HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

APPLICANT S270/2019 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION RESPONDENT

Applicant S270/2019 v Minister for Immigration and Border Protection
[2020] HCA 32
Date of Hearing: 5 August 2020
Date of Judgment: 9 September 2020
S47/2020

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S E J Prince SC with S G Lawrence and I Chatterjee for the appellant (instructed by Purcell Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with R S Francois for the respondent (instructed by Mills Oakley)

CATCHWORDS

Applicant S270/2019 v Minister for Immigration and Border Protection

Immigration – Visas – Cancellation of visa – Revocation of cancellation – Where s 501(3A) of *Migration Act 1958* (Cth) provides that Minister must cancel visa if satisfied person does not pass character test because they have substantial criminal record and person is serving sentence of imprisonment on full-time basis – Where s 501CA(4) provides that Minister may revoke decision to cancel visa if conditions in s 501CA(4)(a) and (b) are met – Where s 501CA(4)(a) requires that person makes representations in accordance with invitation from Minister – Where s 501CA(4)(b) requires that Minister is satisfied person passes character test or there is another reason why decision should be revoked – Where appellant held visa which was not protection visa – Where appellant's visa cancelled under s 501(3A) and Minister declined to revoke cancellation under s 501CA(4) – Whether Minister obliged to, and failed to, consider whether non-refoulement obligations were owed to appellant when exercising power under s 501CA(4).

Words and phrases – "another reason", "cancellation", "discretion", "fear of persecution", "international law", "mandatory relevant consideration", "non-refoulement", "refugee", "revocation", "substantial criminal record", "sufficient evidence", "visa".

Migration Act 1958 (Cth), ss 501(3A), 501CA.

1 KIEFEL CJ AND GAGELER J. The facts relevant to this appeal are set out in the reasons of Nettle, Gordon and Edelman JJ. At issue on this appeal is the decision of the respondent ("the Minister") not to revoke the cancellation of the appellant's visa. The sole ground upon which special leave was granted was that the Minister was obliged to and failed to consider whether non-refoulement obligations were owed to the appellant when exercising the discretionary power under s 501CA(4) of the *Migration Act 1958* (Cth).

2 This was a ground which had not been raised in the courts below. On the application for special leave to appeal, it was submitted by counsel for the appellant that the ground "arises on the materials in evidence below", which is to say that it was capable of determination by this Court on the available evidence. Unfortunately that has not proved to be the case.

3 The appellant's ground of appeal required him to establish, in the first instance, that protection obligations such as those owed to a refugee were or are owed to him. It is only if such obligations were or are owed that an issue as to whether the appellant could be returned to Vietnam without harm could arise. Much of the argument on the appeal was directed to whether there was sufficient evidence to permit a conclusion to be reached on that initial premise. But there were other difficulties with the state of the evidence.

4 The appellant accepted that even if he established that the Minister was required to consider Australia's non-refoulement obligations and that the failure to do so constituted jurisdictional error, he would need to show that there was at least a possibility that the Minister's consideration of that issue would have resulted in a decision to revoke the cancellation of the visa[1]. But there was no sufficient evidence from which the Minister could have concluded that if the appellant was now returned to his country of origin he remained at risk of harm. Such evidence as there was suggests that much has changed since he left Vietnam.

5 It follows that the question of principle which underpinned the grant of special leave does not arise. In the absence of a factual context we do not consider it either necessary or appropriate to comment upon whether s 501CA(4) of the *Migration Act* might oblige the Minister to consider whether non-refoulement obligations are owed when deciding whether to revoke a decision to cancel a visa that is not a protection visa. To answer what is in the circumstances largely a hypothetical question is not useful and may mislead.

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1 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45], [48] per Bell, Gageler and Keane JJ.

6 In our view the proper course is to revoke the grant of special leave, dismiss the application for special leave and order the appellant to pay the costs of the application and this hearing.

7 NETTLE, GORDON AND EDELMAN JJ. This appeal from a decision of the Full Court of the Federal Court concerns the validity of the decision of the respondent ("the Minister") under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke the cancellation of the appellant's Class BB Subclass 155 Five Year Resident Return visa, which is not a protection visa.

8 The appellant was granted special leave to appeal on one ground to the effect that when exercising the discretionary power under s 501CA(4) to revoke the cancellation of the visa, the Minister was obliged to, and failed to, consider whether non-refoulement obligations were owed to the appellant.

