HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA S102/2022
SYDNEY REGISTRY

BETWEEN: **ENT19**
Plaintiff

and

Minister for Home Affairs
First Defendant

Commonwealth of Australia
Second Defendant

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. Whether the **decision** of the first defendant (the **Minister**) to refuse, on 27 June 2022 and purportedly pursuant to ss 47 and 65 of the *Migration Act 1954* (Cth) (the **Act**), the plaintiff's application for a Safe Haven Enterprise (Class XE) Subclass 790 Visa (the **visa**), was unlawful because the Minister:
   (a) purported to exercise a statutorily conferred administrative power in a manner that was inherently judicial (the **constitutional issue**);
   (b) made a decision not authorised by the statute pursuant to which it was purportedly made (the **not authorised by the Act issue**);
   (c) acted on a misunderstanding of the law (the **misunderstanding of law issue**);
   (d) denied the plaintiff procedural fairness (the **procedural fairness issue**); and/or
   (e) failed to consider various relevant matters (the **relevant considerations issue**).
3. If the decision is unlawful, what relief should be granted in the circumstances of this case (the **relief issue**).

PART III: NOTICE

4. The plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth). He considers that no further notice is required.

PART IV: REPORT OF REASONS FOR JUDGMENT

5. There are no reasons for judgment of courts below.

PART V: STATEMENT OF RELEVANT FACTS

6. On 9 December 2013, the plaintiff, a citizen of Iran, arrived in Australia without a valid visa and was detained under the Act.[1] He has been detained ever since,[2] with 4 years of his deprivation of liberty ascribable to serving a sentence of imprisonment for an offence under the Act, and the remaining time being administrative detention under the Act. He is, and has been for some time, detained at Yongah Hill IDC in Western Australia, having been transferred there by the Defendants, even though his entire family resided when he was transferred, and continues to reside, in Sydney.[3]

7. On or about 20 February 2014, whilst being detained at Villawood IDC (Sydney, New South Wales), the plaintiff was charged with people smuggling offences under the Act.[4]

8. On 3 February 2017, the plaintiff made a valid application for the visa.[5]

9. On 13 October 2017, having pleaded guilty, the plaintiff was convicted in the District Court of New South Wales of one count of the aggravated offence of people smuggling – at least 5 people (s 233C of the Act), and he was sentenced to 8 years' imprisonment, to commence on 10 December 2013 and expire on 9 December 2021, with a non-parole period of 4 years to expire on 9 December 2017.[6]

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1 Affidavit of Ziaullah Zarifi affirmed on 5 July 2022 (**Zarifi Affidavit**) at [3]-[4].

2 Department's **submission** at [2]. The submission, exclusive of attachments, is reproduced in Vol 2 of the Application Book filed on 28 September 2002 (**AB 2**), at pages 529-537.

3 Zarifi Affidavit at [2].

4 Zarifi Affidavit at [6].

5 Zarifi Affidavit at [7]. The delayed making of a valid application for a visa, some 3 years after he had arrived in Australia, is likely to have been due to the Minister not lifting the bar in s 46A of the Act until close to the date when the plaintiff made the application.

6 Zarifi Affidavit at [8].

10. The sentencing remarks of his Honour Judge Scotting were before the Minister when she made her decision.[7] They included the following (which were not, however, brought to the Minister's attention by the Department, in the submission it prepared for her):

> General deterrence is a fundamental consideration in a people smuggling offence. A clear message must be sent that people involved will face a very substantial penalty. General deterrence may be attributed less weight in cases where the offender suffers from a mental condition because such an offender is not an appropriate person to be made an example of. The authorities do not mandate an entire disregard of general or specific deterrence by the sentencing judge. The extent of the reduction depends on the circumstances of the case. The factors that are relevant to the assessment include the nature and extent of the mental condition suffered, whether the offender acted with knowledge of what they were doing, and the gravity of their actions and whether the community require protection from the offender by reason of the mental condition suffered.
>
> The extent of the offender's mental condition is now significant. It is hard to judge his mental state at the time of the offences, except to say that I am satisfied that he acted out of desperation for his circumstances, particularly the desire to re-join his family. He knew what he was doing was wrong. The community does not require protection from the offender by reason of his mental condition. This is a case in which the weight to be afforded to general deterrence should be reduced. The extent of that reduction cannot be much because of the paramount importance of general deterrence for this type of offence.

