HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27D – Respondent's submissions

Note: see rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ENT19
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

REVISED SUBMISSIONS OF THE DEFENDANTS

(filed pursuant to paragraph 5 of the orders made on 8 December 2022)

PART I: Certification

1. These submissions are in a form suitable for publication on the internet.

PART II: Concise statement of the issues

2. The plaintiff challenges the **Decision** of the first defendant (the **Minister**) to refuse, on 27 June 2022, the plaintiff's application for a Safe Haven Enterprise (Class XE) Subclass 790 Visa (the **SHEV**). The defendants agree with the statement set out at [2]-[3] of the plaintiff's revised submissions dated 23 January 2023 (**PS**) as to the issues that arise from the plaintiff's second further amended application to this Court dated 20 December 2022 (**PA**).

PART III: Section 78B notices

3. The plaintiff issued a s 78B notice in this matter on 4 July 2022 (Revised Application Book (**AB**) **29-35**), and a further s 78B notice on 20 December 2022 (**AB 35-38**).

PART IV: Statement of material facts

4. The substance of the factual material at PA [5]-[79] (**AB 10-20**) is uncontentious. At [9] of their response dated 10 January 2023 (**AB 39-50**), the defendants identified disputed matters. It appears from the PS that a number of those matters are no longer in dispute. For example, the plaintiff now appears to accept that he has previously indicated to the Department a willingness to be removed to a safe third country (**fn 80 to PS [53]**). Following the approach of the plaintiff (**PS [5]**), where a matter remains in dispute between the parties and is relevant to an issue for determination by this Court, it is addressed below.

5. Separately, the defendants wish to emphasise their acceptance that the plaintiff's application for a SHEV has had a protracted history. That ought not distract from this Court's focus on the constitutional and legal validity of the Decision to refuse the SHEV. The Minister refused the SHEV because she was not satisfied that the grant of the SHEV was in the national interest. As such, the plaintiff did not satisfy the criterion in cl 790.227 of Sched 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**),[1] and visa refusal was required pursuant to s 65(1)(b) of the *Migration Act 1958* (Cth) (the **Act**). The defendants accept that the plaintiff has been found to engage Australia's protection obligations, and that, as at 27 June 2022, all criteria for the grant of the SHEV save for cl 790.227 of the Regulations were satisfied.

[1] Clause 790.227 states: "The Minister is satisfied that the grant of the visa is in the national interest."

PART V: Argument

A. The national interest criterion in cl 790.227 of the Regulations is valid

Clause 790.227 cannot be invalid on inconsistency grounds

6. The plaintiff submits that cl 790.227 is invalid because it is inconsistent with the Act and therefore not authorised by the regulation-making power in s 504(1) of the Act, read with s 31(3). This submission is misconceived. It overlooks that cl 790.227 was inserted into the Regulations by an Act, namely the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (Sch 2, Pt 1, item 18E) (**the 2014 Act**).[2] In other words, it was *not* made by the Governor-General in the exercise of the regulation-making power in the Act. It was made by the Parliament in the exercise of the power to make laws conferred on it by s 51 of the Constitution (specifically, the aliens power in s 51(xix)). By s 3(2) of the 2014 Act, Parliament delegated its legislative power to the Governor-General to amend or repeal the regulation that *it* had made. Clause 790.227 has not been amended since it was made.

7. There is no doubt that Parliament has power to make laws in the form of subordinate legislation. Parliament has "full power to frame its laws in any fashion… that in its wisdom it thinks fit".[3] In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*,[4] in considering the validity of regulations made by the Executive, Dixon J identified the relevant question as being whether Parliament could repose a power that was "essentially legislative" in another organ or body. As an exercise of legislative power by Parliament itself, cl 790.227 cannot be invalid on the basis that it is inconsistent with the Act.

8. Indeed, the inclusion of the criteria for a SHEV in the 2014 Act was deliberately intended to ensure that Parliament knew what the criteria for the SHEV would be. As originally introduced in September 2014, the 2014 Bill created the SHEV but did not provide for its criteria. The Explanatory Memorandum to the Bill said that "[a]mendments to the Migration Regulations to prescribe criteria for this visa will follow in 2015" (at 7). In December 2014, the Government moved amendments to the Bill to set out the criteria for a SHEV, including cl 790.227. A Supplementary Explanatory Memorandum said that the amendment "will make it clear to Parliament what the criteria are for the

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[2] See, by analogy, *Re Fletcher; Ex parte Fletcher v Official Receiver* [1956] Ch 28 at 45–46, 49, 51–52; *R v Lord Chancellor; Ex parte Lightfoot* [2000] QB 597; *Mayes v Tasmania* [2005] TASSC 126 (FC) at [35]. The defendants note that cl 866.226, which was the provision considered in ***Plaintiff S297****/2013 v Minister for Immigration and Border Protection (No 2)* (2015) 255 CLR 231, was in the Regulations as originally enacted.

[3] *Baxter v Ah Way* (1909) 8 CLR 626 at 646 (Higgins J).

[4] (1931) 46 CLR 73 at 98, see also 84 (Gavan Duffy CJ and Starke J).

grant of a SHEV" (at p 1).[5] The 2014 Bill subsequently passed. The above submissions are sufficient to dismiss this ground.

Contextual matters relevant to the power to prescribe visa criteria by regulations

9. Even accepting that cl 790.227 *could be* invalid on the basis that it is "inconsistent" with the Act, that submission should be rejected. Section 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class, expressly including the class of "protection visas" created by s 35A of the Act. Section 504(1) relevantly provides that the Governor-General may make regulations "not inconsistent with [the] Act, prescribing all matters which by this Act are required or permitted to be prescribed". It is "the strong term 'inconsistent' in s 504(1) which controls the relationship between the statute and delegated legislation, not the need, if possible, to give an harmonious operation to a statute as a whole".[6]

10. Clause 790.227 is a criterion for a specified class of visa, namely a SHEV. For this criterion to be invalid, the plaintiff must demonstrate that – despite the fact that the Act gives "a central role to the prescription by the Executive of criteria necessary to be satisfied for the grant of a visa"[7] – it is inconsistent with the Act to make it a criterion for the grant of a protection visa that the Minister is satisfied that the grant is in the national interest. In assessing the plaintiff's submissions to that end, the following five matters of context are relevant.

