# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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ENT19 PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS & ANOR DEFENDANTS

*ENT19 v Minister for Home Affairs*
[2023] HCA 18
*Date of Hearing: 8 December 2022, 14 & 15 March 2023*
*Date of Judgment: 14 June 2023*
S102/2022

**ORDER**

1. *A writ of certiorari issue quashing the decision of the first defendant made on 27 June 2022 to refuse to grant the plaintiff a Safe Haven Enterprise (Class XE) Subclass 790 visa.*

2. *A writ of mandamus issue commanding the first defendant to determine the plaintiff's visa application according to law within 14 days of the date of this order.*

3. *The defendants pay the plaintiff's costs.*

**Representation**

L G De Ferrari SC with J D Donnelly and E A M Brumby for the plaintiff (instructed by Zarifi Lawyers) at the hearing on 8 December 2022

B W Walker SC with L G De Ferrari SC, J D Donnelly and E A M Brumby for the plaintiff (instructed by Zarifi Lawyers) at the hearings on 14 & 15 March 2023

S B Lloyd SC with A M Hammond and J G Wherrett for the defendants (instructed by Australian Government Solicitor)

## CATCHWORDS

## ENT19 v Minister for Home Affairs

Immigration – Refugees – Application for protection visa – Power of Minister under s 65 of *Migration Act 1958* (Cth) to grant or refuse to grant visa – Where visa criterion in Sch 2, cl 790.227 of *Migration Regulations 1994* (Cth) required Minister to be satisfied grant of visa in national interest – Where plaintiff convicted of aggravated offence of people smuggling – Where Minister personally refused to grant plaintiff protection visa – Where sole basis for decision that cl 790.227 not satisfied – Where Minister conceded all other criteria for grant of visa met – Where Minister did not exercise power to refuse visa under s 501 of Act – Whether cl 790.227 permitted Minister to refuse to grant visa solely on ground that not in national interest to grant visa to person convicted of people smuggling – Proper construction of cl 790.227 – Whether Minister's decision authorised by cl 790.227.

Statutes – Interpretation – Context – Construction of visa criterion in Regulations – Where Act of Parliament inserted criterion into existing Regulations made by Governor-General.

Administrative law – Judicial review – Certiorari and mandamus.

Words and phrases – "character test", "mandamus", "national interest", "people smuggling", "personally", "protection visa", "refugee", "unauthorised maritime arrival", "visa refusal".

*Migration Act 1958* (Cth), ss 47, 65, 233C, 501.
*Migration Regulations 1994* (Cth), Sch 2, cl 790.227; Sch 4, Pt 1, cl 4001.

1 KIEFEL CJ, GAGELER AND JAGOT JJ. This application in the original jurisdiction of the High Court under s 75(v) of the *Constitution* challenges the validity of a decision made personally by the Minister for Home Affairs. The decision, made in 2022, was to refuse to grant a Safe Haven Enterprise (Class XE) Subclass 790 visa ("SHEV") to the plaintiff, who had, in 2017, been convicted of the aggravated offence of people smuggling contrary to s 233C of the *Migration Act 1958* (Cth) ("the Act") and sentenced to an eight-year term of imprisonment.

2 The Minister refused to grant the visa to the plaintiff on the sole basis that the Minister was not satisfied that granting the visa to the plaintiff was in the national interest, and so was not satisfied of the criterion for the grant of a SHEV prescribed by cl 790.227 of Sch 2 to the *Migration Regulations 1994* (Cth) ("the Regulations") in terms that "[t]he Minister is satisfied that the grant of the visa is in the national interest".

3 The application also challenged the lawfulness of the detention of the plaintiff. During oral submissions, however, it became apparent that the plaintiff did not challenge the lawfulness of his detention separately from his challenge to the validity of the decision of the Minister. Absent any basis being advanced in those oral submissions for linking the asserted unlawfulness of the detention of the plaintiff to the asserted invalidity of the decision of the Minister, no issue concerning the lawfulness of the detention of the plaintiff properly arises for consideration.

**The issues**

4 The plaintiff's challenge to the decision of the Minister, as the majority explains[1], was ultimately refined during oral submissions to turn on the resolution of four issues. First, was the decision authorised by cl 790.227 on its proper construction? Second, was the decision made for the impermissible purpose of punishing the plaintiff? Third, was the decision made on the incorrect understanding that the Minister personally could not grant the visa? Fourth, was the decision made without taking account of mandatory relevant considerations?

5 The second and third of those issues can be resolved at a factual level by reference to the Minister's written reasons for decision. Those reasons are to be read against the decision-making background, recounted by the majority[2], which

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**1** See reasons of Gordon, Edelman, Steward and Gleeson JJ at [51].

**2** See reasons of Gordon, Edelman, Steward and Gleeson JJ at [47]-[48], [70]-[81].

includes the history of prior litigation and the range of decision-making options presented to the Minister in the departmental briefs to the Minister.

6 The Minister's reasons for decision reveal that the Minister correctly understood that s 65(1)(a)(ii) and (b) of the Act required her, as the self-chosen decision-maker in respect of the plaintiff's application for a SHEV, to refuse to grant a SHEV to the plaintiff if not satisfied that all criteria for a SHEV prescribed by the Act and the Regulations were satisfied. The only criterion to which the Minister directed her attention in making that decision was that prescribed by cl 790.227. Implicit in the choice of the Minister to make the decision by reference to that criterion herself, rather than to leave the making of a decision to a delegate, was recognition that the grant or refusal of a SHEV to the plaintiff was to turn on the Minister's own satisfaction or non-satisfaction of that criterion. From this it follows that the Minister also recognised that if all relevant criteria and requirements were satisfied the Minister was to grant the visa in accordance with s 65(1)(a) of the Act. The third issue, accordingly, involves no error by the Minister.

7 The Minister's reasons for decision further reveal that she avoided any reliance on the character of the plaintiff. The Minister adopted and acted on the uncomplicated and unsurprising view that it was "not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa". For a person convicted of people smuggling to be seen to get the benefit of a protection visa, the Minister explained, "would send the wrong signal to people who may be contemplating engaging in similar conduct in the future" and would tend to undermine "the confidence of the Australian community in the protection visa program". In no meaningful sense can the purpose of the Minister revealed by those reasons be described as punitive. The second issue, accordingly, also involves no error by the Minister.

8 The fourth issue can be resolved without difficulty at the level of principle. The satisfaction of the Minister or delegate required in order to satisfy the criterion prescribed by cl 790.227 that the grant of a SHEV is in the national interest is a state of mind on the part of the decision-maker which must be arrived at by the decision-maker reasonably and on a materially correct understanding of the Act and the Regulations[3]. Neither expressly nor implicitly do the Act or the Regulations make that state of mind one which must be informed by particular

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**3** *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57].

considerations. The notion of mandatory relevant considerations has no application[4].

9 That leaves only the first of the identified issues: whether cl 790.227 authorised refusal of a SHEV to the plaintiff on the basis of the Minister adopting and acting on the view that it was not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa.

**The national interest**

10 Resolution of that remaining issue starts by recognising that the Act expresses its one and only object as being "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"[5]. The Act explains the totality of the provisions it contains for "visas permitting non-citizens to enter or remain in Australia" as being "[t]o advance" that object[6].

11 In the statement of that overall statutory object, as elsewhere in the Act[7], "the national interest" indicates a considered response to what is "largely a political question"[8]. The expression has exactly the same meaning where used in the Regulations[9]. Specifically, the expression has exactly the same meaning where it is used in Sch 2 to the Regulations in the prescription of criteria for the grant of a class of protection visas[10], which s 65(1)(a)(ii) and (b) of the Act require a decision-maker to apply in deciding whether to grant or refuse a visa of that class.

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**4** *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819 at 824 [12], 830 [41]; 403 ALR 604 at 607-608, 616.

**5** Section 4(1) of the Act.

**6** Section 4(2) of the Act.

**7** See ss 145(1)(b), 146(2)(b), 176, 198AB(2)-(3), 339, 411(3), 473BD, 501(3), 501A(2)-(3), 501B(2), 501BA(2), 502(1) of the Act.

**8** *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 46 [40].

**9** See s 13(1)(b) of the *Legislation Act 2003* (Cth).

**10** See now cll 785.227 and 866.226 of Sch 2 to the Regulations.

12 There is no novelty in that proposition. Clause 790.227 was inserted into Sch 2 to the Regulations by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ("the 2014 Act"). At the same time as it inserted s 35A into the Act, providing for a protection visa to be a visa of a class provided for by that section and for there to be a class of temporary protection visas to be known as "safe haven enterprise visas", the 2014 Act also directly amended Sch 1 to the Regulations to create SHEVs as a protection visa and class of temporary visa and directly inserted into Sch 2 to the Regulations the criteria for a SHEV, which include cl 790.227. Before the 2014 Act, however, Sch 2 to the Regulations had always included a criterion identical to that prescribed by cl 790.227, requiring the Minister to be satisfied that the grant of a protection visa was in the national interest[11].

13 Importantly, a criterion for the grant of a protection visa identical to that prescribed by cl 790.227 contained in Sch 2 to the Regulations in the form in which Sch 2 existed before the 2014 Act was considered in *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]*[12]. There it was unanimously said that "where ... the criterion to be applied by the Minister requires the Minister to be satisfied that the grant of the visa is 'in the national interest', the decision-maker may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office".

**The consistency limitation**

14 *Plaintiff S297/2013 [No 2]* nevertheless recognised a limitation on the authorised application under s 65(1)(a)(ii) and (b) of the Act of a criterion requiring the Minister to be satisfied that the grant of a visa is in the national interest. The limitation, in short, is that the political question posed by the criterion cannot be answered by the decision-maker in a manner inconsistent with any affirmative provision of the Act.

15 The affirmative provision of the Act with which the application of the criterion was held to be inconsistent in *Plaintiff S297/2013 [No 2]* was s 46A, which was interpreted as an exhaustive statement by the Parliament of the visa consequences which were to attach to the status of an "unauthorised maritime

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**11** See cl 866.226 of the *Migration Regulations 1994* (Cth) (as in force 1 September 1994).