11. On 19-20 October 2017, news articles were published reporting the plaintiff's conviction a week earlier, and they identified him by his full name.[8] These publications were a direct consequence of the Minister's office having sent, at 3:40pm on 19 October 2017, a media release about the plaintiff's conviction to various news organisations.[9]

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[7] Affidavit of Jonathon Charles Hutton affirmed on 3 August 2022 (**Hutton Affidavit**) at [2]-[3], and Exhibit JCH-1 (this part of this Exhibit being reproduced in AB 2, and relevant pages at 73-100).

[8] Hutton Affidavit, Exhibit JCH-1 (AB 2, pages 252-259).

This took place, even though: (i) the plaintiff had, by then, made a valid application for a protection visa; (ii) the Minister must be taken to have at least constructive knowledge of that fact; and (iii) the Minister must further be taken to have known of the requirements in s 91X of the Act coupled with the possibility that, if the plaintiff's application for a visa was unsuccessful, he might seek judicial review.

[9] Affidavit of Tigiilagi Eteuati affirmed on 19 September 2022 (**Eteuati Affidavit**) at [4] (AB 2, page 553). The media release that was sent to various media organisations is Exhibit TE-1 to the Eteuati Affidavit (AB2, pages 556-558).

12. On 9 December 2017, the non-parole period of the plaintiff's sentence imposed by Judge Scotting, expired. He was released from criminal custody, and immediately re-detained under the Act.[10]

13. On 13 May 2020, the Hon Peter Dutton, who had by then become the Minister for Home Affairs, made a decision in purported discharge of the duty imposed upon him by s 47 of the Act and purported exercise of the power conferred by s 65, to refuse the plaintiff's application for the visa.[11] The then Minister considered that grant of a visa to the plaintiff was not in the national interest, thus he was not satisfied that **cl 790.227** of Sch 2 to the *Migration Regulations 1994* (Cth) was satisfied.[12] To the plaintiff's understanding,[13] this was the first and, until the Minister's decision impugned in this proceeding, the only time that the Minister had acted personally pursuant to s 65 to refuse the grant of a visa.

14. It should also be noted that the Minister (the Hon Peter Dutton), again acting personally, had earlier on 14 October 2019 purported to refuse the grant of the visa pursuant to the discretionary power in s 501(1) of the Act.[14] However, that purported decision had been quashed by Perry J on 20 February 2020.[15] Importantly, it was accepted by the Minister when the matter was before Perry J, and continues to be accepted,[16] that the plaintiff posed and poses no risk to the Australian community.

15. The plaintiff sought judicial review of the decision purportedly made by the Minister on 13 May 2020.

16. On 26 November 2021, the Full Court of the Federal Court allowed the plaintiff's appeal from an adverse decision at first instance, quashed the decision purportedly made on 13

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10 Submission at [2].

11 Zarifi Affidavit at [14].

12 Zarifi Affidavit at [14], and Exhibit ZZ-3.

13 In June of this year, in evidence given by one of her officers before Raper J (whose decision is discussed below), the Minister all but confirmed that plaintiff's understanding is correct.

14 Zarifi Affidavit at [11].

15 Zarifi Affidavit at [12], and Exhibit ZZ-2, the Court noteing that the Minister accepted that '*the application bust be allowed on the basis that the decision [of the Minister] dated 14 October 2019 is affected by jurisdictional error … [because] a critical conclusion, being that the [plaintiff] posed an unacceptable risk of harm to the Australian community, relied on a finding that the [plaintiff] had an "ongoing risk" of reoffending for which no probative basis is identified*'.

16 Minister's **reasons for decision** at [25]. The reasons for decision can be found at Exhibit JCH-1 to the Hutton Affidavit (this part of this Exhibit being reproduced in Vol 1 of the Application Book filed on 28 September 2002 (**AB 1**), with relevant pages at 59-67).

