

HIGH COURT OF AUSTRALIA

GORDON, STEWARD AND BEECH-JONES JJ

PLAINTIFF S32/2026

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP

DEFENDANT

Plaintiff S32/2026 v Minister for Immigration and Citizenship

[2026] HCA 27

Date of Judgment: 5 August 2026

S32/2026

ORDER

Application dismissed with costs.

Representation

The plaintiff is represented by Heretic Law Pty Ltd

The defendant is represented by Australian Government Solicitor

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

CATCHWORDS

Plaintiff S32/2026 v Minister for Immigration and Citizenship

Administrative law – Judicial review – Where delegate refused application for Protection (Class XA) (Subclass 866) visa ("Visa Decision") – Where delegate considered country information prepared by Department of Foreign Affairs and Trade – Where delegate concluded plaintiff could obtain protection from authority of Nepal – Where plaintiff sought merits review of Visa Decision in Administrative Review Tribunal ("Tribunal") – Where Tribunal dismissed merits review application due to plaintiff's non-appearance – Where plaintiff applied to Tribunal to reinstate merits review application – Where Tribunal confirmed dismissal of merits review application – Where plaintiff applied to High Court for constitutional or other writ in respect of Visa Decision – Whether application abuse of process – Whether Visa Decision affected by jurisdictional error – Whether extension of time should be granted.

Words and phrases – "abuse of process", "constitutional writ", "country information", "extension of time", "illogically", "irrationally", "judicial review", "jurisdictional error", "mandatory obligation", "merits review", "protection finding", "protection visa", "significant harm", "unreasonably".

Administrative Review Tribunal Act 2024 (Cth), ss 99, 102.

Migration Act 1958 (Cth), ss 36(2B)(b), 486A, 499.

1 GORDON, STEWARD AND BEECH-JONES JJ. The plaintiff was born in
Nepal in 2001. In or around February 2022, the plaintiff arrived in Australia on a
student visa. In 2024, the plaintiff was convicted of 14 counts of dishonestly
obtaining financial advantage by deception. These offences related to conduct
targeting other members of the Nepali community in Australia. Relevantly,
members of the Nepali community impacted by the plaintiff's conduct have
circulated online material identifying him to other members of the community,
in both Australia and Nepal. The plaintiff believes that he will be harmed if he
returns to Nepal. The plaintiff has been in immigration detention since mid-2025.

2 On 12 August 2025, the plaintiff applied for a Protection (Class XA)
(Subclass 866) visa. On 24 November 2025, a delegate of the defendant refused to
grant the plaintiff a protection visa ("the Visa Decision"). The Administrative
Review Tribunal ("the Tribunal") dismissed the plaintiff's application for review
of the Visa Decision pursuant to s 99 of the *Administrative Review Tribunal Act*
2024 (Cth) ("the ART Act") on the basis of the plaintiff's non-appearance
("the Dismissal Decision"). The plaintiff applied to the Tribunal to reinstate his
review application under s 102 of the ART Act. The Tribunal published a decision
on the reinstatement application which confirmed the Dismissal Decision
("the Confirmation Decision").

3 On 20 April 2026, the plaintiff filed an application for a constitutional or
other writ in this Court seeking: a writ of prohibition prohibiting the defendant
from proceeding to give effect to, or act upon, the Visa Decision; a writ of
mandamus commanding the defendant to reconsider and determine his application
for a protection visa according to law; and consequential relief. The plaintiff
requires an extension of time to file that application.¹

4 By that writ, the plaintiff sought to contend that the Visa Decision was
affected by jurisdictional error because the delegate: (1) failed to comply with
a mandatory obligation under s 499(2A) of the *Migration Act 1958* (Cth)
and *Direction No 84 – Consideration of Protection Visa Applications*
("Ministerial Direction 84") given under s 499 of the *Migration Act* to consider
the Department of Foreign Affairs and Trade's ("DFAT") *DFAT Country*
Information Report: Nepal dated 1 March 2024 ("the 2024 DFAT Report")
for the purposes of the finding under s 36(2B)(b) of the *Migration Act* in relation
to the greater effectiveness of Nepali police in urban areas such that the plaintiff
could obtain protection from an authority of Nepal and there would therefore not
be a real risk that the plaintiff will suffer significant harm ("the Nepal Protection

1 *Migration Act 1958* (Cth), s 486A.

