HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

**BETWEEN:**

**FEL17**
Appellant

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
Respondent

# APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

## PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

### Error of the court below

2. The court below held that the grant of a visa under s 417 (**JBA vol 1 tab 3 p 104)** did not affect the legal consequences of the Delegate's initial refusal of the protection visa because that refusal had legal effect in its own right: **CAB Tab 6 at p 51, [56]**.

3. This is erroneous for the following reasons. ***First,*** it does not accord with a plain reading of s 417 and its legislative purpose, to "override" the outcome of the merits review process and necessarily the Delegate's initial refusal: **AS [12]**. ***Secondly***, even if s 417 does not "override" the Delegate's initial refusal, the affirmation of the Tribunal attaches to, and cannot exist separately from, the Delegate's decision, and so the substitution of the Tribunal's decision means that the decision of the Delegate no longer has any legal effect or consequence, including for the purposes of s 48A (**JBA vol 1 Tab 3 p 90**): **AS [13]**.

### Section 417 as an "override"

4. In *Plaintiff M79*, the Court examined the exercise of power under s 195A to grant a visa. The Court affirmed the very broad scope of the matters the Minister could take into account when considering whether it was in the public interest to grant a visa where the public interest was the only matter that bore upon the grant of the visa: *Plaintiff M79* (2013) 252 CLR 336 at 350, [32]; 353, [39]; and 377, [127] (**JBA vol 3, Tab 17 p 472, 475 and 499**). This is the first case in which this Court has considered an exercise of power under s 417.

5. The dispensing powers are extraordinary powers: *Plaintiff S10/2011* (2012) 246 CLR 636 at 648-649, [30] (**JBA vol 3, Tab 18 pp 515-516**); Explanatory Memorandum to *Migration Reform Bill 1992* (Cth) at [362] (**JBA vol 5, Tab 33 p 877**).

6. The extraordinary nature of the power in s 417 is confirmed by the following features:

   a. the power can only be exercised where it is considered by the Minister to be in the public interest to do so: s 417(1);

   b. the power allows the Minister to grant a visa even where the person had not applied for a visa of that class and neither the Tribunal nor the Delegate would have had power to grant that visa, as was the case here: s 417(1);

   c. the decision must be more favourable than the decision made by the Tribunal: s 417(1);

   d. it is a power that only the Minister administering the Migration Act can exercise (or a Minister authorised by that Minister): s 417(3). This Court has recently emphasised the personal non delegable nature of the power: *Davis* (2023) 97 ALJR 214 (**JBA vol 4, Tab 24**); and

e. where the power is exercised, the Minister must provide a written statement to Parliament explaining why it was exercised: 417(4). This is a specific form of accountability: *Plaintiff M79/2012* (2013) 252 CLR 336 at 353, [40] (**JBA vol 3, Tab 17 p 475**).

7. Section 417 is not an ad hoc power to simply grant a visa when it is thought to be in the public interest to do so (*cf.* s 195A): **AS [18]; AR [6]**. It is a power to "override" the existing exercise of power by the Tribunal: **AR [7] and [8]**; *Davis* (2023) 97 ALJR 214 at 246, [145], fn 172 (**JBA vol 4, Tab 24 p 689**).

8. The power in s 417 can only be exercised once the merits review process provided by the Act has been completed, where it is in the public interest to provide a more favourable result than the outcome achieved as part of an administrative continuum that includes the original decision by the Delegate: *Frugtniet* (2019) 266 CLR 250 at 271-272, [53] (**JBA vol 3 Tab 13 pp 347-348**); *Shi* (2008) 235 CLR 286 at 300-301, [45] (**JBA vol 3, Tab 19 pp 556-557**).

9. The fact that the outcome of the merits review process is *substituted* is critical: **AS [19], [20]; AR [6]**.

10. This has the effect of setting aside the outcome of the Tribunal's review and then putting in its place a new, more favourable, decision. There is no need for an express reference to "set aside" where the only consequence of an exercise of power is the substitution of the existing decision by a more favourable decision: **AR [7]**. When the Minister substituted the Tribunal's decision, that decision no longer had continuing legal force. To allow the Tribunal decision to have any effect after the Minister has intervened would be to fail give effect to the ordinary meaning of "substitute": *cf.* **RS [37]**.

