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 REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. The proper starting point is to consider ss 45, 47 and 65 of the Act, being the right to make an application, have it considered, and have it determined if it is "a valid application for a visa". On the facts of this appeal, that starting point should be followed by consideration of s 415, and then s 417, before s 48A comes into play: *cf.* **RS [14]**. Whether s 48A is engaged – and need be considered at all – logically follows the question of the *effect of*: (a) the Tribunal's affirmation under s 415 of the Delegate's decision; and (b) the Minister's substitution under s 417 of the Tribunal's affirmation. The operation of s 48A must be construed in the context of two levels of review of the visa application: *cf.* **RS [14].**

3. It is the Respondent's construction that offends the binary nature of the visa process under s 65 of the Act: *cf.* **RS [36]**. The Respondent's construction leads to two outcomes from the same visa application, namely a protection visa refusal and a tourist visa grant. The Appellant's construction leads to a single outcome, namely the grant of the tourist visa. That this is a different visa from the visa for which the Appellant originally applied does not offend the scheme of the Act, as this is precisely what s 417 permits. Section 417 provides that the Tribunal's decision is substituted, whether or not the Tribunal (and by necessary implication, the original decision maker) had the power to make the decision to grant the visa granted by the Minister. The exercise of power pursuant to s 417 has resulted in a grant of a visa, even though the Delegate did not have power to grant that visa. There is no unresolved protection visa application; the application was resolved by the grant of a tourist visa: *cf.* **RS [36]**.

4. The substitution of the Tribunal decision connects the exercise of power under s 417 to the original visa application made under s 45 and refused under s 65. The Minister's power under s 417 cannot be exercised unless there was a protection visa application in the first place; the visa application and its affirmation by the Tribunal are jurisdictional pre-conditions under the Act. The visa application is the beginning of the process that leads to the Tribunal decision which is being substituted.

5. Section 5(9A)(c) of the Act relevantly provides that the visa application is "finally determined" once the Tribunal makes a written statement that sets out its decision (s 430(2)). In this case the decision of the Tribunal that "finally determined" the original visa application was substituted with the decision to grant a tourist visa under s 417. The words in s 48A "whether or not the application has been finally determined" do not dictate that the outcome of the Tribunal's review must be ignored in considering whether there is a relevant "refusal": *cf.* **RS [15]** and **[17]**. All that those words mean is that if the Appellant had made a further visa application prior to the Tribunal finally determining his first visa application (which is not what happened in this case), at that point there would be a relevant "refusal" for the purposes of s 48A.

6. The Respondent fails to answer the issue which is dispositive of the appeal. The Respondent's construction does not explain the legislative choice made in s 417 that the Tribunal's decision be *substituted* by a different, more favourable decision, rather than simply empowering the Minister to make a more favourable decision which operated *prospectively* from a time after the Tribunal has affirmed the refusal of a protection visa. The Legislature's choice was intentional: **AS [14]-[26]**.

7. The effect of the Minister's substitution was that the Tribunal's decision was – for relevant intents and purposes – "set aside": *cf.* **RS [27]-[28]**. The Legislature's use of "substitute" in "set the decision aside and substitute a new decision" in s 415(2)(d) and the use of the sole word "substitute" in s 417 to denote the same effective meaning has a straightforward explanation. The power of the Tribunal in s 415 is a *power of review* "that does not involve an exercise of the same power as was exercised by the delegate": **RS [21]**. The specific remedial powers of the Tribunal in exercising this power are set out in s 415(2). These powers are to be exercised after de novo consideration to determine the correct and preferable decision. If necessary, that decision will be a different decision from that of the Delegate, in which case the Delegate's decision is set aside as not being the correct and preferable decision on the merits of the application. The power of the Minister to "substitute a more favourable decision" in s 417 is a substantive power to, by necessary implication, override *the decisions that have come before and substitute in their place a more favourable decision than that of the Tribunal*. Where the outcome sought is only substitution, then a power to substitute is all that is required. Although an express power to set aside is not essential, it would make no difference if a power to set aside was expressly included to reinforce the legislative intent.[1]

8. The Respondent's construction would cause the words "substitute a more favourable decision" to be read as "make an additional more favourable decision". The language of "substitut[ion]" tells against such additionality. Further, the ordinary meaning of "substitution" supports a conclusion that a substitution sets aside the decision being substituted. Indeed, dictionary definitions include: "[t]o put (a person or place) in place of another" and "[t]o take the place of, replace";[2] "to put (one person or thing) in the place of another".[3] The Minister's exercise of power in s 417 has also been described elsewhere as an "override".[4]

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[1] See, for example, s 501J of the Act, which confers power to "set aside an AAT protection visa decision and substitute another decision that is more favourable to the applicant". The Explanatory Memorandum to the Bill which inserted s 501J into the Act provides that the section was "a logical extension of the equivalent power available to the Minister under current section 417 to substitute a more favourable decision for a decision of the RRT in relation to decisions made by that tribunal": Explanatory Memorandum to the *Migration Legislation Amendment Bill (No. 6) 2001 (Cth)*, [64]. It was recognised in the Second Reading Speech that "[t]his ministerial intervention power is consistent with existing powers relating to decisions by the Refugee Review Tribunal and the Migration Review Tribunal": Commonwealth, Parliamentary Debates, House of Representatives, 28 August 2001, 30,423 (Philip Ruddock, Minister for Immigration and Multicultural Affairs). Section 495B of the Act is another example of a power to "substitute", in the context of certain computer-based decisions.

[2] The Oxford English Dictionary (online version, accessed 6 November 2024), definition of "substitute".

[3] The Macquarie Dictionary Online (online version, accessed 6 November 2024), definition of "substitute".

