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

REVISED SUBMISSIONS OF THE PLAINTIFF

(Filed pursuant to paragraph 4 of the orders made on 8 December 2022)

I. CERTIFICATION

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

II. CONCISE STATEMENT OF ISSUES

2. This case concerns the lawfulness of the plaintiff's continuing detention and the decision of the first defendant (the **Minister**) made on 27 June 2022, purportedly pursuant to s 65 of the *Migration Act 1958* (Cth) (the **Act**), to refuse to grant the plaintiff a Safe Haven Enterprise (Class XE) Subclass 790 visa (**SHEV**) on the sole basis that she was not satisfied the grant of the visa was in the national interest (the **Decision**). Clause 790.227 of Sch 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**) provides it is a criterion for the grant of a SHEV that the Minister be satisfied the grant is in the national interest. The following issues arise:

   (a) Is the national interest criterion in cl 790.227 ultra vires the power conferred by ss 31(3) and 504 of the Act to make regulations prescribing criteria for a visa?

   (b) If it is valid, does cl 790.227 permit the Minister to refuse to grant a protection visa by reference to an applicant's conviction for an offence under s 233C of the Act?

   (c) Was the Decision unlawful because the purported exercise of power pursuant to s 65, in purported discharge of the duty imposed by s 47, was penal or punitive in nature; alternatively, was the Decision not authorised by the Act, because s 65 and/or cl 790.227 must be read down or disapplied so as not to permit the exercise of an administrative power that contravenes the limit sourced in Ch III of the Constitution?

   (d) Is the plaintiff's detention authorised by the Act, in circumstances where the effect of s 197C(3) (in force since 25 May 2021) is to abrogate or qualify the enforceable duty to remove an unlawful non-citizen, otherise to be found in s 198?

   (e) Was the Decision affected by jurisdictional error because the Minister acted on a misunderstanding of the law, and/or failed to consider, or to consider rationally, relevant matters?

   (f) What relief should be granted if the plaintiff succeeds on the identified grounds?

3. In summary, the plaintiff submits: **first**, cl 790.227 is invalid; **second**, if it is valid, it did not permit the Minister to refuse to grant the SHEV by reference to the plaintiff's conviction for a people smuggling offence under s 233C of the Act; **third**, the Minister purported to exercise the power in s 65 in a manner that was penal or punitive, and thus

inherently judicial, contrary to Ch III, with the consequence that the exercise of power was unlawful; **fourth**, the Decision was otherwise affected by jurisdictional error because the Minister acted on a misunderstanding of the law, and/or failed to rationally and lawfully consider relevant matters she was bound to consider; **fifth**, since 25 May 2021, the plaintiff's detention has not been authorised by the Act. The Court should accordingly grant the relief sought in the plaintiff's revised application for a constitutional writ.[1]

III. SECTION 78B NOTICES

4. The plaintiff has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).[2]

IV. FACTS

5. The application sets out the material facts, including insofar as they relate to procedural history. By their response,[3] the defendants take issue in some respects with what the plaintiff has identified. These matters are addressed below where relevant.

V. ARGUMENT

A. The national interest criterion in cl 790.227 is invalid, or must be read down

A-1 Statutory scheme for the grant or refusal of protection visas

6. The starting point is determining the "true nature and purpose" of the regulation-making power in the Act.[4] To this end, the operation of the statutory scheme for grant or refusal of protection visas bears critically on the plaintiff's arguments on cl 790.227.

7. It is the text, context and purpose of the Act itself that is central to this question. Although it can be useful to "read regulations together with the statute under which they were made in order to understand a legislative scheme", it is not legitimate to construe a statute, in particular to expand its operation, by reference to the regulations made under it.[5]

8. A SHEV, the visa for which the plaintiff has validly applied, is one of three classes of

[1] Plaintiff's revised application for a constitutional or other writ filed on 20 December 2022 (the **Application**), at **AB Vol 1 7-28**. References to **AB** are to the Revised Application Book filed 20 January 2023.
[2] **AB Vol 1 29-38**.
[3] Defendants' response filed on 10 January 2023 (the **Response**) (**AB Vol 1 39-50**). See also the correspondence between the parties on 12 and 16 January 2023 (**AB Vol 3 875-890**).
[4] *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161 at 164 (Wilson, Dawson, Toohey and Gaudron JJ).
[5] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109-110 [19] (Gummow A-CJ, Kirby, Hayne, Crennan and Kiefel JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247 at 264 [39] (Crennan, Bell and Gageler JJ).

protection visa for which the Act currently provides. Section 35A(6) further provides that the criteria for a class of protection visas are: (a) the criteria set out in s 36; and (b) any other relevant criteria prescribed by regulations for the purposes of s 31 of the Act.

9. The power by which the Executive may make regulations that would prescribe criteria for protection visas is s 504 of the Act, read with s 31(3).[6] Section 504(1) provides that the Governor-General may make regulations "not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed". Section 31(3) provides that regulations may prescribe criteria for, relevantly, protection visas.

10. Clause 790.227 of the Regulations provides that a criterion for a SHEV is that the Minister is "satisfied that the grant of the visa is in the national interest". An identical criterion is found in cl 785.227 (temporary protection visa) and cl 866.226 (permanent protection visa). In the Regulations, this criterion does not appear other than for each of the three classes of protection visa established by the Act.[7] On a previous occasion, this Court considered, but did not need to determine, the validity of the national interest criterion in cl 866.226.[8]

11. By reason of ss 47 and 65, the Minister must consider a valid application for, and is duty-bound to grant, a protection visa to a person who satisfies the criteria for that visa set by Parliament in the Act (s 36), or set by the Executive in the Regulations (if valid),[9] subject to the preventing effect of, relevantly, s 501 (described in s 65 as a "special power to refuse or cancel") or another law of the Commonwealth.

12. In the present case, as at the date of the Decision and leaving to one side cl 790.227, the plaintiff satisfied all criteria for the grant of the SHEV.[10]

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[6] ***Plaintiff M47**/2012 v Director-General of Security* (2012) 251 CLR 1 at 72-73 [162] (Hayne J), cf 41 [53] (French CJ).

[7] It has been a criterion for the grant of a protection visa since 1 September 1994, when the Regulations came into force. The Regulations came into force at the same time as the provisions of the *Migration Reform Act 1992* (Cth), by which the Act in its current form was enacted (notwithstanding many amendments to the Act since that time). At no time since 1 September 1994 has it been a criterion, either in the Regulations or in the Act, for the grant of any other class of visa.

