HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Sep 2024 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:	S107/2024
File Title:	FEL17 v. Minister for Immigration, Citizenship and Multicultu
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	24 Sep 2024

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: **FEL17**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUE

2. The question on the appeal is whether the Appellant was entitled to make an application for a protection visa under s 65 of the *Migration Act 1958* (Cth) (the **Act**) in circumstances in which: (1) the Appellant's previous application for such a visa was refused by the Minister's delegate; (2) the Administrative Appeals Tribunal (**AAT** or **Tribunal**) affirmed that decision under s 415 of the Act; and (3) the Assistant Minister then intervened under s 417 and substituted for the AAT's decision a more favourable decision being the grant of a visa of a different class. The issue is how to construe the interaction between ss 48A, 65, 415 and 417 of the Act and, in particular, whether an initial decision of a delegate of the Minister, the subject of review by the AAT, is of relevant operative legal effect when the Minister substitutes for the AAT affirmation decision a more favourable decision.

PART III: SECTION 78B NOTICE

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: REPORTS OF JUDGMENTS BELOW

4. The reported judgment of the Full Court of the Federal Court of Australia is *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 (***FEL17***). The judgment of Judge Laing in Division 2 of the Federal Circuit and Family Court of Australia has not been reported. Its medium neutral citation is *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 4.

PART V: FACTS

5. The Appellant is an Egyptian national of the Coptic faith. He arrived in Australia in November 2013.[1] He applied for a Protection Visa on 24 December 2013.[2] This was refused by the delegate on 23 July 2014.[3] The Appellant appealed to the Tribunal.

6. The Tribunal affirmed this decision on 11 September 2015, pursuant to its powers under s 415 of the Act.[4] In its reasons the Tribunal accepted that the Appellant had been the subject of harm for religious reasons in Cairo at the hands of his Muslim business partner.[5] This was at the time of the Morsi Government. The Tribunal

[1] Book of Further Materials (**BFM**), BFM47.
[2] Core Appeal Book (**CAB**), CAB16.
[3] CAB16.
[4] CAB16, BFM7-BFM32.
[5] BFM18.

accepted that the Appellant remained at a real risk of serious harm in his home region of Cairo.[6]

7. On the basis of independent Country information, the Tribunal found that the situation for Coptic Christians had improved since the fall of the Morsi Government and that the Appellant could relocate to another large city in Egypt to avoid further persecution.[7]

8. On 18 September 2017, the Appellant was informed that the Assistant Minister for Immigration and Border Protection had personally made a decision to exercise his public interest power under s 417 of the Act to substitute for the decision of the Tribunal a more favourable decision by granting a Visitor (subclass 600) visa.[8] This decision had been made on 12 September 2017.[9] One of the conditions of that visa was Condition 8503.[10] That condition prevented the Appellant from being "granted a substantive visa, other than a protection visa, while [he] remain[ed] in Australia".[11] On 12 October 2017, the Appellant again applied for a protection visa.[12] In his visa application, the Appellant made a statement as to why he left Egypt.[13]

9. On 25 October 2017, the delegate of the Minister notified the Appellant that she considered that the application was invalid, by reason of s 48A of the Act.[14] It is this decision which is the subject of the proceedings in the Courts below.

PART VI: ARGUMENT

10. The heart of the majority's reasoning is as follows:[15]

> [55] The appellant's submission proceeds as if the Delegate's Decision is forever extinguished because it has no independent legal force once affirmed by the Tribunal. However the Delegate's Decision does not disappear or cease to exist. As a matter of fact that decision remains. It is that decision which is affirmed by the Tribunal, and to which continuing legal operation is given. It is that decision which refused the protection visa. That decision has not been set aside.
>
> [56] If the Tribunal's Decision has no legal effect, or no longer has legal effect, the Delegate's Decision has legal effect in its own right. It has not been set aside.

---

[6] BFM31.
[7] BFM31.
[8] BFM33.
[9] BFM35.
[10] BFM35.
[11] *Migration Regulations 1994* (Cth), Reg 2.05, Sch 8.
[12] CAB16, BFM39-BFM113.
[13] BFM87.
[14] CAB5 to CAB8.
[15] CAB51.

11. On this reasoning, the decision of the Delegate regained operative effect when the Assistant Minister made a decision in substitution for the Tribunal's decision. This cannot be accepted, for two reasons.

12. Firstly, consistently with legislative purpose, the effect of s 417 is to set aside the consequences of the original Delegate's decision.

