say, the information must in its terms be of such significance as to lead the Minister to consider in advance of reasoning on the facts of the case that the information of itself "would", as distinct from "might", be the reason or part of the reason for refusing to grant the visa.

46. Their Honours went on to say that "[n]on-compliance with s 57 … denies an applicant an opportunity to respond to prejudicial adverse information" (at [47]). On the facts of that case, their Honours concluded that the information was not "relevant information" because it "*supported* the plaintiff's claim, so far as it went" (at [72], emphasis added). Similarly, in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, McHugh J said in relation to a materially identical provision that "the object of the section must be to provide procedural fairness to the applicant by alerting the applicant to material that the Tribunal considers to be adverse to the applicant's case and affording the applicant the opportunity to comment upon it" (at [50], see also Gummow J at [118]).

47. The fact that there had been media coverage of the plaintiff's conviction was not information that "would be the reason, or part of the reason for refusing to grant [the] visa". It did not "in its terms" contain "a rejection, denial or undermining" of the plaintiff's claim. It was not information of such significance as to lead the Minister to consider in advance of reasoning on the facts of the case that the information "of itself" would be the reason, or part of the reason, why the grant of the visa was not in the national interest. In other words, it was never in contemplation that the visa would be refused *because* there had been media coverage of his conviction. Accordingly, s 57(1)(a) of the Act was not satisfied.

48. Further, s 57(1)(c) was not satisfied because the fact that there had been media coverage of the plaintiff's conviction was information that the plaintiff had given for the purpose of his visa application. Indeed, the plaintiff expressly *relied* on the fact that there was media coverage of the conviction *in support of* his visa application. In reasons dated 28 May 2018, the delegate of the Minister who refused the plaintiff's visa (which was later set aside by the Immigration Assessment Authority) found that the plaintiff's conviction attracted media interest in Australia and that "his full name, nickname, age, citizenship, family composition

and reasons for fleeing Iran were published online" (**AB 229**). The delegate noted that "[a]t his [protection visa] interview, the applicant stated that the Iranian authorities would link the details in the news articles to him, via his official documentation related to his military service, passport, etc" (**AB 239**). It is true that the delegate did not accept "that the fact of being convicted and incarcerated in Australia due to people smuggling charges will of itself attract adverse interest from the Iranian authorities" (**AB 239**). However, that does not gainsay the fact that the information was given by the plaintiff for the purpose of his application. In addition, the Minister did not rely on any such reasoning in her Decision to refuse the visa. In the Decision, the information was a contextual matter supportive of a conclusion that the grant of a visa to the plaintiff may become known more generally.

49. If the above is wrong, and the fact of media coverage was "relevant information", any failure to comply with s 57 was not material to the Decision made. The plaintiff bears the burden of proving that the Minister's decision could have been different if there had been compliance with s 57. He cannot discharge that burden in circumstances where, contrary to **PS [44]**, he had already had the opportunity to comment on the fact of the media coverage: cf *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at [33] (Kiefel CJ, Keane and Gleeson JJ), [56] (Gageler J). As noted above, he relied on the fact of the media coverage in support of his claim for a protection visa. Accordingly, even if the plaintiff had been told that that fact was relevant to the Minister's assessment of the national interest, it would not have been coherent for him to submit that the previous media coverage of his conviction did not support a finding that the grant of a protection visa to him may similarly be subject to media attention. Finally, even if the media coverage can be "blamed" on the former Minister (which is denied, see [8]-[9] above), such a contention is entirely irrelevant to the materiality of any non-compliance with s 57.

The "relevant considerations issue"

50. The plaintiff accepts that "it is largely (although not wholly) a political question for the Minister what range of matters will be considered when he/she is empowered by an Act to make a decision 'in the national interest'" (**PS [48]**). The plaintiff goes on to submit that "[o]nce that choice has been made, however, lawful consideration of the chosen matters must have regard to all that is relevant to each of those matters". The plaintiff then identifies

various matters that are relevant to the matters of national interest considered by the Minister, and therefore, he claims, were *required* to be considered by her (**PS [47]**).

