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

PLAINTIFF'S REPLY

Part I: Certification

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

Part II: Reply

Material facts

2. The plaintiff proposes to address so much of the defendants' written submissions dated 27 October 2022 (**DS**) at [4]-[11], which allege deficiencies and/or errors on the part of the plaintiff in identification of relevant facts: orally; and, after a decision on the plaintiff's application to file a further bundle of materials.

3. The plaintiff's response on all materials (if the Court allows the application) will extend to DS [10], which seeks to contradict the uniqueness of this case in terms of the Minister acting personally pursuant to s 65 of the Act (further, and important contextually, so acting after her predecessor had tried and failed to refuse the grant of a protection visa to the plaintiff by a personal decision pursuant to s 501; and then had tried and failed to refuse by a personal decision pursuant to s 65). And extend to DS [11], regarding risk of re-offending. Both submissions are inconsistent with the position that this Minister herself (not one of her predecessors), took before Justice Raper in June of this year.

4. As to the uniqueness of the plaintiff's case, *viz*: a Minister (in fact two Ministers, one after the other), acting personally pursuant to s 65 of the Act. Mr Morrish gave what evidence he could, based on what he knew. On review of the totality of the transcript before Justice Raper, including of the submissions made by the Minister's senior counsel (and of what was not submitted), this Court will be satisfied that the Minister

all but conceded that this is the only time it has ever occurred. Further and in any event, the Minister is not under the limitations as to knowledge that Mr Morrish was under when he was giving evidence before Justice Raper. If the Minister knows that either she, or any other Minister administering the Act, has ever acted personally pursuant to ss 47 and 65 in some other case, she could say so before this Court. It is purely within the knowledge of the Minister. The evidence which the plaintiff leads, must otherwise be evaluated in accordance with the principle in *Blatch v Archer*.

5. Uniqueness of this case is important in at least two ways. *First*, for the ground of review that the Minister misunderstood the law. *Second*, to this Court's assessment of whether the decision is punitive, having regard to the circumstances of its making.

Reply to the defendants' submission that it is solely a question of construction (DS at [12]), and on Al-Kateb[1] *and AJL20*[2] *more generally*

6. Prior to the majority recently stating, in *ALJ20*, that when "*the Executive executes a statute of the Commonwealth … the constitutional question is whether the statutory authority conferred on the Executive is within the competence of the Parliament; the statutory question is whether the executive action in question is authorised by the statute*", in a case which involved the execution of the duty to detain under the Act, the principle had only ever been applied in the context of challenges on the basis of an implied constitutional right, or of (an express right in) s 92 of the *Constitution*.

7. Appearance and evolution of this principle can and has been criticised on what, the plaintiff respectfully submits, are strong bases.[3] Even if it were the correct principle in respect of challenges brought on a "breach of a right" basis, it is not one that can, or should, be applied universally whenever Executive action is being challenged. In *AJL20* itself, there were powerful dissenting opinions. Justices Gordon and Gleeson relied upon what this Court has said in *Plaintiff M96A/2016*, namely that (at [80], original emphasis of Gordon and Gleeson JJ omitted, then some emphasis added) "*Parliament cannot avoid judicial scrutiny of the <u>legality</u> of detention … [by] mak[ing] the length of detention at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive*". Justice Edelman at [108] spoke against an "*island of freedom*" in the Act, "*permitting the Executive to act for any purpose in*

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

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

3 Boughey and Carter, "Constitutional freedoms and statutory executive powers" (2022) 45(3) *Melbourne University Law Review* (advance).

the exercise of its powers or the performance of its duties, no matter how far that purpose departs from the express or implied terms of statutory authority".

8. Thus, if it were the case that the plaintiff must argue against the principle applying in this case (which the plaintiff does not consider he does), there are powerful argument that the principle is not one carefully developed out over a number of this Court's decisions – certainly, outside of situations such as those in *Wotton*[4] or *Palmer*[5].

9. This Court in *AJL20* was not presented with the much starker case of a Minister of the Crown, personally taking action (*cf AJL20*, being a challenge to a failure by the Executive to act, which would have brought about the end detention), under the most unlimited power that conceivably Parliament may confer on a Minister (subjective satisfaction that the taking of a step will be in the "*national interest*"), knowing and intending that the plaintiff be detained indefinitely under the Act as a consequence, and knowing that she had discretionary personal powers to otherwise bring about the end of the plaintiff's detention, more particularly the power in s 195A, and intending that she would not exercise it.