13. Secondly, the majority misconceived the effect of the Tribunal's decision, which caused the Delegate's decision to lose "independent"[16] effect. It did not regain it.

Section 417

14. The majority's reasoning proceeds upon the basis that the Tribunal never set aside the Delegate's decision so the Delegate's decision remains legally effective once the Tribunal decision is substituted. However, this ignores the legislative purpose of s 417.

15. The power under s 417 is available where a Tribunal has affirmed a visa refusal decision.[17] The power is to substitute for the Tribunal decision a more favourable decision.

16. Section 417 was originally enacted as s 166BE and was inserted by the *Migration Reform Act 1992* (Cth). The explanatory memorandum to the *Migration Reform Bill 1992* (Cth) provides that:[18]

> "Subsection (2) provides that in exercising his or her powers the Minister is not bound by Subdivision AA or AC of Division 2 of Part 2 of the Act or by the regulations, but is bound by the rest of the Act. This means that the Minister can grant a visa that the person did not apply for, and may grant the visa even if the applicant did not satisfy the prescribed criteria. However, the Minister cannot grant the visa if to do so would breach another provision of the Act."

17. In *Plaintiff S10/2011*,[19] French CJ and Kiefel J (as her Honour then was) explained:

> [30] The dispensing provisions and other like provisions in the Act have a distinctive function in its legislative scheme. The Act creates a range of official powers, duties and discretions, particularly in relation to the grant of visas, which are tightly controlled by the Act itself and, under

---

[16] *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16, [70]; (2018) 264 CLR 217, 241-242 (Gageler, Keane and Nettle JJ) (***Plaintiff M174***).

[17] See, *Migration Act 1958* (Cth), s 411(1)(c). See also, *Plaintiff S10/2011 v Commonwealth* [2012] HCA 31, [99(viii)]; 246 CLR 636, 667-668 (Gummow, Hayne, Crennan and Bell JJ) (***Plaintiff S10***).

[18] *Migration Reform Bill 1992* (Cth) cl 363, BFM6.

[19] *Plaintiff S10* [2012] HCA, [30]; (2012) 246 CLR, 648.

> the Migration Regulations, by conditions and criteria to be satisfied before those powers and discretions can be exercised. The dispensing provisions stand apart from the scheme of tightly controlled powers and discretions. They confer upon the Minister a degree of flexibility allowing him or her to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements.

18. The apparent purpose of s 417 is to allow the Minister to remedy circumstances that could not be completely addressed by the right to internal merits review provided in the Act. To achieve that purpose, Parliament made a deliberate legislative choice. The Minister could have been empowered to make a more favourable decision which operated prospectively. No change to the decision of the AAT would have been necessary.

19. However, Parliament chose instead to empower the Minister to substitute a decision for that of the Tribunal decision. In these circumstances, the Parliament's express choice that the AAT decision be "substituted" by the Minister's decision must mean that the Minister's decision becomes the decision on the review, *whether or not the Tribunal had the power to make that other decision.*

20. By giving the Minister the power to substitute a decision, rather than just giving the Minister the power to make a more favourable decision which operated prospectively, the clear legislative purpose is that the new decision is to operate as if it were the decision of the Tribunal, with all the legal consequences of such a decision.

21. When making the substitution decision, the Minister is taken to intend that the consequence of the grant of that visa be the consequences that attach to that class of visa – not those attaching to the visa class actually applied for.

22. In *Plaintiff M79/2012*,[20] in respect of a visa granted under the dispensing power in s 195A of the Act, French CJ, Crennan and Bell JJ observed that:

> [41] In the exercise of his power under s 195A(2) the Minister may decide to grant a particular class of visa because its legal characteristics and legal consequences serve a purpose which he has adjudged to be in the public interest. In this case, he has selected the temporary safe haven visa primarily on the basis that, consistently with the Government's approach to protection claims by offshore entry persons in detention, it will maintain the position that, after release from detention, such persons continue to be barred from applying as of right for a protection visa but must await the application of the ministerial dispensing power , albeit now to be exercised, if at all, under s 91L rather than as previously under s 46A(2).

[20] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24, [41]; (2013) 252 CLR 336, 353-354 (***Plaintiff M79***).

23. Further, in the same case, Gageler J stated that:[21]

> [131] Section 195A does not dispense with, or allow the Minister to dispense with, any statutory consequence that may attach to the holding of a visa of a particular class. The Minister, in exercising the power, must rather choose from within the available range one or more particular classes of visa with their attendant statutory consequences. The choice is one that s 195A requires to be made by the Minister by reference to the public interest. The statutory consequences that attach to the grant of a visa of a particular class are considerations that the Minister is entitled to take into account in considering whether the Minister thinks that it is in the public interest to grant a visa of that class.