**12** (2015) 255 CLR 231 at 242 [18], quoting *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 455 [50] (internal quotation marks omitted).

arrival". A negative corollary of that exhaustive affirmative statement was that a decision-maker lacked authority to add to those legislatively stated visa consequences by treating an applicant's status as an unauthorised maritime arrival as sufficient to justify the conclusion that it was not in the national interest to grant the protection visa sought[13].

16 An observation was made in *Plaintiff S297/2013 [No 2]* to the effect that a criterion prescribed by regulation which operated to permit the Minister "to refuse to grant a valid application for a visa only because the applicant is an unauthorised maritime arrival" would be "inconsistent with the Act and invalid"[14]. The observation highlighted the essential unity between the limitation on the authorised application under s 65(1)(a)(ii) and (b) of the Act of a criterion requiring the Minister to be satisfied that the grant of a visa is in the national interest and the limitation on the scope of the power to prescribe a visa criterion in the exercise of the general regulation-making power conferred by s 504 of the Act to "make regulations, not inconsistent with [the] Act, prescribing all matters which by [the] Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to [the] Act".

17 In *Plaintiff M47/2012 v Director-General of Security*[15], it was held by majority that a criterion for a protection visa prescribing that the visa applicant was not assessed by the Australian Security Intelligence Organisation ("ASIO") to be a risk to security was inconsistent with the Act, and therefore beyond the scope of the regulation-making power conferred by s 504 of the Act. The inconsistency of the prescribed criterion with the Act was held to lie in the criterion operating through s 65(1)(a)(ii) and (b) of the Act to undermine the operation of s 500(1)(c) of the Act, the efficacy of which was held to require that, as an aspect of determining whether the applicant met the statutory criterion then expressed in s 36(2)(a) in terms that the applicant was a non-citizen "to whom the Minister [was] satisfied Australia [had] protection obligations under the Refugees Convention as amended by the Refugees Protocol", any assessment of whether an applicant for a protection visa would be a risk to security would be undertaken only in reliance on Art 1F, Art 32 or Art 33(2) of the Refugees Convention. The inconsistency of the prescribed criterion with the Act was described as arising from

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**13** *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231 at 243 [21].

**14** *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231 at 243 [21].

**15** (2012) 251 CLR 1.

the criterion's variation or departure from – its alteration, impairment, or detraction from – those specifically identified "positive provisions" of the Act[16].

18 The limitation recognised in *Plaintiff S297/2013 [No 2]* on the authorised application under s 65(1)(a)(ii) and (b) of the Act of a criterion requiring the Minister to be satisfied that the grant of a visa is in the national interest can be stated correspondingly in terms that a decision-maker cannot choose to adopt and act on a view of the national interest that would alter, impair or detract from any positive provision that is made by the Act itself in pursuit of the national interest. The authority of the decision-maker to adopt and act on a view of the national interest in addressing the political question posed by the criterion is circumscribed insofar as the decision-maker lacks authority to act on a view of the national interest which contradicts or negates any aspect of the national interest that has already been determined by the Parliament.

19 That is the limitation which arises for consideration in the present case. The plaintiff's argument that cl 790.227 did not authorise refusal of a SHEV on the basis of the Minister adopting and acting on the view that it was not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa was advanced in numerous ways. But it boiled down to an argument that to adopt and act on that view of the national interest was to detract from one or both of two positive provisions of the Act: s 36(1C) and s 501.

**Section 36(1C)**

20 Section 36(1C) provides that a criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds, "is a danger to Australia's security" or, "having been convicted ... of a particularly serious crime, is a danger to the Australian community". The expression "particularly serious crime" is defined for that purpose to include a crime that consists of the commission of a "serious Australian offence" or a "serious foreign offence"[17]. The expression "serious Australian offence" is defined[18] in terms which do not extend to an offence against s 233C of the Act, despite an offence against that section being punishable by imprisonment for a maximum term of 20 years

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**16** See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 77 [174], explaining and applying *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410. See also (2012) 251 CLR 1 at 41-42 [54], 147-148 [382], 162-163 [434].

**17** Section 5M of the Act.

**18** Section 5(1) of the Act.

and carrying by force of s 236B a mandatory minimum term of imprisonment for five years.

21 Taken at its highest, the argument of the plaintiff was that s 36(1C) must be read as a statement of the consequences of the matters stated therein for the grant or refusal of a protection visa, which operates to the exclusion of the prescription or application of a criterion in Sch 2 to the Regulations by reference to the same subject-matter.

22 Recognising that s 36(1C) was inserted into the Act by the 2014 Act in order to "codify" Art 33(2) of the Refugees Convention for the purpose of determining an application for a protection visa under the Act[19], the plaintiff sought to equate the exclusive subject-matter of s 36(1C) with the subject-matter of Art 33(2) of the Refugees Convention. Translated to the scheme of the Act, the subject-matter of s 36(1C) which the plaintiff in that way argued to be exclusive is perhaps best described as the grounds on which a protection visa might be denied by reference to national security or a criminal conviction.

23 To be noted at once is that for s 36(1C) to operate to the exclusion of the prescription or application of a criterion under Sch 2 to the Regulations, non-satisfaction of which would result in denial of a protection visa on grounds of national security or a criminal conviction, would have far-ranging ramifications. The exclusive operation of s 36(1C) would not merely result in non-application of a criterion such as that prescribed by cl 790.227 to deny a protection visa by reference to the national interest in circumstances where an applicant has been convicted of a crime but is not a danger to the Australian community. The exclusive operation of s 36(1C) would result also in non-application of a criterion such as that prescribed by cl 790.226 to the extent that the criterion would pick up public interest criterion 4001 ("PIC 4001") to deny a protection visa to an applicant who, having been convicted of a crime, was unable to satisfy the Minister that he or she passed the "character test", an expression which has been taken to have the same meaning in PIC 4001 as it has in s 501(6)[20]. An applicant convicted of a crime that is not a particularly serious crime might fail the "character test" in a variety of circumstances including, for example, where the applicant has a "substantial

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**19** Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at [1236].

**20** See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 53 [92], 81-82 [188]-[189], 104 [266], 161 [431].

criminal record"[21] or has been convicted of "sexually based offences involving a child"[22].

24 Properly construed within the context of Div 3 of Pt 2 of the Act, s 36(1C) does not operate to the exclusion of the prescription or application of the criterion prescribed by cl 790.227 or any other criterion in Sch 2 to the Regulations. The Division makes express provision in s 31(3) for criteria prescribed by the Act for the grant of visas of a class provided for by the Act to be supplemented by additional criteria prescribed by regulation. More than one provision within the Division[23] makes clear that, where additional criteria for the grant of visas of a class provided for by the Act have been prescribed by regulation, no visa of the class in question can be granted unless the applicant satisfies both any applicable criteria under the Act that relate to the grant of visas of that class, and any applicable criteria prescribed by regulation that relate to the grant of visas of that class.

25 Within that overall context, the potential for the criteria prescribed by s 36 of the Act for the grant of a class of protection visas to be supplemented by additional criteria prescribed by regulation is put beyond any shadow of doubt by s 35A(6). That provision states that the criteria for a class of protection visas are, first, the criteria set out in s 36 and, second, "any other relevant criteria prescribed by regulation for the purposes of section 31".

26 Nothing in the scheme of Div 3 of Pt 2 of the Act suggests that criteria for the grant of any class of visas must be mutually exclusive. Insofar as s 36(1C) operates to deny a protection visa on national security grounds, for example, s 36(1C) plainly overlaps with s 36(1B), which was itself inserted into the Act earlier in 2014[24] in partial response to *Plaintiff M47/2012* and which provides that a criterion for a protection visa is that the applicant is not assessed by ASIO to be a risk to security within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth). Section 36(1A) requires that every applicant for a protection visa must satisfy both s 36(1B) and s 36(1C).

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**21** Section 501(6)(a) of the Act.

**22** Section 501(6)(e)(i) of the Act.

**23** Sections 46AA(4) and 65(1) of the Act.

**24** Item 1 of Sch 3 to *Migration Amendment Act 2014* (Cth); Australia, House of Representatives, *Migration Amendment Bill 2013*, Explanatory Memorandum at [143]-[145].

27 Nor does anything within the scheme of Div 3 of Pt 2 of the Act suggest that the subject-matter of criteria for the grant of a class of visas prescribed by regulation cannot overlap with the subject-matter of criteria for the grant of that class of visas prescribed in the Act. Insofar as they deal with denial of a protection visa on national security grounds, for example, s 36(1C) and s 36(1B) both plainly overlap with PIC 4001 as picked up by cl 790.226 to the extent that PIC 4001 applies to a person who does not pass the "character test" by reason of the circumstance referred to in s 501(6)(g) (in terms materially identical to s 36(1B)), the circumstance referred to in s 501(6)(d)(v) (where the person represents a danger to the Australian community or a segment of it), or the circumstance referred to in s 501(6)(h) (being where there is in force an Interpol notice in relation to the person from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community).

28 Were further confirmation necessary of a legislative intention that s 36(1C) not operate to the exclusion of the prescription or application of another criterion in Sch 2 to the Regulations for the grant of a SHEV, that confirmation could be found in the patent overlap between s 36(1C) and PIC 4001 as picked up by cl 790.226 combined with the manner and timing of their introduction. Given that s 36(1C) (like s 35A) and cl 790.226 (like cl 790.227) were inserted into the Act and the Regulations respectively by the 2014 Act, it can be taken that the Parliament saw no contrariety in their concurrent operation.

**Section 501**

29 Section 501 of the Act has been judicially considered on many occasions. Section 501(1), which is headed "Decision of Minister or delegate – natural justice applies", provides that the Minister "may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Section 501(3), which is headed "Decision of Minister – natural justice does not apply", relevantly provides that the Minister may "refuse to grant a visa to a person ... if ... the Minister reasonably suspects that the person does not pass the character test" and "the Minister is satisfied that the refusal or cancellation is in the national interest".