May 2020, and issued a writ of *mandamus* directed to the Minister (who, by then, was the Hon Karen Andrews), requiring her to determine the plaintiff's application for the visa according to law.[17]

17. On 10 April 2022, the plaintiff filed an application in the Federal Court in relation to the orders by the Full Court in November 2021.[18] In substance, the plaintiff argued that the Minister had failed to comply with the writ of *mandamus*. On 14 June 2022, Raper J ordered the Minister (by then and to this day, the Hon Clare O'Neil) to comply with the order of the Full Court by 27 June 2022.[19]

18. On 27 June 2022, the Minister made the decision, in purported compliance with the order that it be made according to law.[20]

PART VI: ARGUMENT

The constitutional and/or not authorised by the Act issues

19. The Minister made the decision for the substantial purpose of general deterrence.

20. It is highly significant that not only did the Minister decide that the plaintiff should be refused a protection visa, for which he otherwise satisfied all remaining criteria.[21] The Minister also knew,[22] at the time she was considering whether she would act personally or she would leave the decision on the plaintiff's application to a delegate,[23] that because the plaintiff was someone towards whom Australia owed *non-refoulement* obligations, if she made the decision (but not if a delegate made the decision),[24] the consequence would be the plaintiff's continuing detention under the Act, quite possibly for the rest of

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17 *ENT19 v Minister for Home Affairs* [2021] FCAFC 217 (Collier, Katzmann and Wheelahan JJ).

18 Zarifi Affidavit at [20].

19 *ENT19 v Minister for Home Affairs* [2022] FCA 694 (Raper J).

In between the plaintiff making an application to enforce compliance with the writ of *mandamus* and the decision of Raper J, this Court dismissed the Minister's application for special leave to appeal from the Full Court's decision: *Minister for Home Affairs v ENT19* [2022] HCASL 94 (Gordon and Edelman JJ).

20 **Record of decision**, reproduced at pages 529-530 of AB 2.

21 Submission at [18], [25]-[26].

22 Because she was so advised: see e.g. submission at [24]. She had been similarly advised earlier, by a submission of the Department of 10 June 2022 which was tendered in evidence before Raper J.

23 Record of decision.

24 Record of decision; submission at [26].

Refer as well to the plaintiff's submissions below, on the misunderstanding of the law issue.

his life.[25] Unlike a non-citizen whose visa is cancelled on character grounds pursuant to s 501 of the Act (or some other provision in Part 9), the plaintiff has nowhere else to go, but Australia – and Australia owes *non-refoulement* obligations in respect of him.

21. The plaintiff refers to four documents, relevant to ascertaining purpose:

(a) the record of the Minister's decision;

(b) the reasons for the decision;

(c) the brief to the Minister (the Department refers to this as a '*submission*'), which included:

(i) advice to the Minister by her Department;

(ii) a draft decision record; and

(iii) draft reasons for a decision to refuse to grant the visa '*in the national interest*'; and

(d) the Minister's reasons for later issuing a conclusive certificate.[26]

22. These documents demonstrate that the purpose motivating the Minister was her views, at the time of the decision (and continuing to be held, as shown by the later reasons for the conclusive certificate), that:

(a) granting the protection visa to the plaintiff would send the '*wrong signal*' to other individuals who might be contemplating engaging in people smuggling;[27]

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[25] And see reasons for decision at [32], [34]-[37].

As to the Minister's alluding to a potential future exercise of the personal, non-compellable, discretionary powers in ss 195A and 197AB, the plaintiff responds as follows. First, the plaintiff's history painfully demonstrates that successive Ministers, acting personally, have repeatedly sought to refuse to grant him a protection visa, even though he is someone in respect of whom Australia's non-refoulement are engaged. Second, one such Minister (the Hon Karen Andrews) refused for some months to comply with the Full Court's writ of *mandamus*, commanding her to determine according to law the plaintiff's application for a protection visa, and meanwhile the plaintiff languished in immigration detention. Third, in early February this year – i.e., and notably, whilst the then Minister (the Hon Karen Andrews) was refusing to comply with the writ of *mandamus* – the plaintiff, for reasons which remain unknown to him, failed to get past the first hurdle for possible Ministerial consideration of the exercise of those non-compellable powers: see Zarifi Affidavit at [19]. This Court should conclude that the Minister's reference to a potential future beneficial exercise, by herself or by the Minister for Immigration, of those non-compellable powers, is nothing more than a rhetorical device, perhaps considered useful from a legal perspective to attempt to fire-proof her decision, because such possibility is as real as a mirage.

[26] Reproduced at pages 547-551 of AB 2.

[27] Reasons for decision at [22].