[8] ***Plaintiff S297**/2013 v Minister for Immigration and Border Protection (No 2)* (2015) 255 CLR 231 at 242 [17] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

[9] The decision to be made in performance of the duty is "binary": the Minister must grant or refuse to grant, depending on the existence of one or other of two mutually exclusive states of affairs: *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 188-189 [34] (Crennan, Bell, Gageler and Keane JJ).

[10] Application at [66] (**AB Vol 1 18**); Response at [5], [9(o)] (**AB Vol 1 42, 45**). The defendants have not alleged nor adduced any evidence to suggest there has been any relevant change in the plaintiff's circumstances since June 2022. As well, the defendants have elected not to advance any evidence pertaining to a "hypothetical"

A-2 Clause 790.227 is inconsistent with the Act and thus invalid

13. Inconsistency may be manifested in various ways.[11] As French CJ said in *Plaintiff M47*:[12]

> An important consideration in judging inconsistency … is 'the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned'. A grant of power to make regulations in terms conferred by s 504 [of the Act] does not authorise regulations which will 'extend the scope or general operation of the enactment but [are] strictly ancillary'.

14. Having regard to the statutory scheme set out above, at least four considerations lead to the conclusion that cl 790.227 is inconsistent with or repugnant to the Act and invalid.

15. **First**, cl 790.227 negates, at a minimum undercuts, specific elements of the statutory scheme, principally ss 36(1C) and 501(3) (read with s 501(6) and 501C). Together, ss 36 and 501 constitute a careful legislative calibration of the circumstances in which Australia may refuse to extend protection to a refugee, such as the plaintiff, who would otherwise satisfy the criteria for a protection visa. The Executive is not authorised to impose an additional criterion that subsumes or significantly curtails the criteria set by Parliament in ss 36 and 501, giving those provisions no work to do and undermining their purpose.[13]

16. The following considerations support this first argument pointing to invalidity.

17. Section 36(1C), Parliament's chosen way of providing in respect of Art 33(2) of the *Refugees Convention* (being an exception to the non-refoulement obligation in Art 33(1)),[14] provides in para (b) that a criterion for a protection visa is that the applicant is not a person whom the Minister reasonably considers, "having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community". Section 36(1C) falls to be considered "in the contextual fabric for decision-making about those who have been recognised as refugees" and "describes the serious conditions that

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scenario in which the Minister could in the future form a view that the plaintiff poses a risk of harm to the Australian community: **AB Vol 3 879**.

[11] *Plaintiff M47* (2012) 251 CLR 1 at 41 [54] (French CJ) and cases cited.

[12] (2012) 251 CLR 1 at 41 [54] (French CJ) (citations omitted).

[13] See *Plaintiff M47* (2012) 251 CLR 1 at 48 [71] (French CJ), 91 [221] (Hayne J), 152-153 [399] (Crennan J), 169-170 [456]-[161] (Kiefel J). The regulation held invalid in *Plaintiff M47* required the Minister to refuse to grant a refugee a protection visa if ASIO assessed the refugee to be directly or indirectly a risk to security (public interest criterion 4002) (a requirement that Parliament has since effectively reproduced in the Act itself by s 36(1C)(a)). A number of the observations made by the majority apply with equal force to cl 790.227.

[14] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) at [1236]; see also ***KDSP*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 15 [41] (Bromberg J), 41 [161]-[162] (O'Callaghan and Steward JJ).

justify the return of a refugee to a place where he or she may face persecution".[15]

18. As Bromberg J stated in *KDSP* (albeit in the context of whether s 501 could apply to a protection visa), "[h]aving enacted specific criteria to deal with specific circumstances and done so in order to reflect Australia's international obligations to address a specific circumstance by specific measures … Parliament should be taken to have intended that its chosen criteria would be effective and would govern the specific subject matter with which it deals."[16] The Full Court in *KDSP* went on to find that the Act itself may nonetheless provide "two paths for dealing with the same subject matter in the one process … by requiring that subject to be addressed by different considerations".[17] That conclusion does not follow in respect of the Regulations, which are made by the Executive, are in a hierarchically different position from s 501,[18] and may not detract from the Act's operation, as s 504 makes clear.

19. Inconsistency is also revealed between s 501 and cl 790.227. It is a condition for the exercise of the personal power to refuse pursuant to s 501(3)[19] when the Minister is satisfied that refusal is in the national interest that the Minister also reasonably suspects that the applicant for a visa does not pass the character test. That condition on power would be rendered nugatory by cl 790.227, if valid. And, when the Minister is considering s 65 personally, she is directed by sub-s (1)(a)(iii) to be satisfied that grant of the visa "is not prevented by section … 501", which includes the personal power in sub-s (3) with its national interest criterion. Relatedly, the mandatory effect of cl 790.227, when read with s 65(1)(a)(ii), would undercut the discretion conferred by s 501(3), again supporting the conclusion of impermissible inconsistency between the Act and cl 790.227.[20]

20. **Second**, cl 790.227 is inconsistent with the objects of the Act as a whole. Clause 790.227 purports to permit either the Minister or a delegate[21] to refuse to grant a protection visa

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[15] ***NBMZ*** *v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at 7 [21] (Allsop CJ and Katzmann J). The definitions of a "particularly serious crime" in s 5M and of a "serious Australian offence" in s 5(1) indicate Parliament did not intend for commission of an offence under ss 233A to 234A (the provisions creating people smuggling offences) would engage s 36(1C): *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 at 647-648 [46]-[48] (Logan J); cf *AFF20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1564 at [39]-[45] (Bromberg J).

[16] *KDSP* (2020) 279 FCR 1 at 25 [92].

[17] *KDSP* (2020) 279 FCR 1 at 26-27 [100] (Bromberg J), see also 81 [301] (O'Callaghan and Steward JJ).

[18] *Plaintiff M47* (2012) 251 CLR 1 at 88 [211] (Hayne J).

[19] Section 501(3) of the Act also provides for a personal power to cancel a visa, not relevant in this case.

[20] See *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125 at [30]-[36] (Derrington J, Perry J agreeing).

[21] Notwithstanding that Parliament has otherwise, since 1994, expressly provided that a power or discretion made to depend on the national interest should be vested in the Minister personally: see Act, ss 198AB(1), (2),

to a person in respect of whom Australia owes protection obligations, which has the effect of denying benefits that internationally assumed obligations, as given force domestically, require Australia to extend to that person.

