HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA **No. S270 of 2019**
SYDNEY REGISTRY

BETWEEN: **APPLICANT S270/2019**
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The respondent (**Minister**) certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. This appeal concerns the validity of the Minister's decision under s 501CA(4) of the *Migration Act 1958* (Cth) (**the Act**) not to revoke the cancellation of the Class BB Subclass 155 Five Year Resident Return visa previously held by the appellant (being a visa that was not a protection visa). The sole ground of appeal (**CAB 96**) raises three related issues (none of which were raised in the courts below). They are:

   (a) First, whether the material before the Minister raised the issue of whether Australia owed any non-refoulement obligations with respect to the appellant.

   (b) Second, if so, whether the Court should find that the Minister decided to defer consideration of whether non-refoulement obligations were owed with respect to the appellant, on the basis that any such obligations could necessarily be considered if he made an application for a protection visa.

   (c) Third, whether the Minister was required to consider Australia's non-refoulement obligations in making a decision under s 501CA(4) of the Act (and, if so, whether any failure to do so was material).

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PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: STATEMENT OF MATERIAL FACTS WHICH ARE CONTESTED

4. One consequence of the new case that the appellant advances on appeal is that many of the "facts" that he now asserts were not considered by the courts below. That means both that those courts did not make findings with respect to those "facts", and also that in some cases the evidentiary record is incomplete.

5. The Minister submits that the evidence does not support each of the following factual assertions made by the appellant:

(a) That the material before the Minister showed that the appellant had been "*prima facie*" recognized by Australia as a refugee within the meaning of the Refugees Convention,[1] with the result that Australia had "accrued obligations" to him under the Refugees Convention.[2] This is addressed in paragraphs 11 to 18 below;

(b) That the Department's assessment dated 28 December 2006 that the appellant was <u>not</u> a refugee within the meaning of the Refugees Convention, and was <u>not</u> owed any non-refoulement obligations (being Attachment K to the Ministerial Submission), was not put to the appellant for his comment.[3] The unchallenged evidence clearly shows that this assessment <u>was</u> put to him for comment. This is addressed in paragraph 7 below;

(c) That the appellant refrained[4] from referring to his alleged non-refoulement fears in his submissions to the Minister because of the terms of *Direction No. 65 – Migration Act 1958 – Direction under section 499 Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (**Direction 65**).[5] It is not open to the appellant to make this claim, for the reasons addressed in paragraph 10 below.

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1 Convention relating to the Status of Refugees, done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees, done at New York on 31 January 1967.

2 Cf Appellant's submissions filed on 11 May 2020 (**AS**) [58], [68].

3 Cf AS [49], [55], [60]; SBFM 26 – 30.

4 Cf AS [42].

5 A copy of Direction 65 is at BFM 6 – 33.

(d) That the Minister decided not to consider whether any non-refoulement obligations were owed with respect to the appellant because they could necessarily be considered in the context of a protection visa application. There is no evidence (including, in particular, nothing in the Minister's reasons[6]) to support this allegation. This is addressed in paragraphs 18 to 20 below.

PART V: ARGUMENT

(a) Did the material before the Minister raise the issue of whether Australia owed any non-refoulement obligations with respect to the appellant?

The appellant made no claim to fear persecution or serious harm

6. In requesting revocation of the cancellation of his visa, the appellant filled out a form that asked him to "provide your reasons as to why the Minister or his/her delegate should revoke the mandatory cancellation of your visa".[7] The form specifically asked "Do you have any concerns or fears about what would happen to you on return to your country of citizenship? If yes, please describe your concerns and what you think will happen to you if you return".[8] The appellant ticked "yes" to the first question", and wrote "see letter attached" to the second question. However, the letter contained no claim to fear persecution or other serious harm. It simply indicated that the appellant did not know what he would do in Vietnam, and had no place to live or work, as he did not want to live with his brother due to his brother's criminal record.[9]

7. Further, in a letter from the Department dated 24 November 2016, the appellant was provided with particulars of information that had been received which may be taken into account when making the decision whether to revoke the cancellation of his visa. The appellant was invited to comment on that information, which included the "international obligations and humanitarian concerns assessment" that formed Attachment K to the Ministerial submission.[10] The appellant responded to the request for comment on some of the information attached to that letter, but made no

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6 CAB 7–18.
7 SBFM 3.
8 SBFM 11.
9 SBFM 20.
10 SBFM 26

response to the invitation to comment on the assessment that no non-refoulement obligations were owed with respect to him.[11]

8. Notwithstanding the invitations referred to above, there is no evidence in any of the material that the appellant submitted in support of his revocation application that he now has, or has ever had, either a subjective fear of persecution in Vietnam, or a well-founded fear of persecution in that country. The only available inference from the appellant's failure to claim to fear persecution or serious harm if he was returned to Vietnam is that he did not have any such fear. That inference is supported by the fact that the appellant voluntarily returned to Vietnam to visit his parents for a 2½ month period in November 1995,[12] reasonably soon after he arrived in Australia.

