

HIGH COURT OF AUSTRALIA

EDELMAN J

KDSP

PLAINTIFF

AND

MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS

DEFENDANT

*KDSP v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs*

[2021] HCA 24

Date of Hearing: 9 June 2021

Date of Judgment: 4 August 2021

M95/2020

ORDER

- 1. The plaintiff's application dated 8 June 2021 for further amendment of the amended originating application dated 1 April 2021 be refused.*
- 2. The plaintiff's application for an extension of time be refused.*
- 3. The application be dismissed.*
- 4. The plaintiff pay the defendant's costs.*

Representation

L G De Ferrari SC with M W Guo for the plaintiff (instructed by Victoria Legal Aid)

P D Herzfeld SC with G J Johnson and D J Helvadjian for the defendant (instructed by Sparke Helmore Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Administrative law – Migration – Application for Safe Haven Enterprise Visa ("visa") – Where first delegate of Minister held delegation to make decision under s 65 but not s 501 of *Migration Act 1958* (Cth) to consider plaintiff's application for visa – Where referral process required first delegate to refer plaintiff's application to "Visa Applicant Character Consideration Unit" for character checks – Where second delegate of Minister refused to grant visa on character grounds pursuant to s 501 – Where Administrative Appeals Tribunal set aside decision of second delegate and decided that discretion under s 501 should not be exercised to preclude plaintiff's application for visa – Where Minister made personal decision under s 501A(2)(a) to set aside Tribunal's decision and substitute decision to refuse to grant visa – Whether internal departmental processes and policies unlawful – Whether referral process unlawful – Whether public interest criterion 4001 in *Migration Regulations 1994* (Cth) invalid – Whether Minister came under duty under s 65 to grant visa – Whether second delegate had power to make decision under s 501 – Whether Administrative Appeals Tribunal had power to set aside decision by second delegate – Whether Minister had power to make decision under s 501A(2)(a).

High Court – Original jurisdiction – Practice and procedure – Application for constitutional and other writs, injunctions, declarations, and other relief – Where plaintiff brought parallel proceedings concerning same underlying subject matter in original jurisdiction of High Court and by special leave from Federal Court – Where special leave application dismissed – Where plaintiff could have raised many of grounds in special leave application – Where grounds would have been dismissed – Whether plaintiff's rights of appeal have been exhausted – Whether abuse of process – *Anshun* estoppel – Insufficient submissions to determine question – Application for extension of time to make further amendments – Last-minute application – Inefficiency – Delay.

Words and phrases – "amendment application", "binary decision", "character test", "criteria for the grant of a SHEV", "duty under s 65", "extension of time", "last-minute amendment application", "lengthy delay", "original decision", "policy", "public interest criterion 4001", "referral process", "refusal on character grounds", "satisfaction", "single decision", "unlawful detention", "validly prescribed criterion".

Migration Act 1958 (Cth), ss 36, 47, 65, 501, 501A.

Migration Regulations 1994 (Cth), Sch 2, Pt 790, Sch 4, cl 4001.

EDELMAN J.

Introduction

1 This application, for constitutional writs, declarations, injunctions, and other relief, in this Court's original jurisdiction, was brought by the plaintiff, KDSP, shortly after he filed a special leave application in this Court. This application and the special leave application were brought as parallel applications after the dismissal of KDSP's appeal to the Full Court of the Federal Court of Australia from a decision of the primary judge in the Federal Court of Australia.

2 The special leave application brought by KDSP from the decision of the Full Court was dismissed by this Court on 11 February 2021. This application in this Court's original jurisdiction raises new grounds that were not agitated in the Federal Court proceedings. KDSP submitted that at least one of the new grounds did not fall within the jurisdiction of the Federal Court. Nevertheless, many of the new grounds did fall within the jurisdiction of the Federal Court. Although the Minister made no submission to this effect, it is difficult to see why KDSP should not be treated as having been required to choose between commencing proceedings in the Federal Court and commencing proceedings in the original jurisdiction of this Court (albeit subject to possible remitter of some or all of the proceedings in the latter instance). In any event, having commenced proceedings for judicial review in the Federal Court and having appealed unsuccessfully to the Full Court, it was incumbent upon KDSP to raise in the special leave application all the issues in this Court that KDSP could raise on appeal. Had those issues been raised in that special leave application, they would have been dismissed in that application. Instead, KDSP sought to raise those grounds and others in a proceeding in this Court's original jurisdiction. The application was amended to raise further issues. Substantial affidavit material was filed, with senior counsel for KDSP seeking to cross-examine the primary witness for the defendant, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the Minister"). Then, the afternoon before the hearing, KDSP sought leave to amend the application again to raise more new issues.

3 One response by the Minister to KDSP's application is that none of the grounds raised can be agitated for the first time in this Court after KDSP's rights of appeal have been exhausted. This issue might have been put on the basis that many, if not all, of KDSP's grounds should have been raised in the special leave application. There is a long-standing principle that it is usually an abuse of process for this Court's original jurisdiction to be used in place of the statutory process of

appeals¹. But although the Minister opposed the extension of time that was required for all the essential relief sought by KDSP, the focus of the Minister's written submissions was not upon abuse of process in this sense but upon the decision in *Port of Melbourne Authority v Anshun Pty Ltd*², asserting that these issues could, and should, have been raised in the Federal Court proceedings.

- 4 There may be much to be said for the Minister's *Anshun* estoppel submission, but there was little oral argument about the extent to which, on the facts, it was unreasonable for KDSP not to have raised these issues in the Federal Court proceedings. In the absence of full argument concerning the application of *Anshun* estoppel, and in the absence of any submission on abuse of process, I will deal with the arguments which were the focus of counsel. Nevertheless, the considerations underlying any abuse of process submission overlap substantially with considerations for the extensions of time required by KDSP. The extensions of time sought by KDSP are refused. And for the reasons below, to the extent that an extension of time is not required, the substantive application is dismissed.