21. It may be accepted that there is a "tension" between "the power of a sovereign nation to 'admit, exclude and repel aliens' and the 'humane practice', as reflected in treaty obligations, to admit a person seeking refuge from persecution",[22] and that the legislature has considered it necessary, in some instances, to resolve that tension in a manner that does not give primacy to Australia's international obligations. But the relevant point is that the balancing of that tension has been undertaken by Parliament and is given detailed effect in the Act itself, with s 36 being the controlling provision for the circumstances in which a protection visa may be granted or refused, subject only to, relevantly, the "special power" sourced in s 501. It is repugnant to that scheme, and the Act as a whole, for the Executive to purport to confer a power to permit refusal of a protection visa by reference to a national interest criterion, in particular to a delegate, that effectively dispenses with all criteria for such a visa provided for by the Act.

22. Indeed, it is implicit in the objects clause in s 4(1) that the provisions of the Act already reflect Parliament's judgment as to what is in the national interest; where the Minister is separately empowered to exercise a personal power (always discretionary) in the national interest, such as in ss 501(3), 501A, 501B, 501BA and 502, Parliament has expressly said so. As Kirby J stated in *Re Patterson; Ex parte Taylor*:[23]

> [T]he designation of the Minister as the repository of power, and the specification that the Minister personally must exercise the power of the kind mentioned in s 501(3) of the *Migration Act*, obviously reflect the importance, potential controversy and need for political accountability in such a decision and the high responsibility that Ministers bear in protecting the national interest in this and other fields.

23. Properly construed, the Act reveals that it is Parliament's intention that its protective and beneficial provisions, which constitute a "tightly controlled" scheme of "powers and

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(5), 501(4), 501A(2), 501B(3), 501BA(4), 502(2), and paragraphs 21 to 23 below. The only exceptions are in respect of Div 4 of Pt 2, dealing with criminal justice visitors, which provides that the powers exercised under that Div may be delegated only to the Secretary, an SES employee or a commissioned police officer, and in ss 339 (issuing of a conclusive certificate under Div 2 of Pt 5), 412 (issuing of a conclusive certificate under Div 2 of Pt 7) and 473BD (issuing of a conclusive certificate under Div 1 of Pt 7AA) – all of which have only procedural, rather than substantive, consequences. See analogously, in relation to the cognate expression "public interest", ss 137N(3), 195A(5), 197AF, 198AE(2), 336L(5), 351(3), 417(3), 501J(4).

[22] *Plaintiff M47* (2012) 251 CLR 1 at 49 [75] (Gummow J), citing *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2005] 2 AC 1 at 27-32 (Lord Bingham of Cornhill).

[23] (2001) 207 CLR 391 at 502 [330].

discretions",[24] not be diminished by the Executive in purported exercise of a general regulation-making power. Clause 790.227 is fundamentally at odds with the operation and objects of the Act, and invalid.

24. **Third**, and relatedly, cl 790.227 purports to permit a decision to refuse the grant of a protection visa to be made by reference to undefined factual matters and at the near unbounded discretion of the decision-maker. Though this Court in *Graham* made clear that concept of the national interest is "not unbounded",[25] it is a concept of wide import, and "largely a political question".[26] The similar expression "public interest" has been held to "import[] a discretionary value judgment to be made by reference to undefined factual matters"[27] that is confined only so far as it may not be exercised for purposes that are "definitely extraneous to any objects the legislature could have had in view".[28]

25. It is inherently unlikely, in the context of the scheme just described, that Parliament would have intended such a power could validly be vested in a delegate. Moreover, given the breadth of the concept of the national interest, cl 790.227 in effect creates a category or class of visa that is wholly untethered from those created by the Act – rather, it purports to authorise the Minister or a delegate to refuse the grant of a visa for any reason that may be considered politically attractive. Apart from the invalidating inconsistencies already identified, it is unclear whether Parliament could validly delegate such a power. Operating in this way (if it were valid), the practical effect of the criterion could be said to "redraw" the Act, "to say, in effect, '[h]ere are some non-binding guidelines which should be applied', with the 'guidelines' being the balance of the statute", or to purport to delegate to the Minister "the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia".[29] As such provisions may well lack the hallmark of a valid exercise of legislative power,[30] ss 504 and 31(3) should not

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[24] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [30] (French CJ and Kiefel J); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 350 [33] (French CJ, Crennan and Bell JJ).
[25] (2017) 263 CLR 1 at 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[26] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 46 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[27] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[28] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).
[29] ***Plaintiff S157****/2002 v Commonwealth* (2003) 211 CLR 476 at 512 [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[30] *Plaintiff S157* (2003) 211 CLR 476 at 512-513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ); see also *Plainitff M79/2012 v Minister*

be read as authorising such a delegation of power, hence not authorising cl 790.227.

26. **Fourth**, and related to the third point, cl 790.227 does not "prescribe criteria for a visa" within the meaning of s 31(3) of the Act, properly construed. This argument does not turn on the meaning of the word "criteria" as there used, which it may be accepted "demands a wide meaning"[31], having regard to statutory context and the ordinary meaning of "criterion" as "a standard or principle against which, relevantly, an application for the grant of a visa is to be tested".[32] Rather, the point is that the power to prescribe criteria must refer, as a matter of ordinary construction, to a power to set such standards or principles against which an application for a visa will be assessed – it cannot be a power to decide, by reference to a subjective state of satisfaction required to be reached on undefined factual considerations, whether a visa will be granted.

27. The point is well illustrated by the observations of five members of this Court in *Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal*, in the context of a purported exercise of a power to determine "standards" (emphasis added):[33]

> The power to fix a standard which is to be generally applied is quite different from a power to decide ad hoc, from case to case, whether a particular programme may be televised. A power of the latter kind is not a power to fix standards.
>
> It is no doubt true, as the learned Solicitor-General submitted, that the meaning of the words … must be construed in the context provided by the Act as a whole. However, as will be seen, there is nothing in the other provisions of the Act that leads to the conclusion that it is intended that the power to determine standards … should include a power to approve or disapprove of a particular programme: the indication is to the contrary. … A power to decide whether a particular programme should be classified as complying with a standard is, of course, not the same as a power to determine a standard.

28. The same is true of the Act and ss 504 and 31(3). Put another way, ss 504 and 31(3) do not permit what is effectively an overriding veto criterion, which circumvents and renders unnecessary the otherwise tightly controlled criteria in the Act.

29. Accordingly, there is invalidating inconsistency. The consequence of an inconsistency is

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for Immigration and Citizenship (2013) 252 CLR 336 at 366-367 [85]-[88] (Hayne J) (observing, as well, the fundamental principle derived from the *Bill of Rights* that the Executive cannot dispense with domestic law).

[31] *Pillay v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 368 at 373 [29] (the Court).

[32] *Minister for Immigration and Citizenship v Islam* (2012) 202 FCR 46 at 53 [38] (Robertson J); see also *Lilley v Comcare* (2013) 209 FCR 275 at 285 [31] (Rares J).