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Finding"); and (2) further or in the alternative, in making the Nepal Protection Finding, the delegate reasoned illogically, irrationally or unreasonably.

5 The plaintiff's application is refused. It is an abuse of process. The plaintiff could have sought, but did not seek, review of the Confirmation Decision in the Federal Circuit and Family Court of Australia (Division 2) ("the FCFCA"). The application in this Court is an attempt to circumvent that process for merits review provided by the *Migration Act*. The application in this Court is directed to the Visa Decision, not the Confirmation Decision. It is common ground that the FCFCA has no jurisdiction in relation to the Visa Decision because it is a "primary decision" for the purposes of s 476(2)(a) of the *Migration Act*, and that there is otherwise no power to remit the matter to the Federal Court of Australia.² In any event, contrary to the plaintiff's contentions, there was no jurisdictional error in the making of the Visa Decision.

6 These reasons will address the Visa Decision, the Dismissal Decision and the Confirmation Decision, including the relevant circumstances surrounding those decisions, before addressing each of the plaintiff's contentions.

The Visa Decision, Dismissal Decision and Confirmation Decision

The Visa Decision

7 The Visa Decision found that the plaintiff will suffer significant harm within the meaning of s 36(2A) of the *Migration Act*. The Visa Decision relevantly stated that:

"Harm from people to whom he owes money

... [T]here are grounds to believe that families or acquaintances of the victims will try to obtain the money from him if he were to return to Nepal, providing the money is not paid before his removal from Australia. The risk to the [plaintiff] is proportionate to his willingness and ability to pay money to the relevant people in Nepal.

2 See, eg, *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 615 [11]; *Plaintiff M87/2023 v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 387 at 388 [2]; 426 ALR 587 at 588-589.

3.

Does the claimed harm constitute significant harm? – s36(2A) of the [Migration] Act

...

Cruel or inhuman treatment [or] punishment and degrading treatment or punishment

...

The [plaintiff] was intimidated by people he had scammed in Australia, and his details have been published on social media to force him to return the money to the victims of his scam. These actions were intentional, and it is reasonable to assume they were intended to humiliate the [plaintiff] in the eyes of the Nepali community. The [plaintiff] fears he will be subjected to similar, or possibly worse, humiliation in Nepal. While I accept that, on some level, there was justification for the victims to warn others about the [plaintiff's] scam, it was also an unnecessary act of vigilante justice, given that the victims knew the law was on their side and that Australian authorities were willing to act. *Based on these events, I find it plausible that the [plaintiff] will be subjected to what could be reasonably called degrading treatment or punishment by the families of Nepalis to whom he owes money if he were to return to Nepal.*

Finding

I find that the claimed harm is significant harm within the meaning of s36(2A) of the [Migration] Act." (emphasis added)

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The delegate then turned to consider whether the plaintiff could obtain protection from an authority in Nepal for the purposes of s 36(2B)(b) of the *Migration Act* and took into account country information. It is what country information was considered by the delegate that lies at the heart of the plaintiff's complaints. The Visa Decision stated, among other things, that:

"Could the applicant obtain protection from an authority in the receiving country? – s36(2B)(b) of the [Migration] Act

Given that the degrading treatment or punishment of the [plaintiff] would be committed by non-state actors, it will be necessary to consider the capacity of the State to provide adequate protection from that harm – [s 36(2B)(b)]. *In assessing this matter I considered the following [country] information.*

Police force

The effectiveness of Nepal Police is limited. The Nepal Police are hindered by a lack of adequate transport, training and equipment.³ *Police are less competent at maintaining law and order in rural Nepal in comparison to urban centres.*⁴ Police effectiveness is limited by lack of resources, corruption, nepotism and a culture of impunity, particularly among low-level officers.⁵ ...

