# HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

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FEL17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

*FEL17 v Minister for Immigration and Multicultural Affairs*
[2025] HCA 13
*Date of Hearing: 6 December 2024*
*Date of Judgment: 9 April 2025*
S107/2024

**ORDER**

*Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation**

D H Godwin with B M Flaherty for the appellant (instructed by Herbert Smith Freehills)

P M Knowles SC with K N Hooper for the respondent (instructed by Australian Government Solicitor)

## CATCHWORDS

## FEL17 v Minister for Immigration and Multicultural Affairs

Immigration – Protection visas – Invalid application – Where appellant applied for protection visa and was refused by delegate of Minister – Where Administrative Appeals Tribunal affirmed delegate's decision – Where Assistant Minister exercised power under s 417(1) of *Migration Act 1958* (Cth) to substitute more "favourable" decision and granted appellant three-month visitor visa with no further stay condition – Where appellant made second application for protection visa – Where delegate found second application invalid under s 48A – Whether majority of Full Court of Federal Court of Australia erred in finding second application invalid and barred by s 48A – Whether act of refusal in s 48A is reference to historical fact of refusal, or reference to act of refusal which remains legally valid – Whether exercise of substitution power under s 417(1) had effect of setting aside original refusal decision.

Words and phrases – "barred", "continuing legal effect", "continuing legal operation", "decision", "extinguished", "fast track reviewable decision", "finally determined", "grant", "historical fact", "legal effect", "migration zone", "more favourable", "non-citizen", "power to set aside", "power to substitute", "protection visa", "public interest", "refuse", "reviewable decision", "set aside", "substitute", "vary", "Visitor (Subclass 600) visa".

*Migration Act 1958* (Cth), ss 5, 48, 48A, 48B, 64U, 65, 119, 121, 137, 166BC, 166BE, 351, 411, 415, 417, 501A, 501J.
*Migration Legislation Amendment Act 1989* (Cth), s 26.
*Migration Reform Act 1992* (Cth), ss 23, 32.
*Migration Legislation Amendment Act 1994* (Cth), s 83.
*Migration Legislation Amendment Act (No 6) 1995* (Cth).

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND JAGOT JJ. The appellant was refused a protection visa pursuant to s 65 of the *Migration Act 1958* (Cth) ("the Act") by a delegate of the respondent, the Minister for Immigration and Multicultural Affairs ("the Delegate's Decision"). The Delegate's Decision was subsequently affirmed by the Administrative Appeals Tribunal ("the Tribunal") pursuant to s 415(2)(a) of the Act. The Assistant Minister for Immigration and Border Protection then decided to "substitute" the decision of the Tribunal with a more favourable decision made under s 417(1) of the Act – namely, to grant the appellant a Visitor (Subclass 600) visa for three months with a no further stay condition. Subsequently, the appellant made a further application for a protection visa, which was held to be invalid by a delegate of the Minister on the grounds that it was barred by s 48A of the Act.

2 The issue for determination is whether, when the appellant made his further application for a protection visa, he was a non-citizen in Australia who had previously made "an application for a protection visa, where the grant of the visa has been refused" for the purposes of s 48A. If he was, then he was then barred from making his further protection visa application.

**Applicable legislation**

3 Pursuant to s 48A(1) of the Act, a non-citizen may not make a further application for a protection visa while remaining in Australia if the non-citizen has previously made an application for a protection visa while in the migration zone (relevantly Australia) and the grant of that visa "has been refused (whether or not the application has been finally determined)". Pursuant to s 5(9) of the Act as it stood in 2017, an application was relevantly "finally determined" when a decision had been made in respect of the application which was not, or was no longer, subject to any form of review by the Tribunal.

4 Section 48A(1) is expressed to be subject to s 48B. Section 48B confers a personal non-compellable power on the Minister to determine that s 48A does not apply to prevent a further application for a protection visa made by a non-citizen if the Minister thinks that it is in the public interest to do so. If the Minister exercises this power, the Minister must table a statement in Parliament setting out that determination and the reasons for it, including the reasons for thinking that it is in the public interest. In such a case, the non-citizen has seven working days within which to make a further protection visa application.