9. For those reasons, on a fair reading of the material before the Minister, the appellant made no claim that gave rise to any reason to consider Australia's non-refoulement obligations.

10. To the extent that the appellant claims that he refrained[13] from referring to his fears because of the terms of Direction 65,[14] that claim should be rejected. The appellant did not lead any evidence that he decided not to include his non-refoulement claims because of Direction 65. Had he done so, that evidence would have been tested by cross-examination. For that reason, it is not open to him to make the claim for the first time on appeal.[15] That point should be decisive. If necessary, however, the Minister notes in addition that:

    (a) both the letter to the appellant dated 26 April 2016 (which provided the copy of Direction 65) and the revocation request form that the appellant filled out made clear that, if the Minister made the decision personally, then Direction 65 did not bind the Minister and was only "a broad indication of the types of issues that the Minister [was] likely to take into account in deciding whether or not to revoke the decision to cancel your visa";[16]

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11 SBFM 30.

12 BFM 63 at [2]. Specifically, he departed Australia on 22 November 1994 and returned on 9 February 1995: see SBFM 35.

13 AS [42].

14 A copy of Direction 65 is at BFM 6 – 33.

15 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *Suttor v Gundowa* (1950) 81 CLR 418 at 438 (the Court); *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71 (the Court).

16 BFM 41.45 and SBFM 3.

(b) the claim is implausible, given that the appellant was specifically invited to comment on the "international obligations and humanitarian concerns assessment" that was sent to him, which he was told was information that "may be taken into account when making the decision";[17] and

(c) the appellant's submissions to this Court also make the contradictory claim that the appellant "(despite being told not [sic] in the correspondence of 26 April 2016) squarely submitted to the Respondent that he was a refugee."[18] That is, the appellant denies confining his submissions by reason of Direction 65.

The asserted significance of the appellant's reference to himself as a "refugee"

10 11. The appellant contends that the fact that he referred to himself as having been sent by his parents to Hong Kong as a "refugee"[19] when he was a seven-year old child, and that he met his wife at the "refugee center"[20] in Hong Kong, was sufficient to enliven an obligation on the Minister to consider non-refoulement issues, notwithstanding his failure to claim to fear persecution. Indeed, he goes so far as to contend that, even though he may not have a well-founded fear of persecution now, the "fact" that he was recognized as a refugee when he came to Australia in 1990 means that he cannot now be removed unless the Minister is affirmatively satisfied that he has ceased to be a refugee in accordance with Art 1C of the Refugees Convention.[21]

20 12. The visa on which the appellant travelled to Australia (which is not the visa that was cancelled) was described in both the Ministerial submission[22] and in the courts below[23] as a Funded Special Humanitarian (subclass K4B12) visa.[24] In fact, in 1990 there was no class of "Funded Special Humanitarian Visa" and there were no "subclasses" of visa. However, at that time, the Migration Regulations defined a category of "humanitarian visa" that included a number of different visas.[25] The Department instructs that at the relevant time refugee minors were ordinarily given

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17 SBFM 26-27.

18 AS [86].

19 BFM 50.50; see also AS [86].

20 BFM 52.18; see also AS [43].

21 AS [67].

22 BFM 63 [2].

23 CAB 22 [2] (Bromwich J); CAB 39 [2] (Greenwood J, adopted by Charlesworth and O'Callaghan JJ).

24 BFM 62 at [2]. The substantive entry permit granted immediately after the transit visa was not in evidence in the Courts below and is no longer in the records of the Department.

25 Migration Regulations, reg 2.

Code 200 (Refugee) or Code 202 (global special humanitarian program) visas, and that of those two types of visa only the former was funded by the Australian government. It therefore appears likely that the appellant was granted a Code 200 refugee visa. There is, however, no evidence before this Court to that effect (there being no reason that the Minister should have led any such evidence at trial, given the grounds then advanced).