11. *First*, a criterion for a visa based upon the "national interest" is consistent with the basic object of the Act. Section 4(1) provides that *the* object of the Act "is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Any asserted inconsistency with the Act must take into account that the Act includes s 4(1).[8]

12. *Secondly*, the Regulations have contained a "national interest" criterion for the grant of protection visas since they were first enacted on 1 September 1994, at the same time as the provisions of the *Migration Reform Act 1992* (Cth) (**Reform Act**).[9] These contemporaneous regulations assist

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5 In November 2014, the Senate Legal and Constitutional Affairs Legislation Committee had delivered a report on the original Bill. In its dissenting report, the Australian Labor Party expressed concerns that, while the 2014 Bill named a class of visa called a SHEV, "no such substantive visa is actually brought into effect and nobody can apply to obtain a SHEV until and unless the Minister issues regulations to bring the SHEV to life" (at p 46, [1.24]).

6 ***Plaintiff M47****/2012 v Director-General of Security* (2012) 251 CLR 1 at [86] (Gummow J).

7 ***VWOK*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 135 at [20] (the Court).

8 *Plaintiff M47* (2012) 251 CLR 1 at [86] (Gummow J).

9 Clause 866.226, which remains a criterion for the grant of a Subclass 866 protection visa.

to understand the scheme so as to better interpret the Act in light of its purpose (cf **PS [7]**).[10] The "national interest" criterion for protection visas has always been part of the scheme.

13. *Thirdly*, the "national interest" criterion was also present in the immediate predecessors to the protection visa, prior to the Reform Act. It appeared in the "domestic protection (temporary) entry permit", introduced into the then *Migration Regulations 1989* (Cth)[11] by the *Migration Regulations (Amendment) 1991* (Cth)[12] with effect from 27 February 1991. The regulations stated that the "additional criteria" for the permit included that "the Minister is satisfied that the grant of the permit is in the national interest" (para (d)).[13] The contemporaneous extrinsic material shows that the protection visa was, ultimately, the replacement for the domestic protection (temporary) entry permit.[14] In the interim, from 1 March 1994, the domestic protection (temporary) entry permit[15] was replaced by the "protection (permanent) visa" and the "protection (permanent) entry permit" pursuant to the *Migration (1993) Regulations (Amendment) 1994* (Cth).[16] One of the criteria for the visa was that the Minister "is satisfied that the grant of the visa is in the national interest" (cl 817.335).[17] It is therefore not surprising that the Regulations, commencing with the Reform Act, contained the same national interest criterion for the new protection visa. There is no basis to contend that this criterion was repugnant to the scheme of the Act. On the contrary, such a criterion has been a characteristic feature of the protection visa (or entry permit) ever since it was first conceived.

14. *Fourthly*, criteria very similar to the cl 790.227 "national interest" criterion have been found in other refugee and humanitarian entry permits and visas both before and after the Reform Act. Thus, in the *Migration Regulations 1989* (Cth) as made,[18] it was a requirement of various refugee and humanitarian visas and entry permits that settlement of the applicant in Australia "would not be

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[10] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19] (the Court); *Plaintiff M47* (2012) 251 CLR 1 at [324] (Heydon J); *Alphapharm Pty Ltd v H Lundbeck A-S* (2014) 254 CLR 247 at [39].

[11] Statutory Rules 1989 No 365.

[12] Statutory Rules 1991 No 25. The purpose of this entry permit was "to provide temporary residence in Australia for persons granted refugee status by the Minister": Explanatory Statement to the *Migration Regulations (Amendment) 1991* (Cth) (Statutory Rules 1991 No 25).

[13] *Migration Regulations 1989* (Cth) (Statutory Rules 1989 No 365), reg 117A. Regulation 117A was introduced by reg 9 of the *Migration Regulations (Amendment) 1991* (Cth) (Statutory Rules 1991 No 25).

[14] See the Explanatory Memorandum to the Migration Legislation Amendment Bill 1994 (Cth) at [31]-[32].

[15] By then found in *Migration (1993) Regulations 1992* (Cth) (Statutory Rules 1992 No 367), Sch 2, Pt 784. The *Migration (1993) Regulations 1992* (Cth) replaced the *Migration Regulations 1989* (Cth) from 1 February 1993.

[16] Statutory Rules 1994 No 11.

[17] *Migration (1993) Regulations 1992* (Cth) (Statutory Rules 1992, No 367), Sch 2, Pt 817. The criteria for the entry permit (set out in regs 817.721-817.738) were relevantly identical.

[18] Then titled the *Migration (Criteria and General) Regulations 1989* (Cth).

contrary to the interests of Australia".[19] That criterion was carried over into refugee and humanitarian visas in the Regulations as enacted, following the commencement of the Reform Act.[20]

15. *Finally*, as noted above, cl 790.227 was inserted into the Regulations by an Act. Indeed, that Act created two new visa subclasses, both of which included a "national interest" criterion (see also cl 785.227). In doing so, Parliament *confirmed* that the power to prescribe visa criteria in s 31(3) includes the power to prescribe a "national interest" criterion. Those regulations "represent the perfecting or due implementation of the legislative will of that Parliament"[21] *par excellence*.

16. In light of this context, the Court should be slow to conclude that cl 790.227 is inconsistent with the Act. For the following reasons, each of the plaintiff's specific submissions in favour of that conclusion should also be rejected.

The relationship with ss 36(1C) and 501(3)

17. The plaintiff's first submission is that cl 790.227 "negates, at a minimum undercuts, specific elements of the statutory scheme, principally ss 36(1C) and 501(3) (read with s 501(6) and 501C)" (**PS [15]**). He submits that cl 790.227 "subsumes or significantly curtails" the criteria in ss 36 and 501, "giving those provisions no work to do and undermining their purpose".

18. Properly construed, each of s 36(1C), s 501(3) and cl 790.227 impose *cumulative* requirements for the grant of a SHEV. If the applicant does not satisfy the criterion in s 36(1C), or if the Minister decides to refuse the visa under s 501(3), there will be no need for the Minister to consider the national interest under cl 790.227. If the applicant does satisfy the criterion in s 36(1C), and the Minister does not refuse the visa under s 501(3), the Minister must then *also* be satisfied that the grant of the visa is in the national interest. Clause 790.227 provides an *additional* basis to refuse the visa if the Minister considers, for some *other* reason, that the grant of the visa is not in the national interest.

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[19] See regs 101 (refugee visa), 102 (in-country special humanitarian program visa), 103 (global special humanitarian program visa), 104 (emergency rescue visa), 105 (woman at risk visa), 106 (camp clearance visa), 116 (refugee A (restricted) visa or entry permit), 117 (refugee B (restricted) visa or entry permit), 138 (refugee (after entry) permit), 141 (humanitarian grounds entry permit). See also reg 107 (Lebanese concession visa), for which it was a requirement that "the Minister is satisfied that resettlement of the applicant in Australia would not be contrary to the national interests of Australia".