9 Three questions were raised on appeal: did the material before the Minister raise the issue of whether Australia owed any non-refoulement obligations with respect to the appellant; if so, did the Minister decide to defer consideration of that issue because any such obligations could be considered if the appellant made an application for a protection visa; and, finally, whether the Minister was required to consider Australia's non-refoulement obligations in making a decision under s 501CA(4) of the *Migration Act*.

10 For the reasons that follow, the appeal should be dismissed. The appellant made no claim to fear persecution or serious harm so as to raise the issue of whether Australia owed any non-refoulement obligations and, in the circumstances of this matter, non-refoulement obligations were not a mandatory relevant consideration under s 501CA(4) of the *Migration Act*.

Facts

11 The appellant was born in Vietnam but left Vietnam aged seven. After eight years in a refugee camp in Hong Kong and aged 15, the appellant arrived in Australia on 7 June 1990 on a humanitarian visa[2]. The visa did not have as a criterion that the appellant was entitled to protection under the Convention relating

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2 The proceedings below were conducted on the basis that the appellant arrived in Australia on a Funded Special Humanitarian (subclass K4B12) visa. On appeal to this Court, the Minister contended that the appellant likely arrived in Australia on a Code 200 (Refugee) visa. The appellant accepted that the appeal could be conducted on the latter basis.

to the Status of Refugees as modified by the Protocol relating to the Status of Refugees ("the Refugees Convention")[3].

12 On 15 November 1994, the appellant was granted a Class BB Subclass 155 Five Year Resident Return visa. On 22 November 1994, on that visa, the appellant departed Australia for Vietnam and then returned to Australia on 9 February 1995.

13 The appellant is married to an Australian citizen, a woman he met as a child in the refugee camp in Hong Kong. They have three children, all Australian citizens.

14 The appellant also has a lengthy criminal record. On 27 August 2004, the appellant was sentenced at the Sydney District Court for five offences including aggravated break and enter with intent and received various sentences of imprisonment aggregating to a total effective sentence of four years and six months' imprisonment with a non-parole period of two years and six months. On 13 September 2013, the appellant was sentenced at the Sydney District Court for an offence of aggravated break and enter with intent in company (which had occurred on 10 December 2010) and sentenced to six years' imprisonment with a non-parole period of three years and six months ("the 2013 Sentencing").

Cancellation of visa

15 On 26 April 2016, the appellant's visa was cancelled pursuant to s 501(3A) of the *Migration Act* because he was serving a sentence of imprisonment of 12 months or more and therefore had a substantial criminal record[4] ("the decision").

16 On that same day, 26 April 2016, the appellant was sent a notice of the decision, a copy of *Direction No 65 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Ministerial Direction 65") and a number of other enclosures including a revocation request form.

17 Ministerial Direction 65 was explained in the notice of decision in these terms:

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3 Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as modified by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

4 *Migration Act*, s 501(6)(a) and (7)(c).

> "the Minister has issued [Ministerial Direction 65] which identifies issues that are relevant to the revocation consideration. A copy of [Ministerial] Direction 65 is enclosed for your information. *You should address each paragraph in PART C of the Direction that is relevant to your circumstances*.
>
> *Please note that if the decision-maker who makes the decision regarding whether or not to revoke the decision to cancel your visa is a delegate of the Minister, they must follow [Ministerial] Direction 65*. If, however, the Minister makes a revocation decision personally, he or she is not bound by [Ministerial] Direction 65, although [Ministerial] Direction 65 provides a broad indication of the types of issues that the Minister is likely to take into account in deciding whether or not to revoke the decision to cancel your visa." (emphasis added)

It will be necessary to return to the Direction later in these reasons.

Request to revoke cancellation of visa

18 The appellant filled out the revocation request form on 12 May 2016 and sent the revocation request to the Department of Immigration and Border Protection ("the Department"). The form specifically asked the appellant to "provide your reasons as to why the Minister or his/her delegate should revoke the mandatory cancellation of your visa". It also asked the following:

> "Do you have any concerns or fears about what would happen to you on return to your country of citizenship? ...
>
> If yes, please describe your concerns and what you think will happen to you if you return".