KDSP's last-minute application for further amendment

- 5 Sometime after 2 pm on the day before the hearing of this amended application, KDSP notified the Minister and this Court that he proposed to further amend the application to add an entirely new ground to his application and also to add two new prayers for relief. Very little was said in oral argument about the merits of the two new prayers for relief, notwithstanding that KDSP was given the opportunity to make submissions on those prayers. And nothing was said about the merits of the new ground proposed to be included in the further amended application. The latter was unsurprising since the Minister had no practical ability to respond to the entirely new issue with only hours of notice and having also been provided on the morning of the hearing with a lengthy last-minute list of objections to the evidence that the Minister had proposed to tender (such evidence had been provided by the Minister to KDSP months earlier). KDSP simply sought to have the new ground remitted to the Federal Court if his further amended application for constitutional and other writs in this Court were unsuccessful. This would be in effect, although not in form, a third round of litigation concerning the same underlying subject matter.

- 6 The background to KDSP's application for further amendment is that the originating application was brought on 25 September 2020. The originating application was the subject of substantial amendments on 1 April 2021 after KDSP's special leave application had been dismissed on 11 February 2021.

1 *Dimitrov v Supreme Court (Vic)* (2017) 263 CLR 130 at 138-139 [19] and the authorities cited therein.

2 (1981) 147 CLR 589 at 602.

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The Minister provided his response to the amended application on 22 April 2021. KDSP replied on 4 May 2021. The matters stood until the afternoon before this hearing, when KDSP sought to raise a wholly new ground. Even if this new ground had been raised as late as 4 May 2021, in KDSP's reply, the Minister might have been able to address it in this proceeding. But by raising the amendment at the last minute, its effect, if it were allowed, would be to defeat the assumptions of the parties and the Court that this litigation would come to an end with this hearing.

7 The only attempt at explaining the lateness of the new ground was the submission that senior counsel for KDSP had appeared on 3 June 2021 (six days prior to the hearing of this application) at a hearing, in the original jurisdiction of the Federal Court, in which the same ground had been raised. In oral submissions, senior counsel for the Minister said, without demur, that senior counsel for KDSP had been instructed in those proceedings since January 2021. Senior counsel for KDSP proffered no explanation for why this issue had not been raised in the ensuing six months prior to the day before this hearing other than to say that she had inadequate recall of the issues in this proceeding. Whether or not it was an abuse of process for KDSP to have brought the originating application in this Court outside the statutory appeal process, to allow the proposed further amendments would be to condone inefficiency and delay, which is the antithesis of modern case management. KDSP's application to amend further his amended application for constitutional and other writs is refused. The balance of these reasons therefore address only KDSP's amended application filed on 1 April 2021.

Procedural background

8 On 10 August 2016, KDSP applied for a Safe Haven Enterprise (Subclass 790) visa ("SHEV"). On 21 July 2017, a delegate of the Minister refused to grant KDSP a SHEV on character grounds, pursuant to s 501 of the *Migration Act 1958* (Cth). The character grounds related to KDSP's convictions for assault and contravention of an apprehended violence order. This proceeding arises from two decisions subsequent to that s 501 refusal decision. The first is a decision of the Administrative Appeals Tribunal ("the Tribunal") to set aside the s 501 refusal decision by the delegate of the Minister and to substitute a decision that the discretion under s 501 should not be exercised to "preclude [KDSP's] application" for a SHEV. The second is a subsequent, personal decision of the Minister under s 501A(2)(a) of the *Migration Act*, setting aside the decision of the Tribunal and substituting a decision to refuse to grant a SHEV to KDSP.

9 KDSP brought an application for judicial review in the Federal Court of Australia. He asserted that the Minister had failed to make a decision in respect of his application for a SHEV within a reasonable time. He argued that, as a consequence of that failure, the Minister no longer had the power to refuse a visa

under s 501A(2). That application was dismissed³. An appeal to the Full Court of the Federal Court was dismissed⁴. An application for special leave to appeal to this Court was dismissed⁵.

10 After the dismissal of KDSP's appeal by the Full Court of the Federal Court, KDSP brought this originating application in this Court's original jurisdiction. After amendment, KDSP sought twelve different forms of relief, including writs of certiorari, declarations, an injunction, and extensions of time. Apart from a declaration that KDSP's detention was unlawful, which is misconceived, all the relief sought by KDSP is futile unless his submission is accepted that the Minister's decision to exercise the power under s 501A(2) is invalid. KDSP's first attempt to establish invalidity of the Minister's decision under s 501A(2) ended when this Court dismissed his application for special leave to appeal. His second attempt, by this proceeding in this Court's original jurisdiction, must also fail.

The relevant provisions

11 Some of the grounds in the amended application raise basic questions about the legal and practical operation of the system for grant and refusal of visas under the *Migration Act*. It is therefore necessary to begin with a broad outline of the operation of the relevant provisions of the *Migration Act* as they stood at the relevant time.

12 The *Migration Act* empowers the Minister to grant a non-citizen a visa to travel to and enter Australia and/or remain in Australia⁶. In addition to the classes of visa that are prescribed, there is a list of statutory classes of visa⁷. That statutory list includes various types of protection visa, one of which is a SHEV⁸. The *Migration Act* provides for criteria for the grant of a protection visa in s 36, which the applicant must satisfy. Apart from criteria concerning protection obligations,

3 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1207.

4 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1.

5 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 020.

6 *Migration Act 1958* (Cth), s 29.

7 *Migration Act*, s 31(2).

8 *Migration Act*, s 35A(3A).

these include: "that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*)"⁹; and "that the applicant is not a person whom the Minister considers, on reasonable grounds: (a) is a danger to Australia's security; or (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community"¹⁰.