(b) it was not in the national interest (meaning, necessarily, it was against the national interest) for a person convicted of people smuggling to be seen to get the benefit conferred on a non-citizen by a protection visa[28] (to which, *ex hypothesis* on this line of reasoning by the Minister, but also as a matter of fact, the plaintiff would otherwise be entitled);

(c) the grant of a protection visa to a person who had been convicted of people smuggling offences may erode the Australian community's confidence in the protection visa program.[29]

23. An administrative decision by a Commonwealth officer made for the sole or substantial purpose of general deterrence[30] infringes the principle of separation of powers.

24. In this case, both objectively and subjectively (as felt, and will continue to be felt, by the plaintiff), the decision results in punishment of the plaintiff.

25. The plaintiff relies on the following matters, including in their combination, for the proposition that the decision results in punishment:

(a) the plaintiff does not pose a risk to the Australian community;

(b) Australia's *non-refoulement* obligations are engaged;

(c) the Act itself provides for the penal consequences of engaging in people smuggling, and the plaintiff has served his sentence – judicially imposed, following his plea of guilty – for his participation in people smuggling;

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28 Reasons for decision at [22].

Significantly, among the benefits that would flow from the grant of a visa, there would be an end to the statutorily mandated, administrative deprivation of liberty. The plaintiff could also leave Western Australia and finally reunite with his family in Sydney.

The plaintiff notes here that a balancing in the national interest of every aspect of what the Act provides for, including the grant of visa to an individual who has sought to engage Australia's obligations of *non-refoulement* as the only means by which Parliament has determined that such obligations will be met, is the very object of the Act. Section 4 relevantly provides: in subs (1) – '*The object of this Act is to regulate, in the national interest, the coming into, and the presence in, Australia of non-citizens*'; in subs (2) – '*To advance its object, this Act provides for visas permitting non-citizens to … remain in Australia and the Parliament intends that this ct be the only source of the right of non-citizens to … remain*'; and in subs (4) – '*To advance its object, this Act provides for the removal … from Australia of non-citizens whose presence in Australia is not permitted by this Act*'.

29 Reasons for decision at [23].

30 In addition, where the effects of that decision, in particular the further deprivation of liberty possibly for life, can fairly be described as punishment.

(d) the plaintiff's offending was not that of a "typical people smuggler" – as found by Judge Scotting, his actions were motivated by his desperation to be reunited with his family in Australia (all members having been found, after they had arrived without a valid visa, to engage Australia's *non-refoulement* obligation[31]);

(e) given the judicially accepted motivations for the plaintiff's offending, there could be no deterrent effect on "typical people smugglers" in refusing to grant him a protection visa, and/or in his continuing deprivation of liberty consequent upon such a refusal;

(f) the decision has resulted, and will continue to result, in the plaintiff being deprived of his liberty, possibly for the rest of his life.[32]

10 26. In courts below this Court, there is a body of decisions and/or considered statements that offer support for the proposition at [23] above, albeit that those decisions have mostly considered the issue (impermissibility of making a decision for the substantial purpose of general deterrence), under the headings of irrelevant considerations and/or legal unreasonableness.[33]

27. Thus, for example, Davies J in *Re Sergi*[34] said:

> If an order for deportation were made in a case where the sole or substantial factor justifying deportation was the deterrence of others from committing a crime, the making of the order of deportation would serve as punishment of the criminal. The additional detriment of deportation would be imposed on him, not because he was himself a danger
20 to the community or a person whose continued presence in Australia was undesirable, but as a detriment or punishment consequent upon the commission of the crime, which detriment or punishment would serve as a deterrent to others from so acting.

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31 Submission at [11].

32 Unless this Court should find for him in this proceeding.

33 *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224 at 230-1; *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 at 232; *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [76]; *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42]; *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [29]; *ENT19 v Minister for Home Affairs* [2021] FCAFC 217 at [127].

34 *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 224 at 231.

28. In *Tuncok*,[35] the Full Court of the Federal Court noted that '*if the sole, or a substantial, factor justifying cancellation of a visa were the deterrence of others from committing a crime, the purpose of the decision may be punitive …*'.

29. The proposition at [23] above also follows from the principles established by this Court's authorities, and the plaintiff refers, primarily, to *Chu Kheng Lim*[36] and *Alexander*[37].