51. This submission overlooks the fundamental proposition that "[w]hat factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (Mason J). That is, the mandatory relevant considerations are identified by construing the Act. They are not comprised by *any* consideration that is "relevant to" the (permissive) considerations which the Minister in fact took into account.

52. The "national interest" criterion permits the Minister very wide discretion to decide not only what matters to place weight on but what matters to consider in the first place. In *Peko-Wallsend* (1986) 162 CLR 24, Mason J said that, when a statute confers a discretion which is unconfined, the factors which may be taken into account are similarly unconfined (at [42]). As noted above at [26], the "national interest" has been described as an inherently broad expression. In construing the cognate phrase "public interest", this Court has held that the expression "imports a discretionary value judgment to be made by reference to undefined factual matters": *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379 at [42]. The Minister is precluded from taking into account matters "definitely extraneous" to the objects of the Act: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J). However, the Minister can, in forming a view as to the national interest, legally ignore matters even though she could permissibly take them into account. That is so even if the matters are "relevant to" matters which the Minister does consider.[42]

53. This Court has previously rejected a challenge on relevant considerations grounds in an analogous statutory context. In *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, the Court considered s 198AB of the Act, which conferred power on the Minister to designate a country as a regional processing country. The only express condition on the exercise of the power was that "the Minister thinks it is in the

[42] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at [71], [74], [80] (Kiefel and Bennett JJ), cf [46] (Wilcox J).

national interest to designate the country to be a regional processing country". In assessing the national interest, the Minister was required to consider whether the country had given relevant assurances, but could "have regard to any other matter which, in the opinion of the Minister, relates to the national interest". The Court unanimously held that, apart from the relevant assurances, the Minister was not obliged to take any other matter into account (at [42]). Their Honours said that "[a] failure to consider the matters said by the plaintiff to be relevant cannot spell invalidity". In another decision, which concerned the identically worded criterion for the grant of a visa in cl 866.226 of the Regulations, this Court observed that the decision maker "may properly have regard to a wide range of considerations in making that assessment": *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [18]).

The "relief issue"

54. Contrary to **PS [54]-[56]**, if the Decision is quashed, the appropriate order is mandamus commanding the Minister to determine the plaintiff's visa application. It would then fall to the Minister to consider the national interest in light of this Court's determination, including if necessary by expressly disregarding any "substantial purpose" of general deterrence. The plaintiff would not be entitled to either a writ of habeas corpus or peremptory mandamus.

Habeas corpus

55. This Court's decision in *Commonwealth of Australia v AJL20* (2021) 95 ALJR 567 is a complete answer to the plaintiff's claim for a writ of habeas corpus. In that case, Kiefel CJ, Gageler, Keane and Steward JJ said:

> The combined effect of ss 189(1) and 196(1) is that a non-citizen can be lawfully within the Australian community only if he or she has been granted a visa [fn: Subject to *Love v Commonwealth* (2020) 94 ALJR 198; 375 ALR 597.]. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia by one of the means referred to in s 196(1), relevantly in this case removal under s 198.

The majority went on to explain that "[b]ecause the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community, *no question of release on habeas can arise*" (at [61], emphasis added).

56. The plaintiff is an unlawful non-citizen. Contrary to **PS [34]** and **[52]**, the evidence of Ms Wood is not "wholly beside the point"; it proves that the plaintiff's detention is lawful,

as she knows or reasonably suspects the plaintiff to be an unlawful non-citizen (**AB 28-32**). If the Decision is quashed, he will remain an unlawful non-citizen. He will not, by reason of the Decision being held invalid, gain an entitlement to be at liberty in the Australian community. Rather, he will be entitled to have his application for a visa determined by the Minister within a reasonable time: *Plaintiff S297/2013 v MIBP* (2014) 255 CLR 179 at [37] (Crennan, Bell, Gageler and Keane JJ). In this regard, it is not the case that there would be no "path" for the Minister to refuse the protection visa (**PS [34]**). For these reasons, there is nothing particular about this case that takes it outside what was held in *AJL20*.