5 Both ss 48A and 48B were inserted into the Act at the same time by the *Migration Legislation Amendment Act (No 6) 1995* (Cth). The Explanatory

Memorandum which accompanied an earlier version of the Bill which became that Act[1] explained the purpose of these provisions in the following terms:[2]

> "The Act is also being amended to stop the use of repeat applications for protection visas by non-citizens to delay their removal and to circumvent the immigration requirements of Australia. This amendment will contribute to increasing the efficiency of Australia's refugee determination system and to minimising ill-founded protection visa applications. Where the Minister thinks it is in the public interest to do so, he or she will have the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application. The Minister must table a statement in Parliament setting out his or her reasons for thinking this decision is in the public interest."

6 In 2017, the Act included ss 415 and 417. Section 415 set out the powers of the Tribunal on review of a "Part 7-reviewable decision", which, relevantly here, was the Delegate's Decision.[3] A "Part 7-reviewable decision" was defined in s 411 to include certain decisions to refuse the issue of a protection visa. Section 415(2) relevantly provided:

> "The Tribunal may:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
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> ...
>
> (d) set the decision aside and substitute a new decision".

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**1** *Migration Legislation Amendment Bill (No 4) 1995* (Cth).

**2** Australia, House of Representatives, *Migration Legislation Amendment Bill (No 4) 1995* (Cth), Explanatory Memorandum at 3 [12]. The No 4 Bill lapsed and was replaced by the No 6 Bill. No Explanatory Memorandum was specifically produced for the No 6 Bill.

**3** The Tribunal also had the power to review other visa decisions, known as "Part 5-reviewable" decisions.

7 Section 417 conferred on the Minister a personal non-compellable power to "substitute" a decision of the Tribunal made under s 415 with a more "favourable" decision. Section 417(1) was in these terms:

> "If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision."

## Facts

8 The facts are not in dispute. The appellant is a Coptic Christian from Egypt. He made his first application for a protection visa in 2013. As noted, the Delegate's Decision in 2014 refused that application pursuant to s 65 of the Act. That refusal was affirmed by the Tribunal in 2015. In September 2017, the Assistant Minister personally exercised the Minister's power under s 417(1) of the Act to substitute the Tribunal's decision with a more favourable decision. The Assistant Minister decided under s 417 that it was in the "public interest" to issue the appellant a Visitor (Subclass 600) visa, which was valid from 12 September 2017 to 12 December 2017.

9 In October 2017, the appellant made a second application for a protection visa. That application was held to be invalid by a delegate of the Minister on the grounds that it was barred by s 48A of the Act. In November 2017, the appellant sought judicial review of that decision in the Federal Circuit Court of Australia (as it was then named). In 2023, the appellant's application was dismissed. An appeal to the Full Court of the Federal Court of Australia was dismissed in 2023. Special leave to appeal from that judgment was granted to the appellant in 2024.

## The decision of the Full Federal Court

10 It is unnecessary to survey the decision of the primary judge.[4] That decision was upheld on appeal by a majority of the Full Federal Court (Abraham and Halley JJ).[5] In essence, the majority held that the Assistant Minister's exercise of

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**4** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 4.

**5** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356.

power pursuant to s 417 "did not alter history";[6] in other words, it did not undo the fact that the appellant's first application for a protection visa had been refused for the purposes of s 48A. The majority accepted, consistently with the decision of this Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*,[7] that, upon affirmation of the Delegate's Decision by the Tribunal, the Delegate's Decision ceased to have "independent continuing legal operation"[8] but that the Delegate's Decision thereafter had "continuing legal effect"[9] and, critically, had not been "set aside".[10] This conclusion was said to be supported by an earlier decision of the Full Federal Court in *Kim v Minister for Immigration and Citizenship*,[11] which was referred to without criticism by this Court in *Plaintiff M174/2016*.[12] The majority thus concluded:[13]

> "The Assistant Minister did not set the Delegate's Decision aside. The exercise of the power in the Assistant Minister's Decision did nothing to alter the fact that the appellant had previously been refused a protection visa. Rather, the Assistant Minister granted the appellant a different visa under s 417 of the Migration Act, a provision that expressly does not depend upon a person satisfying any prescribed criteria for the grant of a visa."