30 Section 501(4) provides that the power under s 501(3) may only be exercised by the Minister personally and s 501(5) provides that the rules of natural justice do not apply to a decision under s 501(3). If the Minister makes a decision under s 501(3), s 501(4A) obliges the Minister to cause notice of the making of the decision to be laid before each House of the Parliament, and s 501C(3) obliges the Minister to notify the person concerned of the decision and to invite that person to make representations about the revocation of the decision. Section 501C(4) provides that the Minister may decide to revoke the original decision made under s 501(3) if the person makes representations in accordance with the invitation and

satisfies the Minister that the person passes the "character test". Mirroring s 501(4A), s 501C(8) obliges the Minister to cause notice of the making of a decision to revoke or not to revoke the original decision to be laid before each House of the Parliament.

31 Amongst the numerous circumstances set out in s 501(6) as those in which a person does not pass the "character test" are those specified in s 501(6)(a) (being where the person has a "substantial criminal record" as defined by s 501(7)) and in s 501(6)(ba)(i) (being where the Minister reasonably suspects that the person has been or is involved in conduct constituting an offence under one or more of ss 233A to 234A, which relate to people smuggling). The circumstances in which a person has a "substantial criminal record" as defined by s 501(7) include where the person has been sentenced to a term of imprisonment of 12 months or more. By operation of each of s 501(6)(a) and s 501(6)(ba)(i), a person convicted of an offence against s 233C and sentenced to a mandatory minimum term must fail to satisfy the "character test".

32 The plaintiff's argument at its narrowest was to the effect that s 501(3) should be construed as an exhaustive statement of national interest considerations relating to a visa applicant's failure to pass the "character test". A strand of the argument seemed to be that s 501(4A) and s 501C(8) are important political checks on the Minister's resort to the public interest which would be rendered nugatory were the Minister able to take national interest considerations into account in refusing a visa independently of s 501(3).

33 The argument overstated the role of the national interest in s 501(3). Section 501(3) does not confer a general power to refuse visas in the national interest but rather a power to refuse a visa to a person who fails the "character test", which can be done without natural justice if the Minister is satisfied that the refusal is in the national interest, and which when done attracts the notification obligations under s 501(4A) and s 501C(3).

34 The plaintiff's argument at its widest was to the effect that s 501(1) and s 501(3) should together be construed, in light of s 501(6)(a) and s 501(6)(ba)(i), as providing exhaustively for the visa refusal consequences of conviction and sentence for an offence relevantly against s 233C. Why it would not follow from the argument that s 501(1) and s 501(3) would also be construed as providing exhaustively for the visa refusal consequences of all of the other circumstances set out in s 501(6) as those in which a person does not pass the "character test" was not explored.

35 The whole of the plaintiff's argument overlooked s 501H. That section specifically provides that a power under s 501 to refuse to grant a visa to a person "is in addition to any other power under [the] Act, as in force from time to time, to

refuse to grant a visa to a person". The Explanatory Memorandum for the Bill for the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth), which inserted ss 501 and 501H into the Act in 1998[25], made clear that s 501H was intended to mean what it said.

36 In *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs*[26], the Full Court of the Federal Court, comprised of Heerey, Finkelstein and Allsop JJ, dismissed an appeal from a judgment of Crennan J holding that a criterion for the grant of a protection visa then in cl 866.222A of Sch 2 to the Regulations (that an applicant not have been convicted in the previous four years of an offence carrying a maximum penalty of imprisonment for 12 months or more) was not inconsistent with s 501. Her Honour had said[27]:

> "There is nothing clearly inconsistent or clearly lacking in harmony in the coexistence of a power to refuse a particular class of visa for failure to satisfy certain criteria set out in subordinate legislation and a power to refuse to grant a visa on character grounds under the Act. The fact that each of s 501 of the Act and the Regulation in question refers to convictions, but deals with them differently, one from the other, reflects no more than their different purposes. Section 501 may be exercised independently of the satisfaction of criteria for a visa of a specified class. Clause 866.222A does not diminish, add to or derogate from the regime in s 501."

37 The Full Court expressed agreement with that analysis by Crennan J[28]. The Full Court added that:

> "from the terms of s 501, the terms of s 501H and the Explanatory Memorandum for the Bill, the passing of which introduced ss 501 and 501H into the [Act], s 501 can be seen as a power available to the Minister additional to all other powers of refusal and not intended to carve out a

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**25** Australia, House of Representatives, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*, Explanatory Memorandum at [94].

**26** (2005) 147 FCR 135.

**27** *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 336 at [33].

**28** (2005) 147 FCR 135 at 140 [19].

particular field of criminal conviction or character generally as relevant matters in the grant or refusal of a visa"[29].

38 The substance of that statement was quoted with approval by Heydon and Crennan JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[30]. More recently, the construction of s 501 adopted by Crennan J and the Full Court in *VWOK* was adopted by the Full Court of the Federal Court, comprised of Allsop CJ, Kenny, Besanko, Mortimer and Moshinsky JJ, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20*[31] in rejecting an argument to the effect that s 501 does not apply to protection visa applications because s 36(1C) should be understood as an exhaustive statement of the national security considerations applicable to protection visas.

39 In *BFW20*, the Full Court observed of ss 36 and 501[32]:

"The provisions operate in different ways: if an applicant fails to satisfy the character provisions in the protection visa criteria, the application for a protection visa *must* be refused; whereas, if an applicant fails to satisfy the character provisions in s 501, the application *may* be refused. Thus, there is no necessary inconsistency between the provisions."

40 That observation applies equally to describe the difference in operation of s 501 and any other provision of the Act or the Regulations which prescribes a criterion for the grant of a visa so as to be required to be applied by the Minister or a delegate in deciding to grant or refuse a visa application under s 65(1)(a)(ii) or (b) of the Act. Section 501 confers a discretion to refuse a visa. Refusal of a visa for non-satisfaction of a prescribed criterion, however, is mandatory.

41 Section 501 of the Act does not operate to the exclusion of the prescription or application of a criterion for the grant of a visa. That is so irrespective of whether that criterion is set out in a provision of the Act or prescribed by a provision of the Regulations.

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**29** (2005) 147 FCR 135 at 140-141 [19].

**30** (2006) 228 CLR 566 at 614 [155] (fn 162).

**31** (2020) 279 FCR 475.

**32** (2020) 279 FCR 475 at 509 [129].

**Conclusion**

42 Neither s 36(1C) nor s 501 of the Act, on its proper construction, has the exhaustive operation necessary to sustain the proposition that to adopt and act on the view that it is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa is a course excluded from the authority of the Minister or a delegate applying cl 790.227 under s 65(1)(a)(ii) and (b) of the Act.

43 Ordinarily, a decision-maker applying cl 790.227 under s 65(1)(a)(ii) and (b) of the Act can be expected to be satisfied that it is in the national interest to grant a SHEV to an applicant who satisfies all of the other criteria for the grant of a SHEV prescribed by the Act and the Regulations. But not always. There can be circumstances in which the decision-maker, acting reasonably and consistently with the Act, can adopt and act on a political view that the grant of a protection visa to a particular applicant would not be in the national interest. The circumstances of the present case come within that description.

44 The application should be dismissed with costs.

45 GORDON, EDELMAN, STEWARD AND GLEESON JJ. The plaintiff, a citizen of Iran, arrived in Australia by boat in December 2013 and was immediately detained under s 189 of the *Migration Act 1958* (Cth). As he was an "unauthorised maritime arrival" within the meaning of the Act, the plaintiff was unable to make a valid visa application until, on 7 September 2016, a Minister administering the Act determined under s 46A(2) it was in the public interest that the plaintiff be permitted to do so[33]. On 3 February 2017, the plaintiff made a valid application for a temporary protection visa – a Safe Haven Enterprise (Class XE) Subclass 790 visa (a "SHEV")[34].

46 In October 2017, the plaintiff was convicted after pleading guilty to the aggravated offence of people smuggling, contrary to s 233C of the Act. The sentencing judge found that the plaintiff's first attempt to come to Australia by boat from Indonesia with his father, mother and brother had been unsuccessful. The people smugglers required the family to pay more money for the second journey and ultimately did not allow the plaintiff to travel with the rest of his family. The sentencing judge found that the plaintiff was required to work for the people smugglers in a "people management role" to pay for his passage to Australia to be reunited with his family. While the sentencing judge found that in all the circumstances the plaintiff's moral culpability was significantly reduced, general deterrence was a fundamental consideration in sentencing for a people smuggling offence. The plaintiff was sentenced to a term of imprisonment of eight years, with a non-parole period of four years which expired on 9 December 2017, at which time he was transferred to immigration detention.

47 The plaintiff's visa application was first refused under s 65 of the Act in May 2018 when a delegate of the Minister for Home Affairs determined that the plaintiff was not a person to whom Australia owed protection obligations. On review, the Immigration Assessment Authority remitted the decision for reconsideration with a direction that the plaintiff is a refugee within the meaning of s 5H(1) of the Act. The plaintiff's visa application was purportedly refused for a second time by the then Minister for Immigration and Border Protection under s 501(1) of the Act in October 2019. The plaintiff sought judicial review and that decision was quashed by orders of a judge of the Federal Court of Australia in February 2020 by consent. The plaintiff's visa application was purportedly refused for a third time in May 2020, by the then Minister for Home Affairs under s 65 of the Act. That decision was quashed by the Full Court of the Federal Court in

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**33** *Migration Act*, ss 5AA and 46A.

**34** Section 35A of the *Migration Act* provides for protection visas. There is a class of temporary visas known as SHEVs: s 35A(3A).

November 2021 and an order for mandamus was made[35]. On 14 June 2022, a judge of the Federal Court made an order requiring that the mandamus be complied with on or before 27 June 2022[36].