13. Even assuming in the appellant's favour that he was granted a Code 200 (Refugee) visa, the grant of such a visa does not mean that the appellant was recognized as a person who satisfied the definition in Art 1A of the Refugees Convention. The applicable visa criterion made no mention of that Convention. Instead, the relevant criterion was whether the Minister was "satisfied that there are compelling reasons for giving special consideration to granting to the person a permanent entry visa or a permanent entry permit", having regard to a number of specified mandatory considerations.[26] Whilst one of those considerations was "the degree of persecution experienced by the person", the word "persecution" was not used with its Refugees Convention meaning.[27] Accordingly, the appellant is correct to concede that the visa on which he travelled to Australia did not require assessment of his personal circumstances against Art 1A of the Refugees Convention,[28] and was issued to individuals "who may or may not be refugees".[29]

14. The above submissions reflect a position that is well settled in the Federal Court. In *AZAFQ v Minister for Immigration and Border Protection* (***AZAFQ***),[30] Allsop CJ, Robertson and Griffiths JJ held that the fact that the Subclass 200 (refugee) visa used the word "refugee" in its title did not indicate that the holder of that visa was a refugee within the meaning of the Refugees Convention.[31] The Court accepted that the words "refugee" and "persecution" when used in relation to such a visa "should be given

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26 See Migration Regulations, reg 101(a), read with the deeming provision in reg 100. As to the operation of a similar criterion, see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CR 173 at [30]-[32] (French CJ, Bell, Keane and Gordon JJ) and [63]-[66] (Gageler J).

27 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 47 at [9] and [22]; *AZAFQ v Minister for Immigration and Border Protection* (2016) 243 FCR 451 at [36]-[37], [67].

28 AS [28]. See also BFM 85.45.

29 AS [29]. That concession is consistent with BFM 85 (being part of Attachment K before the Minister), stating with respect to the visa on which the appellant arrived that "[t]he criteria for that visa did not require an assessment under the Refugees Convention".

30 (2016) 243 FCR 451.

31 (2016) 243 FCR 451 at [67]-[70].

their ordinary meanings and not be confined to the particular and narrower meanings of those words as used in the Refugees Convention".[32] The Court held that such a visa could be cancelled without reference to non-refoulement considerations, because a non-citizen affected by such a cancellation remained free to apply for a protection visa, which meant that "the legal and factual consequences of the cancellation of the appellant's visa do not necessarily include removal from Australia".[33] Similarly, in *Minister for Immigration, Multicultural and Indigenous Affairs v Hunyh*, an earlier Full Court (Spender, Branson and Stone JJ) had observed, in relation to a Vietnamese child who had arrived in Australia in 1992 and had also been granted a Class 200 "Refugee" visa, that:[34]

> The literal meaning of "refugee" is simply a person taking shelter from pursuit, danger or trouble – especially in a foreign country (see The Macquarie Dictionary, 3rd ed, 1998). Many individuals who fit within the ordinary meaning of the term "refugee" will fall outside the protection provided by the Refugees Convention. The Refugees Convention, which restricts the protection obligations of signatory states to persons who satisfy the criterion, amongst others, that they have a well-founded fear of persecution on one or more of the bases identified in Article 1A of the Refugees Convention, reflects the outcome of the Conference of Plenipotentiaries which met in Geneva in July 1951 … It is now widely accepted that there are categories of refugees within the literal meaning of that term that do not fall within Article 1A of the Refugees Convention.
>
> As the above discussion reveals, it does not logically follow from the fact that the respondent once held a Class 200 visa that he is a person to whom Australia owes, or once owed, protection obligations under the Refugees Convention.

15. Like the respondent in *Hunyh*, it appears that the appellant was part of large cohort of persons who were recognized generally as "refugees" within the ordinary meaning of that word, whether or not they met the technical definition in the Refugees Convention. There were coordinated international efforts to resettle the persons in that cohort during the 1970s and 1980s, and ultimately those who had not been resettled became the subject of the United Nations "Declaration and Comprehensive Plan of Action" adopted on 14 June 1989 (**CPA**). Under the CPA, the criteria for Australia's acceptance for resettlement of persons in a transitional category that included the appellant (being persons already in temporary asylum camps at the date of the CPA) were that they:[35]

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32 (2016) 243 FCR 451 at [67].

33 (2016) 243 FCR 451 at [70].

34 [2004] FCAFC 47 at [21]-[22] (emphasis added).