13 Section 46A relevantly provides that an application for a visa is not a valid application if it is made by an unauthorised maritime arrival who is in Australia and is an unlawful non-citizen. Section 46A(2) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that s 46A(1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

14 Section 47(1) imposes a duty upon the Minister to consider a valid application for a visa. That duty continues until, relevantly to this case, the Minister grants or refuses to grant the visa¹¹. The section provides that, to avoid doubt, the Minister is not to consider an application that is not valid and a decision by the Minister that an application is not valid is not a decision to refuse to grant the visa¹².

15 Section 65(1)(a) provides that, subject to exceptions not presently relevant, the Minister is to grant the visa if the Minister is satisfied that:

- "(i) the health criteria for it (if any) have been satisfied; and
- (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
- (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas),

9 *Migration Act*, s 36(1B), read with s 36(1A)(a).

10 *Migration Act*, s 36(1C), read with s 36(1A)(a).

11 *Migration Act*, s 47(2)(b).

12 *Migration Act*, ss 47(3), 47(4).

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501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

- (iv) any amount of visa application charge payable in relation to the application has been paid".

16 The criteria for the grant of a SHEV, being a visa provided for by s 35A(3A), could be prescribed by the *Migration Regulations 1994* (Cth)¹³. The criteria prescribed as applicable¹⁴ include criteria concerning protection obligations¹⁵ and the criterion contained in cl 790.227 of Sch 2 to the *Migration Regulations*: "[t]he Minister is satisfied that the grant of the visa is in the national interest". They also include the criteria in cl 790.226(a), which requires that the applicant must satisfy public interest criterion 4001 ("PIC 4001"). PIC 4001, contained in Sch 4 to the *Migration Regulations*, is satisfied if either:

- "(a) the person satisfies the Minister that the person passes the character test; or
- (b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the person would fail to satisfy the Minister that the person passes the character test; or
- (c) the Minister has decided not to refuse to grant a visa to the person despite reasonably suspecting that the person does not pass the character test; or
- (d) the Minister has decided not to refuse to grant a visa to the person despite not being satisfied that the person passes the character test."

17 The Minister's duties under ss 47 and 65 can be performed by a delegate, being, in the precise sense of that term, a person who acts with the authority of the Minister but in their own name¹⁶. Two of the ways in which the grant of a visa

13 See *Migration Act*, s 31(3).

14 See *Migration Regulations 1994* (Cth), reg 2.03(1).

15 *Migration Regulations*, Sch 2, cl 790.221 read with *Migration Act*, ss 36(2)(a), 36(2)(aa).

16 *Northern Land Council v Quall* (2020) 94 ALJR 904 at 920 [77]; 383 ALR 378 at 397.

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might be "prevented", and thus s 65(1)(a)(iii) will not be satisfied¹⁷, are (i) by an exercise of power under s 501(1), if the Minister (or, again, a delegate of the Minister) has refused to grant a visa because the person "does not satisfy the Minister that the person passes the character test", and (ii) by an exercise of power under s 501A(2), which may only be exercised by the Minister personally¹⁸, and which relevantly provides as follows:

"501A Refusal or cancellation of visa – setting aside and substitution of non-adverse decision under subsection 501(1) or (2)

(1) This section applies if:

- (a) a delegate of the Minister; or
- (b) the Administrative Appeals Tribunal;

makes a decision (the *original decision*):

- (c) not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person; or
- (d) not to exercise the power conferred by subsection 501(2) to cancel a visa that has been granted to a person;

whether or not the person satisfies the delegate or Tribunal that the person passes the character test and whether or not the delegate or Tribunal reasonably suspects that the person does not pass the character test.

Action by Minister – natural justice applies

(2) The Minister may set aside the original decision and:

- (a) refuse to grant a visa to the person; or
- (b) cancel a visa that has been granted to the person;

¹⁷ See *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at 240 [52]-[54], 246 [83]. See also Australia, House of Representatives, *Migration Reform Bill 1992*, Explanatory Memorandum at 26-27 [74], discussing the "non-discretionary" nature of decision making under the predecessor provisions to s 65 (ss 24, 34).

¹⁸ *Migration Act*, s 501A(5).

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if:

- (c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and
- (d) the person does not satisfy the Minister that the person passes the character test; and
- (e) the Minister is satisfied that the refusal or cancellation is in the national interest."

Background

18 KDSP was born in Afghanistan. He arrived in Australia in 2013 as an unauthorised maritime arrival and was taken into immigration detention. From August 2013 until September 2015, he held a Humanitarian Stay (Temporary) (Class UJ) visa and a bridging visa. On 11 September 2015, the Minister cancelled KDSP's bridging visa under s 116(1)(g) on the basis that he had been "charged with an offence against a law of the Commonwealth, a State, a Territory or another country"¹⁹.

19 The facts from which the offences arose are as follows. In contravention of an apprehended violence order, KDSP attended the home of a woman who had previously ended a relationship with him. Following an examination of her mobile phone and seeing a photo of another man on it, KDSP assaulted the woman by pointing an 18-centimetre knife at her and later grabbing her by the throat and choking her, releasing her only when she pleaded with him to let her go. On 25 September 2015, KDSP pleaded guilty to one charge of contravening an apprehended violence order and two charges of common assault. KDSP was sentenced to three concurrent sentences of ten months' imprisonment with a non-parole period of three months.

20 On 9 December 2015, after the expiry of the non-parole period and the cancellation of his bridging visa, KDSP, being an unlawful non-citizen, was taken into immigration detention, where he has remained.

21 On 18 April 2016, the Minister decided to exercise his power under s 46A(2) of the *Migration Act*, which had the effect of allowing KDSP to apply for a SHEV.

22 On 10 August 2016, KDSP applied for a SHEV. It is common ground that on 18 November 2016, a delegate of the Minister ("the First Delegate") considered

19 *Migration Regulations*, reg 2.43(1)(p)(ii).

