HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S270 of 2019

Appellant S270/2019

v

Minister for Immigration and Border Protection

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I

1. This outline is in a form suitable for publication on the internet.

Part II

2. The single ground of appeal raises three related issues (none of which were raised in the Courts below), being:

   (a) two questions of fact as to:

      (i) whether the material before the Minister raised the issue as to whether Australia owed any non-refoulement obligations to the Appellant **(RS [2(a)])**; and

      (ii) if so, whether the Minister decided to defer consideration of those non-refoulement obligations on the basis that they could be considered in the context of a protection visa application **(RS [2(b)])**;

   (b) a question of principle as to whether the Minister was required to consider non-refoulement obligations in making a decision under s 501CA(4) of the Migration Act (and, if so, whether any failure to do so was material) **(RS [2(c)]).**

3. The Appellant cannot establish that he was ever assessed as being a refugee within the meaning of the Refugees Convention **(Appellant's BFM 63 [2], 115)**. The criteria for the visa that he was likely granted required no such assessment **(RS [12]-[15])**.

   - *Migration (Criteria and General) Regulations 1989* regs 2, 101(a), 100(1) **(Vol 2, Tab 4)**
   - *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [30], [63], [66] **(Vol 3, tab 13)**
   - Comprehensive Plan of Action, **Appellant's BFM pp 111, 115**

- *Minister for Immigration and Multicultural and Indigenous Affairs v Hunyh* [2004] FCAFC 47, [4]-[7], [14]-15], [21]-[22], [25]-[28] **(Vol 5, tab 24)**

- *AZAFQ v Minister for Immigration and Border Protection* (2016) 243 FCR 451 at [31], [64]-[68] **(Vol 4, tab 16)**

4. In 2006, the Department conducted an assessment of the Appellant against Art 1A of the Refugees Convention, and determined that he was not a refugee (**RS [17]**). The Appellant was informed of this assessment, and that it would be before the Minister as part of the consideration of his revocation application, yet he made no submission addressed to that issue (and no claim to fear harm if returned to Vietnam) **(RS [7]).**

- **Appellant's BFM pp 79-80, 85**

- **Supplementary BFM pp 35-36**

5. The Minister did not decide to defer consideration of Australia's non-refoulement obligations on the basis that such obligations could be considered in the context of a protection visa application. There is no factual foundation for the Appellant's assertion to the contrary. To the extent that any claim was made concerning Australia's non-refoulement obligations, the proper inference is that it was considered **(RS [18]-[21]).**

- **Core Appeal Book p 8, [11]**

- Cf *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at [8], [16], [60] **(Vol 4, tab 17)**

6. In any event, the Minister was not required to consider Australia's non-refoulement obligations in making a decision under s 501CA(4) of the Migration Act, in circumstances where the visa that had been cancelled was not a protection visa **(RS [22]-[27]**).

7. It may be accepted that the Minister must consider any "substantial or significant and clearly articulated claim" made in a representation under s 501CA(4)(b): eg *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [39]-[41] **(Vol 5, Tab 22) (RS [30]).**

8. Provided any such factual claim to fear harm is considered, nothing in the text, subject matter or purpose of the Migration Act supports the conclusion that the characterisation of such a factual claim as one that engages Australia's non-refoulement obligations under international law is a mandatory consideration under s 501CA(4), or that the Minister will make a jurisdictional error if he or she does not engage with the extent to which the Parliament has implemented Australia's non-refoulement obligations in the provisions of the Act concerning protection visas (**RS [22] – [30]**).

- *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56 at [41]-[65] **(Vol 5, tab 23)**

- *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 at [106], [180], [183], [185], [193] **(Vol 4, Tab 14)**

- *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [385], [490]-[491] **(Vol 3, tab 6)**

- Cf *Ali v Minister for Home Affairs* [2020] FCAFC 109 at [1], [6], [15], [33], [54], [71], [83], [97], [99], [101]-[103], [110]-[111], [114], [117] **(Vol 4, tab 14)**

9. The Appellant's reliance on the cessation provision in Article 1C of the Refugees Convention to overcome the fact that he does not have any present well-founded fear of persecution in Vietnam is misplaced (**AS [83]**). That is so in part because the Appellant cannot show that he has ever been a refugee within the meaning of Art 1A, and in part because, in any event, the argument fails to have regard to the limits on Parliament's domestic implementation of the Refugees Convention **(RS [31] – [35])**.

- *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [33]-[36], [39], [43]-[44] **(Vol 3, tab 10)**

10. Even if the Minister was required to consider Article 1C(5) (and the proviso thereto), any failure to do so was not material. Nothing in the material before the Minister indicated that there was any reason "arising from previous persecution" that the Appellant could not be returned to Vietnam **(Appellant's BFM 46, 48, 59) (RS [36] – [39])**.

- *Convention relating to the Status of Refugees*, Art 1C(5) **(Vol 6, tab 27)**

- *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45] (**Vol 3, Tab 11**).

Stephen Donaghue   Rachel Francois

5 August 2020