HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Mar 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S102/2022
File Title:	ENT19 v. Minister for Home Affairs & Anor
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Plaintiff
Date filed:	14 Mar 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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 OUTLINE OF ORAL ARGUMENT

PART I: This outline is in a form suitable for publication on the Internet.

PART II: Propositions to be advanced in oral argument

Construction of the Act and cl 790.227

1. Properly construed, cl 790.227 of the Regulations does not permit refusal of a protection visa in purported exercise of the power under s 65 by reason of a person's criminal offending, further or alternatively, by reason of a person's commission of an offence under s 233C of the Act.

2. This construction is necessary to yield a harmonious operation of the Act and the Regulations and to achieve a sphere of operation for cl 790.227 of the Regulations (if valid) (**PS (Revised) (PRS) [15]-[23], [26]-[28], [30]-[36]**). See analogously: *Plaintiff M47* (2012) 251 CLR 1 at [71], [221], [399], [456]-[461].

    - The object of the Act (s 4(1)) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens – the Act seeks to balance the "tension" between the power of a sovereign nation to regulate the entry and deportation of non-citizens with Australia's treaty obligations, in particular the prohibition on expulsion or return of persons recognised as refugees.
    - Section 36(1C) gives effect to Art 33(2) of the *Refugees Convention* and describes the serious threshold which must be met in order to justify return of a refugee to harm (**PRS [17]-[18], [20]-[23]**). Sections 5(1) and 5M of the Act reveal it is unlikely Parliament intended commission of people smuggling offences would engage s 36(1C) (**PRS fn 15**).
    - Sections 233A to 234A (read with s 5C and 501(6)(ba)(i)) are indicative of a legislative intention to provide exhaustively for the consequences under the Act of conviction of an offence under these provisions.
    - The conditions on the exercise of power under s 501 (especially s 501(3)) would be rendered nugatory if cl 790.227 operated as a paramount or cumulative requirement which was otherwise unconstrained by, or overlapped with the subject matter and operation of, ss 36 and 501. Section 501(3) reflects a legislative judgment that matters pertaining to the national interest are appropriately determined by the Minister (see, eg, *Re Patterson* (2001) 207 CLR 391 at [330]).

3. The Minister's decision to refuse the SHEV was made because of the plaintiff's offending under s 233C of the Act (other considerations said to engage the national interest,

including deterrence, being consequent upon that offending) (**PRS [35]-[36], DRS [33]**). Clause 790.227 not permitting refusal for a reason connected with a person's criminal offending, the purported decision was not authorised by the Act and invalid.

4. This construction does not leave cl 790.227 (if valid) with no work to do. If cl 790.227 validly operates as a cumulative requirement before a protection visa may be granted in purported exercise of the power under s 65, then it operates only insofar as it does not subsume or dispense with the criteria governing refusal of a protection visa by reason of a person's criminal history so as to undercut the intended operation of ss 36 and 501. It serves as a further reinforcement of the Act's intended operation that, subject only to s 36 and the "special power" in s 501, it is in the national interest that, for instance, effect be given to Australia's international obligations (the violation of international law being "intrinsically and inherently a matter of national interest": see *CWY20* (2021) 288 FCR 656 at [15], [177], [181]).

5. Further or alternatively, cl 790.227 is ultra vires the Act and invalid (**PRS [6]-[29]**, **PR [2]-[6]**).

The decision contravenes Ch III, alternatively it is not authorised by the Act

6. The purported exercise of power under s 65 will be contrary to Ch III of the Constitution, alternatively not authorised by the Act, if it was exercised for the purpose of punishing the plaintiff for his criminal offending (**PRS [37]-[42]**).

7. The exercise of power will be for the purpose of punishment if, on its proper characterisation: (a) it has as its sole or substantial justifying factor the deterrence of others from committing a crime (**PRS [44]-[46]**); (b) its purpose is to sanction proscribed conduct or to impose a new and additional punishment for committing an offence (**PRS [47]-[48]**); (c) it leads to the detention of an unlawful non-citizen other than for the purpose of removal or to enable an application for a visa to be made and considered (**PRS [49]-[56]**).

8. The decision by the Minister, to exercise the powers in 65 of the Act adversely to the plaintiff, was penal or punitive:

   a. as disclosed by the Minister's reasons: the decision was for the substantial purpose of general deterrence and to further sanction proscribed conduct (**PRS [48], PR [22]-[23]**) (and as was stated in the procedural fairness letter sent by the former Minister the first time the national interest criterion was relied upon: **AB 143**);

   b. as disclosed by its effect: the necessary and only realistic consequence of the decision, which the Minister appreciated, was and is the plaintiff's prolonged, likely indefinite,

detention in custody, which is both inherently punitive and operates as an additional punishment to the consequence already provided by the Act (**PRS [56]**);

c. the consequence of new s 197C(3) operating with ss 189 and 196, namely, the omission of a relevant duty to remove, is that the plaintiff's detention is unlawful, which shows the exercise of power under s 65 to be punitive (**PRS [53]-[55]**).

Misunderstanding of the law / failure to have regard to a relevant consideration

9. The totality of the evidence reveals the Minister proceeded on the incorrect understanding that she, acting personally, could not grant a visa to the plaintiff (**PRS [57]-[60]**).

10. Having elected to determine the matter on the basis that granting a protection visa to a person convicted of people smuggling may undermine public confidence in Australia's protection visa program, the Minister was bound also to consider the matters set out in **PRS [62]**. Had the Minister not misconceived the binary nature of the power she was to exercise, such matters would likely have been taken into account. However characterised, the effect of the course of reasoning adopted was that the decision was affected by jurisdictional error.

Relief

11. **Peremptory mandamus:** It is uncontroversial that the only basis for refusal of the plaintiff's SHEV relied upon by the Minister is the national interest criterion in cl 790.227 (**DRS [66]**) and that, as at June 2022, the plaintiff otherwise satisfied all criteria for the SHEV (**DRS [5]**). Nothing before the Court provides a basis for inferring any different circumstances would be relied upon by the Minister in re-making the decision (cf **DRS [66], see also PRS fn 10 and AB 879**). If there be no basis upon which the Minister could lawfully conclude that it is in the national interest to refuse to grant a protection visa and all other criteria for the visa being satisfied, a writ of peremptory mandamus should issue commanding the Minister to grant the plaintiff a SHEV (**PRS [64]-[65]**).

12. **Habeas:** By reason of the matters at **PRS [49]-[55]**, the plaintiff's ongoing detention is not authorised. Nothing in *AJL20* denies the availability of habeas corpus in circumstances where a person's detention is not authorised by the Act. As *AJL20* at [44] confirms, there is no doubt that the Act does not permit the detention of a non-citizen for purposes unconnected with segregation pending investigation and determination of any visa application or removal (**PRS [66]**).

Dated: 14 March 2023

Bret Walker
Senior counsel for the plaintiff