KDSP's application. The First Delegate held a delegation to make decisions under s 65(1) of the *Migration Act* but did not hold any delegation to make decisions under s 501 of the *Migration Act*. It is common ground that the First Delegate retired from her employment with the Department of Home Affairs ("the Department") on 1 April 2017 and that she is now deceased.

23 On 16 February 2017, KDSP's SHEV application was referred to the Visa Applicant Character Consideration Unit ("the VACCU") for further character checks. Subsequently, KDSP's application was submitted for consideration by a delegate with the relevant authority to assess whether the visa should be refused under s 501 of the *Migration Act* on the grounds that KDSP did not satisfy the character test. On 21 July 2017, a second delegate of the Minister ("the Second Delegate") refused to grant KDSP's application for a SHEV under s 501(1) of the *Migration Act*.

24 On 27 July 2017, KDSP applied to the Tribunal for review of the s 501(1) decision of the Second Delegate. On 12 October 2017, the Tribunal set aside the decision of the Second Delegate and concluded that the discretion under s 501(1) of the *Migration Act* should not be exercised. The Tribunal gave reasons for its decision on 8 November 2017.

25 On 26 March 2018, the Department sent KDSP a "Notice of intention to consider refusal to grant a visa under s 501A(2) of the Act".

26 On 18 April 2019, the Minister made a decision, acting personally under s 501A(2)(a) of the *Migration Act*, to set aside the Tribunal's decision and to substitute it with a decision to refuse to grant a SHEV to KDSP. On 23 April 2019, the Minister notified KDSP's representative of the decision.

27 KDSP brought an application for judicial review in the Federal Court in which, as amended after the Minister's refusal under s 501A(2)(a), he alleged that the Minister had failed to make a decision in respect of KDSP's application for a SHEV within a reasonable time and consequently that the Minister no longer had the power to refuse a visa under s 501A. In that proceeding, the Minister led evidence from Ms Pfeiffer, an Assistant Secretary employed by the Department. An affidavit from Ms Pfeiffer, affirmed on 10 May 2019, described how KDSP's SHEV application had been "referred for character consideration under s 501 of the Act due to his criminal convictions".

28 Following a hearing on 21 June 2019, on 5 August 2019 the judicial review application in the Federal Court was dismissed by Banks-Smith J. On 23 June 2020, an appeal to the Full Court of the Federal Court was dismissed. An application for special leave to appeal was dismissed by this Court on 11 February 2021.

29 Evidence in this proceeding, in an affidavit from the solicitor for KDSP, was to the effect that a new argument occurred to senior counsel for KDSP after the decision of the Full Court of the Federal Court, in part consequent upon counsel's instruction to appear in another case seeking judicial review from a decision made on 11 March 2020.

30 Drawing an inference partly from reasoning in the decision of the Tribunal in that other case and partly from available online departmental instructions, the solicitor for KDSP deposed to her belief that KDSP's application for a SHEV had been transferred by a so-called "section-65 delegate" to the VACCU, which, in turn, assigned the application to a so-called "section-501 delegate", who has been described as the Second Delegate. The new argument was founded upon what were considered to be legal errors in this process.

31 The originating application was filed in this Court on 25 September 2020 and an amended application was subsequently filed on 1 April 2021.

The evidence in this Court

32 Evidence in this Court was given by affidavit from (i) Ms Tattersall, a solicitor for the Minister and (ii) Ms Abraham, a solicitor for KDSP. The Minister also relied on (iii) three affidavits from Mr Arnold, who at the relevant time was the Director of Protection Assessment Support Section. That section provides operational policy guidance, advice, and support tools to protection visa processing officers assessing permanent and temporary protection visa applications and SHEV applications.

33 Senior counsel for KDSP subjected Mr Arnold to a lengthy but ultimately futile cross-examination. In many areas in which specific detail was sought from Mr Arnold he was unable to provide it. This is no criticism of Mr Arnold, who gave his evidence honestly and succinctly. It is merely to say that many questions concerned legal detail and Mr Arnold is not a lawyer nor legally trained. Understandably, he did not recall legal rules by reference to the section number of the *Migration Act*, although he was aware of important provisions such as ss 65 and 501 and, when the content of a provision was described to him, he could recall the legal rules embodied in various other provisions. In the absence of being provided with the relevant written documents, Mr Arnold also did not recall particular policies or policy details. On occasion, oral answers given by Mr Arnold did not match precisely the evidence that he gave in his written affidavits, although the questions that he was asked were not always clear. I am satisfied that all of the evidence given in Mr Arnold's affidavits, which was the result of careful preparation and thought, was credible and reliable.

34 Senior counsel for KDSP, who had required Mr Arnold for cross-examination, submitted that little or no weight should be placed on all of Mr Arnold's oral evidence. I do not accept that submission, especially since much

of Mr Arnold's oral evidence repeated his affidavit evidence. In any event, senior counsel for KDSP only challenged Mr Arnold's oral evidence in three particular respects.

35 First, Mr Arnold gave oral evidence concerning a "s 501 Case Referral" form populated for KDSP by which KDSP's application was referred to the VACCU for consideration. One of the boxes that had been checked on the "Mandatory Documents Checklist" on the form was "Applicant is Schedule 2 criteria met OR the applicant presents an immediate risk that warrants referral". Mr Arnold's oral evidence was that the checked box meant that an indicative assessment had been made in relation to s 36 of the *Migration Act* only. His evidence was that not all the "Schedule 2 criteria" would have been satisfied by 18 November 2016. In only one respect, that explanation is contrary to the terms of the "s 501 Case Referral" form. The indicative assessment that Mr Arnold described appears to have been performed in relation to "Schedule 2 criteria" generally, which relevantly are the criteria described above in Pt 790 of Sch 2 to the *Migration Regulations*, not merely the particular requirements for protection under s 36 that apply in Pt 790. I reiterate that Mr Arnold is not a lawyer and cannot be criticised for minor inaccuracies in his legal explanation. But I accept Mr Arnold's oral evidence that not all "Schedule 2 criteria" had been assessed on an indicative basis on 18 November 2016. In particular, as he explained in his third affidavit, police checks (which would have been required for a character assessment) were required but were not initiated until 25 November 2016. According to the Department's Procedures Advice Manual entitled "s 501 – The character test, visa refusal and visa cancellation", if there is information before the delegate that "indicates that the visa applicant may not pass the character test, the case **must** be referred to the VACCU" (emphasis in original).