57. The plaintiff does not challenge the validity of any provision of the Act (**PS [30]**). Having said that, the plaintiff submits that it would be "open" to this Court to conclude that the recent amendment to s 197C affects the proper construction of ss 189 and 196 (**PS [33]**). The submission seems to be that, given s 198 neither requires nor authorises the removal of the plaintiff to Iran (as that would breach Australia's non-refoulement obligations), and given the plaintiff therefore faces the prospect of indefinite detention, as a matter of construction ss 189 and 196 do not authorise the plaintiff's detention.

58. That submission is entirely foreclosed by this Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562. In that case, a majority of this Court held that ss 189 and 196 validly authorise the detention of an unlawful non-citizen during the period until removal to another country becomes reasonably practicable, even in circumstances where there is no real likelihood or prospect of removal in the reasonably foreseeable future: at [231] (Hayne J, McHugh and Heydon JJ relevantly agreeing), [290] (Callinan J). The recent amendment to s 197C has no bearing on that conclusion. Consistently with *Al-Kateb*, ss 189 and 196 authorise the plaintiff's detention irrespective of whether s 198 authorises his removal to Iran in breach of Australia's non-refoulement obligations.

59. In addition, as noted above, the plaintiff conflates the purposes of the Decision and the purposes of his detention (**PS [33]**). Even if the Decision had been made for an impermissibly punitive purpose, such that the Decision was liable to be set aside, that would have no impact on the validity of the plaintiff's ongoing detention. The purpose of the plaintiff's detention is his removal from Australia, given he is an unlawful non-citizen. Sections 189 and 196 authorise that detention until removal. That is so notwithstanding the

complexities involved in removing the plaintiff, given the protection finding that has been made for him with respect to Iran and the effect of s 197C(3) of the Act.

Peremptory mandamus

60. The only decision in which a peremptory writ of mandamus of the kind sought by the appellant has been ordered is *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.[43] In that case, the Court said (at [39]):

> The issue of a peremptory mandamus is to enforce compliance with the writ which the Court had directed to issue in resolution of the matter then pending in the Court. A peremptory mandamus commands performance of the duty which was the subject of the writ but remains unperformed. What is important is that the Minister's return to the writ of mandamus was legally insufficient. It is that insufficiency which grounds the peremptory mandamus.

61. Consistently with this passage, there is no basis to order peremptory mandamus in the present case for two reasons. *First*, peremptory mandamus would not be issued to enforce compliance with a writ which *this Court* had directed to issue in resolution of *the matter then pending in the Court*. It would be issued to enforce compliance with a writ issued by a different court in an entirely separate proceeding. *Secondly*, the return of the writ issued by the Federal Court was not legally insufficient. Unlike in *Plaintiff S297*, in the event that the Decision is held invalid, it is not apparent that there would be no basis upon which the Minister could nevertheless conclude that it was not in the national interest to grant the visa.

PART VI: Notice of contention or notice of cross-appeal

62. Not applicable.

PART VII: Estimate of time

63. The defendants estimate 2 hours will be required for presentation of their oral argument.

Dated: 27 October 2022

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[43] Indeed, there are only two reported Australian cases where peremptory mandamus has issued: see Chaim, "Peremptory Mandamus in Australian Administrative Law" (2021) 28 *Australian Journal of Administrative Law* 28 at 32.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ENT19
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO THE DEFENDANTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the defendants set out below a list of the particular constitutional provisions and statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	Constitution	Current	Ch III
2.	*Migration Act 1958* (Cth)	Current	ss 51A, 57, 65, 189, 195A, 196, 197AB, 197C, 197D, 198
3.	*Migration Regulations 1994* (Cth)	Current	Sch 2, cl 790.227