24. The same must be the case for s 417. The Minister has identified the consequences attaching to the grant of the visa by identifying the class of the visa – the Appellant will not be subject to other consequences attaching to other classes of visas – even though he originally applied for that other class of visa.

25. It also follows that the Appellant is no longer the subject of the legal consequences attaching to the refusal of his protection visa application as affirmed by the Tribunal.

26. The Appellant's construction of s 417 coheres with the legislative purpose of s 48A as stated in the Explanatory Memorandum,[22] being to prevent "repeat applications". On the Appellant's construction, his second application is only authorised due to the Minister's intervention in respect of his first application.

Section 415

27. Further, the above construction is consistent with established principle as to the operation of s 415 and its analogues.

28. The AAT's task is to "do over again" what the original decision-maker did.[23] An AAT decision "substitutes" for the decision under review.[24]

29. As recognised in *Plaintiff M174/2016*,[25] if there is a jurisdictional error in the Delegate's decision, the Tribunal does not cure the defect in the Delegate's decision, rather, it gives it different legal force as an affirmed decision under s 415, which is its power to affirm the decision.

30. The word "affirm" needs to be considered in the context of what the AAT does when it engages in the administrative review process. It does not act as a "rubber stamp"

---

[21] *Plaintiff M79* [2013] HCA, [131]; (2013) 252 CLR, 378.
[22] *FEL17*, [35]; CAB47.
[23] See, *Shi v Migration Agents Registration Authority* [2008] HCA 31, [100] (Hayne and Heydon JJ) and [134] (Kiefel J); (2008) 235 CLR 286, 315 and 324-325 (***Shi***). See also, *Minister for Immigration and Border Protection v Makasa* [2021] HCA 1, [50]-[51]; (2021) 270 CLR 430, 446-447 (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) (***Makasa***).
[24] *Shi* [2008] HCA, [66]-[67]; (2008) 235 CLR, 305-306 (Kirby J).
[25] *Plaintiff M174* [2018] HCA, [70]; (2018) 264 CLR, 241-242 (Gageler, Keane and Nettle JJ).

when it decides to affirm a decision; it just comes to the same ultimate conclusion. The Tribunal's reasoning process could be entirely different to that of the original decision-maker.

31. When the AAT affirms a decision not to grant a protection visa it does "over again" what the original decision-maker did, and brings finality to that process. In making its decision, subject to statutory indications to the contrary, the AAT is not restricted to reviewing the material considered by the delegate. The AAT makes a fresh decision which has an independent legal operation.

32. The majority in *FEL17*[26] point to the words in *Plaintiff M174* that "it is the order of the Authority operating by force of s 473CC(2)(a) of the Act to affirm the decision of the Minister or delegate that alone gives the decision of the Minister or delegate legal operation."[27] The words that follow are the critical ones: "Once affirmed by the Authority, the decision of the Minister or delegate has no independent continuing legal operation by force of s 65 of the Act, whether actual or purported".[28]

33. The affirmation by the Authority considered in *Plaintiff M174* operated by force of s 473CC(2)(a).[29] Similarly, in this case, the decision of the AAT affirming the original decision operates by force of s 415(2)(a). The legal force is not provided by the section under which the Delegate exercised power.

34. Once the Tribunal made its decision, that decision gave legal force to the delegate's decision from the time of the delegate's decision.[30] The refusal decisions contemplated by s 48A of the Act are ones that have continuing legal operation and not just ones made in fact.[31]

35. Following the Assistant Minister's decision, the Tribunal decision no longer had any legal effect. There was no resurrection or resuscitation of the original s 65 refusal decision, as its independent legal operation had come to an end when the Tribunal made its decision – i.e. the refusal of the application for the protection visa had been "finally determined" (s 48A(1)). The Assistant Minister made a decision that replaced the AAT decision which had in turn affirmed the original decision. The process of administrative review was then brought to an end.

36. It follows that no protection visa application by the Appellant had been refused within the meaning of s 48A when he lodged his further application on 12 October 2017.

---

[26] CAB51; *FEL17,* [54].

[27] *Plaintiff M174* [2018] HCA 16, [70]; (2018) 264 CLR, 241-242.

[28] *Plaintiff M174* [2018] HCA 16, [70]; (2018) 264 CLR, 241-242.

[29] *Plaintiff M174* [2018] HCA 16, [70]; (2018) 264 CLR, 241-242.