[20] See Regulations, Sch 2, cll 200.224 (Subclass 200 (Refugee)), 201.224 (Subclass 201 (In-country Special Humanitarian)), 202.224 (Subclass 202 (Global Humanitarian)), 203.224 (Subclass 203 (Emergency Rescue)) and 204.222 / 204.222A (Subclass 204 (Woman at Risk)). Under the present Regulations, these visa subclasses continue to have this criterion.

[21] *Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide* (1975) 11 SASR 504 at 541.

19. As Gleeson CJ observed in *MIMIA v Nystrom*,[22] "[t]here is nothing novel, or even particularly unusual", about "two sources of power, by which a person in the position of the [plaintiff] may be exposed, by different processes, and in different circumstances, to similar practical consequences". For example, in *KDSP v MICMMA*,[23] to which the plaintiff refers (**PS [18]**), the Full Court of the Federal Court held that s 36(1C) and s 501(1) are "cumulative requirements". The fact that there was "overlap between the fields of operation" of those provisions was "of no moment".[24] The plaintiff seeks to distinguish *KDSP* on the basis that the Regulations "are in a hierarchically different position from s 501, and may not detract from the Act's operation" (**PS [18]**). However, for the reasons above, cl 790.227 does not "detract from" the requirements in s 36(1C) and 501(3). Rather, it provides a further basis upon which a visa may be refused *if* the criterion in s 36(1C) is satisfied and there is no exercise of the power under s 501(3).

20. A similar argument to the plaintiff's was rejected by the Full Court of the Federal Court in *VWOK*,[25] upholding the decision of Crennan J at first instance.[26] In that case, the appellant submitted that cl 866.222A of the Regulations, which prescribed a criterion for a protection visa, was inconsistent with s 501 of the Act. In analysis accepted by the Full Court, Crennan J said that "[t]he fact that each of s 501 of the Act and the Regulation in question refers to convictions, but deals with them differently, one from the other, reflects no more than their different purposes".[27]

21. **PS [19]** mischaracterises the role of the "national interest" in the context of s 501. Both s 501(1) and 501(3) confer a power on the Minister to refuse a visa. Section 501(1) contains a general power to refuse a visa where the applicant does not pass the "character test". Section 501(3) permits the Minister, acting personally, to refuse a visa to a person without according natural justice (s 501(5)) if the Minister reasonably suspects that the person does not pass the character test, *and* the Minister is satisfied that the refusal is in the national interest. Consideration of the national interest arises only in a subset of s 501 cases, and serves to confine the Minister's personal power to refuse a visa on character grounds without according natural justice. Accordingly, it is not correct to describe failure of the character test as a "condition" on a power to refuse a visa on the basis of the "national interest".

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22 (2006) 228 CLR 566 at [2].

23 (2020) 279 FCR 1 at [284] (O'Callaghan and Steward JJ), see also [99]-[100] (Bromberg J). See also *MICMMA v BFW20* (2020) 279 FCR 475 at [129]-[131] (the Court). The High Court refused special leave to appeal on the basis that there was "no reason to doubt the correctness of the conclusion reached by the Full Court of the Federal Court" in both *KDSP* and *BFW20*: [2021] HCATrans 20.

24 (2020) 279 FCR 1 at [301] (O'Callaghan and Steward JJ). See also *MICMMA v EBD20* (2021) 287 FCR 581 at [29].

25 (2005) 147 FCR 135.

26 [2005] FCA 336.

27 (2005) 147 FCR 135 at [18].

Section 501(3) is not properly characterised as a power to refuse visas on national interest grounds. Rather, it is the "national interest" limb which operates as a "condition" on the power of the Minister to refuse a visa without according natural justice.

22. In addition, s 501 in its present form was inserted into the Act in 1998,[28] after the Reform Act. Parliament should not be taken, by strengthening the Minister's powers in character cases, to have by implication invalidated long established regulations. That is confirmed by s 501H, inserted into the Act at the same time, which relevantly provides that "[a] power under section 501… to refuse to grant a visa to a person… is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person".

23. Far from applying "with equal force", the present case is readily distinguishable from this Court's decision in *Plaintiff M47* (**PS fn 13**). In that case, there was a close connection between the matters the subject of the impugned visa criterion (that the applicant was not assessed by ASIO to be directly or indirectly a risk to security) and that aspect of the character test set out in s 501(6)(d)(v). Even in that context, it was only by a narrow majority that the Court held that the purported visa criterion was inconsistent with the Act. By contrast, cl 790.227 does not deal with the same subject matter as ss 36(1C) and 501(3).

24. Finally, in so far as the plaintiff suggests that, if cl 790.227 is valid, that gives s 501(3) no work to do, the submission ignores the fact that s 501(3) applies to *all* visa classes, not just protection visas. Accordingly, s 501(3) plainly has a "useful and pertinent"[29] operation whether or not cl 790.227 is valid.

Inconsistency with the objects of the Act

25. The plaintiff's second submission is that cl 790.227 "is inconsistent with the objects of the Act as a whole" (**PS [20]-[21]**). By this submission, it is not clear whether the plaintiff is contending that *any* additional criterion for the grant of a protection visa would be invalid. If so, the submission cannot stand with s 31(3), which "explicitly provides"[30] that criteria for a protection visa *additional* to those found in s 36 may be prescribed. If the plaintiff's submission is limited to cl 790.227, he does not explain why a "national interest" criterion is inconsistent with the "balance" struck by Parliament, but some other criterion would not be. The legal principle that would support the

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[28] *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth), Sch 1, item 23.

[29] cf *Plaintiff M47* (2012) 251 CLR 1 at [206] (Hayne J).

[30] *Plaintiff M47* (2012) 251 CLR 1 at [136] (Gummow J), see also [283], [316] (Heydon J).

implication of limits on the regulation-making power conferred in broad terms by ss 31(3) and 504(1) of the Act that would allow the prescription of some criteria, but would not support the "national interest" criterion in cl 790.227, is not clear. If it is because the criterion "effectively dispenses with" all the other criteria for the visa (**PS [21]**), that argument should be rejected for the reasons addressed in detail above.