30. Importantly, the plaintiff does not challenge the validity of any provision of the Act, including not challenging validity of ss 189 and 196 in their combined operation (*cf Al-Kateb*[38]). Nor does the plaintiff seek to argue that ss 189 and 196 must be read down, lest they be unsupported in their operation, in the particular case, by the aliens power (*cf* both *Al-Kateb* and *AJL20*[39]).

31. Rather, the plaintiff's argument focuses squarely on the specific administrative decision that was made by the Minister and the purpose for which it was made. That being said, s 197C is now in very different terms from when this Court considered it in *AJL20*. In fact, the amending of s 197C of the Act was the significant reason why earlier this year this Court refused the Minister's application for special leave to appeal in respect of the Full Court's decision on the plaintiff's appeal.[40]

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35 *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42] (Moore, Branson and Emmett JJ).

Shortly before the decision in *Tuncok* was handed down, a differently constituted Full Court made it clear that whether or not a particular decision under the Act would be liable to be set aside because its sole or substantial purpose was general deterrence (and/or, the decision could otherwise fairly be described has being punitive), will depend on the precise circumstances of the particular decision: *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [65], [75]-[76] (Tamberlin, Sackville and Stone JJ). The Full Court also considered a constitutional argument in relation to s 501(2) of the Act, including whether it should be read down: see at [44]-47], [58]-[66], [73]-[74].

In *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, Allsop CJ and Katzman J, were acutely aware of the significant different considerations that arise when the decision at issue is not one involving the cancellation of a generic visa pursuant to s 501 of the Act; rather, it is the refusal of a protection visa to a person in respect of whom Australia's *non-refoulement* obligations are engaged: see at [3]-[5], [12]-[16], [28]-[31].

36 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

37 *Alexander v Minister for Home Affairs* [2022] HCA 19.

38 *Al-Kateb v Godwin* (2004) 219 CLR 562.

39 *Commonwealth of Australia v AJL20* [2021] HCA 21.

40 *Minister for Home Affairs v ENT19* [2022] HCASL 94 (Gordon and Edelman JJ).

32. Now that s 197C has been amended, the legal position is that s 198 neither requires nor authorises the removal by the Commonwealth of the plaintiff from Australia to Iran. This legislative change, in turn, affects the operation of s 196(1), either solely as a matter of statutory construction or, at least in the plaintiff's case, in conjunction with the fact that he is facing '*the prospect of immigration detention for an indefinite period*' (in the Minister's own words).[41]

33. Although the plaintiff does not need to argue to this effect to succeed, he does submit that it would be open to this Court to conclude that the recent amendment of s 197C also affects the proper construction of ss 189 and 196. Strictly, nothing in *Al-Kateb* or *AJL20* stands against that course, given the differences in Act as it stood at the relevant times. Additionally, and specifically by reference to this case, given the punitive purpose of the decision it must be at least arguable that the plaintiff's indefinite detention, brought about by ss 189 and 196 of the Act, is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose.[42]

34. The important point of noting the difference between this case and the way challenges were brought in *Al-Kateb* and in *AJL2,* and thus the reasoning that supported the manner in which those challenges were disposed of by this Court, is that there is nothing that stands against the issuing of the writ of *habeas corpus* in this case. It is wholly beside the point that Ms Wood has conducted the exercise of reviewing the plaintiff's "detention case" to which she attests.[43] If the decision of the Minister cannot stand, then, given no "path" would exists for the Minister (or her delegates) to refuse to grant the protection visa to the plaintiff, his continued detention under the Act is necessarily unlawful.

35. An alternative analysis is that the Act, read both in its entirety and with reference to the following provisions in particular:

    (a) s 4 (*Object of the Act*), in particular subs (1), (2) and (4);

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41 Reasons for decision at [34].

42 Similar difficulties of, ultimately, lack of logic, vexed the Tribunal member who decided *SQHG and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 2810: see at [154]-[157].

In this respect – logic or lack thereof: the famous statement by Oliver Wendell Holmes that the '*life of the law has not been logic: it has been experience*' was not an invitation to set aside, in law, logic for life experience; rather, it was an exhortation to judges to walk in other people's (non-judicial) shoes.