10. The plaintiff submits it was not necessary for the majority in *AJL20* to rely upon the principle, otherwise found in cases such as *Wotton*, to determine in the way it did the issue presented in *AJL20*. If the plaintiff is wrong, and the extension of application of the principle was necessary to the majority reaching the opposite conclusion to the minority, it is nevertheless clear that the majority only considered that the principle applied together with and because of the foundational proposition, stated at [44], that "*the detention authorised by ss 189(1) and 196(1) of the Act is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal*" (emphasis added). There was no consideration of whether, if a decision being made in the (purported) determination of a visa application is for a punitive purpose, the "*hedging duties*" (at [45], [48]) analysis would still hold valid.

11. The majority in *AJL20* also carved out at [43] the Executive exercising "*whatever authority is inherent in s 61 of the Constitution*". The plaintiff respectfully submits that, as a matter of substance (constitutional principles being about substance), a distinction between "*whatever authority is inherent in s 61 of the Constitution*" and a

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4 *Wotton v Queensland* (2012) 246 CLR 1.

5 *Palmer v Western Australia* [2021] HCA 5.

power exercised by a Minister of the Crown by reference to a subjective state of satisfaction that its exercise will be in the "*national interest*", is wafer-thin.

12. Further, with regards to *Al-Kateb* and *AJL20*: they are narrowly decided cases (4-3); with strong dissents; and, importantly, in no subsequent case where the correctness of *Al-Kateb* was challenged, did a majority of this Court find it necessary to decide that issue, noting further, on the other hand, that correctness has at least been doubted on a number of occasions, for example in *Plaintiff M47/2012*[6] by Justices Gummow[7] (at [114]-[120]) and Bell (at [532]).

13. Nor did either case considered the question of what can lawfully start the next phase of detention mandated under the Act, that is, lawfulness of what commences the continuing detention, possibly for life (as in the plaintiff's case), at the precise point in time when the duty imposed by s 47 has been (at least purportedly) discharged.

14. Further still, neither case considered the role of s 195A (not in the Act at the time *Al-Kateb* was decided), and how it is capable of operating, as some sort of future option available to a Minister personally (never exercised), with the "*hedging duties*" in a way that does not undermine the conclusion of constitutional validity. Neither case considered the effects of s 197C as it now stands (as distinct from how it stood when *AJL20* was decided). Finally, neither case considered the proposition advanced by the defendants (DS [36]), for the first time in any court (so far as the plaintiff's research can establish), as to what is to be made of enactment of s 197D.

Reply to the defendants' first point (DS at [15]-[22])

15. The plaintiff's submissions are grounded on the circumstances of his case, and why, having regard to all relevant circumstances, the decision is punitive.

16. The defendants, on the other hand, have been studious in failing to engage with any of the factual matrix, let alone engaging with the entirety of it. For example, they fail to engage with the twin matters of: the Act itself criminally proscribing the conduct of people smuggling; and, the plaintiff having served the sentence of imprisonment which a court of law had imposed for his offending.

17. As to DS [17], *Pattinson*[8] and *Fair Work Building Industry Inspectorate*[9] are cases

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6 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

7 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

8 *Australian Building and Construction Commission v Pattinson* [2022] HCA 13.

concerned with a Ch III court having conferred upon it the power to impose a civil penalty. They say nothing at all that is relevant to whether the separation of powers principle may be infringed by the Executive purportedly making a decision pursuant to a statutory power directed solely to the grant, or the withholding, of the benefit of residing lawfully in the Australian community. The plaintiff otherwise would refer the defendants to the analysis by Justice Gageler in *Garlett*.[10]

18. As to DS [19], the argued-for distinction between cancellation and refusal, raises no higher than an assertion. This Court ought not accept an assertion, particularly when the refusal is of a protection visa in circumstances where it is admitted that Australia owes obligations of *non-refoulement*. And, contrary to the defendants' submission, the Full Court's decision in *ENT19*[11] does not stand for the proposition that a principled, and valid, distinction can be made between cancellation and refusal.

19. As to DS [22], there is no "*admit or deport*", in the plaintiff's case. There is no "*or*", because neither will happen.