[33] (1985) 156 CLR 1 at 4-5 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). See also, analogously, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 760, 762 (Dixon J) (the regulation-making power "could not justify a by-law committing the whole subject matter of the power to a discretionary authority exercisable in each particular case" and "a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent") and *Turner v Owen* (1990) 26 FCR 366 at 389 (Pincus J).

that an impugned regulation is not a valid exercise of the regulation-making power under the empowering statute and is void for want of power, unless the regulation is capable of being read down.[34] Given the breadth of the concept of the national interest, and given the inherently evaluative task to be undertaken, it is not capable of being read down so as to not be repugnant to the Act. Clause 790.227 not being valid, the Decision, purportedly made pursuant to ss 47 and 65, was not made according to law.

A-3 If valid, cl 790.227 does not permit the refusal of a protection visa solely by reason of a conviction for an offence under ss 233A to 234A of the Act

30. In *Plaintiff S297,* this Court held that cl 866.226 (identical to cl 790.227) did not authorise the Minister to refuse an application for a protection visa by attaching determinative and adverse significance to S297's status as an unauthorised maritime arrival, in addition to the consequences which the Act expressly attributed to that status, found in s 46A.[35]

31. The Court's construction of cl 866.226 was consistent with earlier authorities establishing that the Executive may not, by regulation, create a distinct and independent liability additional to the those for which the legislature has already provided as consequences for a particular act or status; and may not impose a liability that is heavier than, and different from, punishment expressly authorised under the empowering statute.[36]

32. In light of these authorities, cl 790.227 does not permit the Minister to expose an applicant for a visa to a "distinct or independent addition of liability", or to a "heavier and different punishment", than that provided under the Act for an offence committed under ss 233A to 234A. The statutory scheme with respect to offences under ss 233A to 234A discloses that Parliament intended to provide exhaustively for the consequences of a contravention of those provisions under the Act, including the visa consequences.

33. Relevantly, ss 233A to 233C create the offences of people smuggling and aggravated people smuggling and specify maximum penalties, namely imprisonment for 10 years (people smuggling) and 20 years (aggravated people smuggling). By s 236B, the Act imposes mandatory minimum penalties for offences committed under ss 233B, 233C and 234A, provided the person who committed the offence was not under 18 years old when the offence was committed. Section 236C provides that the sentencing court must take

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[34] See *Stevens v Perrett* (1935) 53 CLR 449 at 463 (Rich, Dixon and McTiernan JJ); *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [52] (Gleeson CJ and Gummow J); *Acts Interpretation Act 1901* (Cth), s 46.
[35] (2015) 255 CLR 231 at 239 [5], 243-244 [20]-[21] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). For that reason, the Court found it unnecessary to decide whether cl 866.226 was invalid: see at 244 [23].
[36] *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 412 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Grech v Bird* (1936) 56 CLR 228 at 239-240 (Dixon J).

into account any period of time that the person has spent in immigration detention when imposing a sentence on a person convicted of an offence. In addition to the penalties for contraventions and a mandatory minimum sentence scheme, the Act provides other consequences for committing offences against ss 233A to 233C. Section 5C provides that for the purposes of the Act a non-citizen is of "character concern" if the Minister reasonably suspects the non-citizen has been involved in conduct constituting an offence under ss 233A to 234A.[37] And s 501(6)(ba)(i) provides that a person does not pass the character test if the Minister reasonably suspects that the person has been involved in conduct constituting an offence under one or more of ss 233A to 234A.

34. Importantly, although a consequence of committing an offence under ss 233A to 234A is that the person fails the character test, commission of such an offence does not disentitle a person from applying for a protection visa under the Act.[38]

35. Having regard to the Minister's reasons, read fairly, there can be no doubt that the plaintiff's conviction for a people smuggling offence was the sole reason, or the basis for, the Minister's conclusion that it was not in the national interest for him to be granted a protection visa.[39] The effect of the Minister's decision was thus to impose additional consequences for the plaintiff's offence under s 233C in addition to those identified by Parliament. Indeed, the Minister identified no consideration justifying refusal in the national interest that was unconnected to the plaintiff's conviction. As the Minister's dispositive reasoning makes clear,[40] the fact of the plaintiff's offending feeds into, and is inseparable from, the considerations relating to "protecting and safeguarding Australia's territorial and border integrity" and "maintain[ing] the confidence of the Australian community in the protection visa program".[41]

36. Plainly, given cl 790.227 is the last option for refusal by the Minister of the grant of a SHEV to the plaintiff, the Decision imposes additional consequences for the plaintiff's offending beyond those prescribed by the Act, which it cannot do. Despite the broad, evaluative nature of what is in the "national interest", the concept is not one that lacks

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[37] Act, s 5C(1)(bc)(i).
[38] Cf Act, s 46A(1). The Minister lifted the bar in respect of the plaintiff under s 46A(2) on 7 September 2016 (**AB Vol 1 11**).
[39] All the other evidence, in particular the briefs to the Minister of 10 June 2022 (**AB Vol 1 51-55**) and 22 June 2022 (**AB Vol 1 56-64**), but also the procedural history of this case and the joint media release (**AB Vol 3 958-961**), are consistent with this fair reading of the Minister's reasons.
[40] Decision at [39] (**AB Vol 2 98**).
[41] Decision at [21]-[25] (**AB Vol 2 94-95**).

limits, and those limits are supplied by the Act.[42] The Decision was unlawful.

B. The purported exercise of power was punitive

B-1 Principles

37. Three fundamental propositions bear on the question whether the manner of the purported exercise of power under s 65 of the Act contravened Ch III of the Constitution and on the lawfulness of the plaintiff's continuing detention under the Act.