35 BFM 115.38 – 115.54.

(a) had arrived in a temporary asylum camp prior to the "cut off" date (different dates being set by different countries of first asylum, but there being no dispute that the appellant arrived in Hong Kong before the relevant date);

(b) had not been assessed as not being a refugee "under established status-determination procedure" (meaning that a negative assessment against the Refugees Convention was an exclusionary factor, rather than a positive assessment against Art 1A being required for inclusion); and

(c) had not expressed a wish to return to Vietnam.

16. Given the above, on the evidence before the Court the appellant cannot discharge his burden of showing that he was ever recognized as a refugee within the meaning of Art 1A of the Refugees Convention. For that reason alone, his submissions based upon Art 1C of that Convention must fail.

17. Further, and separately from the above, the evidence also indicates that the appellant was assessed against the Refugees Convention on 19 December 2006, at which time he was found not to be a refugee within the meaning of the Refugees Convention.[36] That assessment was followed by a more detailed 19-page assessment undertaken by the Department dated 28 December 2006,[37] which concluded that the appellant was not owed any international non-refoulement obligations. Those assessments were before the Minister. Even if the appellant's general and historical references to himself as a refugee might otherwise have supported an inference that he had that status, no such inference was open having regard to those assessments.

(b) Did the Minister defer considering whether any non-refoulement obligations were owed with respect to the appellant?

18. The Minister's reasons say nothing to suggest that the Minister decided to defer any consideration of non-refoulement obligations. The appellant's allegation[38] that the Minister did so is a transparent attempt to take advantage of the reasoning of the Full Federal Court in *BCR16 v Minister for Minister for Immigration and Border Protection* (2017) 248 FCR 456 (***BCR16***). In that case, however, the Minister had found in her reasons that the appellant had made claims that "may give rise to international non-refoulement obligations", before stating that, because the appellant

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36 AS [28], BFM 85.45, SBFM 35-37

37 BFM 79 – 97.

38 AS [53]-[55].

was able to make an application for a protection visa, "it is unnecessary to determine whether non-refoulement obligations are owed … for the purposes of this decision".[39]

19. The facts of this case are profoundly different. On a fair reading, the appellant's occasional references to himself as a "refugee" described in general terms the circumstances in which he came to Australia, rather that constituting a non-refoulement claim.[40] Unlike *BCR16*, there is nothing in the reasons that suggests that the Minister considered that non-refoulement claims had been made, but decided not to consider them because they could be considered in a protection visa application.[41]

10 To the contrary, as the appellant at one point concedes, the reasons are "silent as to any consideration of international non-refoulement obligations".[42] That is not surprising, because in addition to the absence of any claim to fear persecution or serious harm, the Minister had material before him that concluded that "Australia did not owe protection obligations to [the appellant]".[43] In light of those facts, the obvious inference is that the Minister's reasons do not discuss Australia's non-refoulement obligations because on the material before him he did not consider that any claim had been made that required him to consider those obligations.[44] That inference is supported by the fact that the Minister <u>did</u> address every specific form of harm that the appellant claimed to fear.[45]

20 20. In light of the above, the appellant's submissions that the Court should infer that the Minister "elected to defer the consideration of protection issues and related international obligations on the basis that the appellant could make a protection visa application"[46] are without foundation:

(a) The appellant's submission that the "nature of the visa held by the Appellant and the circumstances of its grant" placed the Minister on notice that "the

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39 *BCR16 v Minister for Minister for Immigration and Border Protection* (2017) 248 FCR 456 at [16].

40 Cf AS [55(iv)].

41 The fact that the appellant was not barred from applying for a protection was also noted in that submission. However, that simply reflects the fact that, if he wished to make non-refoulement claims in the future, he would have the opportunity to do so.

42 AS [51].

43 BFM 70 at [77].

44 CAB at 6 – 18.

45 See Reasons at [33] to [65] and [106] (CAB 10 – 13 and 18).

46 AS [54]. Note AS [70], which recognizes the weakness of his position, referring to the Minister having "either deferred <u>or not considered</u>" non-refoulement.