19 The appellant ticked "yes" to the first question and wrote "see letter attached" in response to the second question. The attached letter did not contain any claim to fear persecution or other serious harm. The letter set out that, at the 2013 Sentencing, the judge had "referred to the [appellant's] traumatic experience of ... being [a] refugee in a Hong Kong refugee camp for a number of years at such a young age" and the "desperate circumstances" in the early years of his life. The letter stated that the appellant's wife was also a refugee having fled Vietnam to Hong Kong and then to Australia.

20 The letter, however, went on to state that: the appellant did not wish to return to his country of birth; he had no ties to Vietnam; he did not know what he would do once he arrived in Vietnam; he did not have a place to live or to work in Vietnam; he did not know his way around the country; and he did not want to live with his brother due to his brother's previous criminal record.

21 On 24 November 2016, in a letter from the Department, the appellant was provided with particulars of information, including an "International obligations and humanitarian concerns assessment" ("the Assessment") dated 28 December 2006. The letter stated that the Department had received the information, including the Assessment, and that the information may be taken into account when making the decision whether to revoke the cancellation of his visa. The appellant was invited to comment on that information.

22 Part C of the Assessment, headed "*Non-Refoulement* Obligations", listed 22 relevant considerations or questions, all of which were assessed not applicable to the appellant. The Assessment concluded that no non-refoulement obligations were owed with respect to the appellant. In relation to the first consideration – "[a]re there indications that a pattern of gross, flagrant or mass violations of human rights may exist in the State of reference?" – the comments section of the Assessment recorded that "[i]t must be noted that [the appellant] has not indicated a fear of returning to Vietnam on the basis of any Convention reason. He was only seven years old when he left Vietnam and has returned only briefly since, that being in 1994/95." In relation to another relevant consideration, the Assessment stated that the appellant was a person who had never been held to fall within Art 33(1) of the Refugees Convention because, as the comments section explained:

> "[The appellant] arrived in Australia as the holder of a Funded Special Humanitarian (subclass K4B12) visa. The criteria for that visa did not require an assessment under the Refugees Convention. Accordingly, [the appellant] had never been assessed in respect of Article 33(1) of the Refugees Convention prior to 19 December 2006, when a Protection Obligations Assessment was undertaken by a Protection visa delegate in the NSW Office in response to a request by NSW Compliance Cancellations/Refusals, Sydney office. That assessment found that [the appellant] did not fall within Article 33(1)."

23 On 2 December 2016, the appellant responded to the Department's request for comment in the letter of 24 November 2016. The appellant's comment, or lack of comment, is telling. His submission relevantly stated:

> "My wife, like me, escaped Vietnam as a child fleeing the post-war terrors. She also spent years in the refugee camp in Hong Kong and I could never ask her to retrace that dreadful history by returning to the place of her fear."

He attached letters from his wife and three children. He made no response to the invitation to comment in relation to the Assessment.

24 On 17 January 2017, the Minister[5] declined to revoke the earlier cancellation.

Issue

25 Section 501CA(4) states:

"The Minister *may* revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); *or*

(ii) *that there is another reason why the original decision should be revoked*." (emphasis added)

26 The key question is whether the Minister was required to consider whether Australia owed non-refoulement obligations to the appellant as "another reason" under s 501CA(4)(b)(ii). The answer is no.

Whether Australia owed non-refoulement obligations not raised

27 The Department invited the appellant to provide reasons why he did not now wish to return to Vietnam and, in particular, to comment on the Assessment. There was nothing in any of the material submitted by the appellant in support of his revocation request that indicated or suggested that he now held a subjective or well-founded fear of persecution in Vietnam.

28 The fact that the appellant told the Department in December 2016 that "[m]y wife, like me, escaped Vietnam as a child fleeing the post-war terrors. She also spent years in the refugee camp in Hong Kong and I could never ask her to retrace that dreadful history by returning to the place of her fear", does not advance the appellant's case. Australia's non-refoulement obligations are

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5 The revocation decision was signed by the Assistant Minister for Immigration and Border Protection. However, the parties accepted that the revocation decision was made by the Minister personally.

forward-looking[6]. On a fair reading of the material before the Minister, the appellant made no claim that gave any reason to require the Minister to consider Australia's non-refoulement obligations. As the Minister submitted, the only available inference from the material the appellant submitted in support of his revocation request is that he does not have any such fear.