48 The decision that is the subject of this proceeding was purportedly made on 27 June 2022. The first defendant, the Minister for Home Affairs, purportedly made a decision under s 65 of the Act to refuse the plaintiff's application because she was not satisfied of the visa criterion in cl 790.227 of Sch 2 of the *Migration Regulations 1994* (Cth) that the grant of the SHEV was in the national interest ("the Decision"). The Minister's reasons reveal that the criterion in cl 790.227 was not met because in her view it was not in the national interest to grant a protection visa to a person convicted of a people smuggling offence. In her reasons, the Minister said that she was aware that the plaintiff faces the prospect of indefinite detention under the Act as a legal consequence of the Decision because he cannot be returned to Iran by operation of s 197C(3)[37] and "the prospects of finding another country willing to receive him are poor".

49 Non-satisfaction of cl 790.227 was the sole basis for refusing the plaintiff's application. Satisfaction of the visa criteria other than that in cl 790.227 was not in issue. The defendants accepted that at the time of the Decision all of the criteria for the grant of the visa, apart from cl 790.227, were satisfied.

50 The plaintiff sought judicial review of the Decision in the original jurisdiction of this Court, seeking various remedies on different grounds, including writs of habeas corpus, mandamus and certiorari, and declarations relating to the validity and construction of cl 790.227. During the oral hearing, the plaintiff also sought a declaration that he satisfies the criteria for the grant of a SHEV.

## Issues for determination and resolution

51 The plaintiff filed a Revised Application for a Constitutional or Other Writ after the hearing of the matter was adjourned in December 2022, as well as revised

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**35** *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100.

**36** *ENT19 v Minister for Home Affairs* [2022] FCA 694.

**37** *Migration Act*, s 197C(3) relevantly provides that s 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if the non-citizen has made a valid application for a protection visa that has been finally determined and a "protection finding" was made for the non-citizen with respect to the country.

written submissions. At the resumption of the hearing in March 2023, the plaintiff's counsel informed the Court that his outline of oral argument was definitive of the argument that he sought to put before the Court and that if arguments, or aspects of arguments, were not addressed in the outline of oral argument, they were no longer being pursued. In oral argument, the plaintiff's counsel also confirmed that he did not press the argument, made in the Revised Application, that cl 790.227 is invalid for inconsistency with the Act. That was because cl 790.227 was made not by the Governor-General under s 504 of the Act, but by Parliament inserting the clause into the Regulations[38].

52 Four grounds remained. First, was the Decision authorised by cl 790.227, properly construed? Second, was the Decision contrary to Ch III of the *Constitution*, or alternatively not authorised by the Act, because the power in s 65 was exercised for the purpose of punishing the plaintiff for his criminal offending? Third, was the Decision invalid because the Minister proceeded on the incorrect understanding that she, acting personally, could not grant the visa to the plaintiff under s 65? Finally, was the Decision invalid because the Minister failed to take into account mandatory relevant considerations? The third and fourth grounds received little attention in the parties' submissions.

53 As will be explained, the plaintiff's case is resolved on the first ground – on the proper construction and application of cl 790.227 of the Regulations, the Decision was invalid. A writ of certiorari should issue quashing the Decision and a writ of mandamus should issue commanding the first defendant to determine the plaintiff's application according to law within 14 days[39].

54 It is unnecessary and inappropriate to address the issues raised by the other grounds. In particular, it is unnecessary to consider the proper construction and constitutional validity of the scheme for detention for the purposes of removal under s 198, as qualified by s 197C(3), in circumstances where the plaintiff's visa

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**38** *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ("the Asylum Legacy Caseload Act"), s 3 and Sch 2, Pt 1, item 18E.

**39** *High Court Rules 2004* (Cth), r 25.13.4.

application has not been finally determined and he is presently being detained for the purpose of determination of that application[40].

**Statutory framework**

55 Section 47(1) of the Act imposes a duty on the Minister to consider a valid application for a visa[41]. Section 65 provides that, after considering a valid application for a visa, the Minister is to grant or refuse the visa. The consideration of an application under s 47(1) and the decision under s 65 are routinely made by a delegate.

56 The consideration of a visa application, and the decision to grant or refuse a visa, are not discretionary. The obligation under s 47 is to "consider a valid application for a visa", and under s 65, "after considering a valid application for a visa", is to grant or refuse the visa depending on the satisfaction of certain matters. The requirement to consider an application for a visa under s 47 continues until the application is withdrawn, the Minister grants or refuses to grant the visa, or further consideration is prevented by other provisions of the Act[42]. If, after considering the application, the Minister or delegate is satisfied of the matters in s 65(1)(a)(i) to (iv), the Minister or delegate must grant the visa[43]. If the Minister or delegate is not so satisfied, the Minister or delegate must refuse to grant the visa[44]. As Crennan, Bell, Gageler and Keane JJ said in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* ("*Plaintiff S297 [No 1]*"), "[t]he decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts – to grant the visa under s 65(1)(a), or to refuse to grant the visa under s 65(1)(b) – depending on the existence of one or other of two mutually exclusive states of

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**40** See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 48 [72], 92 [226], 155-156 [404]-[405], 170 [460]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 344 [30], 368-369 [135]-[136], 371 [146]. See also *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 229-230 [21]-[23].

**41** See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 188 [32].

**42** *Migration Act*, s 47(2).

**43** *Migration Act*, s 65(1)(a).

**44** *Migration Act*, s 65(1)(b).

affairs (or 'jurisdictional facts') – the Minister's satisfaction of the matters set out in each of the sub-paragraphs of s 65(1)(a), or the Minister's non-satisfaction of one or more of those matters"[45]. Of course, the Minister's satisfaction or non-satisfaction must be formed lawfully[46]. If it is based on a misconstruction of one or more of the matters, the opinion or belief is not that which s 65 requires in order for the power to be enlivened[47].

57 Under s 65(1)(a), there are four matters of which the Minister or delegate must be satisfied: (i) the health criteria; (ii) the other criteria for the visa prescribed by the Act or the Regulations; (iii) that the grant of the visa is *not* prevented by, among other sections, s 501 (special power to refuse or cancel a visa on character grounds); and (iv) that any amount of visa fee has been paid.

*Section 65(1)(a)(ii)*

58 The criteria for the grant of a protection visa – including a SHEV – are the criteria set out in s 36 and any other relevant criteria prescribed by regulation for the purposes of s 31[48]. Section 36(1A) provides that an applicant for a protection visa must satisfy both of the criteria in s 36(1B) (applicant is not assessed adversely by the Australian Security Intelligence Organisation) and s 36(1C) (Minister does not consider on reasonable grounds that the applicant is a danger to Australia's security, or, having been convicted of "a particularly serious crime"[49], is a danger to the Australian community), and at least one of the criteria in s 36(2) (Australia owes protection obligations to the applicant because they are a refugee[50]

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**45** (2014) 255 CLR 179 at 188-189 [34] (footnote omitted).

**46** See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 638 [102], referring to *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [37]-[38]; 207 ALR 12 at 20.

**47** cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 180-181 [59]-[60], see also 236-237 [256]; *Stanley v Director of Public Prosecutions (NSW)* (2023) 97 ALJR 107 at 119 [54]; 407 ALR 222 at 234-235.

**48** *Migration Act*, s 35A(6). Section 31(3) provides that the regulations may prescribe criteria for a visa or visas of a specified class.

**49** *Migration Act*, s 5M (definition of "particularly serious crime"), directing attention to s 5 (definition of "serious Australian offence"). Neither definition includes aggravated people smuggling under s 233C of the Act.

**50** *Migration Act*, s 36(2)(a).

or because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm[51]). In 2014, Parliament introduced s 36(1C) and amended s 36(2)(a) (to provide as a criterion that the applicant satisfy a new statutory definition of refugee[52]) as part of a suite of amendments to articulate and codify Australia's interpretation of its protection obligations under the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967)[53].

59 The Regulations include a number of criteria for SHEVs. One criterion is that the applicant satisfies public interest criterion ("PIC") 4001[54]. PIC 4001 can only be satisfied if one of the following is met[55]:

> "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

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**51** *Migration Act*, s 36(2)(aa). See also s 36(2)(b) and (c).

**52** "[R]efugee" is defined in s 5H(1)(a) as a person, in a case where the person has a nationality, who is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country.

**53** Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 2, 10-12, 168 [1150]-[1153], 180-181 [1234]-[1243]. See also *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 7 [16], 41 [161]-[162].

**54** *Migration Regulations*, Sch 2, cl 790.226.

**55** See *Migration Regulations*, Sch 4, Pt 1, cl 4001.

(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*." (emphasis added)

60 The "character test" referred to in PIC 4001 is defined in s 501(6) of the Act[56]. That sub-section provides that a person does *not* pass the character test if the person meets any of the criteria set out in s 501(6)(a) to (h). Otherwise, the person passes the character test. Relevantly, s 501(6)(ba)(i) provides a person does *not* pass the character test if the Minister reasonably suspects that the person has been or is involved in conduct constituting an offence under one or more of ss 233A to 234A of the Act (people smuggling), whether or not the person has been convicted of an offence constituted by the conduct.

61 Another criterion in the Regulations is cl 790.227 which states that "[t]he Minister is satisfied that the grant of the visa is in the national interest". The Minister relied on this criterion to refuse to grant the plaintiff a SHEV under s 65 of the Act. The proper construction and application of this clause, in the context of the decision-making process under ss 47 and 65, is the principal issue in this case. Identical criteria to cl 790.227 are also found in Sch 2 of the Regulations in cl 785.227 (temporary protection visas) and cl 866.226 (permanent protection visas) ("cognate clauses"), but not for any other class of visa under the Act.

*Section 65(1)(a)(iii)*

62 Before turning to consider the proper construction and application of cl 790.227, it is necessary to set out the remainder of the legislative scheme governing the Decision. Not only must all of the statutory and regulatory criteria be met for the grant of the visa under s 65(1)(a)(i) and (ii), but the Minister was also required by s 65(1)(a)(iii) to be satisfied that "the grant of the visa is not prevented" by specific sections in the Act or any other provision of the Act or of any law of the Commonwealth.