Appellant was (or might have been) assessed *prima facie* as a refugee" [47] proceeds from a mistaken premise as to the visa that was cancelled. That visa was a Class BB Subclass 155 Five Year Resident Return visa.[48] There is nothing about that visa to suggest that its holder is a "refugee";

(b) Direction 65 does not assist in drawing any inference as to the manner in which the Minister reasoned, given that the Minister was not bound by that direction. That is particularly true because the part of Direction 65 on which the appellant relies is relevant only where a "non-citizen makes claims which may give rise to international non-refoulement obligations";[49]

(c) Contrary to the appellant's claim that the "failure to put to the Appellant for comment Attachment K … entitled "International Obligations and Humanitarian Concerns" supports the inference that consideration of non-refoulement was deferred,[50] the fact that Attachment K was put to the appellant for comment, on the express basis that it may be relevant to the revocation decision, strongly indicates that the Minister did not "defer" any consideration of non-refoulement obligations, but instead considered that no such obligations were owed with respect to the appellant; and

(d) Given the Minister's obligation under s 501G(1)(e) to give reasons for his decision, the failure to mention non-refoulement in those reasons contradicts any inference that the Minister formed the view that non-refoulement claims had been made, but then decided that it was unnecessary to consider those claims because they could be considered in a protection visa context. If the Minister had reasoned in that way, his reasons would have contained as statement of the same kind that appeared in the reasons in *BCR16*. If something is not referred to in a statement of reasons, it may be inferred that the Minister did not consider that thing to be material (which is, of course, different from inferring that the matter was not considered at all).[51]

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47 AS [53].

48 CAB 7 [1].

49 BFM 19 (Direction 65 at [14.1(4)].

50 AS [55(v)].

51 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5] (Gleeson CJ), [34]-[35] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ); *Cotterill v Minister for Immigration and Border Protection* (2016) 240 FCR 29 at [121] (Kenny and Perry JJ), [101]-[102] (North J).

21. The central proposition in the sole ground of appeal is that the Minister deferred consideration of non-refoulement because he believed that this could necessarily be considered in a protection visa application. As the appellant cannot discharge his burden of proving that the Minister reasoned in that way,[52] the appeal should be dismissed.

(c) Non-refoulement obligations are not a mandatory relevant consideration under section 501CA(4)

22. Even if, contrary to the submissions above, the appellant's reference to himself as a "refugee" constituted a non-refoulement claim, the Minister was under no obligation to consider that claim in deciding under s 501CA(4) whether to revoke cancellation of the appellant's Class BB Subclass 155 Five Year Resident Return visa.

23. The text of s 501CA(4) confers a wide discretion on the Minister. It states no express mandatory considerations. While mandatory relevant considerations can, of course, be identified by reference to the subject-matter, scope or purpose of a statute,[53] there is nothing in either the text of s 501CA, or its subject matter or purpose, that requires the Minister to take account of any risk of non-refoulement when deciding whether to revoke cancellation of any visa that is not a protection visa.

24. The Act expressly deals with the topic of non-refoulement in the provisions concerning the grant of protection visas (being a class of visa created specifically to allow decision-makers to grant visas to persons who cannot be removed from Australia consistently with its non-refoulement obligations under international law),[54] and in the context of removal.[55] In light of those express provisions, there is no basis to construe the general provisions in the Act concerning the cancellation of visas of all kinds on character grounds, or the revocation of mandatory cancellations on such grounds, as requiring consideration of non-refoulement, at least in cases where the specific provisions concerning protection visas are available to an applicant who wishes to invoke them.

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52 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 (French CJ, Bell, Keane and Gordon JJ) at [24].

53 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40 (Mason J).

54 See, eg *Migration Act 1958* (Cth) ss 5(1) (definitions of various Conventions, Covenants, and words and phrases such as "cruel or inhuman treatment or punishment", "degrading treatment or punishment", "non-refoulement obligations", "protection visa", "significant harm", "torture", "well-founded fear of persecution"), 5H, 5J, 35A, 36, 37A and 91A to 91X.

55 See, in particular, s 197C.

25. It is only through the specific provisions of the Act mentioned above that Australia's non-refoulement obligations under international law have been implemented in domestic law. There is no proper basis to treat those international obligations as mandatory relevant considerations with respect to other provisions of the Act (including s 501CA(4)), for as McHugh and Gummow JJ observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*:[56]

> [I]n the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in *Teoh* accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error.