38. The **first proposition** is that the adjudgment and punishment of criminal guilt is a function that is essentially and exclusively judicial in character.[43] Such exclusively judicial function is not confined to punishment for criminal guilt, but rather, "extends to all laws that are properly characterised as punitive".[44] Chapter III of the Constitution precludes the conferral of that essentially judicial function on any organ of the Executive.[45] This is so whether or not the power to punish is conferred in terms ostensibly divorced from punishment and/or criminal guilt, because Ch III is concerned with substance, not form.[46]

39. The **second proposition** is that subject to exceptional cases, the involuntary detention of a person is a form of punishment and exists only as an incident of that exclusively judicial function of adjudging or punishing criminal guilt.[47] The exception applicable to unlawful non-citizens is limited by purpose: segregation pending a determination whether to grant or refuse a visa, or pending removal once a decision has been made. That limited authority to detain unlawful non-citizens can be conferred by Parliament on the Executive without infringing Ch III only because detention for that purpose is not punitive in nature.[48]

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[42] *Graham* (2017) 263 CLR 1 at 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[43] *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); ***Alexander** v Minister for Home Affairs* (2022) 96 ALJR 560 at 578 [71] (Kiefel CJ, Keane and Gleeson JJ), 595 [158] (Gordon J), 611 [235] (Edelman J).
[44] *Alexander* (2022) 96 ALJR 560 at 611 [236] (Edelman J); see also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J).
[45] *Alexander* (2022) 96 ALJR 560 at 595 [158] (Gordon J), citing *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J).
[46] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Re Woolley* (2004) 225 CLR 2 at 35 [82] (McHugh J); *Alexander* (2022) 96 ALJR 560 at 577 [72], 580 [79] (Kiefel CJ, Keane and Gleeson JJ), 595 [158] (Gordon J).
[47] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); ***Falzon** v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340-341 [16] (Kiefel CJ, Bell, Keane and Edelman JJ).
[48] ***Al-Kateb** v Godwin* (2004) 219 CLR 562 at 584-586 [45]-[48] (McHugh J), 650-651 [266]-[267] (Hayne J), 658 [289], 660-661 [295] (Callinan J); *Falzon* (2018) 262 CLR 333 at 341 [17] (Kiefel CJ, Bell, Keane and Edelman JJ); *Commonwealth v **AJL20*** (2021) 273 CLR 43 at 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

40. The **third proposition** is that the Act cannot authorise an ostensible exercise of power by the Minister pursuant to s 65 (coupled with the duty in s 47) that is penal or punitive in nature, because Parliament cannot authorise the doing by the Executive of any action that would contravene Ch III and the separation of powers principle.[49] Moreover, because Ch III limits not only the possible repositories of judicial power, but also the manner of its exercise,[50] it must follow that a particular exercise by an officer of the Commonwealth of a facially anodyne statutorily conferred power may contravene Ch III.

41. Whether an exercise of power has exceeded the limits mandated by the Constitution is to be determined having regard to both the manner and purpose of the power's exercise and the effect of the exercise of power on a person who is its object.[51] This is not to conflate "questions concerning the purpose of the Act with questions concerning the purpose of the officers of the Executive bound by it",[52] but rather, is consistent with well established principles governing the characterisation of exercises of power as judicial or otherwise. Consistently with those principles, it is relevant to consider "the subject-matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes" (emphasis added).[53]

42. Where Parliament has vested a broad discretionary power, or has conferred a rule-making power that, as exercised to make regulations then purports to permit exercise of a statutory power by reference to a broad and largely unfettered criterion (as has occurred here, if cl 790.227 is valid), an individual exercise of that statutory power can be unlawful, and it will be unlawful when incompatible with Ch III.[54] It may be accepted that in such cases "the statutory question can converge with the constitutional question".[55] In the present case, whether framed as a statutory question or a constitutional question – and bearing in mind the basal proposition derived from *Lim* that the question is one of substance and

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[49] Which applies to both the legislative and executive branches: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275-276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Minister for Home Affairs v* ***Benbrika*** (2021) 272 CLR 68 at 141-142 [160] (Gordon J).
[50] *Leeth v Commonwealth* (1992) 174 CLR 455 at 486-487 (Deane J).
[51] *Alexander* (2022) 96 ALJR 560 at 585 [107] (Gageler J).
[52] Cf *AJL20* (2021) 273 CLR 43 at 69 [42] (Kiefel CJ, Gageler, Keane and Steward JJ).
[53] *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 363 [35] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[54] See ***Palmer*** *v Western Australia* (2021) 272 CLR 505 at 531 [68] (Kiefel CJ and Keane J). See also generally Walker and Hume, "Broadly Framed Powers and the Constitution" in Williams (ed), *Key Issues in Public Law* (2017) at 144-171 and Boughey and Carter, "Constitutional Freedoms and Statutory Executive Powers" (2022) 45(3) *Melbourne University Law Review* (advance).
[55] *Palmer* (2021) 272 CLR 505 at 546-547 [121]-[123] (Gageler J).

not form – the Minister's purported discharge of duty, imposed upon her by s 47 of the Act, by purported exercise of the power conferred by s 65, was unlawful: either the exercise of power contravened the limit sourced in Ch III, or it was ultra vires the Act.

B-2 The purported exercise of power in reliance on cl 790.227 was punitive in character

43. The following matters disclose that the true, substantive characterisation of the purported exercise of power under s 65 is that it was a form of punishment.

44. ***The sole or substantial justifying factor for the Minister's exercise of the power was the deterrence of others from committing a crime:*** An exercise of power will be punitive if its sole or substantial purpose is the deterrence of others from committing a crime.[56] Although deterrence may in some cases have a legitimate protective element, at least in the context of a decision to cancel a visa,[57] it is necessary, for the purposes of considering whether the particular exercise of power is punitive, to identify the "principal purpose".[58] And once it can be seen that a decision to refuse a visa is made for the substantial purpose of deterrence, "an affinity arises with punishment for crime".[59]

45. A number of matters strongly support the conclusion that the substantial purpose of the Decision was general deterrence, not protection. Most fundamentally, the Minister said so in the Decision itself, particularly at [21]-[24], and [39]-[40].[60] Justice Katzmann characterised the former Minister's reasons for refusing to grant the plaintiff a SHEV on 13 May 2020, which were expressed in near identical terms, as being for the sole or substantial purpose of deterrence. As her Honour stated, "the Minister determined that the [plaintiff] should be further punished by being denied a protection visa so as to give effect to considerations of general deterrence of people smugglers".[61] This amounts, impermissibly, to double punishment, in particular where the plaintiff has already been

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[56] See, eg, *Alexander* (2022) 96 ALJR 560 at 579-580 [78] (Kiefel CJ, Keane and Gleeson JJ, citing *Kennedy v Mendoza-Martinez* 372 US 144 at 168, 187-188 (1963), 612-613 [246] (Edelman J); *NBMZ* (2014) 220 FCR 1 at 8-9 [28]-[31] (Allsop CJ and Katzmann J). See also ***ENT19*** *v Minister for Home Affairs* (2021) 289 FCR 100 at 127-129 [124]-[133] (Katzmann J) and the authorities cited.

[57] See the discussion in *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424 at 455-465 [144]-[153] (Mortimer J).

[58] *Alexander* (2022) 96 ALJR 560 at 570 [75] (Kiefel CJ, Keane and Gleeson JJ). See also *NBMZ* (2014) 220 FCR 1 at 8 [30] (Allsop CJ and Katzmann J); *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42] (Moore, Branson and Emmett JJ).