26. By saying it is "implicit" in the objects clause in s 4(1) "that the provisions of the Act already reflect Parliament's judgment as to what is in the national interest" (**PS [22]**), the plaintiff seems to argue that the Act exhaustively regulates the subject matter of the national interest, so that any regulation utilising the concept would be invalid. However, as **PS fn 21** accepts, the concept of the "national interest" is used in a number of provisions of the Act, in a variety of contexts, with both "substantive" or "procedural" consequences. That assortment does not evince an intention that there can be no regulation with a "national interest" criterion, particularly having regard to the legislative history addressed in detail above.

The breadth of the criterion

27. The plaintiff's third submission embraces two distinct contentions. *First*, the plaintiff submits that it is "inherently unlikely … that Parliament would have intended such a power could validly be vested in a delegate" (as opposed to the Minister) (**PS [25]**). *Secondly*, the plaintiff submits that "it is unclear whether Parliament could validly delegate such a power" and that the provisions "may well lack the hallmark of a valid exercise of legislative power" (**PS [25]**).

28. The first submission is mere assertion. It overlooks that the Minister has an express power to delegate any of the Minister's powers under the Act (s 496(1)) (save for powers conferred only on the Minister personally). Contrary to **PS [25]**, cl 790.227 does *not* purport to authorise the Minister or a delegate to refuse the grant of a visa "for any reason that may be considered politically attractive". As the plaintiff accepts (**PS [24]**), the concept of the "national interest" is "not unbounded".[31] It is susceptible to judicial review, including for legal unreasonableness.

29. In relation to the second contention, cl 790.227 is not tantamount to the hypothetical Act suggested in argument in ***Plaintiff S157****/2002 v The Commonwealth* (*cf* **PS [25]**).[32] An argument based directly on that hypothetical was made and rejected in respect of s 46A(2) in *Plaintiff M61/2010E v The Commonwealth* in relation to the Minister's view of the "public interest".[33] Here,

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[31] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57].

[32] (2003) 211 CLR 476 at [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[33] (2010) 243 CLR 319 at [56].

there is no reason to distinguish between the Minister's view of the "public interest" and the "national interest". Both concepts have sufficient "content" so as not to engage the possible limitation discussed in *Plaintiff S157*. Indeed, this Court accepted as much in *Plaintiff S156/2013 v MIBP*,[34] which concerned a provision conferring power upon the Minister to designate a country as a regional processing country subject to the precondition that the Minister thinks this to be "in the national interest". In upholding the validity of that provision, there was no suggestion that this condition lacked ascertainable legal content.

30. The plaintiff's fourth submission is that cl 790.227 does not "prescribe criteria for a visa" within the meaning of s 31(3) (**PS [26]**). Having accepted that the word 'criteria' "demands a wide meaning", the plaintiff does not explain how, as a matter of statutory construction, cl 790.227 does not prescribe a "criterion". In any event, even on the plaintiff's definition, cl 790.227 falls within the ordinary meaning of the term "criterion". It states, in terms, a standard which must be met for an applicant to be granted a SHEV. It is no less a standard because it depends on the formation of an opinion by the Minister. Many visa criteria require the formation of such opinions.[35] Further, it is no less a "criterion" because the scope of the "national interest" is such that it may be open to wide differences of opinion. The same may be said of the standards expressly described as "criteria" in, for example, ss 36(1B) and 158 of the Act. It is also true of many of the criteria long prescribed in the Regulations.[36] Finally, the long history of such criteria discussed above tends against any suggestion that the commencement of the Reform Act would preclude the continued prescription of such criteria. The use of the same word – "criteria" – in s 31(3), as inserted by the Reform Act, suggests precisely to the contrary, as does the enactment of cl 790.227 by primary legislation. The historical prescription and description of these matters as "criteria" tells strongly against the conclusion that these matters no longer met the definition of "criteria" upon the commencement of the Reform Act.

B. The Minister's consideration of the plaintiff's conviction was not *ultra vires* cl 790.227

31. At **PS [30]-[36]**, the plaintiff contends that cl 790.227 does not permit the refusal of a SHEV "solely by reason of a conviction for an offence under ss 233A to 234A of the Act", primarily by an

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[34] (2014) 254 CLR 28.

[35] For example, ss 32(2), 36(2) and 158 of the Act (see also s 505). Section 158 identifies a "criterion" of a criminal justice visa as being that the Minister, having had regard to (among other things) "the safety of individuals and people generally" and "any other matters that the Minister considers relevant", has "decided, in the Minister's absolute discretion, that it is appropriate for the visa to be granted". The word "criteria" therefore plainly has a very broad meaning, embracing a subjective judgement by the Minister (albeit one that must be formed reasonably). There is no basis to give that word a more confined reading in s 31(3) of the Act.

[36] See, eg, Public Interest Criteria 4003, 4014, 4018.

attempted analogy between the Decision and the decision struck down by this Court in ***Plaintiff S297****/2013 v MIBP* (2015) 255 CLR 231. The analogy to *Plaintiff S297* is inapt in circumstances where, as noted above, cl 790.227 was inserted by an Act, rather than made by regulation under the Act. Here, cl 790.227 forms part of the Act to be construed as a whole.[37]

32. Contrary to **PS [35]**, the plaintiff's conviction was not the "sole reason" for the Decision, nor was the SHEV refused on that basis. The plaintiff's conviction was a factum giving rise to the national interest considerations which were the reason for the Decision. This case is therefore distinguishable from *Plaintiff S297,* in which the then-Minister admitted that the only reason that the visa had been refused was because the plaintiff was an "unauthorised maritime arrival", and for that reason the Minister was not satisfied that it was in the national interest to grant the visa (see at [13]).

33. The defendants accept, however, that if the plaintiff had not engaged in people smuggling conduct, then the national interest considerations to which the Minister gave weight would not have arisen. To the extent that this is sufficient to characterise the offending as the "reason" for the Decision, the courts have "recognised on many occasions that the seriousness of the applicant's crime may be sufficient to justify a decision to refuse a visa (having regard to the national interest)".[38] Indeed, it has been expressly acknowledged that crimes involving "circumventing passport and immigration laws" can fall into this category.[39] By permitting consideration of such matters, cl 790.227 does not create a "distinct and independent addition of liability" for the conduct prohibited by ss 233A to 234A (cf **PS [31]-[32]**). Analogously, in *MIMIA v Huynh* (2004) 139 FCR 505, Kiefel and Bennett JJ held at [74] that "[i]f the Minister were able, consistent with the object of the Act, to consider a matter as broad as the national interest, in determining whether a person ought to be permitted to remain in Australia… the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa, where there has been a sentence to imprisonment for the requisite term." It is open to the Minister to have regard to the fact that a person has been convicted of an offence under s 233C in assessing whether or not she is satisfied that it is in the national interest to grant a protection visa.