Double Jeopardy

The law provides protection from double jeopardy. ... DFAT reported in March 2024 that it was 'not aware of any cases of double jeopardy, including crimes committed overseas upon return to Nepal'.⁶

Criminal Justice Procedure

... [DFAT] reported in March 2024 that DFAT had been told by in-country sources 'that Dalits and Madhesi in particular were sometimes arrested or detained on flimsy evidence by "racist" police from other caste and ethnic groups'.⁷ Police '[c]orruption and misconduct are reportedly common' in Nepal.⁸

...

The DFAT March 2024 country information report on Nepal reports that '[i]n-country sources told DFAT pro bono lawyers were generally effective

3 Department of Foreign Affairs and Trade, *DFAT Country Information Report: Nepal* (2019) ("2019 DFAT Report") at 29.

4 2019 DFAT Report at 29.

5 2019 DFAT Report at 29.

6 2024 DFAT Report at 33.

7 2024 DFAT Report at 31.

8 2024 DFAT Report at 32.

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and competent'.⁹ Court cases sometimes took years to go through the courts, although others were resolved more quickly.¹⁰

... DFAT was told by in-country sources 'that bribes and threats are sometimes used against litigants or their lawyers to procure preferred outcomes. DFAT assesses that, while prevalent at all levels, the vulnerability of courts to political pressure, bribery and intimidation is more pronounced in lower-level courts'. Court rulings were 'not always implemented... Still, in-country sources told DFAT that court rulings are widely reported in the local media and that most Nepalis have at least some faith in the justice system'.¹¹ ...

Analysis

While I acknowledge that many issues affect the effectiveness of the Nepali police, the situation is significantly better in urban areas like Birtamod, where the [plaintiff] lives. ...

As indicated above, the threat to the [plaintiff] depends on his ability to pay the money he owes. The [plaintiff] repeatedly stated he is willing to pay. His family runs a successful business in Nepal, and there is no evidence before me suggesting that they would not help the [plaintiff] fulfil his commitments. There is no information before me to indicate that the Nepali authorities would withhold their protection obligations to the [plaintiff] if he were in any serious danger, or that they would not investigate and prosecute any potential perpetrator if he were seriously harmed or injured.

As such, I find that should the [plaintiff] return to Nepal, he could reasonably expect to obtain protection from the Nepali authorities such that there would not be a real risk of suffering significant harm.

Finding

I have considered whether the [plaintiff] will face a real risk of suffering significant harm, as defined in s36(2A) of the [Migration] Act, if he returns to Nepal. *In considering this criterion, I have taken into account*

9 2024 DFAT Report at 33.

10 2024 DFAT Report at 33.

11 2024 DFAT Report at 33.

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the personal circumstances of the [plaintiff] as well as the country information above.

I find that the [plaintiff] can obtain, from an authority of the country, protection such that there would not be a real risk that the [plaintiff] will suffer significant harm as provided for in paragraph 36(2B)(b) of the [Migration] Act.

I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to Nepal there is a real risk [the plaintiff] will suffer significant harm as defined in s36(2A) of the [Migration] Act. Therefore, I am also not satisfied that [the plaintiff] is a person in respect of whom Australia has protection obligations as provided for in s36(2)(aa) of the [Migration] Act." (emphasis added)

The final section of the delegate's reasons states that they took into account "the country information above". As the extract records, both the *DFAT Country Information Report: Nepal* dated 1 March 2019 ("the 2019 DFAT Report") and the 2024 DFAT Report are footnoted.¹²

The Dismissal Decision

9 Shortly after being notified of the Visa Decision that had been made on 24 November 2025, the plaintiff applied to the Tribunal for merits review. The plaintiff's review application was listed for hearing on 5 February 2026.