[59] *NBMZ* (2014) 220 FCR 1 at 8 [31] (Allsop CJ and Katzmann J), citing *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 15 (Davies J).

[60] **AB Vol 2 94, 98.** That this was the substantial purpose is also revealed by the other documents produced by the defendants, constituting the entirety of the documentary material before the Minister: see **AB Vol 3 878**.

[61] *ENT19* (2021) 289 FCR 100 at 128-129 [133]. The decision of 13 May 2020 is at **AB Vol 3 593-595**; see especially the similarities in the language used at [13]-[15] of the former Minister's reasons (**AB Vol 3 595**).

sentenced on that basis, and where general deterrence was (again, as Katzmann J observed), "apart from the objective seriousness of the offence, the single most important factor accounting for the length of the [plaintiff's] sentence" (emphasis added).[62]

46. Further, there is no probative basis for a finding that the plaintiff poses an unacceptable risk of harm to the Australian community, as successive Ministers have accepted.[63] As well, there has never been a finding that the plaintiff does not satisfy the criteria for a protection visa because he is a danger to the Australian community under s 36(1C).

47. ***The purpose was to sanction proscribed conduct:*** Relatedly, an exercise of power will be punitive if its purpose is to sanction proscribed conduct.[64] In *Alexander,* Edelman J noted the difficulty in drawing a line between (i) punitive laws, which have as one of their purposes sanctioning proscribed conduct; and (ii) laws which use certain conduct merely as a factum which informs a decision to impose harsh consequences for separate purposes concerning the public interest.[65] His Honour went on to explain (citations omitted):[66]

> [D]etention is plainly punitive when it is imposed as part of a sentence for an offence for purposes which include sanctioning an offender's conduct and preventing and deterring further offending. If that punishment is then continued, thus exceeding what the offender individually deserves for their conduct, it does not cease to be punitive. Indeed, it becomes more punitive.

48. This is precisely the present case. Here, any protective element of the exercise of power (which is not admitted) would flow from general deterrence, and would be unconnected with what the plaintiff deserves individually for his conduct, or his individual risk profile. The case is thus readily distinguishable from both *Falzon*[67] and *Benbrika*[68] – both cases where Parliament had validly designated past offending as a factum engaging a power to impose harsh consequences involving restriction of individual liberty, where the validity of the impugned provisions was dependent on the protective purpose of the power.[69]

49. ***The consequence of the exercise of power was the plaintiff's prolonged or indefinite detention for a purpose not connected with removal or assessment***: A final important

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[62] *ENT19* (2021) 289 FCR 100 at 128-129 [133]. The sentencing remarks are at **AB Vol 2 101-128**.
[63] Decision at [25] (**AB Vol 2 95**); Orders of Perry J dated 20 February 2020 (**AB Vol 2 288**); and see fn 10.
[64] *Alexander* (2022) 96 ALJR 560 at 611-612 [238], [240] (Edelman J).
[65] *Alexander* (2022) 96 ALJR 560 at 612 [241] (Edelman J).
[66] *Alexander* (2022) 96 ALJR 560 at 612-613 [246] (Edelman J) (emphasis added).
[67] (2018) 262 CLR 333.
[68] (2021) 272 CLR 68.
[69] *Falzon* (2018) 262 CLR 333 at 347-348 [47] (Kiefel CJ, Bell, Keane and Edelman JJ), 359 [94] (Nettle J); *Benbrika* (2021) 272 CLR 68 at 103 [47] (Kiefel CJ, Bell, Keane and Steward JJ). See also, eg, *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 306 [58] (the Court).

part of the statutory scheme bearing on the characterisation of the Minister's purported exercise of power is that the refusal of an application for a protection visa, if no other visa is granted or held, renders or maintains the applicant an unlawful non-citizen and engages the mandatory detention regime set out in Divs 7 to 9 of the Act, in particular under ss 189, 196, 198 and (since 25 May 2021)[70] 197C(3).

50. This Court has recently considered that scheme in *AJL20*.[71] As the Act then stood, the majority held that the detention of unlawful non-citizens authorised by ss 189(1) and 196(1) of the Act was reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending assessment of any visa application or removal from Australia.[72] This was because "the authority and obligation of the Executive to detain unlawful non-citizens is hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes" (emphasis added), such that "[u]pon performance of these duties, the detention is brought to an end."[73] It is because (and only because) these duties are enforceable that "'the length of detention [is not] at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive'"[74] and "the duration, and thus lawfulness, of the detention authorised by the Act is capable of determination from time to time".[75]

51. In direct response to the issue that gave rise to *AJL20*,[76] Parliament amended the Act to introduce, most relevantly, s 197C(3), which now provides that s 198 of the Act does not require or authorise the removal of a person to a country where a protection finding has been made about the person in respect of that country.[77] In the only decision thus far that has raised whether the effect of s 197C(3) may be to change the character of the detention under the Act in circumstances where that provision is engaged, such that the decisions of this Court in *AJL20* and *Al-Kateb* are distinguishable, Jagot J observed that there was a question of whether "such continuing detention would be lawful under Australian law,

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[70] *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), s 2.
[71] (2021) 273 CLR 43.
[72] (2021) 273 CLR 43 at 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).
[73] (2021) 273 CLR 43 at 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).
[74] (2021) 273 CLR 43 at 70 [45] (Kiefel CJ, Gageler, Keane and Steward JJ), citing cf *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at 597 [31].
[75] (2021) 273 CLR 43 at 70 [45] (Kiefel CJ, Gageler, Keane and Steward JJ).
[76] See, eg, Explanatory Memorandum to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) at 2-3.
[77] Also introduced was ss 36A and 197D.

despite the detention (arguably) not being for the purpose of removal or assessment".[78]

52. The consequences of s 197C(3) being engaged in the plaintiff's case are as follows.

53. **First**, because the plaintiff is the subject of a protection finding with respect to Iran within the meaning of s 197C(5),[79] the effect of s 197C(3) is that there is no "enforceable duty" – indeed, there is no power under the Act – to remove him to Iran. Section 197C(3) effectively abrogates the "hedging duty" found in s 198(6). No safe third country has been identified to which the plaintiff may be removed.[80] Consistently with what was said by the majority in *AJL20,* the absence of any hedging duty to remove (as distinct from, and irrespective of, the practicability of removal) is that the plaintiff's detention can no longer be said to be for the legitimate non-punitive purpose of detention pending removal.