34. Further, the Act does not reveal an intention to "provide exhaustively" for the consequences that might flow from people-smuggling crimes (cf **PS [32]**). The fact that the Act provides that

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[37] Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at 190, submitting that the principle in *Foster v Aloni* [1958] VLR 481 at 483-485 "must in principle apply in the unusual circumstance where regulations are made by legislation itself" and citing the 2014 Act.

[38] *CKL21 v Minister for Home Affairs* (2022) 401 ALR 647 at [69] (Moshinsky, O'Bryan and Cheeseman JJ) and the cases there cited.

[39] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [79] (Gaudron J).

conduct constituting a people-smuggling offence gives rise to "character concern" (s 5C(1)(bc)(i)), or means that a person fails the character test (s 501(6)(ba)(i)) is no more than what the Act provides in relation to all persons who have a "substantial criminal record" (ss 5C(1)(a), (2) and 501(6)(a), (7)). Further, if the Act did evince an intention by Parliament to provide exhaustively for the consequences of contravening ss 233A to 234A, that would have the surprising consequence of invalidating, pursuant to s 109 of the Constitution, all State legislation imposing consequences for that offending.[40]

35. Finally, contrary to **PS [36]**, cl 790.227 is not "the last option" for refusal of the SHEV. It is merely one of many criteria set out in s 65 of the Act and cll 790.211-790.411 of the Regulations, each one of which must be satisfied before a SHEV can be granted.

C. The Decision was not penal or punitive so as to contravene Ch III of the Constitution

36. The plaintiff contends that the Minister's exercise of power under s 65 of the Act, being the Decision, was penal or punitive in character (**PS [37]**). He does not allege that s 65 of the Act, or cl 790.227 of the Regulations has that character, and hence does not challenge their validity on this basis. In circumstances where there is no *constitutional* challenge to the relevant provisions, the question is whether the Decision was authorised by the statute.[41]

37. The defendants accept that neither s 65 of the Act nor cl 790.227 of the Regulations gave the Minister power to inflict upon the plaintiff further punishment for his criminal conduct (that is, consequences that are penal or punitive in character). That is because the Act does not authorise a purported exercise of the exclusively judicial function of the adjudgment and punishment of criminal guilt.[42] If the Decision had this character, the Defendants accept it would be invalid because it would be *ultra vires* the Act. But, as set out below, it did not.

38. The power to cancel or refuse a visa to a non-citizen is "not to be regarded as punitive in character merely because exercise of the power involves interference with the liberty of the individual or imposes what the individual may see as sanctions consequential on his criminal connections" (*Djalic* at [66]). Something more is required, such as the exercise of power to "punish the non-citizen

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[40] Such as the requirement on the holder of an Australian practising certificate to notify conviction of a serious offence (defined in s 6 to include any indictable offence against a law of the Commonwealth) pursuant to s 51 of the *Legal Profession Uniform Law* (NSW).

[41] *Commonwealth of Australia v* ***AJL20*** (2021) 95 ALJR 567 at [43] (Kiefel CJ, Gageler, Keane and Steward JJ).

[42] ***Chu Kheng Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also ***Djalic*** *v Minister for Immigration and Indigenous Affairs* (2004) 139 FCR 292 at [66] (Tamberlin, Sackville and Stone JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [15] (Kiefel CJ, Bell, Keane and Edelman JJ); and ***Alexander*** *v Minister for Home Affairs* (2022) 96 ALJR 560 at [67] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing).

and not for protection of the Australian community or some other legitimate objective" (*Djalic* at [66]).

39. At **PS [43]-[44], [47] and [49]**, the plaintiff identifies the three matters that he contends disclose the "substantive characterisation" of the Decision as "a form of punishment". *First,* that the sole or substantial justifying factor for the Decision was deterrence. *Secondly,* that the purpose of the Decision was to "sanction proscribed conduct". *Thirdly*, that the Decision resulted in "detention for a purpose not connected with removal or assessment".

40. Concerning the first "matter", the major premise of the argument is that a decision will be punitive if it is made solely or substantially for the purpose of general deterrence. The minor premise is that the Decision was made for such a purpose. Neither should be accepted.

41. The authorities do not support the plaintiff's contention that an administrative decision made for the sole or substantial purpose of general deterrence is unconstitutionally punitive. The cited passages from *Alexander*, for example, merely note that deterrence is one aim of criminal punishment, and a factor in sentencing. Analogously, protection of the Australian community and expectations of the Australian community are considerations in criminal punishment and sentencing[43] yet are not inherently punitive. Indeed, deterrence is "squarely concerned with the protection of the Australian community", rather than punishment (*Djalic* at [74]-[75]). *Alexander* also affirmed the basic proposition that "executive powers to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport, is not punitive in nature, and not part of the judicial power of the Commonwealth".[44] Further, the plaintiff's submission that a decision made for the purpose of general deterrence is inherently punitive is inconsistent with this Court's well-settled approach to civil penalties[45] and disciplinary sanctions,[46] both of which are intended to deter without punishing.

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[43] See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act 1991* (Vic), s 5; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [38] (Kiefel CJ, Bell, Keane and Steward JJ).

[44] *Alexander* at [76] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing), citing *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; at [20]-[21] (Gleeson CJ).

[45] *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426 at [9], [15]-[16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [51], [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 264 FCR 155 at [19] (Allsop CJ, White and O'Callaghan JJ).

[46] *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), [96]-[97] (Kirby J); *Comcare v Banerji* (2019) 267 CLR 373 at [40] (Kiefel CJ, Bell, Keane and Nettle JJ).

42. In *NMBZ v MIBP* (2014) 220 FCR 1, Allsop CJ and Katzmann J made obiter comments, at [28]-[31], concerning whether deterrence was a "legitimate consideration" in a visa cancellation decision focused on the protection of the public while noting they had not dealt with the issues "in detail" or "reach[ed] a conclusion" (at [20]). Their Honours stated that "[a] Minister may consider that the refusal of a visa to persons who have offended in some fashion may act as a disincentive to others and in this way protect other detainees or the Australian public" (at [29]), though care was needed in light of older authorities, including decisions of the Administrative Appeals Tribunal, suggesting a potential punitiveness in such reasoning.[47]

43. The concerns expressed in those older decisions are inapt to the issue before this Court. None related to a constitutional question, and each concerned the cancellation of a visa held by a person who had long been part of the Australian community,[48] rather than a visa refusal. It is appropriate to draw a distinction between the case of refusal of a visa to a non-citizen who has never lawfully resided in Australia (such as the plaintiff), and the cancellation of a visa held by a lawfully resident non-citizen. Even if the latter for the sole purpose of deterrence could be punitive, the former cannot be so characterised.[49] It is also appropriate to distinguish a character-based cancellation, which is necessarily focused on public protection, from the broader national interest criterion at issue here.[50]