43 Affidavit of Chelsea Wood affirmed on 29 July 2022 (AB 1, pages 27 to 53).

(b) ss 13 (*Lawful non-citizens*), and 14 (*Unlawful non-citizens*);

(c) ss 29 (*Visas*), 31 (*Classes of visa*), 35A (*Protection visas–classes of visas*), 36 (*Protection visas–criteria provided for by this Act*), and 36A (*Consideration of protection obligations*) – which provisions demonstrates, plainly, that the Act sets protection visas apart from all other classes of visas;

(d) ss 46 (*Valid visa application*), 47 (*Consideration of valid visa application*), and 65 (*Decision to grant or refuse to grant visa*);

(e) ss 189 (*Detention of unlawful non-citizens*), 196 (*Duration of detention*), and 198 (*Removal from Australia of unlawful non-citizens*);

(f) recently amended s 197C (*Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198*); and

(g) subdiv A (*People smuggling and related offences*), of Div 12 of Part 1,

does not confer on the Minister a power to make any decision (arguably), certainly not a decision pursuant to s 65 to refuse to grant a protection visa:

(h) for the sole or substantial purpose of general deterrence;

(i) resulting in further punishment;

(j) in circumstances where the Act provides the criminal consequences for the conduct sought to be "deterred" from, and the visa applicant has already been convicted under the Act in respect of such conduct and has served the punishment imposed by the court, in particular has served a sentence of imprisonment;

(k) where the individual would not pose any risk to the Australian community, if he were to be granted the protection visa; and

(l) where the consequences, because the individual satisfies all other criteria for grant of a protection visa (meaning, *inter alia*, that Australia's *non-refoulement* obligations are engaged), will be administrative deprivation of liberty, possibly for life.

36. The fact that the Minister sought to anchor purpose to a criterion (cl 790.227), required under the Act to be satisfied for the grant of the visa, which permitted her to consider '*the national interest*', does not affect the conclusion that the decision is unconstitutional, alternatively not authorised by the statute pursuant to which it was purportedly made.

37. The expression '*the national interest*' is not one that lacks limits.[44] What may lawfully come within what the Minister can choose to consider to be in the national interest, when it is made a criterion for an administrative decision, is not left to the determination of the Executive. The Minister cannot, under cover of '*the national interest*', make a decision that would breach the separation of powers under the *Constitution*.

The misunderstanding of the law issue

38. If an administrative decision-maker acts on a misunderstanding of the applicable law, a conclusion of jurisdictional error will follow.[45]

39. The Minister, acting personally to discharge the "duty coupled with power" in ss 47 and 65 of the Act, must be taken to have proceeded in accordance with the legal and political advice that the Department had given to her. And, as noted earlier in these submissions, the Department's "brief" included a mix of express advice on some matters, and drafts of a decision record and reasons for decision advising, impliedly, as to the matters there stated.

40. Upon consideration of the totality of the materials before the Minister, it is clear that she was never advised that, if she should decide to personally discharge the "duty coupled with power" in ss 47 and 65, she could then decide to grant the visa to the plaintiff. To the contrary, the Department's advice to her was that, if she decided that she did not want to make a personal decision (i.e., if she should decide to leave the determination of the plaintiff's visa application to one her delegate), then and only then '*the application will proceed to "grant" and [the plaintiff] will be released from immigration detention*'.[46]

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44 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, [57]. Notably, nowhere was the Minister advised about the significance of this Court's decision in *Graham*.

45 *Hetton Bellbird Collieries* [1944] HCA 42; (1944) 69 CLR 407 at 430; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [33]. (Unless the misunderstanding was in respect of some immaterial aspect of the decision: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123.

46 Submission at [17].

41. The only two options presented to the Minister, in terms of ss 47 and 65,[47] were a refusal decision by her, or a grant decision by a delegate.[48] Given:

(a) the limited amount of what was done by the Minister – she signed and dated the draft decision record, after having "circle selected" some options; and she signed and dated the draft reasons for decision; and

(b) what has not been done by the Minister, which includes:

(i) requesting further advice on any aspect of the submission, legal or political;

(ii) requesting clarification about the media articles and how they came to be, given the existence at that point in time of an undetermined application for a protection visa, and especially given that she was now proposing to rely their existence in concluding that it was not in the national interest for the plaintiff to be granted a visa,

(iii) marking changes which she required to be made, in respect of the draft reasons for decision which had been prepared by the Department; and

(iv) giving any direct evidence in this proceeding,

the inference this Court should draw, including by reason of:

(c) who the decision-maker is – a Minister of the Crown (in right of the Commonwealth) with portfolio responsibilities that are not limited to the Act;

(d) the rarity of a decision pursuant to s 65 being made by the Minister personally;

(e) the fact that she had been a Minister for less than a month,

is that the Minister proceeded on a misunderstanding of the law, namely that she could not, acting personally, grant the visa to the plaintiff.