54. Further, the effect of s 197D, introduced at the same time as s 197C, appears to be that the only way the Act now contemplates that the duty to remove under s 198 will be re-enlivened is by potential exercise of a broad statutory discretion that may be exercised at the initiative of the Minister at any point in time, from time to time, or not at all. The combined effect of ss 197C(3) and 197D thus appears to be, contrary to the requirement elucidated in *AJL20*, that the duration of detention is not capable of curial determination from time to time, because the existence of a duty to remove depends on the exercise of a discretionary power, and ceases to be set by the Act, once s 197C(3) has been engaged.[81]

55. This being so, there is no legitimate non-punitive purpose for the plaintiff's detention. Given ss 189(1) and 1961(1) do not authorise detention for a punitive purpose,[82] and that at all relevant times since 20 February 2020[83] the only lawful way in which the duty coupled with power in ss 47 and 65 could be discharged was to grant him the SHEV,

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[78] [2022] FCA 878 at [58]-[60], referring to *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374] (Gageler J).
[79] Decision at [3] (**AB Vol 2 91**); see also Application at [66(a)] (**AB Vol 1 18**); Response at [5] (**AB Vol 1 42**).
[80] No allegation has been advanced by the Minister that there is any prospect of removing the plaintiff to a safe third country, nor that there is any such country in which the plaintiff has a right to reside, nor that any person in respect of which Australia has accepted that it owed protection obligations has ever been removed to a safe third country: see **AB Vol 3 965-969**. In fact, shorn of words chosen to attempt to colour reality, the Minister was advised that the plaintiff will be kept in detention because removal to Iran is not authorised and there is no prospect of removal, voluntary or involuntary, to a safe third country. That the plaintiff once expressed a willingness to go to a safe third country and nothing happened is powerful evidence: **AB Vol 3 878, 881-883**.
[81] Cf *AJL20* (2021) 273 CLR 43 at 70-71 [45] (Kiefel CJ, Gageler, Keane and Steward JJ).
[82] See paragraphs 38 to 39 above.
[83] Being the date on which it was conceded by the Minister that there was no probative basis to support a finding that the plaintiff posed an unacceptable risk of harm to the Australian community (**AB Vol 2 288**), coupled with the acceptance by the defendants that the plaintiff satisfies all criteria apart from cl 790.227: see fn 10 above.

the plaintiff's detention is not, and has not been since 25 May 2021, authorised by the Act. Further, the effect of the Minister's purported discharge of the duty in s 47, coupled with the power in s 65, was to cause the plaintiff's detention contrary to law, and contrary to Ch III of the Constitution.

56. **Second**, the practical, human consequence of these matters, as the Minister acknowledged and was well aware, is the plaintiff's administrative detention for an indefinite period.[84] Put another way, as a consequence of the Decision, and because the plaintiff is a refugee within the meaning of the Act (posing, paradoxically, an insufficient risk of harm to the Australian community to engage s 36(1C)), he faces the real prospect of incarceration in Australia for the rest of his life, not by judicial process but (purportedly) by reason of the Act containing ss 189, 196, 197C(3) and 197D, which together purport to require his detention but now do not authorise his removal. That consequence, not merely harsh but catastrophic, further supports characterisation of the exercise of power as punitive.[85] The Decision, purportedly in reliance on the national interest criterion, caused a new and continuing period of detention to commence, where consideration of whether the plaintiff may be admitted into the Australian community no longer existed, and removal is not authorised. No amount of speculation as to some future exercise of non-compellable powers[86] can ameliorate the fact that the Decision was made without lawful authority.

C. The Minister acted on a misunderstanding of the law

57. A decision maker falls into jurisdictional error if she misunderstands the nature of the jurisdiction to be exercised, misconceives her duty, fails to apply herself to the question to be decided or misunderstands the nature of the opinion to be formed.[87]

58. Upon consideration of the totality of the materials before the Minister, it is clear she was never advised that if she decided personally to discharge the duty coupled with power in ss 47 and 65 of the Act, she could decide to grant the visa to the plaintiff. To the contrary,

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[84] Decision at [34] (**AB Vol 2 97**).
[85] See, eg, *Alexander* (2022) 96 ALJR 560 at [77], 583 [96] (Kiefel CJ, Keane and Gleeson JJ), 597 [166] (Gordon J).
[86] The evidence shows that not once, but thrice, has that speculation been thwarted (Application at [28], [42], [47], **AB Vol 1 13-15**).
[87] *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33] (Gageler and Keane JJ), provided the misunderstanding was material to the decision, such that there is a realistic possibility of a different outcome if the error had not been made: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [29]-[31] (Kiefel CJ, Gageler and Keane JJ); ***Nathanson*** *v Minister for Home Affairs* (2022) 96 ALJR 737 at 741 [2] (Kiefel CJ, Keane and Gleeson JJ), 750 [45] (Gageler J), 753 [63] (Gordon J). See also *Graham* (2017) 263 CLR 1 at 33 [68] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

the Department's advice was that, if she decided she did not want to make a personal decision (that is, if she should decide to leave the determination of the plaintiff's visa application to one of her delegates), then and only then "the application will proceed to 'grant' and [the plaintiff] will be released from immigration detention".[88] The only two options presented to the Minister in terms of ss 47 and 65 were a refusal decision by her or a grant decision by a delegate. Moreover, the Minister's own description of the power in s 65 omits any reference to the duty to grant a visa if all criteria are satisfied.[89]

59. A material omission from a briefing paper may affect the process embarked in reliance on it.[90] Moreover, where a matter is not adverted to in written reasons (and not adverted to in briefings), the proper inference to draw is that such a matter has in fact not been adverted to, considered or taken into account.[91] Given what was not done by the Minister in this case – including requesting further advice on any aspect of the advice(s) given to her, marking changes which she required to be made in respect of the draft reasons for decision, or giving evidence – the inference the Court should draw is that the Minister did not consider she could grant the visa to the plaintiff.[92]

60. Thus, it also ought to be concluded that the Minister exercised the power conferred by s 65 under the mistaken understanding that it was not an open course for her to grant the SHEV to the plaintiff. There was a "purported but not a real exercise of the power conferred",[93] i.e. a constructive failure to exercise the jurisdiction, which includes the duty in s 47. It necessarily follows that the effect of the error was to deprive the plaintiff of a realistic possibility that the outcome could have been different, had the Minister not misconceived of the binary nature of the power which she was to exercise.[94]