63 Section 501 is one of the specified sections in s 65(1)(a)(iii). Section 501 provides powers to refuse a visa that are "in addition to any other power under th[e] Act" – which includes s 65 – to refuse to grant a visa to a person[57]. In *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural*

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**56** See *Plaintiff M47* (2012) 251 CLR 1 at 53 [92], 81-82 [188]-[189], 104 [266], 161 [431].

**57** *Migration Act*, s 501H(1).

*Affairs*[58] and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20*[59], the Full Federal Court held that the powers in s 501 are available in respect of protection visas even though this permits refusal of such visas where, for example, the person has been convicted of a crime such that the person fails the character test under s 501(6) but the crime is not a "particularly serious crime" within the meaning of s 36(1C). As the Full Court held, Parliament's intention for s 501 to be available to refuse protection visas was evident from the plain language of ss 65 and 501[60] and the legislative history, it being accepted prior to the insertion of s 36(1C) into the Act[61] that s 501 was capable of applying to a protection visa[62]. Although there was overlap between ss 36 and 501, there was no necessary inconsistency as the narrower character provisions in s 36 were mandatory criteria requiring refusal of a visa, whereas the broader character provisions in s 501 enlivened a discretion to refuse the visa[63]. It is therefore necessary to address s 501 in some detail.

Section 501 – Refusal or cancellation of visa on character grounds

64 Section 501 is headed "Refusal or cancellation of visa on character grounds". Section 501 provides for discretionary powers to cancel or refuse a visa where a person does not pass the "character test", which is set out in s 501(6). As set out above, a person does not pass the character test if the Minister reasonably suspects that the person has been or is involved in conduct constituting an offence under s 233C of the Act[64]. As will be explained, the powers under s 501 are subject to conditions. This is unsurprising given the consequence under the Act

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**58** (2020) 279 FCR 1.

**59** (2020) 279 FCR 475.

**60** See *Migration Act*, s 65(1)(a)(iii) and s 501, Note 1: "*Visa* is defined by section 5 and includes, but is not limited to, a protection visa". See also *KDSP* (2020) 279 FCR 1 at 20 [67]-[69], 77 [286]; *BFW20* (2020) 279 FCR 475 at 508-509 [120]-[128].

**61** By the Asylum Legacy Caseload Act, Sch 5, Pt 2, s 9.

**62** See *KDSP* (2020) 279 FCR 1 at 22-23 [82]-[83], 74 [278]; *BFW20* (2020) 279 FCR 475 at 510-514 [132]-[147].

**63** *BFW20* (2020) 279 FCR 475 at 509-510 [129]-[131]. See also *KDSP* (2020) 279 FCR 1 at 76-77 [282]-[285].

**64** *Migration Act*, s 501(6)(ba)(i).

of cancellation or refusal of a visa to a non-citizen in the migration zone is mandatory detention and removal or deportation from Australia[65].

65 Section 501 contains two discretionary visa refusal powers in sub-ss (1) and (3). Applications may be made to the Administrative Appeals Tribunal for review of a decision made under s 501 by a delegate of the Minister, but not if the decision is made by the Minister personally[66].

66 Section 501(1) provides that the Minister, or their delegate, *may* refuse to grant a visa to a person if the person does not satisfy the Minister or delegate that the person passes the character test. If a delegate of the Minister or the Tribunal makes the decision under s 501(1) not to refuse to grant a visa, the Minister has a personal non-delegable power under s 501A to set that decision aside and refuse to grant the visa to the person if the Minister reasonably suspects the person does not pass the character test, the person does not satisfy the Minister they pass the character test, and the Minister is satisfied the refusal is in "the national interest"[67]. If the Minister takes this action, the decision is not reviewable by the Tribunal under Pts 5 or 7 of the Act[68]. The Minister has a similar power under s 501B, also exercisable in "the national interest", to set aside a decision by a delegate to refuse a visa under s 501(1), and to personally refuse the visa, in which case the Minister's decision is not reviewable even if the original decision is the subject of an application for review by the Tribunal[69].

67 Section 501(3) provides that the Minister may refuse to grant or cancel a visa to a person if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in "the national interest". Section 501(3) is a special personal non-delegable power for the Minister to refuse a visa in the first instance[70]. As the power is personal to

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**65** *Migration Act*, ss 189, 196, 198, 200. cf *Love v The Commonwealth* (2020) 270 CLR 152.

**66** *Migration Act*, s 500(1)(b).

**67** *Migration Act*, s 501A(2) and (4A). See also s 501A(3).

**68** *Migration Act*, s 501A(7).

**69** *Migration Act*, s 501B(2), (4), (5).

**70** *Migration Act*, s 501(3), (4), (4A).

the Minister, its exercise is never subject to review by the Tribunal[71]. Further, unlike s 501(1), natural justice does not apply to the exercise of the non-delegable power in s 501(3)[72]. If the Minister makes a decision under s 501(3), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day the decision was made[73]. The Minister must also invite the person to make representations to the Minister about revocation of the original decision[74]. The Minister may then revoke the original decision if the person makes representations, and the person satisfies the Minister that they pass the character test[75]. If the Minister makes a decision to revoke or not to revoke the original decision, the Minister must provide notice to Parliament within 15 sitting days[76]. In the second reading speech for the Bill introducing s 501 in 1998[77], the Minister explained that "in exceptional or emergency circumstances, the [M]inister, acting personally, will be given powers to act decisively on matters of visa refusal, cancellation and the removal of non-citizens"[78]. The Minister observed that under the personal powers the Minister would be "very accountable for his actions to the parliament, his colleagues and the people of Australia" but that decisions made

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**71** *Migration Act*, s 500(1)(b).

**72** *Migration Act*, s 501(5).

**73** *Migration Act*, s 501(4A). This sub-section does not apply in relation to certain paragraphs of the character test or if the person was the subject of an adverse security assessment under the *Australian Security Intelligence Organisation Act 1979* (Cth): s 501(4B).

**74** *Migration Act*, s 501C(3)(b).

**75** *Migration Act*, s 501C(4).

**76** *Migration Act*, s 501C(8).

**77** *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998* (Cth).

**78** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1229.

personally by the Minister would not be subject to review by the Tribunal because of their "national significance"[79].

68 It is necessary to say something more about the structure of s 501(1) and (3). A decision under s 501(1) involves two steps, being a consideration of whether the person has satisfied the decision-maker that the person passes the character test, *and if not*, the exercise of the discretion whether to exercise the power to refuse the visa[80]. If the outcome of the first step is that the decision-maker is satisfied by the person that they pass the character test, the only decision open to the decision-maker is not to refuse the visa[81]. A decision under s 501(3) requires consideration of the two conditions in s 501(3)(c) and (d): first, whether there is a reasonable suspicion that the person does not pass the character test and second, whether the refusal or cancellation of the visa is in the national interest[82]. Only if the Minister holds such a reasonable suspicion *and* is satisfied that the refusal or cancellation is in the national interest, may the Minister exercise the discretion to refuse to grant or to cancel the visa. Otherwise, the only decision open to the Minister is not to refuse or cancel the visa.

69 The provisions provide no express criteria for exercise of the discretion. It has been said that "the protection of the Australian community lies at the heart" of the discretionary powers under s 501[83]. Ultimately, the exercise of the discretion

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**79** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998 at 1231.

**80** See *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at 441-444 [28]-[41].

**81** See *Makasa* (2021) 270 CLR 430 at 443 [39].

**82** *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57].

**83** *KDSP* (2020) 279 FCR 1 at 17 [57], quoting *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 310 [68]. See also *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65 at [104]-[105]; *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [42]-[44]; *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488 at 496-497 [61]-[62]; *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367 at 368 [1], 378-379 [47]-[50], 380 [58]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* (2021) 285 FCR 540 at 562 [86]. See also *Tanielu v*

in s 501(1) or (3) will depend on the facts and circumstances of the case, having regard to any mandatory and permissible considerations arising from a proper construction of those provisions[84]. In this case, it is sufficient to observe that those considerations would generally include for s 501(1), and will necessarily include for s 501(3), considerations in respect of the reason that the person failed the character test being considerations that would fall under the umbrella of a general concept of "the national interest" broadly construed. Put in different terms, where a person fails the character test because, for example, the person was or was suspected of being a people smuggler, the discretions under s 501(1) and (3) will encompass any and all considerations that may support the refusal of a visa to a person by reason of people smuggling.

**Minister's refusal to grant the SHEV**

*Briefing materials*

70 There were two briefs to the Minister. The first brief, dated 10 June 2022, set out at least two options: take no further action (in which case the plaintiff's SHEV application would be referred to a delegate for decision), or personally refuse the SHEV application under s 65 relying on the national interest criterion in cl 790.227. One paragraph under the heading of "Potential options" was redacted in the materials before this Court.

71 The second brief to the Minister, dated 22 June 2022 and signed by the Minister on 27 June 2022, presented the same two options as well as a third option to make a personal decision to refuse the visa under s 501(1) or (3) of the Act. Under "Option 1 - Proceed towards SHEV finalisation", the Minister was informed that, if she took no further action in this case, the plaintiff's SHEV application would be referred to a delegate for decision. The brief stated, among other things:

> "On information currently before the section 65 visa delegate [the plaintiff] is on a notionally positive visa pathway.

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*Minister for Immigration and Border Protection* (2014) 225 FCR 424 at 453 [135], 456 [154]; *Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1281 at [46].

**84** See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40. See also *BFW20* (2020) 279 FCR 475 at 509 [130].

> Further, depending on future Government policy, a SHEV grant could be converted to a permanent protection visa grant."

72 Under "Option 2 - Consideration under section 65 relying on national interest criterion", the Minister was informed that "[i]t is open to you as the Minister to make a personal decision to refuse [the plaintiff's] SHEV application under section 65 of the Act, relying on the criterion set out in clause 790.227 ... if you are satisfied that the grant of the visa is not in the national interest". The Minister was further informed that:

> "The national interest criterion is usually only considered in exceptional circumstances by the Minister, when the other criteria for the visa, including character and security requirements, have been met.
>
> Similarly, while it is open to a delegate to consider refusing [the plaintiff's] SHEV application under section 65 of the Act relying on the national interest criterion, the Department is not aware of this having occurred in the past and notes that a delegate cannot be compelled to make a decision in a particular manner. In practice, delegates do not rely on this criterion as the Commonwealth's long-standing position is that what is in the national interest is largely a political question of considerable breadth, entrusted to the Minister personally. Accordingly, it is likely that if a decision is made by a delegate, the SHEV will be granted as the other criteria for the grant have notionally been met."