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[47] The Minister was advised that a "third option" which had been noted in the submission (AB 2 at page 530, option 3), namely another attempt at refusal pursuant to s 501 of the Act, was '*not viable*': see submission (AB 2 at page 535), heading above [30]. (The paragraph itself has been redacted by the Minister on a claim of LPP). That no decision to refuse the plaintiff's application for the protection visa can be made pursuant to s 501 was all but conceded by the witness called by the Minister to give evidence before Raper J.

[48] Although the Department couched its advice in terms of '*notional positive visa pathway*' (submission at [18]), no doubt being well aware of the issues raised by the plaintiff before Raper J (including by the cross-examination of the witness that had been put forward by the Minister, and by reason of his submissions in regards to peremptory mandamus), the true position is that if the Minister's decision to refuse pursuant to s 65 by reference to '*the national interest*' criterion in cl 790.227 cannot stand, there is simply no other basis upon which the protection visa could be refused.

The procedural fairness issue

42. A '*factor*' the Minister chose to '*take[] into account in determining whether the grant of the visa would be in the national interes*t',[49] was that, even if the plaintiff undertook not to publicly disclose that he had been granted a protection visa, there were ways by which that matter might become known.[50] The Minister made reference, *'[i]n this respect*', to the '*considerable media coverage of [the plaintiff's] conviction for people smuggling*'.[51]

43. Apart from it being unclear why the fact that this individual (*cf* some generic, "typical people smuggler") had been granted a protection visa might be an issue for the Australian community, what is significant is that the '*considerable media coverag*e' is to be blamed on the Minister's predecessor, i.e. the Hon Peter Dutton.

44. Significantly as well, this '*considerable media coverag*e' was not an issue the plaintiff could have been aware of, from knowing the reasons that the then Minister (again, the Hon Peter Dutton) gave in May 2020, when he purported to make a decision, in discharge of the "duty coupled with a power" in ss 47 and 65, to refuse the grant of the visa to the plaintiff '*in the national interest*'.[52]

45. It was open to the Minister, once she had decided that she would be the decision-maker for the purposes of ss 47 and 65, to obtain, pursuant to s 56, whatever information she considered relevant. It was thus open to her to obtain these news publications. However, once she did that, she was obligated to have regard to that information (s 56(1)), and she was obligated to give particulars of that information to the plaintiff (s 57(2)(a)). The Minister did the former, but not the latter.

46. Whether framed as breach of the common law obligation of procedural fairness,[53] or as breach of the statutory obligation in s 57(2), it is clear the decision has been vitiated by jurisdictional error.

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49 Reasons for decision, heading for [20]-[34].

50 Reasons for decision at [24].

51 Reasons for decision at [24].

52 Compare paragraph 24 of Minister O'Neil's reasons in 2022, with paragraph 15 of Minister Dutton's reasons in 2020, which are reproduced at AB 2, pages 538-540.

53 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

The relevant considerations issue

47. The Minister's reasons and the decision record (and, in their totality, the materials that were before her when she made her decision), evidence that the Minister paid no regard to any of the following:

    (a) the Act itself provides for the (punitive) consequences when an individual, including someone in respect of whom Australia owes *non-refoule*ment obligations, engages in people smuggling;

    (b) in the plaintiff's case, his involvement in people smuggling had been for the purpose of being reunited with his family in Australia – he did not engage in that conduct to take advantage of others, or seek to exploit their vulnerabilities as asylum-seekers, in order to profit;

    (c) it had been the then Minister for Immigration and Border Protection (the Hon Peter Dutton), who, jointly with the then Minister for Justice, had caused '*the considerable media coverage of the [plaintiff's] conviction for people smuggling*';[54]

    (d) whether, if she sought to inform the Australian community (e.g., by a media release) of the circumstances which justified the grant of a protection visa to the plaintiff, such a communication might assist in '*maintain[ing] the confidence of the Australian community in the protection visa program*',[55] if she further explained that inherent to the '*protection visa program*' is the furthering of humanitarian purposes.