36 The second respect in which senior counsel for KDSP submitted that Mr Arnold's oral evidence should not be accepted was that it was contrary to the terms of written policy documents, such as written policy provisions that appear to permit a "s 65 delegate" to refuse an application based on non-satisfaction of any mandatory criteria in Pt 790. So far as Mr Arnold's evidence is inconsistent with the written policy documents, those written documents should be preferred as the evidence of departmental practice. But I do not accept the submission by senior counsel for KDSP that the policy documents permitted the First Delegate to grant the SHEV under s 65 despite concerns about his character and concerns that the power under s 501 might be exercised. Indeed, the First Delegate had no delegated authority to make a decision based on s 501.

37 The third basis upon which senior counsel for KDSP said that the oral evidence of Mr Arnold should not be accepted was in relation to whether KDSP presented an immediate risk that warranted referral to the VACCU. But Mr Arnold did not give any oral evidence to that effect. Any conclusion of immediate risk could only be an inference drawn on the basis that KDSP did not satisfy the Sch 2 criteria and the box was checked that "Applicant is Schedule 2 criteria met OR the

applicant presents an immediate risk that warrants referral". According to the Department's Procedures Advice Manual, a referral to the VACCU is required if the visa processing officer holds a "reasonable suspicion" that the visa applicant does not pass the character test under s 501(6). Further, the manual provides that a referral for consideration under s 501 should only occur if the visa applicant "satisfies all other criteria for visa grant". The "other criteria" must refer, relevantly, to criteria other than those Sch 2 criteria, in Pt 790, concerned with character.

KDSP's grounds for relief in this Court

38 In his amended application, KDSP seeks relief in this Court on grounds that can be categorised into five different groups. Some of the grounds recast submissions made in the Federal Court proceedings, which culminated in the dismissal of KDSP's special leave application on 11 February 2021. Almost all, if not all, of the grounds concern matters that could have been raised in the proceedings before the Federal Court if the relevant information had been gathered by the legal representatives of KDSP at that time and the submissions had been conceived in time.

39 In the reasons below I explain that: (i) each of the grounds has no merit; (ii) the grounds fail collectively because time should not be extended where required to permit the application; and (iii) the fifth ground fails, and on that basis the whole application must fail.

The grounds have no merit

The first grounds (grounds 1 and 1A)

40 The factual premise underpinning the first grounds (grounds 1 and 1A) is that on 18 November 2016 the First Delegate was satisfied that all the criteria for the grant of the SHEV were satisfied or, alternatively, that the First Delegate was satisfied that all criteria were satisfied except PIC 4001, and that PIC 4001 was invalid. KDSP submitted that the Minister came under a duty pursuant to s 65(1)(a) of the *Migration Act* to grant the SHEV, which could have been enforced by mandamus.

41 KDSP submitted that since the Minister wrongly failed to perform his duty, the following relief, with extensions of time as necessary, should be granted: (i) a declaration that all criteria for the grant of a SHEV to KDSP were satisfied and that the Minister came under the duty imposed by s 65(1)(a) to grant the visa; (ii) a mandatory injunction requiring the Minister to grant KDSP a SHEV with an effective starting date of 18 November 2016; and (iii) a declaration that KDSP's detention has been unlawful since 18 November 2016. In part, the first grounds

rely upon the decision of the Federal Court in *AJL20 v The Commonwealth*²⁰. Appeals from that decision, removed into this Court, were allowed²¹.

42 There are, in any event, significant obstacles to the first grounds. First, insofar as a declaration is sought that KDSP's detention has been unlawful since 18 November 2016, an insurmountable obstacle to this submission is that KDSP throughout his period of detention was and remains an unlawful non-citizen and was, and is, required to be kept in detention even if he *ought* to have been given a visa²² provided, as was not in dispute, that his detention was and is for the purposes of removal within the scope and purposes of the *Migration Act* and that an officer reasonably suspected him of being an unlawful non-citizen²³.

43 Secondly, a reason why the entirety of the first grounds must fail is that the factual premise underpinning these grounds is not made out. Whilst the affidavit evidence suggests that the First Delegate had reached, at least, a preliminary or indicative view that Australia owed protection obligations to KDSP for the purposes of s 36, this does not establish that, at any time, the First Delegate was satisfied that KDSP met all of the requirements for the grant of a SHEV. Nor, for the reasons explained above, does the referral of KDSP's application to the VACCU establish that the First Delegate was satisfied that all visa criteria had been met. The obvious inference is that the First Delegate had, at the least, doubts about whether PIC 4001, and the character criteria, had been met.

44 To reiterate, there is no evidence that the First Delegate was satisfied that KDSP had satisfied cl 790.226(a) so far as it related to PIC 4001, which directs attention to the character test. To the contrary, the affidavit evidence established that at least in relation to the "'onshore' element" of that consideration, which Mr Arnold explained was concerned with matters within Australia, consideration was "required", including police checks which were initiated on 25 November 2016, after the date at which KDSP submitted the Minister could have been compelled to grant the SHEV.

45 Confronted by this obstacle, KDSP submitted that there was nothing in the *Migration Act* or in the *Migration Regulations* which permitted the division of the consideration of PIC 4001 into onshore and offshore elements. But it could not seriously be suggested that the *Migration Act* or the *Migration Regulations* prohibited a division of a character inquiry, for administrative convenience, into

20 (2020) 279 FCR 549.