10 On 24 December 2025, the detention centre where the plaintiff was detained informed the Tribunal that hearing documentation had been hand-delivered to the plaintiff and they had arrangements in place to escort the plaintiff to attend the Tribunal hearing in person. On 4 February 2026, the day before the hearing, the plaintiff informed the Tribunal that he had appointed a new lawyer and requested an adjournment. The Tribunal advised the plaintiff that, if he had appointed a lawyer, he should have his lawyer contact the Tribunal on his behalf and request an adjournment. No lawyer contacted the Tribunal. On the day of the hearing, the plaintiff failed to appear. The Tribunal contacted the detention

12 The 2024 DFAT Report was also referred to and cited in other parts of the Visa Decision, including within: Pt 5 "Findings of fact" in fn 30 (concerning the characterisation and orientation of political parties in Nepal), fn 52 (describing Hinduism as the prevailing religion in Nepal) and fn 62 (concerning attitudes towards LGBTQIA+ issues in Nepal); and Pt 6 "Refugee criterion assessment and finding – s36(2)(a)" in fns 73-75 (concerning political opinion in Nepal).

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centre and was told that the plaintiff had refused transport because he was feeling unwell. The same day, the plaintiff sent an email to the Tribunal indicating that he needed an adjournment as he was unwell. He also confirmed he did not have a legal representative. He said he had a medical appointment on that same day and indicated that he would provide a medical certificate but failed to do so.

11 On 9 February 2026, the Tribunal made the Dismissal Decision, dismissing the plaintiff's application for review of the Visa Decision on the basis of the plaintiff's non-appearance. The Tribunal published reasons for that decision. In sum, the Tribunal was satisfied that the plaintiff had received appropriate notice of the listing; had provided inconsistent information about his legal representation and sickness; and had provided insufficient information about his medical condition, including how that condition prevented him from participating in the hearing, when he became aware that he was unfit to attend the hearing and when he would be fit to attend a hearing.

The Confirmation Decision

12 On 9 March 2026, the plaintiff applied to the Tribunal to reinstate his review application under s 102 of the ART Act. On 11 March 2026, the Tribunal published the Confirmation Decision. In the course of those reasons, the Tribunal found that the plaintiff had misled it and was seeking to delay his hearing without a valid reason. The plaintiff was notified of the Confirmation Decision on 12 March 2026. On 14 April 2026, the plaintiff was issued with a notice of intention to remove from Australia, specifying an anticipated removal date of 21 April 2026.

Application for constitutional or other writ in this Court

13 On 19 April 2026, the plaintiff served on the defendant an unsealed application for a constitutional or other writ, which was filed in this Court on 20 April 2026. On 20 April 2026, following an urgent hearing, this Court made interim orders restraining the defendant from removing the plaintiff from Australia until 27 April 2026. On 23 April 2026, by consent, the order made on 20 April 2026 restraining the defendant from removing the plaintiff from Australia was extended "until this proceeding has been substantially determined, or otherwise finalised or further order".

14 The plaintiff filed an affidavit in support of his application for a constitutional or other writ. In that affidavit, the plaintiff described what occurred at the time of the Dismissal Decision. The plaintiff states that in mid-January 2026, his phone was stolen while he was in immigration detention and that, although he was able to use his friend's phone to make calls and send emails for numbers he could remember, he could not access his emails or text messages as

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the authentication code needed to access these accounts was being sent to the number of his stolen phone, which he never got back. He was able to get a new phone at the end of January 2026 and, when he obtained that phone, he could see that his then legal representatives had attempted to contact him to get more information for his review application in the Tribunal. When the plaintiff then responded, the lawyers told the plaintiff that they were no longer acting for the plaintiff as the plaintiff had not responded and the file had been closed. The plaintiff then attempted to engage new lawyers. On 4 February 2026, the plaintiff contacted his current solicitor, who told the plaintiff that she was unable to assist and that the plaintiff should turn up at the Tribunal hearing the next day and ask for more time.

15 The plaintiff states that on the day of the hearing, he was a "mental wreck", was vomiting and had stomach cramps. The plaintiff also states that he had booked a medical appointment for that week and that detainees do not get told the date and time of the appointment until the afternoon of the day before. On the evening of 4 February 2026, the plaintiff states, he was told he had a medical appointment on 5 February 2026. The plaintiff states that he felt that he had to attend that medical appointment, as it could otherwise be another week or more before he got to see a doctor. The plaintiff attended the appointment. The doctor gave the plaintiff medicine and referred the plaintiff for a CT of the abdomen and pelvis. The plaintiff attempted to communicate this to the Tribunal on 5, 6 and 9 February 2026. These communications were considered and addressed by the Tribunal in both the Dismissal Decision and the Confirmation Decision.