Reply to the defendants' second point (DS at [23]-[29])

20. DS [27], following from DS [26] and thus seeking to argue that no constitutional difficulty arises of the kind noted by Justice Mortimer in *Tanielu*[12] (which the Minister accepts is good law), is disingenuous. *First*, because the defendants skirt around the fact that the Minister made it very clear that she wanted to send "*a signal*" to other would-be "typical people smugglers" (without, however, addressing why making an example of this individual would deter those others). *Second*, because it raises no higher than assertion to say that those two matters, certainly on the specifics of this case, are not "*divorced from protecting the Australian community*".

21. As to DS [28], findings made by another court, on evidence that was not the same as the evidence in this case, have no precedential value. All that the history of two decisions by successive Ministers for Home Affairs shows, is that the Department must have considered that the reasoning by the majority of the Full Court had left the

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9 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.

10 *Garlett v Western Australia* [2022] HCA 30 at [111]-[139]. His Honour was in dissent, but there is nothing in the judgments of the majority, the plaintiff submits, that impeaches the correctness of analysis to be found at these paragraphs.

11 *ENT19 v Minister for Home Affairs* [2021] FCAFC 217.

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

Minister with a possible path to again refuse the grant of the visa to the plaintiff, by a personal decision that hinged on the criterion in cl 790.227.

22. DS [29], asserting that the Minister's considerations were not "*directed to the plaintiff as individual*", is again disingenuous. And wrong. The only reason why the Department, under the direction of Mr Morrish, made a decision[13] on 10 June 2022, and then again on 22 June 2022, to brief the Minister as to how she could personally make a decision pursuant to ss 47 and 65 to refuse the grant of a visa to the plaintiff, was precisely and solely because of who the plaintiff is, of all previous attempts to refuse to him a visa having failed, and of there being no other remaining avenue by which to otherwise refuse him the visa.

Reply to the defendants' third point (DS at [30]-[33])

23. An administrative decision will be punitive, if a Court assess it to be so.

24. A relevant matter, in the context of a decision pursuant to s 65 of the Act which will result in refusal of a visa to a person who has made a valid application (and in respect of whom, it is admitted, Australia's *non-refoulement* obligations are engaged), where all other criteria for the grant are otherwise satisfied, and where moreover that person does not pose a risk to the Australian community, is whether the detention which the Minister knows and intends will be consequent, can properly be characterised[14] to be for the purpose of: receiving, investigating and determining an application for a visa

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13 Mr Morrish conceded that there was nothing in the Act which required the Department to make this decision, and nor was there anything elsewhere, for example by way of some form of instruction from this Minister, that constituted a requirement. The best that Mr Morrish could say was that, the matter having been so delayed by this Minister's predecessors that there had been a change of government, and insufficient time to create some new "Ministerial arrangements" by which the two new Ministers administering the Act might wish to allocate between them what matters, if any, should be brought to their attention to enquire for Ministerial potential interest of a personal exercise of power, the Department was proceeding on automatic pilot, on what it understood had been intended by previous Ministers of a different government.

In other words, there was nothing at all that prevented the Department from making a choice not to brief this Minister about how to refuse to grant the protection visa to the plaintiff. And if the Department had not briefed the Minister, the plaintiff would have been granted the visa. Mr Morrish conceded that he knew that the processes that had been going on, in parallel, about "grants decision", were only being stayed because of the section of the Department over which he had responsibility taking its time to await "new Ministerial arrangements" being put in place, after which Mr Morrish would have known whether a brief was in fact required to be put before the Minister, because she would had said so. Assuming she would have, which is an untestable counterfactual.

14 See, eg, *Alexander v Minister for Home Affairs* [2022] HCA 19 at [76].

(plainly not); or, after determination, admitting into the community (plainly not, in the plaintiff's case) or deporting (again, plainly not in the plaintiff's case).

25. The Minister made it plain that the reason for causing the plaintiff's indefinite, and harsh, detention to continue under the Act (in truth, a fresh start of such detention: see [13] above), was to send a signal to other would-be "typical people smugglers". She must, objectively, be held to have wanted this result – causing detention, because the only other option she was presented with, was to refrain from consideration of the "*national interest*" at all, in circumstances where the Department made it quite clear that only a refusal made personally under the "*national interest*" rubric could stand in the way of the plaintiff not being detained. Further, as the Minister was acting personally in respect of ss 47 and 65, she could have simultaneously made a decision pursuant to ss 195A or 197AB to alleviate the punishment, but she chose not to.