26. Consistently with the above, there are a number of decisions of the Full Federal Court holding that non-refoulement is not a mandatory relevant consideration under the provisions of the Act concerning the cancellation or revocation of visas on character grounds unless the visa in question is a protection visa.[57] For example, in *Minister for Immigration and Border Protection v Le*,[58] a person who arrived in Australia from Vietnam in 1984 (having been assessed by Australian officials overseas as meeting the definition in Art 1A of the Refugees Convention) had her visa cancelled on character grounds. Like the present appellant, in seeking to persuade the Minister not to cancel her visa under s 501(2), Ms Le did not make any submissions that required any consideration of non-refoulement. In the Minister's reasons for cancelling the visa, the Minister noted that Ms Le was able to make a valid application for a protection visa, and on that basis found it unnecessary to determine whether non-refoulement obligations were owed with respect to her. Chief Justice Allsop, Griffiths and Wigney JJ found no error in that reasoning, holding that the existence of such obligations "was not a mandatory relevant consideration under

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56 (2003) 214 CLR 1 at [101] (emphasis added). See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [385] (Gageler J), [490]-[491] (Keane J); *Kaur v Minister for Immigration and Border Protection* (2017) 256 FCR 235 at [22] – [23] (Dowsett, Pagone, Burley JJ); *Snedden v Minister for Justice* (2014) 230 FCR 82 at [147] (Middleton and Wigney JJ, Pagone J agreeing at [242]); *Australian Crime Commission v NTD8* (2009) 177 FCR 263 at [66] (Black CJ, Mansfield and Bennett JJ); *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 at [59]

57 *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56 at [41], [44], [61(e)], [64]; *COT15 v Minister for Immigration and Border Protection (No 1)* (2015) 236 FCR 148 at [38]; *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at [18]-[19] (Flick, Griffiths and Perry JJ). As to protection visas (where cancellation engages the bar on a further application for such a visa in s 48A), see *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [17] (Allsop CJ and Katzmann J).

58 (2016) 244 FCR 56 at [41]-[65].

s 501(2) where it remained open to Ms Le to make an application in Australia for a protection visa".[59]

27. The reason that the Act is properly construed as not impliedly requiring the Minister to consider non-refoulement obligations before cancelling any visa other than protection visa (or, by parity of reasoning, before refusing to revoke a mandatory cancellation[60]) is that, provided a non-citizen is able to apply for a protection visa, it will be the decision on that application (rather than the cancellation or non-revocation decision) that determines whether or not the person will be permitted to remain in Australia.[61] That is true whether the application for a protection visa is dealt with on character grounds, or by considering the merits of any protection claims that are made. The fact that Parliament has enacted a legislative regime that allows protection visas to be refused on character grounds,[62] and that it has done so without imposing any requirement that a decision-maker first determine whether non-refoulement obligations are owed before refusing a protection visa on such grounds (that being the point made in *BCR16*[63]), simply demonstrates the limits of Parliament's incorporation of the Refugees Convention into domestic law (ie its intention that even a person with respect to whom protection obligations are owed may be denied a visa to remain in Australia). It does not provide any warrant for circumventing those limits, by restricting the cancellation on character grounds of visas that have nothing to do with Australia's compliance with its non-refoulement obligations.

28. The above analysis is not disturbed by *BCR16* (which the Full Court expressly stated was not a case about mandatory relevant considerations).[64] That case concerned a

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59 (2016) 244 FCR 56 at [41].

60 See *BMX15 v Minister for Immigration and Border Protection* (2016) 244 FCR 153 at [85] (Bromberg J).

61 In *BAL19 v Minister for Home Affairs* [2019] FCA 2189, Rares J held that the refusal power in s 501 does not apply to protection visas. If correct, then the circumstances in which character considerations could result in the refusal of a protection visa are greatly restricted. The Minister has appealed against that decision, and its correctness is also in issue in several other appeals currently before the Full Court of the Federal Court.

62 See s 65(1)(a)(iii) and s 501, including in particular "Note 1" to s 501, which states that "***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa." Further, it is part of the *ratio* of *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 that a protection visa can be refused under s 501 of the Act.

63 (2017) 248 FCR 456 at [36], [43]-[44], [75] and [90] (Bromberg and Mortimer JJ). Note, however, that Direction 75 now requires delegates to consider protection claims before character criteria, which largely overtakes the decision in *BCR16*: see *DOB18 v Minister for Home Affairs* [2019] FCAFC 63 at [193] (Robertson J, Logan J agreeing); *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89 at [76].