16 The plaintiff then states that, between 5 February and 9 March 2026, he contacted two lawyers, who were unable to assist. On 9 March 2026, the plaintiff ultimately engaged a lawyer. The plaintiff sent the CT report dated 10 February 2026 to this lawyer, who made representations to the Tribunal which the Tribunal considered when making the Confirmation Decision.

Abuse of process

17 This proceeding is an abuse of process.

18 It may be accepted that the plaintiff filed this application in this Court after being served with a notice of intention to remove him imminently from Australia. There is, however, no dispute that the plaintiff could have sought (and, subject to an extension of time being granted under s 477(2) of the *Migration Act*, could still seek) judicial review of the Confirmation Decision in the FCFCA and that, if the plaintiff was successful in challenging the Confirmation Decision, then on remitter the plaintiff would have a further opportunity to have the Tribunal review the Visa Decision on the merits.

19 The *Migration Act* provides for a scheme of merits review of the Visa Decision in the Tribunal,¹³ not judicial review of the Visa Decision in the FCFCA or the Federal Court.¹⁴ The plaintiff did not participate in the hearing before the Tribunal on 5 February 2026 and, as has been explained, the reasons for the plaintiff failing to do so were rejected by the Tribunal.¹⁵ At no time has the plaintiff sought to challenge the Dismissal Decision or the Confirmation Decision on the basis that those decisions were affected by jurisdictional error.

20 In those circumstances, any application for merits review, judicial review or appeal by the plaintiff should progress "through the hierarchy of tribunals and courts culminating (usually after satisfying the requirement of special leave to appeal) in a decision of this Court".¹⁶ This is the case even though the decision which the plaintiff could request the FCFCA to review is the Confirmation Decision, rather than the Visa Decision. The plaintiff should not be permitted to circumvent the hierarchy of review provided for by the *Migration Act*.

Merits

21 The plaintiff contends the Visa Decision was affected by jurisdictional error on two grounds.¹⁷ Both complaints concern the Nepal Protection Finding,¹⁸ and that section of the Visa Decision under the heading "Police force", which stated:

"The effectiveness of Nepal Police is limited. The Nepal Police are hindered by a lack of adequate transport, training and equipment.¹⁹ *Police are less competent at maintaining law and order in rural Nepal in comparison to urban centres.*²⁰ Police effectiveness is limited by lack of resources,

13 See [5] above.

14 *Migration Act*, ss 476 and 476A.

15 See [10] and [11] above.

16 *San Bao Pty Ltd v Minister for Immigration and Citizenship* (2026) 100 ALJR 391 at 393 [3].

17 See [4] above.

18 See [8] above.

19 2019 DFAT Report at 29.

20 2019 DFAT Report at 29.

corruption, nepotism and a culture of impunity, particularly among low-level officers.²¹" (emphasis added)

The plaintiff submits that that passage formed the basis for the delegate's finding under the heading "Analysis" that "[w]hile I acknowledge that many issues affect the effectiveness of the Nepali police, the situation is significantly better in urban areas like Birtamod, where the [plaintiff] lives".

22 First, the plaintiff alleges that, in making the Nepal Protection Finding, the delegate failed to comply with a mandatory obligation under s 499(2A) of the *Migration Act* and Ministerial Direction 84 to consider the 2024 DFAT Report for the purposes of the finding under s 36(2B)(b) of the *Migration Act*. The plaintiff's complaint is that the 2019 DFAT Report was replaced by the 2024 DFAT Report and the latter was "different in a critical respect, namely, that it did not include the negative comment on rural police forces from which the delegate extrapolated a positive statement as to the effectiveness of urban police (which the plaintiff submits was not logically available to the delegate in any event)". The plaintiff submits that any contention that the 2024 DFAT Report does not provide a basis to conclude that the observations in the 2019 DFAT Report were factually inaccurate "fails to acknowledge that not even the 2019 [DFAT] Report provides a positive statement or observation as to the effectiveness of urban police which could support the Nepal Protection Finding".