44. In any case, *Re Sergi* (at 230-231), *Re Barbaro* (at 15) and *Tuncok* (at [44]) each expressly accepted that it was proper for a decision-maker to take into account the general deterrent effect of deciding to cancel a visa, and none found that a visa cancellation decision (let alone a refusal) made for the sole or substantial purpose of deterrence would be punitive. Each of these cases must also be understood in light of *Djalic* at [75], where the Full Court held that "the very point of taking account of general deterrence as a factor in making a cancellation decision is to enhance the safety and well-being of the Australian community by discouraging non-citizens from engaging in criminal conduct." At [76], the Full Court reserved the question of whether a cancellation decision made for the sole or substantial purpose of deterrence could be seen as punitive, while saying nothing about visa refusals.

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47 ***Re Sergi*** *and Minister for Immigration and Ethnic Affairs (**MIE**)* (1979) 2 ALD 224 at 231 (Davies J) and ***Re Gungor*** *and MIE* (1980) 3 ALD 225 at 232 (Smithers J); ***Re Barbaro*** *and MIE* (1980) 3 ALD 1 at 15 (per Davies J); ***Tuncok*** *v MIMI* [2004] FCAFC 172 (Moore, Branson and Emmett JJ).

48 27 years in *Re Sergi*, 8 years in *Re Gugnor*; and 32 years in *Tuncok*.

49 See *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100 at [154] (Wheelahan J, Collier J agreeing at [1]).

50 See, for example, the comments of Mortimer J in ***Tanielu*** *v Minister for Immigration and Border Protection* (2014) 225 FCR 424 at [144] that in the s 501 context, "there will be a point at which where reliance on the national interest, devoid from any considerations of 'protection' may become punitive because "[t]he 'national interest' forms no express part of the discretion in s 501". No such concern could arise here. See also *Djalic* at [73].

45. An alternative approach to the plaintiff's major premise is to recognise that the premise wrongly posits "general deterrence" as an ultimate purpose. A decision made to deter future conduct is innately designed to stop conduct considered to be adverse. Rather than being an end in itself, the deterrence serves the purpose that the law prohibiting the conduct is serving. That purpose will be readily capable of being characterised as some matter in the national interest, rather than being to punish a person.

46. The plaintiff's minor premise is also flawed. The Decision was not made for the sole or substantial purpose of general deterrence. The purpose of the Decision is to be discerned in the context of the relevant statutory scheme, and from the Visa Decision Record at **AB 59-67** (with its attachments from **AB 72-526**). As regards the statutory scheme, the Minister was required to refuse the SHEV under s 65 of the Act because she was not satisfied that the grant fulfilled the national interest criterion in cl 790.227. The existence of that criterion means that the statutory scheme expressly contemplates that visas may be refused on national interest grounds to persons who otherwise engage Australia's protection obligations, and who do not engage s 36(1C) of the Act (cf **PS [46]**).

47. As regards the Visa Decision Record, the Minister did not say that the Decision was for the substantial purpose of general deterrence. The concept of "deterrence" appears nowhere in the Decision. At [22]-[23], the Minister identified two matters that led her to conclude the grant would not be in the national interest: the importance of "protecting and safeguarding Australia's territorial and border integrity" and the importance of maintaining "the confidence of the Australian community in the protection visa program". Those were legitimate, non-punitive objectives (cf *Djalic* at [66]). Contrary to **PS [46]**, the Minister did not accept that there is no probative basis to find that the plaintiff poses an unacceptable risk of harm to the Australian community, only that there was no such basis to find there was a risk of people smuggling reoffending by the Plaintiff (**AB 95, [25]**; see also **Response [9(n)] at AB 45**).

48. As noted at **PS [45]**, the Minister's reasoning in the Decision was very similar to the reasoning in the 13 May 2020 decision of the then-Minister in relation to the plaintiff (at **AB 593-595**), which was quashed on another ground in *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100. At [154], the Full Court majority rejected an argument that general deterrence was the then-Minister's substantial purpose. Their reasoning was correct and applies equally to the Decision. It should be preferred to Katzmann J's dissent.

49. While deterring people smugglers may be one way to protect Australia's border integrity, the Minister did not indicate that was her purpose. Rather, the Minister's assessment was that the national

interest requires protection of Australia's border integrity, including strong measures to combat people smuggling. One aspect of that is signalling to show that people smugglers do not achieve the migration outcome of a protection visa grant. Removing that incentive is different to deterrence. Alternatively, even if deterrence were an element of the Minister's purpose, it could not be said to be the sole or substantial purpose.

50. Regarding the plaintiff's second "matter" (see [39] above and **PS [47]**), there is no sense in which the Decision was for the purpose of further sanctioning the plaintiff's people-smuggling. The plaintiff identifies no textual foothold in the Decision for that contention. Rather, the plaintiff's conviction was a factum giving rise to the national interest considerations. Neither of those considerations were directed to the plaintiff as an individual. The reasons show that the Minister was not further punishing the plaintiff but rather acting in accordance with her conception of the national interest by seeking to ensure the efficacy of Australia's border protection regime and by protecting public confidence in the protection visa program.

51. Finally, the plaintiff's Detention continues to be authorised by the Act, such that there is no substance to the plaintiff's third "matter" (**PS [49]**). In this respect, it is important to be clear that the Decision did not *cause* the detention of the plaintiff.[51] As a non-citizen, the plaintiff's rights to enter and remain in Australia depend on his holding a visa under the Act. He has never held such a visa. The refusal of the SHEV under s 65 simply meant that the plaintiff *continued* to have the legal status of an unlawful non-citizen, who was liable to be detained pursuant to ss 189, 196 and 198 of the Act for the purpose of his removal from Australia (having been detained for the purpose of determining his application prior to the Decision). Even if the Decision was invalid due to being actuated by a purpose not authorised by the Act, the plaintiff's detention would always have been valid, and he would continue to be required to be detained under s 189.[52] That is so notwithstanding the difficulties with removal arising from the fact that the plaintiff engages Australia's protection obligations.