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**6** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 372 [64].

**7** (2018) 264 CLR 217.

**8** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 369 [47], 370 [52], citing *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 242 [70].

**9** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 371 [54].

**10** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 371 [54].

**11** (2008) 167 FCR 578.

**12** (2018) 264 CLR 217 at 233 [40].

**13** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 372 [64].

11 Snaden J dissented. His Honour was of the view that a protection visa application "will stand 'refused'" if there is a decision under the Act that operates with that "legal effect".[14] Here, his Honour reasoned, the Delegate's Decision had ceased to have that effect because of both the Tribunal's decision and then the decision of the Assistant Minister.[15] Relying on *Plaintiff M174/2016*, Snaden J reasoned that the Tribunal's decision had become the "sole source of legal effect for the refusal".[16] Subsequently, the decision of the Assistant Minister to substitute a more favourable decision served "to relieve of operative or legal effect the decision that was made under s 415; and to leave the 'more favourable' decision to operate with legal effect in its stead".[17] It followed that, either way, there had ceased to be a legally effective refusal for the purposes of s 48A of the Act.

## Issue for determination

12 On appeal to this Court, the appellant pursued a single ground of appeal; namely, that the Full Federal Court erred in finding that the appellant's second application for a protection visa was invalid as it was barred by s 48A of the Act. The appellant contended that the reasoning and conclusion of Snaden J was correct.

13 The issue for determination gives rise to two issues of statutory construction. The first concerns the nature of the act of refusal in s 48A. Is that a reference to the historical fact that a protection visa application had been refused? Or is it a reference to an act of refusal which remains legally valid, as Snaden J reasoned? The second concerns the effect of the Assistant Minister's act of substitution in s 417(1). Did that have the effect of setting aside both the Tribunal's decision and the original refusal decision?

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**14** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 358 [3].

**15** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 358 [3]-[4].

**16** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 358 [4], citing *Plaintiff M174/2016* (2018) 264 CLR 217 at 247 [92].

**17** *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 299 FCR 356 at 359 [5].

**Refusing a protection visa – s 48A**

14 The better view is that the reference to the act of refusal in s 48A is simply to an historical fact, that has not been set aside in fact, regardless of its legal effect. In this way, the act of refusal is like the decision subject to review in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*;[18] the reference in s 48A to the refusal of a protection visa is merely to "a decision in fact made, regardless of whether or not it is a legally effective decision".[19] Such a decision validly confers on the Tribunal a power of review.

15 In that respect, the Delegate's Decision in this case is also like the "fast track reviewable decision" in *Plaintiff M174/2016* which was capable of being reviewed by the Immigration Assessment Authority, albeit in limited ways, and even though the decision to be reviewed might be infected with jurisdictional error. As Gageler, Keane and Nettle JJ said in *Plaintiff M174/2016*:[20]

> "The limitations on the form of review for which Pt 7AA provides are in the end insufficient to warrant departure from the *Brian Lawlor* construction. Applying that construction, a fast track reviewable decision triggering the operation of the Part and forming the subject of the Authority's review is a decision made in fact to refuse to grant a protection visa to a fast track applicant, regardless of whether or not that decision is legally effective."

16 Once affirmed by the Immigration Assessment Authority, a "fast track reviewable decision" vitiated by error was not thereby cured.[21] Instead, it was the decision to affirm by the Authority which had operative effect. That did not, however, deny the conclusion that there was nonetheless a "fast track reviewable decision" that had been made in fact.

17 The appellant relied upon the decision of Mansfield J in *Al Tekriti v Minister for Immigration and Multicultural and Indigenous Affairs*[22] in support of

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**18** (1979) 24 ALR 307.