48. It may be accepted 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*'. Once 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.

49. The substance of each of (a) to (d) at [47] above, necessarily arose for the Minister's consideration once she chose the below as matters relevant to '*the national interest*':

    (a) the need to deter others "would be smugglers" from engaging in people smuggling;

A somewhat similar case of breach of the common law obligation of procedural fairness, in the context of a decision pursuant to s 501A of the Act purportedly made in '*the national interest*', is *Durani v Minister for Immigration and Border Protection* [2014] FCAFC 79 (Besanko, Barker and Robertson JJ).

54 Reasons for decision at [24].

55 Reasons for decision at [23].

(b) how reprehensible "typical people smugglers" are; and

(c) the plaintiff's conviction for people smuggling having been reported in the media.

50. By failing to give any consideration to each of (a) to (d) at [46] above, the Minister erred, and the decision should further be set aside on this basis.

The relief issue

51. If the plaintiff succeeds on either the constitutional issue or the not authorised by the Act issue, those prayers for relief that seek the issue of writs of peremptory *mandamus* and *habeas corpus* come to be considered.

52. As to *habeas corpus*, the plaintiff has set out, earlier in these submissions, why his case stands on an different footing than the case of (the individual known as) AJL20, and why the evidence of Ms Wood takes the Minister nowhere.

53. If the Minister's decision is unconstitutional and/or not authorised by the statute pursuant to which it was purportedly made, it has always been so. Further, the Minister having decided to take on the burden of "duty coupled with power" imposed by ss 47 and 65, and it being clear that any future lawful decision by her, in discharge of that duty, can only be to grant the protection visa to the plaintiff, the Minister cannot resist an order for *habeas corpus*. The plaintiff should have been restored of his liberty many months ago, if not years.

54. For similar reasons, peremptory *mandamus* directed to the Minister, ordering her to grant the protection visa to the plaintiff, should also issue.

55. It is true that there has been no writ of *mandamus* issued by this Court, directing the Minister to determine according to law the plaintiff's application for a visa. It is also true (because it logically follows), that there has been no insufficient return by the Minister to such writ by this Court.

56. However, another Ch III court issued a writ of *mandamus* back in November 2021, and if the return to that writ is taken to be the Minister's decision which the plaintiff challenges here, than that return can be adjudged insufficient. If that is accepted then, by analogy to the fashioning of the writ by this Court in *Plaintiff S297/2013*,[56] and having regard as well to the command found in s 32 of the *Judiciary Act 1903* (Cth), the plaintiff

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[56] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

respectfully submits that in his case, which is unique for quite a number of reasons, this Court should issue the writ of peremptory *mandamus*.

57. The relief sought by the plaintiff, in the alternative to the writs of peremptory *mandamus* and *habeas corpus*, is standard in judicial review, and need not be further addressed in these submissions.

PART VII: ORDERS SOUGHT

58. The plaintiff seeks the final orders set out in Part I of his Further Amended Application for a Constitutional or other Writ dated 26 August 2022, and further refers to the above submissions on the relief issue.

PART VIII: ESTIMATE OF ORAL ARGUMENT

59. The plaintiff estimates that presentation of his argument, including reply, will take 2¼ to 2½ hrs.

Dated: 7 October 2022

Lisa De Ferrari
T (03) 9225 8444
E lisa.deferrari@vicbar.com.au

Jason Donnelly
T (02) 9221 1755
E donnelly@lathamchambers.com.au

IN THE HIGH COURT OF AUSTRALIA S102/2022
SYDNEY REGISTRY

BETWEEN: **ENT19**
Plaintiff

and

Minister for Home Affairs
First Defendant
Commonwealth of Australia
Second Defendant

10 **ANNEXURE**

RELEVANT STATUTES AND INSTRUMENTS

1. *Migration Act 1958* (Cth), ss 4, 13, 14, 29, 31, 35A, 36, 36A, 46, 47, 56, 57, 65, 189, 196, 197C, 198, 233C (Compilation 152, 1 September 2021).
2. *Migration Regulations 1994* (Cth), Sch 2, cl 790.227 (Compilation 233, 5 April 2002 to 30 June 2022).