29 The appellant's contention that he refrained from referring to his fears of returning to Vietnam in his responses to the Department because of the terms of Ministerial Direction 65 should be rejected. There is no finding, and nothing before this Court to suggest, let alone support a finding, that the appellant decided against including material to support his non-refoulement claims because of the terms of that Direction.

30 As the factual summary records, the appellant was provided with the Assessment and asked to comment on the Assessment, which he did. The material provided by the appellant to the Department stated that he and his wife fled the "post-war terrors" in Vietnam and that they both suffered traumatic experiences in a refugee camp in Hong Kong, at a young age, for a number of years. The fear described by the appellant may be accepted. But the fear in issue is more specific. The question is whether the appellant now has a subjective or well-founded fear of persecution in Vietnam. None has been identified. And, in any event, the contention that the appellant refrained from referring to his fears pertinent to his non-refoulement claims because of the terms of Ministerial Direction 65 was not raised below. Had it been, it could have been tested by the Minister in cross-examination, which is no longer possible now. In the result, it would be unjust to permit the appellant to raise it for the first time on appeal[7].

31 Similarly, the appellant's contention that the Minister was obliged to consider whether the appellant had ceased to be a refugee in accordance with Art 1C of the Refugees Convention does not arise. Even if the appellant falls within Art 1C(5) of the Refugees Convention (and it is unnecessary to decide that question), the material he provided to the Department did not suggest that the Refugees Convention still applies despite Art 1C(5) or that there are compelling

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6 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 578 [192]; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 495 [58], 499 [74]; *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 27 [74].

7 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

reasons, arising out of previous persecution, for him refusing to avail himself now of the protection of Vietnam.

32 In light of these conclusions, it is unnecessary to address the other issues raised in this appeal. It is, however, appropriate to say something further about s 501CA(4).

Non-refoulement obligations not a mandatory relevant consideration under s 501CA(4)

33 Although mandatory relevant considerations may be identified by reference to the text, subject matter, scope and purpose of the statute[8], there is nothing in the text of s 501CA, or its subject matter, scope or purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke cancellation of any visa that is not a protection visa where the materials do not include, or the circumstances do not suggest, a non-refoulement claim[9].

34 That conclusion is reinforced by the fact that non-refoulement is addressed separately in the Act in provisions concerning the grant of protection visas (being a class of visa created specifically to allow decision-makers to grant visas to persons who cannot be removed from Australia consistently with its non-refoulement obligations under international law)[10] and in the context of removal[11]. Given those express provisions, it would be contrary to the apparent scheme of the Act to construe general provisions concerning the cancellation of visas of all kinds on character grounds, or the revocation of mandatory cancellations on such grounds, as requiring consideration of non-refoulement, or at least in cases where the specific provisions concerning protection visas are available to an applicant who wishes to invoke them and non-refoulement has not been squarely raised. It is

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8 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 591 [34].

9 See also *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56 at 65 [41], 72 [65].

10 See, eg, *Migration Act*, ss 5H, 5J, 35A, 36, 37A, 91A-91X.

11 *Migration Act*, s 197C.

unnecessary to decide, however, whether consideration of that matter can be deferred where a non-refoulement claim is made in a revocation request[12].

35 Put in different terms, it is through express provisions in the Act that Australia's non-refoulement obligations under international law have been implemented in Australian domestic law[13]; and, if a non-citizen affected by cancellation seeks to have the Minister consider non-refoulement and remains free to apply under those express provisions for a protection visa[14], the Minister is not required to consider non-refoulement unless a claim for a protection visa is made.

36 It follows in this matter that, although the s 501CA(4) discretion is wide, it must be exercised by the Minister considering the claims and material put forward by the applicant. If *no* non-refoulement claim is made – as in this case – non-refoulement does not need to be considered in the abstract. In those circumstances, it would only need to be considered at a later time, if the applicant applied for a protection visa. The appellant has not done so.

Conclusion and order

37 For these reasons, the appeal is dismissed with costs.

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12 cf *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at 470 [63].

13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [101]. See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 627 [385], 650-651 [490]-[491].

14 See *AZAFQ v Minister for Immigration and Border Protection* (2016) 243 FCR 451 at 472-473 [67]-[69].