D. The Minister failed to take into account relevant considerations

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[88] Brief dated 22 June 2022 at 2 (option 4), 5 [17] (**AB Vol 1 57, 60**).
[89] Decision at [12] (**AB Vol 2 93**).
[90] *NBMZ* (2014) 220 FCR 1 at 6 [16] (Allsop CJ and Katzmann J), citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 30-31, 45, 65-66; see also *de Bruyn for Minister for Justice and Customs* (2004) 143 FCR 162 at 167 [24]-[25] (Kiefel J), 177 [71] (Emmett J); *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494 at 561-562 [282] (North J).
[91] *NBMZ* (2014) 220 FCR 1 at 6 [16] (Allsop CJ and Katzmann J); *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at 165 [72] (Kenny J); *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 at 595 [130] (Besanko J, Allsop CJ, Kenny, Kerr and Charlesworth JJ agreeing).
[92] Such an inference is also supported by the rarity of a decision pursuant to s 65 being made by the Minister personally and the fact that the Minister had been the Minister for Home Affairs for a less than a month.
[93] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 455 [196] (Gummow and Hayne JJ).
[94] *Nathanson* (2022) 96 ALJR 737 at 741 [2] (Kiefel CJ, Keane and Gleeson JJ), 750 [45] (Gageler J).

61. In making the Decision, the Minister elected to treat as a critical consideration the "perception of granting a protection visa to a person who has already been convicted of people smuggling offences".[95] Having elected to exercise her power (in its ample discretionary nature, by its dependency on national interest) by treating as the primary relevant matter the consequences that might flow from granting a protection visa to a person who has been convicted of a people smuggling offence, the Minister was bound to exercise that jurisdiction lawfully.[96]

62. Where the specifically identified concern of the Minister was about public perception and deterrence, lawful and rational consideration of that matter required the Minister also to have regard to the following: the Act itself provides criminally for the consequences when an individual engages in people smuggling; consistently with the scheme contemplated by Parliament, there had been a determination by a court of the level of general deterrence appropriate in the plaintiff's case; and that in the case of the plaintiff, as a refugee himself, his involvement in people smuggling had been for the purpose of being reunited with his family in Australia, and not to profit from or exploit the vulnerabilities of asylum seekers.

63. The Minister did not have regard to any of these matters. Whether properly characterised as a failure to have regard to a matter she was bound to take into account given how she had elected to exercise jurisdiction, or a failure to exercise that power rationally, the effect of the course of reasoning adopted, by which known countervailing matters were entirely disregarded, was that the Decision was affected by jurisdictional error.

VI. ORDERS SOUGHT

64. Given the plaintiff otherwise satisfies all criteria for the grant of a SHEV, if cl 790.227 is invalid or did not permit the Minister to refuse in the plaintiff's case, the consequence is that the Minister, having elected to discharge the duty in s 47, coupled with the power in s 65, was bound to grant the SHEV. Moreover, if the Court finds that the Decision was unlawful because it was punitive, or not authorised by the Act by reason of Ch III, it is readily apparent from the the totality of the materials before the Court that there is no basis for refusing the visa that would not depend upon considerations of the plaintiff's

[95] Decision at [25] (**AB Vol 2 95**).
[96] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 488-489 [39] (McHugh and Kirby JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 353-354 [77]-[79] (the Court); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), [88]-[91] (Gageler J).

offending so as not to fall foul of Ch III.[97] If any of those findings are made, there will only be one lawful path open to the Minister (or a delegate).

65. No other basis for refusing the plaintiff's visa having been identified, and in light of the numerous opportunities (of successive Ministers) to consider the plaintiff's application for a SHEV since it was validly lodged in February 2017, the Minister "cannot, and should not, now be given any further opportunity to consider the matter afresh".[98] In those circumstances, it is appropriate that a writ of peremptory mandamus issue forthwith commanding the Minister to grant the plaintiff a SHEV.[99]

66. If the plaintiff's detention is not authorised by ss 189(1) and 196(1) of the Act by reason of s 197C(3), nothing in *AJL20* precludes the grant of habeas. Although the majority in *AJL20* observed that "the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community", such that "no question of release on habeas can arise",[100] that observation was made in circumstances where the detention was authorised by the Act but the Executive had been "dilatory" in "performing the hedging duties imposed upon it",[101] and thus the majority considered that the appropriate remedy was mandamus to compel performance. However, where the detention is not authorised by the Act, because it is not for the permissible purpose of segregation pending removal (further, there is no remaining obstacle to grant of the visa for which the plaintiff applied and perementory mandamus should issue), the available and appropriate remedy is habeas corpus.

67. The plaintiff further seeks declarations that his detention is not authorised by ss 189(1) and 196(1) of the Act and therefore is and has been unlawful since 25 May 2021.

68. The plaintiff has now been detained by the Commonwealth since 14 December 2013. He has been detained notwithstanding that he has served the sentence of imprisonment for the offence for which he was convicted, satisfies all criteria for the grant of a protection visa under the Act (apart from cl 790.227 of the Regulations) and presents no

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[97] Notably, there have been two decisions by a Minister acting personally, purportedly pursuant to s 65 and relying on cl 790.227 not being satisfied, grounded in the same reasoning (being the Decision and the decision of the former Minister of 13 May 2020). This supports a conclusion that there is nothing else left as a basis for refusing "in the national interest". The decision of 13 May 2020 is at **AB Vol 3 586-595**. The earlier attempt of the former Minister to refuse the visa relying on s 501(1), on 14 October 2019 (**AB Vol 2 567-576**), was set aside by consent on 20 February 2020 (**AB Vol 2 288**).

[98] *Plaintiff S297* (2015) 255 CLR 231 at 248 [41] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

[99] Such order can be made by this Court "in the first instance": see *High Court Rules 2004* (Cth), r 25.13.7; see also *Judiciary Act 1903* (Cth), s 32.

[100] *AJL20* (2021) 273 CLR 43 at 76 [60]-[61] (Kiefel CJ, Gageler, Keane and Steward JJ).

[101] *AJL20* (2021) 273 CLR 43 at 73 [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

risk of reoffending and no unacceptable risk to the Australian community. The plaintiff respectfully submits that if the Court is minded to grant the relief sought, it should do so at the conclusion of the oral hearing, with written reasons to follow.

VII. ESTIMATE OF TIME

69. The plaintiff estimates that 3 hours will be required for presentation of his oral argument.

Dated: 23 January 2023

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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

ANNEXURE

RELEVANT STATUTES AND INSTRUMENTS

1. *Migration Act 1958* (Cth), ss 4, 13, 14, 29, 31, 35A, 36, 36A, 46, 46A, 47, 65, 189, 196, 197C, 197D, 198, 233C, 501, 502, 504 (Compilation 152, 1 September 2021).
2. *Migration Regulations* 1994 (Cth), Sch 2, cl 790.227 (Compilation 233).