HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	M1/2021
File Title:	Plaintiff M1/2021 v. Minister for Home Affairs
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Defendant
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No: M1/2021 M1/2021

BETWEEN:

PLAINTIFF M1/2021
Plaintiff

and

MINISTER FOR HOME AFFAIRS
10 Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

*Questions 1 and 2(a)-(b) (non-*refoulement *not required to be taken into account, but considered in any event)*

2. The power in s 501CA(4) of the *Migration Act 1958* (Cth) (**Act**) is cast in wide terms. While the words "another reason" in s 501CA(4)(b)(ii) are broad enough to cover a range of matters (DS [12] fn 8), the provision does not require the Minister to take into account any particular factor or issue as a mandatory relevant consideration – including non-*refoulement*.
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3. Section 501CA(4) does require the Minister to consider a former visa holder's representations, and the claims and material therein, by implication.

   a) *Applicant S270/2019* (2020) 94 ALJR 897 at [36] (JBA, Vol 4, Tab 30).

4. By that implied duty, Parliament has required the Minister to have regard to a particular *body* of information, which may involve a mass of diffuse, sometimes entirely extraneous, material. The duty requires consideration of that body of information as a whole, but not every statement within it (DS [14] fn 10-12). Unlike a duty to have regard to a particular *issue* or *factor* (which will set the decision maker's agenda and shape the path of decision making), the legislative design in imposing a duty of that nature is similar to that involved in the imposition of a duty to afford procedural fairness. It is a duty not to "overlook" the representations made to seek to persuade the Minister to exercise the power conferred by s 501CA(4).
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   a) *Viane* (2018) 263 FCR 531 at [67] (JBA, Vol 4, Tab 58).
   b) *Dranichnikov* (2003) 77 ALJR 1088 at [24] (JBA, Vol 4, Tab 35).

5. Here, the delegate sufficiently complied with that duty insofar as it related to the representations about non-*refoulement* by reading, recognising and understanding them

(SCB 120 [12], 125 [46]-[49]) (DS [33]-[35]). The delegate then engaged in a permissible process of reasoning, taking the view that that claim, even if made out, would not be a reason to revoke the cancellation and so put it to one side. It is not alleged that that reasoning was irrational or unreasonable. It was an approach which conforms to the legislative intention apparent from ss 501E and 501F and the express provisions dealing with non-*refoulement* in the context of the grant of protection visas and removal. It did not involve a denial of natural justice (DS [36]).

a) *Tickner v Chapman* (1995) 57 FCR 451 at 495 (JBA, Vol 4, Tab 57).
b) *Omar* (2019) 272 FCR 589 at [36(c)] (JBA, Vol 4, Tab 58).
c) *Huynh* [2004] FCAFC 47 at [27]-[28] (JBA, Vol 4, Tab 44).
d) *Applicant S270/2019* (2020) 94 ALJR 897 at [34]-[35] (JBA, Vol 4, Tab 30).

6. The assertion that any of that involved a failure to consider a matter to which the delegate was required to have regard would only be made good if the Plaintiff could demonstrate that Parliament has, in addition, mandated that the *issue* of the existence or breach of non-*refoulement* obligations be considered and determined in the context of s 501CA(4). But this is not required by the Act (DS [18]-[26]).

a) *Applicant S270/2019* (2020) 94 ALJR 897 at [34]-[35] (JBA, Vol 4, Tab 30) and the references to *CPCF* (2015) 255 CLR 514 at [385], [490]-[491] (JBA, Vol 3, Tab 8).
b) *Drame* [2020] HCATrans 207 (JBA, Vol 4, Tab 34).
c) *Ali* (2020) 278 FCR 627 at [95]-[106] (JBA, Vol 4, Tab 29) is wrong.

Question 2(c) (no misunderstanding of the Act)

7. **As to the *first* asserted misunderstanding** (that the delegate assumed that consideration of non-*refoulement* would be the same under ss 65 and 501CA(4)) the delegate did not reason that a protection claim would involve the *same* analysis as consideration of non-*refoulement* under s 501CA(4) (DS [39]-[40]; *cf* PS [37]). The point made at SCB 125 [48]-[49] was that it is appropriate for claims invoking Australia's non-*refoulement* obligations to be considered via the protection visa mechanism. SCB 125 [49] reveals that the delegate understood that the grant of a protection visa will turn on satisfaction of *criteria* which the Plaintiff will either meet or not meet and, by reference to Direction 75, that such a visa may be refused even if s 36(2) is satisfied. The delegate also understood that exercise of the power in s 501CA(4) involves weighing factors for and against revocation of the cancellation decision (SCB 120 [14], 127 [68]).

8. **As to the *second* asserted misunderstanding** (that the delegate conflated Australia's non-*refoulement* obligations in international law with the criteria for the grant of a protection visa) the statement that "non-*refoulement* obligations" will be "fully considered" in a protection visa application needs to be read in the light of the references to Direction 65 (see, in particular, cl 14.1(1)) and Direction 75. In saying that non-*refoulement* would be "fully considered" (at [48]) or "fully assessed" (at [49]), the delegate was saying no more than that, in so far as Australia has implemented its

international obligations, its consideration would not be truncated by the peremptory application of ineligibility criteria.

9. In any event, none of that is said to have led to an identified *material* error and the second asserted misunderstanding collapses into the first:

   a) *Omar* [2019] FCA 279 at [78] (JBA, Vol 4, Tab 51).
   b) *Ali* (2020) 278 FCR 627 at [34], [116], [117] (JBA, Vol 4, Tab 29).

Question 3 (no jurisdictional error)

10. Any misunderstandings that did affect the delegate's reasoning were errors within jurisdiction (DS [44]-[47]; *cf* PS [34], [37], [40]). The Plaintiff's reliance on cases that say that, in exercising a statutory power, a decision-maker must act on "a correct understanding of the law", is misplaced. The "law" refers to the power being exercised or the immediate legal effect of the decision.

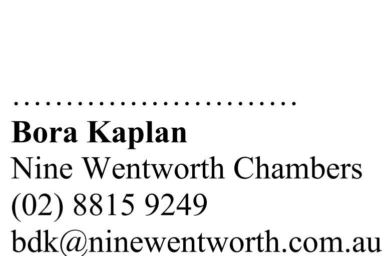
    a) *Connell* (1944) 69 CLR 407 at 430 (JBA, Vol 3, Tab 21).
    b) *Probuild Constructions* (2018) 264 CLR 1 at [75] (JBA, Vol 4, Tab 19).
    c) *Snedden v Minister for Justice* (2014) 230 FCR 82 at [153]-[154], [163]-[164], [242] (JBA, Vol 4, Tab 56).
    d) *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [196] (JBA, Vol 3, Tab 24).
    e) *Graham* (2017) 263 CLR 1 at [68] (JBA, Vol 3, Tab 11).

11. The alleged misunderstandings here related not to the test to be applied under s 501CA(4) or the legal effect of a decision made under that provision, but rather to the treatment of non-*refoulement* in a different decision-making process under the Act or to the scope of Australia's non-*refoulement* obligations as enacted in domestic law. Neither involved the breach of an inviolable limitation or restraint on the power conferred by s 501CA(4).

Questions 4-6 (extension of time, relief)

12. The Minister does not wish to be heard on the application for an extension of time (DS [48]-[50]). As to relief, the application filed on 5 January 2021 should be dismissed and the Plaintiff should be ordered to pay the Minister's costs (DS [51]-[52]).

Dated: 30 November 2021



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