23 Second, the plaintiff alleges that, in making the Nepal Protection Finding, the delegate reasoned illogically, irrationally or unreasonably. The plaintiff submits that the only basis for the Nepal Protection Finding was page 29 of the 2019 DFAT Report and that there is "no logical connection" between the negative statements about rural police in the passages of the 2019 DFAT Report relied upon and the delegate's findings about the effectiveness of urban police.

24 Both contentions fail. First, the delegate did not fail to comply with the mandatory obligation under s 499(2A) of the *Migration Act* and Ministerial Direction 84. The delegate referred to the 2024 DFAT Report for the purpose of making a finding under s 36(2B)(b) of the *Migration Act*.²² The fact that the 2024 DFAT Report was not referred to under the headings "Police force" and "Analysis"

21 2019 DFAT Report at 29.

22 See [8] above.

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does not mean that the report was overlooked.²³ The plaintiff does not otherwise contend that the delegate was precluded from considering the 2019 DFAT Report.

25 Second, the delegate did not reason illogically, irrationally or unreasonably or solely based on page 29 of the 2019 DFAT Report. As the structure of that section of the reasons records, the finding in relation to s 36(2B)(b) of the *Migration Act* includes the statement that:

"In considering this criterion, *I have taken into account the personal circumstances of the [plaintiff] as well as the country information above.*

I find that the [plaintiff] can obtain, from an authority of the country, protection such that there would not be a real risk that the [plaintiff] will suffer significant harm as provided for in paragraph 36(2B)(b) of the [Migration] Act." (emphasis added)

26 The personal circumstances of the plaintiff, set out in the preceding "Analysis" section, included that:

"As indicated above, the threat to the [plaintiff] depends on his ability to pay the money he owes. *The [plaintiff] repeatedly stated he is willing to pay. His family runs a successful business in Nepal, and there is no evidence before me suggesting that they would not help the [plaintiff] fulfil his commitments.* There is no information before me to indicate that the Nepali authorities would withhold their protection obligations to the [plaintiff] if he were in any serious danger, or that they would not investigate and prosecute any potential perpetrator if he were seriously harmed or injured." (emphasis added)

In short, if the plaintiff paid the victims of his offences, as he said he was willing to do, then that would ameliorate the threat.

27 The delegate then made a finding that the plaintiff could obtain, from an authority of Nepal, protection such that there would not be a real risk that the plaintiff will suffer significant harm as provided for in s 36(2B)(b) of the *Migration Act*. In making that finding, the delegate took into account the country information referred to in that part of the reasons of the Visa Decision, which necessarily included the 2024 DFAT Report.

23 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605-606 [31], 616-617 [69], 623 [91]-[92].

28 Accordingly, contrary to the plaintiff's submissions, the statement in the "Analysis" section that "[w]hile I acknowledge that many issues affect the effectiveness of the Nepali police, the situation is significantly better in urban areas like Birtamod, where the [plaintiff] lives" was not a critical consideration. Whilst acknowledging that many issues affect the effectiveness of the Nepali police, what was critical were the plaintiff's personal circumstances. Further, after expressly taking into account the 2024 DFAT Report, it was in that context that the delegate made the finding in relation to s 36(2B)(b) of the *Migration Act*, being that there was no information before them to indicate that the Nepali authorities would withhold their protection obligations to the plaintiff if he were in any serious danger, or that they would not investigate and prosecute any potential perpetrator if the plaintiff were seriously harmed or injured.

Extension of time

29 The plaintiff was required to make his application for a constitutional writ within 35 days of the date of the relevant migration decision.²⁴ The plaintiff did not do so. The Court must be satisfied that it is necessary in the interests of the administration of justice to extend the 35-day period.²⁵ In deciding that question, relevant considerations include the length of and reasons for the delay and the merits of the putative application for judicial review.²⁶

30 The circumstances in this case do not justify a grant of an extension of time. The application is an abuse of process and it fails to disclose any jurisdictional error in the Visa Decision.

Conclusions and orders

31 The application should be dismissed with costs.

24 *Migration Act*, s 486A(1).

25 *Migration Act*, s 486A(2).

26 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 276 CLR 579 at 588-589 [12], 599-600 [40].