Reply to the defendants' fourth point (DS at [34]-[36])

26. At DS [36], the defendants seek to resist the characterisation of an end to the plaintiff's detention as a mirage, by pointing to things that have never happened in his case, and the fabled possible occurrence of which stands against a determined course of action taken personally against him by three Ministers for Home Affairs. The defendants then, for good measure, add the possibility of a future decision by the Minister pursuant to s 197D of the Act. This submission is extraordinary.

27. The defendants are desiring to argue before this Court that the Minister can lawfully administer the Act, by making decisions such as the one she has made in respect of the plaintiff's lawful and outstanding application, on the basis that she can refuse the grant of a protection visa, to an individual who otherwise satisfies all criteria for it, thereby causing from that point onwards that person's indefinite detention under the Act (particularly as she will refuse to exercise her powers under ss 195A or 197AB), because at some future time she, or some yet to be sworn-in future Minister, might make a finding that that person no longer engages Australia's protection obligations. Even though, if the Minister had never made the punitive decision in the first place, that person would have been granted a visa, thus some contestable ability at some future time to retrospectively validate as non-punitive years of detention, by acting under s 197D, would never have come into existence.

Reply to the defendants' fifth point (DS at [37])

28. If the decision is invalid, the plaintiff's detention is not authorised. And, if there is no other basis upon which any other decision to refuse to grant him a protection visa can be made, the plaintiff cannot "*continue to be required to be detained under s 189*".

29. The defendants concede that nothing, apart from yet another attempt at refusing by the Minister acting personally pursuant to ss 47 and 65 to consider cl 790.227, can be tried. The defendants have not even attempted to say what else could be held against the plaintiff "*in the national interest*", in addition to what has been so far held against him by two successive Ministers. There is nothing else.

Reply on the misunderstanding of the law issue (DS at [38]-[41])

30. The totality of the evidence must be considered. The brief dated 10 June 2022 did not inform the Minister that she, personally, could grant the visa. The brief dated 22 June 2022 similarly did not so inform her. The first brief was cleared by Mr Morrish who, in giving evidence before Raper J, made it pellucid that he, and his section, do not get involved in advising about possible grant of a visa; in fact, he had limited knowledge about how grant decisions are made, apart from knowing that "someone else, not the Minister personally, makes those decisions".

31. When the Minister came to make the decision on 27 June 2022, she had been sworn in less than a month earlier, and she had no prior experience of making decisions in the administration of the Act. Further, she had to act under time pressure (due to the failure by her predecessor, over many months, to comply with the writ of *mandamus* issued by the Full Court). Finally, the Minister, on clear notice as to the case which the plaintiff alleges, has elected not to give any evidence at all, including as to what might have been her understanding of the Act when she made the decision.

32. At DS [40], the Minister makes a powerful point against her own submission that she did not misunderstand the law. There was nothing in what went from the Department to the Minister to the effect that "*if the Minister was minded to grant the visa, it was not necessary for her to make the decision personally*". Nothing was said in anything provided by the Department, as to what the Minister should do if she, personally, was minded to grant the protection visa. Nor was the Minister advised at all as to whether it could be in the "*national interest*" for her to grant that visa. Further, the pathway to a delegate making a decision to grant the visa was on purpose sought to be expressed by the Department, in those two briefs to her, as one with less than 100% certainty –

no doubt by reason of the extant litigation in the Federal Court, where the plaintiff was seeking the issue of a writ of peremptory *mandamus*. Somewhat ironically, the Minister must now contend it would be 100% certain that a delegate would grant.

33. The totality of the evidence shows that the Department considered that the plaintiff's application for a visa should be put before the Minister, not because it had to be put. Rather, it was put before this Minister because this section, specialising as it does in refusals, had come to the view that this Minister might again attempt to refuse to grant in the "*national interest*".

34. It is wrong to suggest that, had the Minister been provided with a balanced brief, she might not have made a different decision. That more balanced brief, possibly emanating not solely from a section that specialises in refusals, could have made it clear to the Minister that it was possible for her, after noting she had been briefed solely because the only remaining criterion was cl 790.227 (which delegates do not evaluate), to make a finding that it was in fact "*in the national interest*" to grant to this particular plaintiff a protection visa, even though he had been convicted of an offence of people smuggling (and had fully served that sentence).