**19** (1979) 24 ALR 307 at 314.

**20** (2018) 264 CLR 217 at 236-237 [52].

**21** *Plaintiff M174/2016* (2018) 264 CLR 217 at 241-242 [70].

**22** (2004) 138 FCR 60.

his contention that s 48A must be construed as referring to a refusal decision with continuing legal effect. That case concerned another provision of the Act inserted in order to prevent repeat visa applications, namely s 48. Like s 48A(1), s 48(1) referred to a non-citizen not being able to apply for certain classes of visa if they, amongst other things, had been "refused a visa". In *Al Tekriti*, an application for a protection visa had been refused. Following a review of that decision, the Tribunal set aside that decision and substituted it with a decision that there had been no grounds to refuse to grant the protection visa that had been sought. Subsequently, the applicant in that case applied for another type of visa. Mansfield J decided that s 48 did not apply to preclude that application because of the Tribunal's decision.[23]

18 *Al Tekriti* is distinguishable from the circumstances here. That is because, for the reasons given below, here the Delegate's Decision was not set aside by the exercise of the discretion under s 417(1).

**Substituting a decision – s 417**

19 The appellant contended, in conformity with the reasons of Snaden J, that the effect of the Assistant Minister's decision to "substitute" a more favourable decision was that the Delegate's Decision ceased to have any legal effect thereafter, including when the appellant made his application for a protection visa in 2017. Critical to that submission was the proposition that the Tribunal's decision had replaced the Delegate's Decision as the only legally operative refusal decision, and that the Assistant Minister, by substituting his own more favourable decision for the Tribunal's decision, had thereby extinguished the Tribunal's affirmation of the Delegate's Decision. This left the Delegate's Decision as being wholly ineffective.

20 However, when regard is had to the statutory language, context, history and purpose of s 417, the Delegate's Decision had not been set aside for the purposes of s 48A.

21 As to statutory language, s 417 does not on its face confer a power to set aside a decision of the Tribunal (or indeed any underlying decision of a Minister or delegate); the power is confined to one of substitution only. The concept of "substitution" in s 417 is to be understood in the context that s 417 also provides that the Minister's power to substitute a more favourable decision exists whether or not the Tribunal had power to make that new decision. This indicates that the concept of "substitution" in s 417 is not the Minister's decision replacing the Tribunal's decision but, rather, the Minister's decision operating in accordance with

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**23** (2004) 138 FCR 60 at 68 [36].

its terms irrespective of the Tribunal's decision. The Tribunal's decision merely becomes immaterial for the duration of the operation of the Minister's decision.

22 As to statutory context, this shows that the power of substitution in s 417 cannot be read as including a power to set aside the Tribunal's decision. That is because when Parliament has wanted to confer a power to set aside a decision it has done so expressly. Section 415(2)(d) of the Act, set out above, exemplifies this point. Other examples of Parliament expressly conferring a power of setting aside a decision and of substituting it with another may be found in ss 501A and 501J(1) of the Act.

23 As to statutory history, the language of s 417 should be contrasted with the language of its early predecessor. That predecessor was introduced into the Act in 1989 and was in these terms:[24]

> "Where the Minister thinks that it is in the public interest to do so, the Minister may:
>
> (a) set aside a decision of the Tribunal; and
>
> (b) substitute a decision that is more favourable to the applicant."

24 This provision conferred on the Minister a power to both "set aside" and "substitute" a decision. Juxtaposed in this way, again Parliament plainly intended that the phrase and the word respectively were to mean different things, or at least, to have different fields of operation.

25 In 1993, the foregoing provision was repealed by the *Migration Reform Act 1992* (Cth) ("the Migration Reform Act") and was replaced by a new s 121(1). That provision was in these terms:[25]

> "If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 119 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision."

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**24** Section 64U(1) of the Act, introduced by s 26 of the *Migration Legislation Amendment Act 1989* (Cth) and renumbered as s 137 by the same amending Act.

**25** Introduced by s 23 of the Migration Reform Act.

26 The Migration Reform Act also introduced a new s 166BE, which employed the same language, and was the direct predecessor to s 417. Section 166BE(1) was in these terms:[26]

> "If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 166BC another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision."

27 Section 121 applied to a category of decisions that was broadly equivalent to what was, under the Act in 2017, a "Part 5-reviewable decision" by the Tribunal, and s 166BE applied to a category of decisions that was broadly equivalent to what was a "Part 7-reviewable decision" by the Tribunal.