73 This was somewhat inaccurate. Clause 790.227 is a general criterion applying to all SHEVs (with cognate clauses applying to other classes of protection visa) and must be considered and satisfied for all applications, whether decided by the Minister or a delegate. Clause 790.227 is not, as the second brief stated, "usually only considered in exceptional circumstances by the Minister" and the question of what is in "the national interest" under cl 790.227 is not entrusted to the Minister personally. Further, the clause creates a positive criterion, not a negative criterion – the decision-maker must form the positive state of mind that the grant is in the national interest. The brief presented cl 790.227 to the Minister as if it were a personal criterion entrusted to the Minister to decide that the grant of the visa was *not* in the national interest.

74 The description of Option 2 in the brief, however, appears to have been accurate in a practical sense. In their Response to the Revised Application for a Constitutional or Other Writ, the defendants stated that they were unable to identify any instance where a delegate had refused a visa under s 65 by finding that cl 790.227 (or a cognate clause) was not satisfied. The defendants were also unable to identify any instance, other than the plaintiff's case, where the Minister acted

personally to refuse the grant of a visa relying on cl 790.227. The only instance that the defendants were able to identify of the Minister acting personally to (purportedly) refuse the grant of a visa on the basis of a cognate clause was the decision which was held invalid by this Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]*[85].

75 In relation to "Option 3 - Consideration under section 501 of the Act", the second brief said, "not viable". The reasons why it was considered not viable were redacted in the materials provided to this Court.

*Reasons*

76 The second brief attached a draft Statement of Reasons for personally refusing the SHEV under s 65 relying on cl 790.227, which the Minister signed on 27 June 2022 without amendment. In that Statement of Reasons, the Minister set out her reasons for her decision that she was not satisfied that granting the SHEV to the plaintiff was in the national interest.

77 Relevantly, under the heading "Other factors taken into account in determining whether the grant of the visa would be in the national interest", the Minister stated that she did "not accept [the plaintiff's] submission that refusing to grant him a SHEV on the basis of clause 790.227 would be a refusal to grant the visa 'on character grounds', a matter dealt with by s 36(1C) of the Act". The reasons did not refer to PIC 4001 or s 501. The Minister stated that "a refusal to grant [the plaintiff] a SHEV on the basis of clause 790.227 is because of my assessment of other adverse impacts that granting a protection visa to a person who has been convicted of people smuggling would have on Australia's border protection regime, and the policy that underpins it".

78 Next, the Minister stated:

> "I regard protecting and safeguarding Australia's territorial and border integrity, which includes measures to combat people smuggling, to be matters that clearly go to the national interest. In my view, granting a protection visa to a person who has been convicted of people smuggling would send the wrong signal to people who may be contemplating engaging in similar conduct in the future, thereby potentially weakening Australia's border protection regime. *It is not in the national interest for a person*

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**85** (2015) 255 CLR 231.

> *convicted of people smuggling to be seen to get the benefit of a protection visa*." (emphasis added)

This statement is, in effect, a statement of general policy that it is not in the national interest for convicted people smugglers to get protection visas.

79 The Minister then set out what she described as an "additional reason" why she considered that granting the SHEV to the plaintiff would not be in the national interest:

> "I also consider it is in the national interest to maintain the confidence of the Australian community in the protection visa program. People smuggling can be seen to conflict with the values underlying the protection visa program since it involves taking advantage of, and exploiting, those seeking protection by smuggling them across borders. *The grant of a protection visa to a non-citizen who has been convicted of people smuggling may erode the community's confidence in the program*." (emphasis added)

80 The Minister's reasons for making the Decision were also restated in the Minister's reasons for issuing a conclusive certificate under s 473BD of the Act on 12 July 2022 in relation to the Decision. The conclusive certificate meant that the Decision was not reviewable by the Immigration Assessment Authority under Pt 7AA of the Act[86]. The Minister said that, if the Immigration Assessment Authority were able to review the Decision, it could remit the Decision for reconsideration with a direction that the plaintiff meets the criterion in cl 790.227. The Minister stated:

> "I am aware that all other visa criteria are met in [the plaintiff's] case, and so a remittal in those terms would in effect amount to a direction to grant the visa."

81 The Minister said that she decided to issue a conclusive certificate because she believed that it would be contrary to the national interest to change the Decision or for it to be reviewed. The Minister repeated her reasons for the Decision, referring to her "conclusions about the perception of granting a protection visa to a person who has already been convicted of people smuggling offences". Those same reasons were said to weigh in favour of finding that it would

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**86** If the Minister issues a conclusive certificate in relation to a fast track decision, the decision is not a fast track reviewable decision: *Migration* Act, s 473BD read with s 473BB (definition of "fast track reviewable decision").

be contrary to the national interest for the Decision to be changed or reviewed by the Immigration Assessment Authority.

82 It is clear from the reasons for the Decision that the Minister was concerned with the potential consequences of the plaintiff being granted the visa because of his status as a convicted people smuggler. The two considerations identified by the Minister as justifying the refusal of the visa – not encouraging other potential people smugglers and maintaining community confidence in the protection visa program – were directly related to, or concomitant with, that fact. The plaintiff's conviction for people smuggling was not simply taken into account as one of a number of considerations – it formed the basis of the conclusion that the Minister was not satisfied the grant of the visa was in the national interest.

83 Three further matters should be noted. First, the Minister conceded in this Court that, at the time of the Decision, the plaintiff satisfied all of the criteria set out in s 36 and in the Regulations, other than the criterion in cl 790.227. The Minister accepted in her reasons that Australia owes protection obligations to the plaintiff because the plaintiff is a refugee. Although the briefing material and reasons did not address any of the other visa criteria, it can be inferred that the Minister was aware at the time of the Decision that all the criteria, apart from cl 790.227, were satisfied[87]. Necessarily, that included the criterion in PIC 4001 which required consideration of the character test and satisfaction either that, in effect, the person passed the character test or the Minister had decided not to refuse to grant the visa to the person despite the person not passing the character test. Second, the Minister did not decide to refuse the visa on the basis that PIC 4001 was not satisfied (s 65(1)(a)(ii)), nor did she decide that the grant of the visa was prevented by s 501 (s 65(1)(a)(iii)). Indeed, the Minister marked on the brief that she was "not inclined" to make a personal decision to refuse the plaintiff's visa under s 501(1) or (3). Third, the Minister relied only on cl 790.227 and concluded that cl 790.227 was not satisfied only because the plaintiff was convicted of people smuggling offences.

84 The Minister's reasons in the present case are similar to those in *Plaintiff S297 [No 2]*, where the Court held that the Minister decided the visa application

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**87** On the second brief, the Minister "noted" that, if she did not agree to refuse the visa relying on cl 790.227 or under s 501, the Department would proceed toward the grant of the SHEV and, two weeks later, in her reasons for issuing a conclusive certificate in relation to the Decision under s 473BD of the Act, the Minister said she was aware that all other visa criteria were met.

in that case on the "one basis" that the national interest under a cognate clause[88] required that no unauthorised maritime arrival should be granted a protection visa[89]. As the transcript records, the Minister's reasons in that case were that the grant of protection visas to unauthorised maritime arrivals would not be in the national interest in part because it would encourage people smuggling[90]. The Minister's decision record in that case, obtained from the court file, stated, among other things, that:

> "[T]he grant of permanent protection visas to persons who arrive in Australia as unauthorised maritime arrivals would make it easier for people smugglers to claim that they have a product they can market now or in the future, thereby undermining Australia's efforts to combat the activities of people smugglers. That is contrary to Australia's national interest because: it undermines efforts to prevent deaths at sea that result from people being put on dangerous journeys to Australia by sea by people smugglers; it undermines Australia's capacity to decide the identity of the non-citizens who may enter Australia's territory, undermining the integrity of Australia's visa systems and its sovereign right to protect its borders; it impacts negatively on Australia's international relationships with partner nations in cooperation with whom Australia seeks to combat all forms of people smuggling ... ; the grant of permanent visas to unauthorised maritime arrivals – irrespective of whether they arrive by sea or by air – erodes the community's confidence in the effective and orderly management of Australia's migration programme".

85 In *Plaintiff S297 [No 2]*, the Minister argued that his reasons for refusing the visa went further than the bare fact the person was an unauthorised maritime arrival[91]. The unanimous Court disagreed, observing that "[t]he Minister's decision record shows that he saw 'the national interest' as requiring refusal of a [protection] visa to any and every unauthorised maritime arrival"[92]. The Court held that the national interest criterion should not be construed as permitting the Minister to

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**88** *Migration Regulations*, Sch 2, cl 866.226 (protection visas subclass 866).

**89** (2015) 255 CLR 231 at 248 [40].

**90** *Plaintiff S297 [No 2]* [2014] HCATrans 276 at 2785-2840, 3483-3490.

**91** (2015) 255 CLR 231 at 237 (summary of defendants' submissions). See also *Plaintiff S297 [No 2]* [2014] HCATrans 276 at 3150-3155.

**92** *Plaintiff S297 [No 2]* (2015) 255 CLR 231 at 241 [13], see also 244 [21].

treat the plaintiff's status as an unauthorised maritime arrival as sufficient to justify the conclusion that it was not in the national interest to grant the visa. In that case, relevantly, s 46A(2) of the Act provided that the Minister could decide that it was in "the public interest" to lift the bar in s 46A(1) to an unauthorised maritime arrival making a valid application for a visa. The national interest criterion was read as not authorising a decision to refuse an application on the basis that the applicant was an unauthorised maritime arrival, because to read it as the Minister alleged was not consistent with s 46A. Parliament had exhaustively prescribed by s 46A the visa consequences which followed from that status[93]. And a Minister had decided it was in the "public interest" to permit the plaintiff to make a valid application for a visa[94]. The parallels with this case are obvious.