21 *The Commonwealth v AJL20* (2021) 95 ALJR 567.

22 See *Ruddock v Taylor* (2005) 222 CLR 612 at 622 [27].

23 *Migration Act*, s 189.

onshore and offshore components. Provided that the ultimate decision under s 65 is made by a single delegate, possessed of all the relevant information, it cannot matter whether that information is compiled by one person or one hundred people.

46 KDSP thus sought to challenge the validity of PIC 4001 insofar as it is applied by cl 790.226(a). The first basis for the challenge was that PIC 4001 was void for uncertainty because it used the expression "character test" without definition. But, unless the contrary intention appears, "expressions used in any [legislative] instrument ... have the same meaning as in the enabling legislation as in force from time to time"²⁴. The expression "character test" is defined in s 501(6) of the *Migration Act*. Despite a very brave attempt at argument to the contrary by senior counsel for KDSP, it is plain beyond argument that "*the* character test" to which PIC 4001 refers is not some new, undefined character test. Rather, it is the character test set out in s 501(6). This point was made by at least four members of this Court in *Plaintiff M47/2012 v Director-General of Security*²⁵. Whether or not it is correct to say, as senior counsel for KDSP submitted, that these statements are not authoritative, they are obviously correct. That the starting words of the chapeau to s 501(6) state that the test is "[f]or the purposes of this section" does not detract from the clear intention in PIC 4001 to refer back to that meaning in s 501(6)²⁶.

47 The second basis for KDSP's challenge to the validity of PIC 4001 insofar as it is applied by cl 790.226(a) was to suggest that the clause had transformed the discretionary nature of the Minister's power to make a decision under the various parts of s 501 into a mandatory duty to make such a decision. In other words, the mandatory nature of cl 790.226(a) in its application of PIC 4001 had purported to contradict the discretionary nature of s 501, creating an inconsistency between the *Migration Act* and the *Migration Regulations*. But there is no such mandatory requirement in PIC 4001 and no such contradiction. Although cl 790.226(a) makes the satisfaction of PIC 4001 mandatory for the grant of the SHEV, it does not require the Minister to exercise the power under s 501. For instance, the Minister might not exercise any power under s 501 but PIC 4001 could be satisfied by para (b) if a delegate of the Minister is "satisfied, after appropriate inquiries, that there is nothing to indicate that the person would fail to satisfy the Minister that the person passes the character test".

48 For completeness, a final submission by senior counsel for KDSP, which concerned departmental policy but was unrelated to the facts of this case, was that

24 *Legislation Act 2003* (Cth), s 13(1)(b).

25 (2012) 251 CLR 1 at 53 [92], 81-82 [188]-[189], 104 [266], 161 [431].

26 *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at 246 [86].

a departmental policy to the following effect was invalid: "A visa cannot be refused on character grounds by a s 65 delegate because of a failure by the applicant to satisfy PIC 4001." It is unnecessary to assess that submission. There was no refusal of KDSP's application by a s 65 delegate for failure to satisfy PIC 4001.

49 Since these grounds fail on their factual premise, it is unnecessary to consider the validity of the legal premise underlying these grounds. The legal premise was that mandamus could lie to compel a delegate to make a decision under s 65 based upon written or electronic entries that the delegate had recorded about their views. It may be open to doubt that a delegate would be bound by a prior, internally recorded view that protection obligations had, or had not, been met. There may be much to be said for the submission by the Minister that the relevant satisfaction of the delegate is the satisfaction at the time the decision is made. Within the reasonable time in which the decision must be made there is room for the Minister or delegate to change their mind about the satisfaction of various criteria even if the view previously held had been recorded internally.

The second ground

50 The second ground alleges the unlawfulness of the internal process and policy by which a delegate, with authority to perform the duty under s 65, would refer the application to the VACCU for consideration of whether the Minister's power under s 501 should be exercised. KDSP submitted that the implementation of this process in the period commencing 18 November 2016 and ending on 16 February 2017 was unlawful. KDSP seeks a declaration to this effect. There is a dispute between the parties concerning whether the documents upon which KDSP relies to assert that the referral process was unlawful were applicable at the time of consideration by the Second Delegate. It is unnecessary to resolve this dispute because, on the policy before the Court, the process is not unlawful. There is nothing in the *Migration Act* which prevents an officer with delegated power to make a decision under s 65 from forming indicative or preliminary views prior to making the decision. Nor is there anything which prevents the officer from referring the application for a decision under s 501. Such a referral does not involve a piecemeal approach to a s 65 decision. There is only ever one decision made under s 65.

51 KDSP relied upon numerous paragraphs in written departmental policies concerning circumstances in which a "s 65 delegate" was "required" to refer an application to the VACCU for consideration of character issues, being issues concerning s 501. For instance, KDSP submitted that the referral process that was in operation as at 18 November 2016 involved a delegate of the Minister considering the grant of a visa under s 65 subject to a direction, if the visa was not to be refused on any other basis, not to consider paras (c) and (d) of PIC 4001 and instead to refer the visa application to the VACCU, where the Minister or a delegate would consider whether to exercise the power in s 501. If the power in

s 501 was not exercised, then the application would be referred back to the delegate considering the exercise of power under s 65.

52 KDSP submitted that the various internal policies involved a direction by Commonwealth officers, rather than the Minister, contrary to s 499 of the *Migration Act*, which was said to be the only source of power for directions to be given. Alternatively, KDSP submitted that if the policies were a direction from the Minister then they would be contrary to s 499(2), which precludes directions by the Minister that are inconsistent with the *Migration Act* or the *Migration Regulations*. This was said to be so because it is not lawful for the Minister to require a "s 65 delegate" to refrain from considering paras (c) and (d) of PIC 4001.