52. The plaintiff remains in immigration detention because he is not presently willing to voluntarily return to Iran, and the protection finding made for him with respect to Iran, combined with s 197C(3) of the Act, means that his involuntary removal *to Iran* is neither required nor authorised by the Act. As a result, his immigration detention has no defined end date, and is in that sense indefinite. Contrary to **PS [56]**, s 198(6) of the Act nevertheless continues to both authorise and require the plaintiff's

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[51] See, by analogy, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [63] (Kiefel CJ, Bell, Keane and Edelman JJ), see also [69], [84]-[85] (Gageler and Gordon JJ), and [96] (Nettle J).

[52] *AJL20* at [61] (Kiefel CJ, Gageler, Keane and Steward JJ).

removal from Australia. His detention remains "hedged about by enforceable duties"[53] (**cf PS [50]**). The limitation imposed by s 197C(3) does not abrogate that requirement, or alter the position which has subsisted since this Court's decision in ***Al-Kateb*** *v Godwin* (2004) 219 CLR 562. In that case, a majority of this Court held that ss 189 and 196 validly authorise the detention of an unlawful non-citizen during the period until removal to another country becomes reasonably practicable, even in circumstances where there is no real likelihood or prospect of removal in the reasonably foreseeable future: at [231] (Hayne J, McHugh and Heydon JJ relevantly agreeing), [290] (Callinan J). The amendments to s 197C have no bearing on that conclusion. Consistently with *Al-Kateb*, ss 189 and 196 authorise the plaintiff's detention irrespective of whether s 198 authorises his removal *to Iran*.

53. The Minister was aware, and considered, that the immediate consequence of refusing the SHEV would be the plaintiff's continuing immigration detention, pending his removal from Australia (see [34]-[37] of the Decision at **AB 97-98**). At [34], she expressly recognised that though s 197C prevented the plaintiff's removal to Iran, there remained an ongoing legal obligation for the Department to pursue third country resettlement.

54. There are several circumstances that may bring an end to the plaintiff's held detention, such as the exercise of the Ministerial powers in ss 195A or 197AB of the Act. The Ministerial Intervention guidelines describe the types of cases that might be referred for Ministerial consideration. In the past, the plaintiff has not met the relevant guidelines for referral to the Minister. The position in that regard may change, for example, if the plaintiff has no outstanding primary or merits review processes in relation to his SHEV application, if the Minister considers it is in the public interest to grant the plaintiff another kind of visa under s 195A, or if "Ministers change [or] Ministers change their minds".[54] Ministerial Intervention is not an extension of the visa process. The ss 195A and 197AB intervention powers are personal and non-compellable. There may be a future decision by the Minister pursuant to s 197D of the Act that the plaintiff is no longer a person in respect of whom a protection finding would be made. Significantly, a third country willing to receive him may be identified, noting the Department's ongoing obligation to pursue that outcome. That this has not yet occurred does not render it impossible. In recent years, Australia has facilitated the resettlement of more than 1,000 people, most of whom have been found to be refugees, to the United States, Cambodia and other countries.[55] Further, the plaintiff's release from detention is not at the

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[53] *AJL20* at [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

[54] See *BNGP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 878 at [42] (Jagot J).

[55] **AB 967-968, [16]-[23].**

"unconfined discretion of the executive".[56] Should the plaintiff later become willing to return to Iran, perhaps due to changes in that country, he is free to do so.[57]

D. The Minister did not act on a misunderstanding of the law

55. Contrary to **PS [57]-[60]**, the Minister did not proceed on a misunderstanding of the law because she was not advised by the Department that she could, acting personally, grant the SHEV. In the brief dated 22 June 2022 (**AB 56**), the Department set out two options.[58] The first option was "to take no further action in this case" and the plaintiff's application would be referred to a delegate for decision (**AB 60, [17]**). The second option was to make a personal decision to refuse the SHEV based on the national interest criterion (**AB 60, [19]**).

56. The Minister's power to grant or to refuse a visa is so fundamental to the scheme of the Act, and so plain from s 65, that the Court should be very reluctant to accept that the Minister mistakenly thought that she could not grant a visa simply because there was no positive statement that she could do so. As this Court held in *Plaintiff S297/2013* at [34], "[t]he decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts". Contrary to the submissions at **PS [59]** about what was "not done", the Minister demonstrated substantial engagement in the making of the Decision. In addition to the written briefs, she had two meetings with staffers concerning it (**AB 884**), and she reviewed and considered the brief and its attachments for three hours (**AB 99**).

57. Further, as a matter of substance, the selection of the first option would have been a decision to grant the SHEV, because the Minister was aware from the 22 June 2022 brief that the plaintiff satisfied all other criteria for the SHEV (see **AB 56, item 1(i); AB 60, [18]; AB 61, [26]**). The 22 June brief also explained that the question whether the Minister wanted to refuse the SHEV on national interest grounds was being put to her because of the "Commonwealth's long-standing position" that "[t]he national interest criterion is usually only considered in exceptional circumstances by the Minister, when the other criteria for the visa, including character and security requirements, have been met" (**AB 61, [25], [26]**). Accordingly, if the Minister were minded to grant the SHEV, it was not necessary for her to make that decision personally – that decision could (and would) be made by a delegate.

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[56] Cf *Pollentine v Bleijie* (2014) 253 CLR 629 at [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[57] Noting that in recent years, 59 relevant persons have voluntarily returned to their home countries (**AB 967, [15]**).

[58] There was a third option, but it was described in the heading as "not viable".

58. In any event, even if the Minister had proceeded on a misunderstanding of the law, any such error was immaterial to the Decision she made. In the present case, even if the Minister was advised that she could make a personal decision to grant the SHEV, there is no prospect that the Decision she made could have been different. It was the Minister's view that, having regard to the need to protect and safeguard Australia's territorial and border integrity and to maintain the confidence of the Australian community in the protection visa program, it was not in the national interest to grant a protection visa to the plaintiff.

59. Contrary to **PS [59]**, the authorities do not support the proposition that a failure to refer to *a non-material matter* is an indication that the matter was not "adverted to, considered or taken into account". In this case, the lack of reference to the possibility of a personal ministerial visa grant can "sensibly understood as a matter considered, but not mentioned because it was not material": *MIBP v SZSRS* (2014) 309 ALR 67 at [34] (Katzmann, Griffiths and Wigney JJ).

E. The Minister did not fail to take into account relevant considerations

60. The plaintiff accepts that the Minister's power to determine what matters she will consider when deciding what is "in the national interest" is of "ample discretionary nature" (**PS [61]**). The plaintiff goes on to submit, however, that given the Minister's choice in the Decision to consider "the perception of granting a protection visa to a person who has already been convicted of people smuggling offences", a "lawful and rational consideration of that matter" *required* the consideration of three further specified matters (**PS [61]-[62]**). The plaintiff's additional contention that these matters also constituted a "failure to exercise that power rationally" (PS [63]), is not pleaded, but is also without basis. The authorities cited in **PS fn 96** establish only that decision-makers are required to exercise discretions lawfully, reasonably and rationally, which the defendants accept. Not considering the three specified matters would not be unlawful, irrational or unreasonable.