**Was the Decision authorised by cl 790.227, properly construed?**

86 Regulations are to be construed according to the ordinary principles of statutory construction[95]. The starting point for the ascertainment of the meaning of a provision is its text, while at the same time regard is to be had to its context and purpose[96]. Of course, the statutory context of regulations includes the Act under which the regulations were made and are sustained. Context should be regarded at the first stage and not at some later stage and it should be regarded in its widest sense, including by reference to legislative history and extrinsic material[97]. As Kiefel CJ, Nettle and Gordon JJ explained in *SZTAL v Minister for Immigration and Border Protection*[98]:

> "This is not to deny the importance of the natural and ordinary meaning of a word ... Considerations of context and purpose simply recognise that,

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**93** *Plaintiff S297 [No 2]* (2015) 255 CLR 231 at 243 [21].

**94** *Plaintiff S297 [No 2]* (2015) 255 CLR 231 at 244 [21].

**95** *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 110 [19]. See also *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398; *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 15-16 [28].

**96** *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14].

**97** *SZTAL* (2017) 262 CLR 362 at 368 [14]. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

**98** (2017) 262 CLR 362 at 368 [14].

understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

87 The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision[99]. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[100]. As expressed by Gageler J in *SAS Trustee Corporation v Miles*, "statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means"[101]. Where conflict appears to arise in construing an Act, "the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions", and this "will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'"[102]. Ultimately, the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended[103].

*Clause 790.227 was inserted by Parliament into the Regulations*

88 Unusually, cl 790.227 was not made by the Governor-General in the exercise of the regulation-making power under s 504 of the Act. Instead, it was inserted by Parliament into the existing Regulations by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy*

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**99** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

**100** *Project Blue Sky* (1998) 194 CLR 355 at 381-382 [70].

**101** (2018) 265 CLR 137 at 157 [41] (footnotes omitted).

**102** *Project Blue Sky* (1998) 194 CLR 355 at 382 [70], quoting *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.

**103** *Project Blue Sky* (1998) 194 CLR 355 at 384 [78]. See also *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 460-461 [76].

*Caseload) Act 2014* (Cth), which also amended the Act to introduce the SHEV as a new class of protection visa[104]. Clause 790.227 was inserted into the Regulations at the same time as all of the other criteria in the Regulations for the new SHEV class, including cl 790.226 which prescribed PIC 4001 as a criterion for the visa[105].

89 That is, Parliament did not create a statutory visa criterion by inserting cl 790.227 into the Act – for example, by amending s 36. Rather, Parliament made cl 790.227 in the form of an amendment to the Regulations, which were made by the Governor-General under s 504 of the Act. In doing so, Parliament made it clear that the Governor-General was able to amend or repeal the Regulations as amended[106]. When the Regulations as amended were registered under the then *Legislative Instruments Act 2003* (Cth), s 5(3) of that Act provided that, by virtue of the registration, the instrument was taken to be a "legislative instrument", defined as an instrument of a legislative character "that is or was made in the exercise of a power delegated by the Parliament"[107]. In short, cl 790.227 cannot be construed as if it were a provision of the Act, because it is not and never has been part of the Act, and the amending Act which inserted it into the Regulations did not express such an intention. It is a clause of the Regulations.

90 The subordinate status of cl 790.227 to the Act does not mean the clause is less binding in law than a statutory provision. However, it may, and here does, indicate that in reconciling provisions that otherwise present issues of inconsistency or incoherency, Parliament intended the clause to give way more readily or be adjusted if necessary to ensure a harmonious interpretation.

*Proper construction of cl 790.227*

91 How then should cl 790.227 be construed? The plaintiff submitted that cl 790.227 does not permit refusal of a protection visa by reason of a person's criminal offending, or alternatively by reason of the commission of an offence under s 233C of the Act, putting forward as many as four different constructions to support that argument, all of which to a significant extent sought to chart the

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**104** Asylum Legacy Caseload Act, s 3 and Sch 2, Pt 1, Div 2, items 13-18A.

**105** Asylum Legacy Caseload Act, s 3 and Sch 2, Pt 1, Div 2, item 18E.

**106** Asylum Legacy Caseload Act, s 3(2).

**107** *Legislative Instruments Act 2003* (Cth), s 5(1), (3). The Regulations as amended by item 18E of Div 2 of Pt 1 of Sch 2 of the Asylum Legacy Caseload Act were registered on 4 May 2015.

metes and bounds of the application of the clause by reference to its context under the Act. The construction put forward by the plaintiff that should be accepted is that cl 790.227 does not operate to permit the Minister or delegate to reconsider or revisit, under the criterion of "the national interest", those matters that have already been considered as part of the decision-making process under s 65 (some of which are committed to the Minister personally) and to treat those matters as sufficient to form the opinion that the Minister or delegate is not satisfied that the grant of the visa is in the national interest.

92 The defendants' construction was, in effect, that cl 790.227 is to be read according to its plain meaning, unconstrained by its context. On its face, cl 790.227 is very broad: "[t]he Minister is satisfied that the grant of the visa is in the national interest". There is no definition of "national interest" in the Act or Regulations. On the defendants' construction, cl 790.227 (and its cognate clauses) requires refusal of a protection visa where the Minister or delegate is not satisfied that the grant of the visa is, in their subjective view, in the national interest – on a case-by-case basis or, indeed, by the application of a general policy under which the Minister or delegate thinks it is not in the national interest for persons with, for example, certain criminal convictions to be granted protection visas.

93 In *Plaintiff S156/2013 v Minister for Immigration and Border Protection*, six members of the Court said that "[w]hat is in the national interest is largely a political question"[108]. That was in the context of a personal non-delegable statutory power for the Minister to designate a regional processing country under the Act where the statute expressly stated that the "only condition" for the exercise of the power was that "the Minister thinks that it is in the national interest"[109]. Similar statements in other cases were made in the context of personal Ministerial powers[110]. For example, in *Minister for Immigration and Multicultural Affairs v*

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**108** (2014) 254 CLR 28 at 46 [40]; see also 38-39 [10].

**109** *Plaintiff S156* (2014) 254 CLR 28 at 46 [40].

**110** See, eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 527-529 [60]-[63], 536 [87], 539 [102]; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 417-418 [74]-[77], 499 [323], 502-503 [330]-[331]; *Graham* (2017) 263 CLR 1 at 30 [57]. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 202; *South Australia v O'Shea* (1987) 163 CLR 378 at 411; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 455 [50]; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 353 [39]-[40], 358-359 [62], 376 [121], 377 [126]-[127]. cf *Plaintiff S297 [No 2]* (2015) 255 CLR 231 at 242 [18].

*Jia Legeng*, Gleeson CJ and Gummow J observed that "[t]he statutory powers in question have been reposed in a political official ... who not only has general accountability to the electorate and to Parliament, but who, in s 502, is made subject to a specific form of parliamentary accountability", and, after referring to the requirement in that section for the Minister to consider the national interest, quoted Brennan J in *South Australia v O'Shea*: "[t]he public interest in this context is a matter of political responsibility"[111].

94 But in this case Parliament did not place cl 790.227 into the personal hands of a Minister. Clause 790.227 and its cognate clauses are an anomaly in the scheme which otherwise reposes broad discretionary statutory powers for the grant, refusal or cancellation of visas[112] based on "the national interest"[113] and "the public interest"[114] in the Minister personally, generally also subject to provisions for parliamentary accountability. What is said in one context cannot be unthinkingly transposed to another. A personal Ministerial discretionary power exercisable in exceptional or specific circumstances has a different function and purpose to a mandatory general visa criterion in regulations of which the decision-maker (whether the Minister or a delegate) must be positively satisfied when making any decision to grant a visa of that class.

95 On the defendants' construction, the concept of "the national interest" is unconstrained by the function of cl 790.227 as a general visa criterion in regulations, its context as part of a decision-making process under ss 47 and 65, the criteria for protection visas in s 36 (s 65(1)(a)(ii)), the other criteria in the Regulations for SHEVs (including PIC 4001) (s 65(1)(a)(ii)), and the specific powers under s 501 to refuse visas to persons who do not pass the character test (s 65(1)(a)(iii)). On the defendants' construction, the Minister or delegate could *start* with the consideration of the national interest under cl 790.227,

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**111** (2001) 205 CLR 507 at 539 [102], quoting (1987) 163 CLR 378 at 411.

**112** Or for permitting or preventing a person making a valid application for a visa.

**113** See *Migration Act*, ss 501(3), 501A(2), (3), 501B(2), 502(1). See also ss 198AB-198AC. cf ss 5 (definition of "non-disclosable information"), 145(1), 146(2), 339, 411(3), 473BD.

**114** See *Migration Act*, ss 46A(2), (2C), 46B(2), (2C), 48B, 72(2), 91F(1), 91L(1), 91Q(1), 133A(1), (3), 133C(1), (3), 137N(1), 195A(2), 351(1), 417(1), 501J(1). See also ss 197AB-197AG, 198AD(5), (8), 198AE(1), (1A), 336L. cf ss 33(7)(b), 365(2), 375, 375A(1), 376(1), 378(1), 437, 438(1), 440(1), 473GA, 473GB(1), 473GD(1), 500A(8).

broadly construed, and refuse the visa under s 65 on the basis that it has not been satisfied, abstaining from considering or assessing any of the other criteria or limbs of s 65. On the defendants' construction, cl 790.227 would permit the Minister to treat as determinative the same reason a person fails the character test under s 501 (but does not, say, fall foul of s 36(1C)) to refuse the visa under s 65 for non-satisfaction of cl 790.227.