53 The problem with KDSP's submission is that it seeks to segment a single decision into various discrete decisions. A delegate of the Minister who is considering the grant of a visa under s 65 makes only one decision – a binary decision to grant (s 65(1)(a)) or to refuse to grant (s 65(1)(b)) a visa upon consideration of a valid application – not a series of stepped decisions. Contrary to the submissions of KDSP, the nature of a decision under s 65 is not altered by the extended definition of a "decision" in s 474, which is concerned with "privative clause decisions". KDSP specifically relied on s 474(3)(h), which draws into the class of "decision" referred to "in this section" (ie s 474) the "conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation". Plainly, s 474(3)(h) is not extending the meaning of a decision under s 65.

54 There is, therefore, no reason why the single decision made under s 65 could not be deferred pending consideration by the Minister, or another delegate, of whether or not to exercise the power under s 501. The decision under s 65 must still be made within a reasonable time but what amounts to a reasonable time is determined "having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act"²⁷. That decision-making framework includes a reasonable opportunity, where relevant, for the Minister or delegate (where permitted) to consider, and exercise, any powers under s 501. Indeed, the condition in s 65(1)(a)(iii) that the "grant of the visa is not prevented by section ... 501 (special power to refuse or cancel) or any other provision of this Act" contemplates that the Minister will at least have an opportunity to exercise that power. It is both lawful and desirable for the

27 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 190 [37].

Department to develop policies and processes to facilitate the exercise of powers such as those under s 501 consistently with a decision under s 65²⁸.

55 The departmental policy permissibly allowed the delegate who performs the duty imposed by s 65(1) to form views on whether the visa applicant satisfies criteria other than those going to character and security and to await a separate decision under s 501. The views formed by a delegate holding a delegation to make a decision under s 65, however firmly held and whether or not recorded, could only ever be preliminary or indicative views, since the relevant time for making a decision is the time at which the delegate considers all criteria together. And, contrary to the submission of KDSP, there is no departmental policy which prevents full consideration by the delegate of all the conditions required by s 65. For instance, the provision in the Department's Procedures Advice Manual which requires the return of the application to the delegate where the Minister has decided not to refuse the visa, and which provides that "the applicant will have satisfied PIC 4001(c) or (d), whichever is applicable", is doing nothing more than describing a state of fact.

56 In short, the delegate only makes a single decision under s 65(1): whether to grant or refuse to grant a visa. No such single decision was ever made in relation to KDSP under s 65 by the First Delegate.

The third ground

57 The third ground seeks declarations that PIC 4001 is invalid and cl 790.226(a) of Sch 2 to the *Migration Regulations* was not, on 18 November 2016, and is not, validly prescribed as a criterion for the purposes of s 35A(6)(b) of the *Migration Act*. KDSP submitted that PIC 4001 is "void for uncertainty" and ultra vires the regulation-making power in s 504 of the *Migration Act* and consequently that the part of cl 790.226(a) which refers to PIC 4001 is also invalid. For the reasons already given above, this submission must be rejected.

The fourth ground

58 The fourth ground relies upon the same matters as the first grounds, asserting that the Minister, by the Second Delegate, had no power to make the decision under s 501(1) on 21 July 2017 as by that time KDSP had met all of the criteria for the grant of the SHEV. KDSP seeks extensions of time and orders quashing the Minister's decision, by one of his delegates, under s 501(1). This ground fails for the same reasons set out above. In any event, any relief in relation

28 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 194 [54].

to this ground would be futile because the decision made by the Second Delegate under s 501(1) was set aside by the Tribunal. Even if the Minister's decision made under s 501(1) could have been said to be invalid, the Tribunal had authority to set aside the decision in fact made by the Minister²⁹. Whether valid or not, the decision by the Second Delegate has no practical effect upon KDSP.

The fifth ground

59 The fifth ground is that the Minister had no power to make the decision under s 501A(2), and KDSP seeks extensions of time and orders quashing the Minister's decision. Apart from KDSP's first grounds – which assert, in the teeth of a reasonable suspicion by officers that he was an unlawful non-citizen, that his detention was unlawful – the fifth ground is a crucial ground for all of the relief sought by KDSP. The fifth ground is crucial for KDSP because unless the Minister's decision to refuse KDSP the SHEV under s 501A(2) is quashed, he cannot be granted the SHEV. The fifth ground is therefore assessed separately below.

60 In the fifth ground, KDSP asserts that the decision of the Minister made under s 501A(2) was invalid because if the First Delegate had complied with her duty under s 65(1)(a) of the *Migration Act*, it "would have been apparent to the Minister" that the Minister's duty to consider a valid application for a visa had ended pursuant to s 47(2)(b) because the Minister had "grant[ed] ... the visa". In other words, on KDSP's submission, s 47(2)(b) is not concerned with a factual state of affairs. Rather, so it was said, s 47(2)(b) is concerned with a deemed, or legal, state of affairs so that the Minister's duty to consider an application for a visa had come to an end because (on the contested assumption that all the criteria for the SHEV had been satisfied) the visa *should* have been granted.

Delays in seeking relief and overlap with the Federal Court proceedings

61 Apart from the declarations sought by KDSP in the second and third grounds, all other grounds of relief sought by KDSP require substantial extensions of time. Without the extensions of time on those other grounds, which are concerned with relief specifically directed to KDSP, there would be no utility for KDSP in the grant of the declarations sought in the second and third grounds.