Reply on the procedural fairness issue (DS at [42]-[49])

35. Contrary to DS [44], the plaintiff relies not just on one sentence in the reasons, but on the entirety of the materials that had been given to the Minister, including the briefs by the Department, the pre-drafted set of reasons, the form of the record for the decision proposed to her, and the attachments which the Department chose to include in those two briefs, in support of his contention of breach of s 57 of the Act and/or procedural fairness. It is, *inter alia*, highly relevant that: the Minister was provided with one set of pre-drafted reasons for refusal (and no possible reasons for grant); her predecessor had not relied upon the media articles; and the limited "natural justice" letter the Department gave to the plaintiff[15] made no mention of those media articles, nor gave notice that existence of those media articles and what was disclosed by them, might be deployed adversely to the plaintiff's interest.

36. With respect, the submission at DS [47] is nonsensical, in the context of a decision being made purely by reference to the criterion of "*national interest*", further on the accepted position that, largely (but see *Graham*[16]), it is for the Minister to decide

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15 AB 2, page 541.

16 *Graham Minister for Immigration and Border Protection* (2017) CLR 1.

what matters, in each case, will be selected to be ones relevant to be considered as to where the national interest may lie.

37. The matters at DS [48] should not have been submitted. There is no evidence at all that the plaintiff gave to the delegate, as part of his protection visa application, the information about the media articles. Instead, the proper inference to be drawn from AB 229, in particular the way in which the news articles are referenced at footnote 42, namely as documents held by the Department, is that it was the delegate who put to the plaintiff the existence of those news articles (without disclosing, however, the actions of previous Minister of issuing the press release), and the plaintiff then made responsive submissions as to why this also gave rise to a *sur place* claim.

38. It follows from the above analysis, that DS [49] is wholly misconceived.

Reply on the relevant considerations issue (DS [50]-[53])

39. Nothing in DS [51]-[53] traverses the critical point that, once a decision-maker with a freedom (never unlimited: see *Graham*), to decide what matters they will take into account in evaluating a broad criterion (here, "*national interest*"), has chosen those matters, they must engage with each of those relevant considerations lawfully.

40. Nothing to the contrary is to be found in the joint reasons in *Huynh*,[17] of Kiefel J (as her Honour then was) and Bennett J. On the other hand, support for the plaintiff's contention is found in the Full Court's decision in *CWY20*.[18] There, it was under the rubric of legal reasonableness that the Full Court imposed a constraint of lawfulness in respect of how the Minister must proceed to consider any matter which he/she has first chosen as relevant to the *"national interest*".

41. Ultimately, the defendants' submissions amount to the proposition that the Minister was free to entirely disregard that the Act provides for the punitive consequences of engaging in people smuggling, and that the plaintiff had already served the sentence imposed by a court in respect of his commission of that offence. (It is notable that the defendants have made no attempt at all, to show any consideration having been given

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17 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505.

18 *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 at [157]-[169] (Besanko J, with whom Allsop CJ agreed at [1], Kenny J agreed at [19] as expanded at [22], Kerr J agreed at [176], and Charlesworth agreed at [181]).

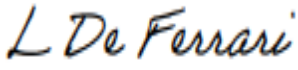
to those matters.) To accept such a proposition would be, with respect, inconsistent with this Court's jurisprudence developed in *Peko-Wallsend*,[19] *Li*,[20] and *Graham*.

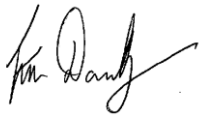
Reply on the relief issue (DS at [54]-[61])

42. There is no lawful path to which the defendants attempt to point to, as arguable, by which the Minister could, again acting personally, make a decision pursuant to ss 47 and 65 that it is in the "*national interest*" the plaintiff be refused a protection visa. The full history of this case, with all the decisions that have been made by successful Ministers, including as well how this Minister had been advised as to what was, and was not open, demonstrate this to be the case. And thus, the defendants are unable to say anything to support their proposition (DS [61]) that "*it is not apparent that there would be no basis upon which the Minister could nevertheless conclude that it was not in the national interest to grant the visa*".

43. If the decision is quashed, and there is no arguable lawful path for another personal decision to refuse pursuant to ss 47 and 65, then the evidence of Ms Wood as to what she considered, prior to this Court quashing the decision and reaching the conclusion of no arguable lawful path for any other decision, is beside the point.

Dated: 15 November 2022





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19 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

20 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.