HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S22/2025
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Registry:	Sydney
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PLAINTIFF S22/2025**
Plaintiff

and

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: Legal consequences (Response [10]-[23])

2 The delegate correctly identified the legal consequences of his decision: namely that the Plaintiff would remain an unlawful non-citizen liable to detention under ss 189(1) and 196(1) and removal under s 198, if and for so long as there was a real prospect of his removal becoming practicable in the reasonably foreseeable future: **SCB 355 [106]-[117]**. Having found that, in the particular circumstances of this case, there was not currently a real prospect of removal, the delegate also reasoned that the Plaintiff would not remain in detention: **SCB 355-356 [116]-[117]**.

3 The delegate deliberately refrained from pre-empting, or making any finding as to the outcome of, the entirely separate exercise of power to grant a visa, while recognising that that was a process that was likely to occur: **SCB 356 [117]**. In so doing, the delegate expressly limited himself to considering the direct legal consequences brought about by the (non) exercise of the power in s 501CA(4), that is, the change to the Plaintiff's legal status able to be brought about by the exercise of that power: **SCB 355-356 [106]-[117]**. The statement that "[t]he Minister will separately consider the type of visa" suggests only that this process would occur; and says nothing about what type or types of visa may be available: **SCB 356 [117]**.

4 There was no requirement for the delegate to consider or make any finding as to the outcome of the separate process relating to a visa. That power to grant a Bridging Visa (Removal Pending) (**BVR**) arose under the entirely separate regime in reg 2.25AB of the *Migration Regulations 1994* (Cth) and it was not a necessary or required consequence of the (non) exercise of s 501CA(4). On any view, the consideration and grant of a BVR was not a "*direct and immediate consequence[] that the Migration Act attaches to [the] decision*": *Taulahi v Minister for Immigration* (2016) 246 FCR 146 (**Vol 3, Tab 27**) at [84].

5 There is no dispute that, when the decision was made, the delegate was actually aware that the Plaintiff would be considered for the grant of a BVR under reg 2.25AB: **SCB 16 [54(b)]**. But his awareness of that fact did not convert the outcome of the exercise of power in reg 2.25AB into a mandatory relevant consideration which must be considered in exercising s 501CA(4). The existence or otherwise of a mandatory relevant consideration

is a matter that must be determined on the proper construction of the statute: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

6 The *NMBZ* line of authority does not require a decision-maker to pre-empt the outcome of separate exercises of discretionary power: *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 (**Vol 3, Tab 25**) at [6], [8], [9], [17], [168]-[178]; *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 (**Vol 3, Tab 15**) at [4], [5], [13], [17]-[20]; *Ezegbe v Minister for Immigration and Border Protection* (2019) 164 ALD 139 (**Vol 3, Tab 19**) at [9], [16]-[18]; *Taulahi* at [37]-[38], [52], [81]-[84], [94]; *BNGP v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 298 FCR 609 (**Vol 3, Tab 16**) at [101], [138]; *AJN23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 304 FCR 384 (**Vol 3, Tab 14**) at [20]-[34].

7 Alternatively, even if the delegate is understood as making an error in respect of what type of visas may be available, that would not invalidate the decision. The delegate did not proceed on any incorrect understanding of the "law applicable to the decision to be made": *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[137], citing *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944 69 CLR 407 (**Vol 2, Tab 11**) at 430; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 (**Vol 2, Tab 10**) at [75]. A legal error extraneous to the power does not necessarily invalidate the exercise of power: cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [80], [100]; Act, s 474.

Ground 2: Direction 110 (Response [24]-[27])

8 The delegate did not err in his application of cll 8.5(1) and 8.5(2). The Plaintiff impugns a sentence referring to "the Australian community's general expectations about non-citizens": **PS [22]-[23]**; **SCB 354 [104]**. That sentence should be understood as referring to the general expectations as articulated in cl 8.5(1) and the first sentence of cl 8.5(2). There is nothing to indicate that the delegate erroneously considered the Plaintiff's offending was conduct within the second sentence of cl 8.5(2): **SCB 354 [101]-[104]**.

9 The community's expectation stated in cl 8.5(2) that a non-citizen "should not be granted or continue to hold a visa" was capable of rational application: cf **PS [24]**. The expectation articulated in Direction 110 is directed to the substantive visa under consideration (here, the Temporary Protection Visa): **SCB 693 cll 5.1(4), 5.2**. In any event, to suggest that the grant of a BVR somehow subverts the community's expectation referred to in cl 8.5(2) is

to favour form over substance. The cancellation and non-revocation of the Plaintiff's visa, even if he would be placed on a BVR for some time, is consistent with the community's expectation in cl 8.5(1), as it is consistent with ultimate removal if and when removal becomes reasonably practicable. The events subsequent to the grant of the BVR demonstrate as much: **SCB 19 [74]-[75]**. The Plaintiff's real complaint is about the weight ascribed to this consideration.

Ground 3: Merit advice (Response [28]-[34])

10 There are no limitations on the sources of information that may be considered in reaching the state of satisfaction prescribed by s 501CA(4): *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 (**Vol 2, Tab 8**) at [18]. The delegate was not bound by the rules of evidence, and was entitled to place weight on the material that the Plaintiff had provided, including the Merit Advice.

11 The Merit Advice was provided inadvertently to the Department. There is nothing to suggest that the delegate was aware that the document was privileged, or that it was not intended to form part of the revocation request. The delegate was entitled to use the material in connection with the exercise of the power in s 501CA(4): cf *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646 (**Vol 2, Tab 5**) at [6]. The Plaintiff has identified no authority that a decision-maker falls into jurisdictional error merely by considering privileged material provided by the person subject to the exercise of power.

12 Alternatively, if the Plaintiff establishes some form of error, it cannot have been material in circumstances where the delegate only referred to a sentence in the Merit Advice which directly quoted from the sentencing remarks, which the delegate otherwise extensively considered and which was not itself privileged: **SCB 347 [35]; 185 [15]; *cf* 186 [21]; 261**.

Disposal

13 Questions 1-4 should be answered "No". Question 5 should be answered "None, and consequentially the proceedings should be dismissed". Question 6 should be answered "the Plaintiff".

Date: 16 June 2025

Patrick Knowles **Bora Kaplan** **Michael Maynard**