96 If this Court were to accept the defendants' construction, it would mean taking Parliament to have intended by cl 790.227 to leave the assessment of whether it is in the national interest for a person who is found to be a refugee to be refused a protection visa to the subjective evaluation of the Minister or a delegate on a case-by-case basis, unconstrained by any of the other provisions that govern the decision to grant or refuse a protection visa. Or it would mean that the Minister or delegate could choose to administer a general policy that they personally consider to be in the national interest, unconstrained by the policy set by Parliament in the Act to regulate, in the national interest, the grant or refusal of such visas[115]. Clause 790.227 and its cognate clauses would be ultimate control criteria to be utilised by the Executive to refuse protection visas without any need to consider, or be constrained by, the other criteria set by Parliament and the discretionary statutory powers provided by Parliament to refuse visas. While possible, the scope of any judicial review of the Minister or delegate's subjective opinion would be limited[116]. The defendants' construction should be rejected.

97 Clause 790.227 was not intended to be a trump card for the Minister or delegate to use to refuse a visa under s 65 without needing to consider, or be constrained by, any of the other criteria and powers relevant to that decision. That would be inconsistent with the nature of the duty being performed and power being exercised – ss 47 and 65 – which are not discretionary. The consequences of such an interpretation are apparent from the Minister's decision-making process in this case. In her reasons, the Minister did not consider the other criteria for the grant of the protection visa or consider the plaintiff's SHEV application as a whole – instead she just considered "the national interest" in cl 790.227 as a freestanding concept divorced from its context in the Act and Regulations. Unlike s 501(3) of the Act, cl 790.227 is not a special visa refusal power conferred by the Act on the Minister personally; it is one of a number of general visa criteria

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**115** *Migration Act*, s 4(1).

**116** See *Graham* (2017) 263 CLR 1 at 30 [57]; *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 at 598 [142].

that must be positively satisfied for the Minister and the delegate alike to grant a protection visa. Clause 790.227 must be construed in light of its function and its proper context.

98 That is not to say that cl 790.227 has no work to do. The concept of "the national interest" as used in the Act is undoubtedly broad and the possible considerations it may encompass cannot be catalogued. In this context, as cl 790.227 is a general visa criterion to be satisfied for all visa decisions for that class, "the national interest" must be informed in part by consideration of the nature of visas of that class, specifically, protection visas. The satisfaction of the criteria that are set out in the Act for protection visas, in particular the satisfaction of one of the criteria in s 36(2), is the primary basis on which Parliament expects that the Minister or delegate will be satisfied that the grant of the visa is in the national interest. That said, of course there might be other considerations that weigh against the general expectation in cl 790.227 that the grant of protection visas to persons to whom Australia owes protection obligations is in the national interest. For example, such a scenario might be where Australia is at war with the country from which the applicant seeks refuge. It is for this reason that, although the expression of cl 790.227 is in positive terms – as a criterion for grant of a visa, not for refusal of a visa – the parties were right to describe it in its negative sense because it is not a criterion that sits independently of all the others; the premise that it is in the national interest to grant a visa when a person is owed protection obligations and meets the other criteria can only be displaced by other national interest matters.

99 Again, put in different terms, it can be accepted, as the defendants submitted, that cl 790.227 is a cumulative requirement for the grant of a SHEV operating in addition to the other visa criteria and powers – cl 790.227 provides an *additional* basis to refuse the visa if the Minister considers, for some *other* reason, that the grant of the visa is not in the national interest. But that reason must be "another" reason. Determining whether that is the case will depend on an evaluation of the Minister or delegate's reasons.

*Proper application of cl 790.227*

100 The question of application in this case is narrow. When read in the context of the provisions of the Act and the Regulations applicable to the Minister's decision under s 65, did cl 790.227 authorise the Minister to conclude as she did that *because* the plaintiff was a convicted people smuggler it was not in the national interest to grant the plaintiff the protection visa that he sought? More particularly, could the Minister reach that conclusion when the Minister accepted that PIC 4001 was satisfied and expressly disavowed reliance on s 501?

101 Being satisfied of PIC 4001 and disavowing reliance on s 501 but then concluding, for the reason that the Minister did, that the visa should be refused under s 65 because it was not in the national interest under cl 790.227 to grant the visa, are inconsistent one with the other. Why is that so? First, cl 790.227 was considered divorced from its context under ss 47 and 65, which required consideration of the visa application and a binary decision to grant or refuse a visa based on that consideration – if satisfied of the conditions in s 65(1)(a) the visa must be granted; if not so satisfied, the visa must be refused.

102 Second, an accepted premise for the Decision was that the plaintiff was a convicted people smuggler and that therefore he failed the character test. As explained, the Minister accepted that, at the date of the Decision, all other criteria for the grant of the visa other than cl 790.227 were satisfied[117]. That is important. It means that the Minister accepted that PIC 4001 was met. PIC 4001 requires in effect for the Minister to have been satisfied that the person passes the character test, or for the Minister to have decided not to refuse to grant the visa despite the person not passing the character test. There was no dispute in this case that the plaintiff did not pass the character test. The Minister must have decided not to refuse to grant the visa despite reasonably suspecting that the plaintiff did not pass the character test.

103 Third, because the plaintiff failed the character test, s 501(3) permitted the Minister (but not a delegate) to exercise a discretion to refuse the visa if satisfied that the refusal of the visa to the plaintiff was in the national interest. The discretion in s 501(1) to refuse the visa was also enlivened. PIC 4001 required the Minister to, in effect, consider these powers. But s 501 was not used to refuse the plaintiff's visa. The Minister was advised that its application was "not viable", and the Minister said she was "not inclined" to exercise the power. That was a decision not to exercise a power in respect of someone who had failed the character test with a specific statutory criterion of "the national interest", which was subject to personal exercise by the Minister and tabling requirements.

104 Fourth, that being so, it was inconsistent to conclude only because the plaintiff was a people smuggler that it was not in the national interest to grant the plaintiff a visa. As explained above[118], the plaintiff's conviction for people smuggling formed the basis of the conclusion that the Minister was not satisfied the grant of the visa was in the national interest. What were described in the Minister's reasons as "other adverse impacts" to Australia's border protection

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**117** See [83] above.

**118** See [76]-[82] above.

regime and "additional reason[s]" about maintaining public confidence in the protection visa program were themselves issues that were referable to the people smuggling conviction – the reason that the plaintiff failed the character test – and which would bear directly on the consideration of PIC 4001 and the exercise of the Minister's discretionary powers under s 501. Considerations that may support refusing a visa to an applicant who failed the character test, referable to the reason that the applicant failed the character test, inform the assessment under PIC 4001 and s 501 (s 65(1)(a)(ii) and (iii)), and cannot be resurrected as part of the same decision-making process to form the basis of a decision relying on cl 790.227.

105 That is not to say that the discretions in s 501(1) and (3) are general powers to refuse or cancel a visa on "national interest" grounds where a person fails the character test. As explained above[119], the exercise of the discretion in s 501(1) or (3) will depend on the facts and circumstances of the particular case, having regard to any mandatory and permissible considerations arising from a proper construction of those provisions. The discretion will at least encompass matters referable to the reason why the person failed the character test that would fall under the umbrella of a general concept of "the national interest". Those matters alone cannot be the *additional* basis or *other* reason sufficient for the Minister to conclude that the grant of the visa is not in the national interest under cl 790.227.

106 As has been said, cl 790.227 was not intended to be a trump card for the Minister to use to refuse the visa under s 65 without needing to consider, or be constrained by, any of the other criteria and powers relevant to the decision. Unlike s 501 of the Act, cl 790.227 is not a special visa refusal power conferred by the Act. It is a positive visa criterion in the Regulations to be satisfied for all grants of a protection visa by the Minister and delegates alike. It cannot be treated as if it were a personal dispensing power. The Decision should be quashed.

## Orders

107 In the event of success on the first ground, the plaintiff initially sought a peremptory writ of mandamus commanding the first defendant to grant the plaintiff's SHEV application, on the basis that the return to the writ of mandamus issued by the Full Federal Court was legally insufficient and there was no other lawful basis for the Minister to refuse the visa, relying on this Court's decision in *Plaintiff S297 [No 2]*[120]. In the hearing, the parties drew the Court's attention to

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**119** See [69] above.

**120** (2015) 255 CLR 231 at 247-250 [36]-[47].

amendments to the Regulations, with effect from 14 February 2023, whereby in certain circumstances an applicant who has an undetermined SHEV application will have that application automatically converted into an application for a Resolution of Status (Class CD) visa, a form of permanent protection visa[121]. Relevantly, one of those circumstances, for applicants who meet certain criteria, is where the Minister makes a record that the Minister is satisfied that the applicant satisfies the criteria for the grant of a SHEV[122].

108 In light of the amendments to the Regulations, the plaintiff submitted that the Court should issue a writ of certiorari quashing the Decision, a writ of mandamus requiring the first defendant to determine the plaintiff's visa application according to law, and a declaration that the plaintiff satisfies the criteria for the grant of a SHEV. The plaintiff submitted that the declaration would have utility because it would ensure there was "no going back" on material already covered. The defendants agreed that, if the plaintiff was successful, the orders sought by the plaintiff would be more appropriate than peremptory mandamus because those orders would allow the Minister to grant a Resolution of Status visa, but resisted the making of the declaration. The defendants submitted that the Court should make an order for mandamus, and if compliance with that writ is legally insufficient, the Court could then make an order for peremptory mandamus.

109 In the circumstances, a writ of certiorari should issue quashing the decision of the first defendant made on 27 June 2022 to refuse to grant the plaintiff a SHEV and a writ of mandamus should issue commanding the first defendant to determine the plaintiff's visa application according to law within 14 days of the date of this order. The Minister has conceded that, at the date of the Decision, the plaintiff met all of the criteria for the SHEV other than cl 790.227. These reasons explain the proper construction and application of cl 790.227. The Court's power to grant declaratory relief is limited by the scope of the issues in the proceeding and a declaration as to the position conceded by the Minister is unnecessary.

110 The defendants should pay the plaintiff's costs.

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**121** *Migration Regulations*, cl 2.08G, as inserted by *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (Cth), s 4 and Sch 1, Pt 1, cl 2. See also *Migration Act*, s 45AA. See also Explanatory Statement to the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (Cth) at 1.

**122** *Migration Regulations*, cl 2.08G(1), table, item 4, column 2.