[30] *Kim v Minister for Immigration and Citizenship* [2008] FCAFC 73, [33]-[35]; (2008) 167 FCR 578, 585 (Tamberlin J, Gyles and Besanko JJ agreeing) (***Kim***); *Plaintiff M174* [2018] HCA 16, [40]; (2018) 264 CLR, 233.

[31] See *Al Tekriti v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 772, [35]; (2004) 138 FCR 60, 68 (Mansfield J).

Section 415(3) of the Act

37. The majority in *FEL17* said:[32]

> [40] Section 415 of the Migration Act provides the powers of a Tribunal on review. As the Minister submitted, the text of s 415 reflects that it is only where the Tribunal varies a delegate's decision, or sets aside a delegate's decision and substitutes a new decision, that s 415(3) provides that "the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister". Accordingly, the Minister was correct in contending that the Tribunal's Decision to affirm the Delegate's Decision under s 415(2)(a) is not taken to be a decision of the Minister (or Delegate).

38. When the Tribunal varies a Delegate's decision, or sets aside that decision and substitutes its decision, the Tribunal does not exercise the power under s 65 of the Act to grant the visa. That is why 415(3) is needed to deem this effect.

39. This is not a problem for an affirmation as the visa application remains refused - so that suggests why s 415(3) makes no reference to affirmation. Put another way, the legislative purpose of s 415(3) is to ensure that the AAT decision attracts all the rights and obligations that were attached to or enlivened by the original decision. In the case of an affirmation by the AAT it follows that, as that affirmation does not substantively change the operation of the decision-maker's decision, there was no need for it to be referred to in s 415(3). The conclusion drawn by the majority in *FEL17* at [40], referenced above, does not assist the Respondent.

40. Absent an intervention by the Minister, affirmation of the Delegate's decision by the Tribunal brings finality to the relevant administrative decision-making process. This is consistent with this Court's observations in *Makasa*,[33] in respect of s 43(6) of the *Administrative Appeals Tribunal Act 1975* (Cth), upon which s 415(3) was evidently modelled:[34]

> [50] Looking to the generic operation of the AAT Act, an intention not to allow further re-exercise of a power by a primary decision-maker after re-exercise of that power by the AAT under s 43(1)(b) or (c)(i) of the AAT Act on review of an earlier exercise of power by the primary decision-maker is inherent in the nature of the merits review function for which it is the design of s 43 of the AAT Act to make provision. The merits review function of the AAT is "to stand in the shoes of the decision-maker whose decision is under review so as to determine for

---

[32] CAB48.

[33] *Makasa* [2021] HCA; (2021) 270 CLR.

[34] *Makasa* [2021] HCA, [50]-[51]; (2021) 270 CLR, 446-447 (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) (footnotes omitted).

itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review". The function of the AAT, in other words, is "to do over again" that which was done by the primary decision-maker. The function would be reduced to a mockery were the subject-matter of the decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review.

[51] The object of s 43(6) of the AAT Act, in deeming a decision made by the AAT under s 43(1)(b) or (c)(i) in variation of or substitution for the decision under review to be a decision of the primary decision-maker, is to bring finality to the administrative decision-making process. Like any other legal fiction, the deeming effected by s 43(6) of the AAT Act cannot be taken to have a legal operation beyond that required to achieve the object of its enactment. Section 43(6) cannot be taken so far as to be read as requiring an exercise of power by the AAT to be treated as no more than an exercise of power by the primary decision-maker which the primary decision-maker is able by operation of s 33(1) of the AI Act simply to re-exercise.

41. It is accordingly submitted that one statutory purpose of s 415(3) was to align the legal effect of substitution or variation with that of affirmation.

PART VII: ORDERS SOUGHT

42. The Appellant seeks the orders set out in the Notice of Appeal dated 19 August 2024.

PART VIII: ESTIMATE

43. The Appellant estimates approximately 1.5 hrs for oral submissions in chief.

Dated: 24 September 2024

David Godwin
02 9221 9208
dgodwin@qsc.com.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **FEL17**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
STATUTES			
	Migration Act 1958 (Cth)	As at 12 September 2017	ss 48A, 65, 195A, 415, 417 and 473CC
	Migration Reform Act 1992 (Cth)	As enacted	s 32
	Administrative Appeals Tribunal Act 1975 (Cth)	As at 12 September 2017	s 43
STATUTORY INSTRUMENTS			
	Migration Regulations 1994 (Cth)	As at 12 September 2017	Reg 2.05, Schedule 8