11. Justice Snaden rightly held that once the process of substituting contemplated by s 417(1) transpires, the only decision with any operative legal effect under the Act is the decision made under the section: **CAB, Tab 6 at p 36, [6]**.

12. The Delegate's decision has no continuing legal consequences, *cf.* s 501A(2) **(JBA vol 1, Tab 3 pp 110-111**). If the Minister substitutes a Tribunal decision with a decision refusing the visa pursuant to s 501A, it could not be suggested that the original refusal decision by the Delegate had any legal force or is of any legal consequence. For the purposes of s 48A, the visa refusal is that of the Minister under s 501A, and not that of the Delegate under s 65. The same must be the case for the Delegate's decision where a Tribunal affirmation has been substituted by a more favourable decision to grant a visa under s 417.

13. Parliament intended that the Minister's s 417 decision replaces all prior decisions in the chain as a means of achieving finality in decision-making whilst providing "a degree of flexibility" beyond both the scheme of tightly controlled powers and discretions within the Act, and the confines of merits review: *Plaintiff S10/2011* (2012) 246 CLR 636 at 648-649, [30] (**JBA vol 3, Tab 18 pp 515-516**).

14. The Respondent's argument that the Delegate's decision in fact has legal consequence although no "independent continuing legal operation" following the Minister's

substitution should be rejected: *cf.* **RS [20]**. It fails to give proper consideration to the Minister's intervention and decision.

15. The stated purpose of s 48A was "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" (**JBA vol 5, Tab 34 p 880, [12]**).

16. That purpose is not subverted by the Appellant's construction of s 417 as the Minister has total control over whether to intervene and there is direct accountability for his or her decision: **AS [26]**.

**The Affirmed Delegate's decision is not a "refusal" for the purposes of s 48A without a legally operative Tribunal decision**

17. When the Tribunal reviewed the Delegate's decision, it did over again what the Delegate did: **AS [31];** *Makasa* (2021) 270 CLR 430 at 446-447 [50]-[51] (**JBA vol 3, Tab 15 pp 419-420**); *Frugtniet* (2019) 266 CLR 250 at 271, [51] (**JBA v 3 Tab 13 p 347**); *Shi* (2008) 235 CLR 286 at 315, [100] (**JBA vol 3, Tab 19 p 571**). The Tribunal's exercise of power was a new exercise of power, considering the same question as the Delegate, and making a new decision under s 415 of the Act: **AS [29], [33]**. When the Tribunal affirmed the Delegate's decision, the refusal decision of the Delegate remained in place but its legal force was provided by the Tribunal's exercise of power under s 415. The Delegate's decision ceased to have any continuing "independent" legal force or effect: *Plaintiff M174* (2018) 264 CLR 217 at 241-242, [70]; and 246-247, [92] (**JBA v 3, Tab 16 pp 447-448 and 452-453**).

18. It would be inconsistent to conclude that, nevertheless, the Delegate's decision had independent legal consequences for the purposes of s 48A.

19. The Delegate's decision had been subsumed into the decision of the Tribunal in the exercise of its *de novo* review power. Unless the Tribunal decision was invalid, the Delegate's decision no longer had any "independent" legal consequence.

20. Once the Tribunal decision ceased to have legal force it ceased also to be the source of the legal force of the Delegate's decision: **AS [35]**. The refusal decision no longer had any legal force or consequence.

21. Sections 48A and 48 only apply to refusals of visas which have continuing legal force: **AS [34], AR [12];** *Al Tekriti* (2004) 138 FCR 60 at 67, [30] (**JBA v 4, Tab 21 p 605**). The decision to grant a visa under s 417 could not, and did not, give legal force to a decision by the Delegate to refuse a visa of a different class.

**Dated:** 5 December 2024

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