62 Section 486A(1) of the *Migration Act* requires that an application to this Court for a remedy to be granted in exercise of the Court's original jurisdiction in relation to a migration decision must be made to the Court "within 35 days of the date of the migration decision". There is a power to extend time under s 486A(2)

29 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307. See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 232-233 [39], 248 [95].

as this Court considers appropriate if (i) an application for an order extending that time has been made in writing to the Court, specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order and (ii) this Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

63 By s 486A(3), read with s 477(3)(d), the orders sought by KDSP relate to migration decisions for which written notice was given on, or for which the appropriate date is: 18 November 2016 – in relation to the alleged failure of the Minister to grant the SHEV; 21 July 2017 – in relation to the decision of the Second Delegate under s 501(1); and 18 April 2019 – in relation to the Minister's decision under s 501A(2). KDSP's grounds for judicial review in relation to these decisions are, respectively, out of time by more than: three and a half years; three years; and one year. By the rules of this Court, and subject to the grant of an extension of time³⁰, KDSP's application for writs of certiorari in relation to the decisions of the Minister under s 501(1) and s 501A(2), respectively by the Second Delegate and personally, are also years or many months out of time³¹.

64 There is no adequate explanation for these lengthy delays by KDSP. To the extent that KDSP's explanation relies upon his counsel's late appreciation of a new argument relating to the implementation of the referral process to the Second Delegate, even if this alone were a sufficient explanation for substantial delay it would not explain the delay between (i) 11 March 2020 (by which time, even on KDSP's case, he could have become aware of the implementation of a referral process to a delegate with authority to make a decision under s 501) and (ii) the commencement of this proceeding on 25 September 2020. And although KDSP asserted that only this Court has jurisdiction in relation to the fourth ground because the Federal Circuit Court of Australia³² and Federal Court³³ lack jurisdiction, there is no adequate explanation for why the fourth ground was brought three years out of time in this Court and only after KDSP's appeal to the Full Court of the Federal Court had been dismissed.

65 Most fundamentally, there is not merely no adequate explanation for the lengthy delay by KDSP in seeking the crucial ground of relief, namely the fifth

30 *High Court Rules 2004* (Cth), r 4.02.

31 *High Court Rules*, r 25.02.2(b).

32 See *Migration Act*, ss 476(2)(a), 476(4), read with ss 5(1) (definition (b) of "migration decision"), 5E(1)(b), 474(2), 474(3)(b).

33 Compare *Migration Act*, s 476A(1)(c) with decisions purportedly under s 501 made by a delegate of the Minister.

ground. Whether or not the fifth ground is an abuse of process or raises matters upon which the Minister can preclude a further proceeding³⁴, the issue asserted in the fifth ground was so relevant to the subject matter of the judicial review application in the Federal Court that the failure to rely upon it either at first instance or upon appeal to the Full Court of the Federal Court or as a new ground in KDSP's special leave application is itself a sufficient basis to refuse to extend time.

66 By the time that the Federal Court proceedings were heard in June 2019, KDSP had been aware for more than two months that the SHEV had been refused by the Minister under s 501A(2). On 10 May 2019, in those proceedings, Ms Pfeiffer had affirmed an affidavit which said that KDSP's SHEV application had been "referred for character consideration under s 501 of the Act due to his criminal convictions". A challenge to the lawfulness of that referral of the character consideration under s 501 of the *Migration Act*, as a step that somehow invalidated the Minister's consideration of s 501A(2), should reasonably have been made in the Federal Court proceedings. If KDSP's concern was that further documents would be needed to support that submission, then those documents could have been sought in those proceedings.

The merits of the fifth ground

67 In any event, the crucial fifth ground relied upon by KDSP is misconceived.

68 Section 501A applies, by ss 501A(1)(b) and 501A(1)(c), if the Tribunal makes a decision "not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person". This precondition for the operation of s 501A is concerned with a decision, described as the "original decision", that is made, as a matter of fact, by the Tribunal. The precondition is not concerned with whether the decision of the Tribunal is, or is not, valid as a matter of law. Just as the Tribunal had jurisdiction to make its decision under s 501(1) even if the decision of the Second Delegate were invalid, so too the Minister had jurisdiction to make a decision under s 501A(2) even if the decision of the Tribunal were invalid³⁵.

69 Sections 501(1) and 501A(2) of the *Migration Act* operate irrespective of whether a person meets all requirements for the grant of a visa under s 65, since the power to grant a visa under s 65 requires, by s 65(1)(a)(iii), that the grant of the visa "is not prevented by section ... 501 (special power to refuse or cancel) or any other provision of this Act". The very purpose of ss 501(1) and 501A(2) is to permit the refusal of a visa even if the s 65 requirements for the grant of a visa are

34 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.

35 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 313-315, 335, 337; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 232-233 [39], 248 [95].

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otherwise met. The Minister's powers under ss 501(1) and 501A(2) are therefore not spent even if a visa *should* have otherwise been granted under s 65, but has not been granted.

70 The Minister's duty to consider a valid visa application under s 47, and the Minister's ability to exercise the powers under ss 501(1) and 501A(2), do not come to an end pursuant to s 47(2)(b) merely because a visa *should* have been granted under s 65. As Bromberg J held in the Full Court of the Federal Court in the proceedings in which this fifth ground could have been agitated, the Minister's power under s 501A(2) "is a step in the performance of the duty imposed by s 65"³⁶. Similarly, O'Callaghan and Steward JJ said that s 501(1) and visa criteria such as the criterion prescribed in s 36(1C) are "cumulative requirements"³⁷.

71 On the facts of this case, the provision in s 501A(2)(a) that the Minister may set aside the original decision and "refuse to grant a visa to the person" applied to the "original decision" of the Tribunal on 12 October 2017 to set aside the decision of the Second Delegate so that the discretion under s 501(1) of the *Migration Act* would not be exercised to preclude KDSP's application for a SHEV.

Conclusion

72 KDSP requires an extension of time to bring his application for writs of certiorari. For the reasons above, that extension of time should be refused. KDSP should not now be permitted to bring a challenge in this Court's original jurisdiction to the decision of the Minister under s 501A(2). Further, KDSP's challenge on the fifth ground has no prospects of success. The remainder of the relief sought is futile and, in any event, also has no prospects of success. The application must be dismissed with costs.

36 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 29 [115].

37 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 77 [284].