61. The plaintiff's submission overlooks the fundamental proposition that "[w]hat factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion": *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* (1986) 162 CLR 24 at 39 (Mason J). That is, the mandatory relevant considerations are identified by construing the Act. A "national interest" criterion permits the Minister very wide discretion (see also *Plaintiff S297* at [18]). It permits her to decide not only what matters to place weight on but what matters to consider in the first place (*Peko-Wallsend* at 42). She is permitted to legally ignore matters even though she could permissibly take them into account, and even if the matters are relevant to factors

she does consider.[59] By contrast, the plaintiff's submission amounts to saying that the Minister is *bound* to consider everything that he considers to be a "known countervailing matter" (**PS [63]**) weighing against the matters that the Minister does consider.

62. In any case, the factors identified by the plaintiff were not "entirely disregarded" (**PS [63]**). The Minister was cognisant that the Act provides criminal consequences for people smuggling, that there had been a determination by a court in relation to the plaintiff, and of the background to the plaintiff's offending, because those matters were expressly referred to in the Decision and attachments (for example at **AB 91-92, [4]-[5], [7], 94 [19], 101ff**).

F. What relief should issue if the Decision is quashed

63. Contrary to **PS [64]-[68]**, if the Decision is quashed, on any ground, the appropriate order is mandamus commanding the Minister to determine the plaintiff's SHEV application.

Peremptory mandamus not appropriate

64. Peremptory mandamus is an extraordinary remedy.[60] It properly arises for consideration in this case only if cl 790.227 were held invalid or was read down so as not to support the Decision. For the reasons above, cl 790.227 cannot be invalid. In the event that cl 790.227 is read down so that the Decision was invalid, mandamus is the appropriate relief.

65. *First*, in this matter, any peremptory mandamus would not be issued to enforce compliance with a writ that *this Court* had directed to issue in resolution of *the matter then pending in the Court*. It would be issued to enforce compliance with a writ issued by a different court in an entirely separate proceeding (compare *Plaintiff S297* at [39]). That should not be countenanced.

66. *Secondly*, the Minister would not thereby have been "*bound*" to grant the SHEV. If cl 790.227 is read down in some way, 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 SHEV. For example, it may fall to the Minister to consider the national interest while expressly disregarding any "substantial purpose" of general deterrence. In addition, while the defendants accept that all other criteria were satisfied as at June 2022, significant time has elapsed since then.[61] In particular, the

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[59] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at [74], [80] (Kiefel and Bennett JJ), cf [46] (Wilcox J). See also, by analogy, *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [42]: "[a] failure to consider the matters said by the plaintiff to be relevant cannot spell invalidity".

[60] Indeed, there are only two reported Australian cases where peremptory mandamus has issued: see Chaim, "Peremptory Mandamus in Australian Administrative Law" (2021) 28 *Australian Journal of Administrative Law* 28 at 32.

[61] In this regard, in *Plaintiff S297*, the Court found it "not necessary to examine what consequences might follow if it were alleged that there had been some relevant change in circumstances": at [41].

defendants do not accept that, at present, "[i]f he were at liberty, the Plaintiff would not pose an unacceptable risk of harm to the Australian community" (**Response, [9(n)-(o)]**). The Court should make an order for mandamus and, *if* compliance with *that* writ is legally insufficient, it would be open to make an order for peremptory mandamus.

No basis for habeas corpus

67. For the reasons set out at [51]-[54] above, the plaintiff's detention remains authorised by ss 189(1) and 196(1) of the Act. It is for the purpose of his removal from Australia.

68. In those circumstances, this Court's decision in *AJL20* is a complete answer to the plaintiff's claim for a writ of habeas corpus. In that case, Kiefel CJ, Gageler, Keane and Steward JJ said:

> The combined effect of ss 189(1) and 196(1) is that a non-citizen can be lawfully within the Australian community only if he or she has been granted a visa [fn: Subject to *Love v Commonwealth* (2020) 94 ALJR 198; 375 ALR 597.]. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia by one of the means referred to in s 196(1), relevantly in this case removal under s 198.

The majority went on to explain that "[b]ecause the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community, *no question of release on habeas can arise*" (at [61], emphasis added).

69. The evidence of Ms Wood (**AB 923-929**) establishes that the plaintiff is an unlawful non-citizen. If the Decision is quashed, he will remain an unlawful non-citizen. He will not, by reason of the Decision being held invalid, gain an entitlement to be at liberty in the Australian community. Rather, he will be entitled to have his SHEV application determined by the Minister within a reasonable time: *Plaintiff S297* at [37]. The appropriate relief is mandamus.

PART VI: Notice of contention or notice of cross-appeal

70. Not applicable.

PART VII: Estimate of time

71. The defendants estimate 3 hours will be required for presentation of their oral argument.

Dated: 15 February 2023

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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

ANNEXURE TO THE DEFENDANTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the defendants set out below a list of the particular constitutional provisions and statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	Constitution	Current	s 51, Ch III
2.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Current	s 3A
3.	*Legal Profession Uniform Law* (NSW)	Current	s 51
4.	*Migration (1993) Regulations 1992* (Cth)	Incorporating amendments from *Migration (1993) Regulations (Amendment) 1994* (Cth)	Sch 2, Pt 817.
5.	*Migration Act 1958* (Cth)	Current	ss 4, 5C, 31, 32, 35A, 36, 46A,51A, 57, 65, 158, 195A, 197AB, 197C, 189, 196, 198, 233A to 234A, 496, 501, 501C, 504

6.	*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)	As made	s 3, Sch 2, Pt 1, item 18E
7.	*Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth)	As made	Sch 1, item 23.
8.	*Migration Reform Act 1992* (Cth)	As made	
9.	*Migration Regulations 1994* (Cth)	Current	Sch 2, cll 785.227, 790.211-790.411, 866.226
10.	*Migration Regulations 1989* (Cth) (then titled the *Migration (Criteria and General) Regulations 1989* (Cth)	As at 27 February 1991	Reg 117A
11.	*Migration Regulations (Amendment) 1991* (Cth)	As made	Reg 9
12.	*Sentencing Act 1991* (Vic)	Current	s 5