64 (2017) 248 FCR 456 at [61] (Bromberg and Mortimer JJ).

citizen of Lebanon whose partner visa was cancelled under s 501(3A), and who sought revocation of that decision. In doing so, he claimed to fear harm upon return to Lebanon by reason of being an Alawite and by reason of the fact that it was generally very dangerous in Lebanon because of the civil war then underway. The Full Court found that the Assistant Minister had made a jurisdictional error, as she had expressly reasoned that she did not need to consider the claims summarized above because they could necessarily be addressed in an application for a protection visa.[65] The majority held that involve two specific errors: *first*, the Minister had failed correctly to understand the operation of the Act, including specifically that protection visas could be refused on character grounds without any consideration being given to the risk of harm;[66] and *second*, the Minister failed to understand the claim of the harm feared was broader than the kinds of harm that would enliven non-refoulement obligations of that kind that might meet the criteria for a protection visa (because it included a generalized fear of harm).[67]

29. As to the first of those errors, no equivalent error was made in this case. For the reasons already advanced, in this case, unlike *BCR16*, no claim to fear harm was made. The Minister did not decide to defer consideration of that claim, because there was no such claim. That provides a sufficient basis to distinguish *BCR16*. Nevertheless, it is important to be precise as to what *BCR16* decided. The Full Court found that the Minister misunderstood the law in making her decision on the basis that any claim to fear harm in Lebanon would necessarily be considered in deciding whether to grant a protection visa.[68] That was the jurisdictional error. It does not follow from that conclusion – and *BCR16* expressly does not hold[69] – that the Minister is required to consider non-refoulement when making decisions under s 501CA(4). To the contrary, the Full Court did not question the correctness of *Le*, or the other cases in the line of authority referred to above, that hold otherwise.

30. As to the second error identified in *BCR16*, again no equivalent error was made on the facts of this case. It may be accepted that, if a person claims to fear harm and that claim is not considered by the decision-maker because the decision-maker

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65 (2017) 248 FCR 456 at [60] (Bromberg and Mortimer JJ).

66 (2017) 248 FCR 456 at [68], [90]-[91] (Bromberg and Mortimer JJ).

67 (2017) 248 FCR 456 at [71], [93] (Bromberg and Mortimer JJ).

68 (2017) 248 FCR 456 at [68] (Bromberg and Mortimer JJ).

69 (2017) 248 FCR 456 at [77]-[78], [90] (Bromberg and Mortimer JJ).

confines him or herself to harms of a kind that enliven non-refoulement obligations, then that may be a jurisdictional error.[70] In this case, however, the Minister considered all of the appellant's claims about harm, and did not purport to confine his consideration to harms giving rise to non-refoulement obligations (no such harm having been identified).

The appellant's direct reliance on the Refugees Convention

31. The appellant submits that the Minister's decision not to revoke the cancellation of his visa was a decision that the appellant ceased to be a refugee.[71] This is not correct. There is no basis for the appellant's assertion that it is "uncontroversial".[72]

32. As submitted above, the appellant has not established the premise for this submission, because he has not discharged the burden of establishing that he was ever recognized by Australia as a refugee within the meaning of the Refugees Convention,[73] given the relevant criteria in the CPA and the criteria in the most relevant visa categories in 1990, at the time that he was granted a visa to come to Australia (see paragraphs 11 to 15 above).

33. However, even if the appellant was recognized by Australia as a refugee, the decision to cancel his Class BB Subclass 155 Five Year Resident Return visa (and then not to revoke that cancellation) was not a decision to revoke that status. If, at the time the appellant's visa was cancelled, Australia had international obligations with respect to him under the Refugees Convention, then those obligations continued notwithstanding the cancellation of his visa. Those obligations might, but need not necessarily, result in the grant of a protection visa.

34. For that reason, the appellant's extensive submissions with respect to Art 1C of the Refugee's Convention are irrelevant to the validity of the impugned decision.[74] So, too, are his submissions that suggest that he was "entitled" to various "accrued

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70 *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [54]; *DOB18 v Minister for Home Affairs* [2019] FCAFC 63 at [185] (Robertson J, Logan J agreeing); *Minister for Home Affairs v Omar* (2019) 373 ALR 569 at [44] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

71 AS [63]-[72].

72 AS [72].

73 AS [58].

74 AS [62]-[73]

rights" under that Convention.[75] These submissions assume that the Refugees Convention confers rights under domestic law. It does not.

35. The appellant's complaint that it is not sufficient to comply with the Convention that he is entitled to apply for a protection visa, because if he made such an application he would "be required to demonstrate afresh eligibility for the visa by reference to the criteria set out in section 36 of the Act",[76] is no more than a complaint about the way that Parliament has chosen to implement the Convention in domestic law. The complaint fails to recognise that this Court has previously held that the Act may permissibly require applicants for protection visas to demonstrate that very thing, notwithstanding Art 1C of the Refugees Convention.[77] As a matter of Australian domestic law, it is not the case that the appellant is entitled to a visa "even where 'the circumstances in connexion with which he has been recognized as a refugee have ceased to exist'".[78] Indeed, in the section of his submissions immediately following the section in which he relies extensively on Art 1C, the appellant concedes that "[a]ny residual entitlement to protection enjoyed by the Appellant on account of the cessation provisions in the Refugees Convention is not recognized in the Act".[79] That concession is correct. It renders his reliance on Art 1C irrelevant.