28 The language of ss 121 and 166BE is relevantly the same as that found in s 417(1).[27] In each case, as is the case with s 417, Parliament confined the Minister's personal power to that of substitution. In addition, with the advent of ss 121 and 166BE, the nature of the power changed. The Minister's more favourable decision, as is the case with s 417, was not confined by "whether ... the Tribunal had the power to make" it. Moreover, by the new s 166BE(2) (and s 121(2)), in exercising the power of substitution the Minister was "not bound by Subdivision AA or AC of Division 2 of Part 2 or by the regulations, but [was] bound by all other provisions of [the] Act".[28] In 2017, Subdiv AA included ss 48A and 48B. There was therefore no suggestion in this case, for example, that the Minister could not have exercised the power in s 417 to issue the appellant with a protection visa. Subdivision AC included the power in s 65 to grant a visa. The Explanatory Memorandum which accompanied the Bill that became the Migration Reform Act records the consequence of these changes in the following terms:[29]

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**26** Introduced by s 32 of the Migration Reform Act.

**27** Section 166BE was later renumbered as s 417 by s 83 of the *Migration Legislation Amendment Act 1994* (Cth). Section 121 was later renumbered to be s 351 by the same 1994 Act.

**28** By 2017, the reference to Div 2 of Pt 2 had become a reference to Div 3 of Pt 2.

**29** Australia, House of Representatives, *Migration Reform Bill 1992* (Cth) and *Migration (Delayed Visa Applications) Tax Bill 1992* (Cth), Explanatory Memorandum at 64 [304].

> "This means that the Minister can grant a visa that the person did not apply for, and may grant the visa even if the applicant did not satisfy the prescribed criteria. However, the Minister cannot grant the visa if, to do so, would breach another provision of the Act."

29 Given the foregoing, it makes little sense for the Minister to continue to have a power to set aside the Tribunal's decision. Section 417 in this respect confers on the Minister considerable flexibility in deciding what more favourable decision might be made. In that respect, the exercise of power by the Minister no longer necessarily involves revisiting the decision made by the Tribunal.

30 It follows that the Minister's decision to substitute a more favourable decision in 2017 did not set aside the Tribunal's decision to affirm the Delegate's Decision (to refuse the appellant's first protection visa application). It also follows that neither the Tribunal's decision, nor that of the delegate, has been set aside. As a result, the Delegate's Decision in 2014 persists for the purposes of s 48A.

31 Finally, as to statutory purpose, the presence of s 48B is critical to a correct understanding of the legislative regime. That is the provision which specifically permits the bar imposed by s 48A to be disapplied by a personal non-compellable decision of the Minister when it is in the "public interest" do so. The Explanatory Memorandum to an earlier version of the Bill which became the Act which introduced s 48B described its function in these terms:[30]

> "Proposed new section 48B provides the Minister with the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application if the Minister thinks it is in the public interest to do so. In exercising this power, the Minister must table a statement in Parliament setting out the determination and the reasons for it, referring particularly to the Minister's reasons for thinking his or her actions are in the public interest."

32 It would be incongruous if a power to substitute a more favourable decision – also exercisable in the "public interest" – could indirectly supply the same remedy as that which Parliament had specifically supplied by s 48B. That is especially so given that the power conferred by s 48B: is personally exercisable by the Minister; imposes no duty on the Minister to exercise it; and, when exercised, obliges the Minister to table a statement to Parliament concerning the Minister's

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**30** Australia, House of Representatives, *Migration Legislation Amendment Bill (No 4) 1995* (Cth), Explanatory Memorandum at 7 [14]. See fn 2 above.

decision. If the bar imposed by s 48A is to be lifted, it should be by an exercise of the power conferred by s 48B. That is what Parliament intended.

**Disposition**

33 For the foregoing reasons, it should be concluded that the reference in s 48A to the act of refusing a protection visa is to a decision in fact made, and that the reference in s 417 to a power of substitution does not include a power to set aside the Tribunal's decision. This appeal must be dismissed with costs.