Materiality

36. Materiality is "in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision."[80]

37. Even if (contrary to the submissions above) the Minister was required to consider whether non-refoulement obligations were owed with respect to the appellant in deciding whether to revoke the cancellation of the appellant's visa, it is plain (and

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75 AS [68].

76 AS [67].

77 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1; See also *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [68] and [69] (Callinan, Heydon and Crennan JJ, with whom Gummow ACJ agreed).

78 AS [69].

79 AS [83].

80 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 412 at [45] (Bell, Gageler and Keane JJ). See also *Hossain v Minister for Immigration* (2018) 264 CLR 123 at [31] (Kiefel CJ, Gageler and Keane JJ); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [23] (Gageler and Keane JJ).

the appellant implicitly concedes[81]) that the circumstances that existed in Vietnam in 1982 have long since "ceased to exist". For that reason, any protection obligations that may once have been owed with respect to the appellant under the Refugees Convention have "ceased to apply" by reason of Art 1C(5), unless the proviso to that provision applies. In practical terms, therefore, the appellant's contention is that the Minister was required to consider whether there were "compelling reasons arising out of previous persecution for refusing to avail himself of the protection" of Vietnam.[82] The only matters to which the appellant points in that regard are:

(a) "his decades of residence in Australia as a consequence of being a child refugee, his three Australian children, his wife being resident in Australia and the … trauma and dislocation of his life flowing from the post war events in Vietnam" (AS [74]); and

(b) the fact that he "overcame a history of drug addiction and incarceration" where it was proposed to return him to a "developing nation which is a one party communist state" (AS [94]).

38. Those matters are not reasons "arising from previous persecution" for refusing to avail himself of the protection of Vietnam (as opposed to be reasons he does not wish to return to Vietnam). Indeed, there is nothing to relate any of those matters to "previous persecution" in Vietnam (there being no evidence of any such persecution, the appellant's claim at its highest being to have suffered trauma and dislocation in the refugee camp in Hong Kong[83]). As there was no material before the Minister that could have enlivened the proviso to Art 1C(5), there was no basis upon which the Minister could have been satisfied that any protection obligations that may once have been owed continued to be owed. For that reason, any failure by the Minister to consider whether protection obligations were owed with respect to the appellant was not material, as it could not realistically have resulted in a different decision.[84]

39. Furthermore, the Minister did in fact consider all the matters identified by the appellant in his reasons at [13] to [28], [33] to [65] and [106]. He did not consider

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81 AS [67] and [69].

82 AS [69].

83 BFM at 48.21, 58.48 – 59.38 (appellant's submissions to the Minister) and SBFM at 46.50 (Court transcript referred to the appellant's submissions)

84 Eg *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 412 at [45] (Bell, Gageler and Keane JJ).

any of those matters to have the consequence that he should revoke the cancellation of the visa.[85] For that additional reason, any failure to consider Art 1C(5) could not have been material, as there is no realistic basis upon which the Minister could have concluded that those same matters were "compelling reasons" capable of enlivening the proviso to Art 1C(5).

PART VI: ESTIMATED TIME FOR ORAL ARGUMENT

40. The Minister estimates that he will require 75 minutes for oral argument.

Dated: 5 June 2020

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[85] CAB at 8 – 13 and 18.

IN THE HIGH COURT OF AUSTRALIA **No. S47 of 2020**
SYDNEY REGISTRY

BETWEEN: **APPLICANT S270/2019**
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

RESPONDENT'S LIST OF LEGISLATIVE PROVISIONS
(ANNEXURE TO WRITTEN SUBMISIONS)

1. Convention relating to the Status of Refugees, done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees, done at New York on 31 January 1967.

2. *Direction No. 65 – Direction under section 499 Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

3. *Migration Act 1958* (Cth) (as at 29 May 1990).

4. *Migration Act 1958* (Cth) (as at 17 January 2017): ss 5(1), 5H, 5J, 35A, 36, 37A, 65, 91A-91X, 197C, 501, 501CA, 501G

5. *Migration Regulations* (as at 3 April 1990) from *Statutory Rules 1989* (No. 365): reg 2, regs 100-101.

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