[4] *Davis v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2023] HCA 10, [145]; (2023) 97 ALJR 214, 246 (Edelman J).

9. It is accepted that the Tribunal does not directly exercise the powers of the Minister, including the power to refuse a visa application under s 65 of the Act (**RS [24]**). However, it is also clear that the Tribunal decision gives the Delegate's decision under s 65 legal effect. Once the Tribunal decision is substituted, the Delegate's decision no longer has its legal effectiveness supplied by the Tribunal decision. That the Delegate's decision is not expressed to be substituted by the Tribunal's affirmation does not mean that the s 417 decision reinstates the legal force of the Delegate's decision: *cf.* **RS [22]**.

10. The Minister, in exercising his power pursuant to s 417, "think[ing] that it is in the public interest to do so", substitutes the decision of the Tribunal, which in turn had provided legal force to the Delegate's decision by its affirmation. The Minister's decision under s 417 thereby removes the continuing operative force of the decision of the Delegate. This explains why the Legislature chose to confer a power to substitute the Tribunal decision, as opposed to a power to make a *prospective* or *entirely separate* decision detached from the jurisdictional pre-conditions connecting it to the original protection visa application.

11. The Minister decided that it was in the public interest that the outcome of the Appellant's protection visa application (a visa refusal) should be substituted with a more favourable outcome (a visa grant). The consequence of the Respondent's argument (see **RS [29]**) is that although the Tribunal's decision to affirm the visa refusal has been substituted, the visa refusal itself remains in place as a decision of the Delegate. This is inconsistent with the import of the decision in fact made by the Minister and the legislative purpose of the power that the Minister was exercising.

12. The Minister's substitution decision under s 417 of the Act has removed any legally operative "refusal" (either at the level of the Minister or at the level of the Tribunal): *cf.* **RS [15] and [29]**. That is so because "refusal" in s 48A does not mean "refusal which has no (other) legal effect due to substitution". *Al Tekriti*[5] establishes that ss 48 and 48A are engaged by a legally operative refusal decision of the Delegate, and not just one in fact. Mansfield J explained that "[t]he fact that s 48(1)(b)(i) operates whether or not the application for a visa has been finally determined, that is whether or not the time for any review … has expired, or if an application for review has been made whether or not the application for review has been determined, does not mean that a decision to refuse a visa which has been set aside on review should nevertheless be given effect to."[6]

13. That the effect of s 417 might overlap with s 48B is of no moment: *cf.* **RS [33]**. They are different powers; one to grant a visa, and the other to allow an application for a protection visa within 7 working days. They are also enlivened at different stages of the decision-making and review process, and for different purposes. Section 48B is available to the Minister once the Delegate makes a decision pursuant to s 65, whereas s 417 is not available until the Tribunal has made a decision on review. That s 48A is expressed to be subject to s 48B does not mean that it is not subject to *any other* provisions of the Act: *cf.* **RS [33]**. Indeed, "the phrase 'subject to' is a simple provision which merely subjects the

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[5] *Al Tekriti v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 772; (2004) 138 FCR 60 (Mansfield J) (***Al Tekriti***).
[6] *Al Tekriti* [2004] FCA at [30]; (2004) 138 FCR 60 at 67.

provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision."[7]

14. Section 48 only applies to persons who do not hold substantive visas, whereas the outcome of a s 417 decision may be that the person receives a substantive visa. For this reason, there is no doubt that s 417 operates to overcome s 48 where a substantive visa has been granted under s 417: *cf.* **RS [34]**. Section 417 provides an exceptional power that ameliorates the stringent provisions of the Act: **AS [17]**.[8] That it does so in relation to the provisions which prevent repeat visa applications is consistent with that overall legislative purpose. The Minister is under no obligation to exercise the power in s 417, just as the Minister is under no obligation to exercise the power in s 48B. That the necessary consequence of the Minister's choice to intervene under s 417 is that there is no longer a "refusal" for the purposes of s 48A merely demonstrates the provisions of the Act working as intended.

15. The decision in *Kim*[9] illustrates the unlikely consequences of the Respondent's construction. In *Kim* it was agreed that the Delegate's original decision was invalid, but the Tribunal could affirm the original decision on different grounds. Had the Minister exercised his power to substitute the Tribunal decision in *Kim*, the Respondent's construction would mean that the admittedly invalid Delegate's decision would re-emerge as if no Tribunal decision had ever been made. Given that the Delegate's decision was admittedly invalid in *Kim*, that would leave an undecided protection visa application, which would have to be reconsidered even though it had been affirmed by the Tribunal. This outcome seems unlikely and inconsistent with the balance of the statutory scheme.[10]

16. The Appellant notes that Part 7 of the Act, which contained ss 415 and 417, was repealed as of 14 October 2024.[11] The Explanatory Memorandum is instructive:[12]

> 57. Schedule 2 combines Parts 5 and 7 of the Migration Act and significantly reduces the differences in provisions applicable to reviewable migration and protection decisions. It also significantly standardises the powers and procedures to be used in migration and protection reviews by providing for powers and procedures under the ART Bill to apply.

17. The repeal does not affect the utility of this appeal as s 351 of the current Act is in materially identical terms to the repealed s 417. The construction issue before the Court

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[7] *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905, 911 (Megarry J), cited in *Medical Council of New South Wales v Lee* [2017] NSWCA 282, [87] (Sackville AJA, Beazley P and Basten JA agreeing).
[8] See *Plaintiff S10/2011 v Commonwealth* [2012] HCA 31, [30]; 246 CLR 636, 648-649 (French CJ and Kiefel J, as her Honour then was).
[9] *Kim v Minister for Immigration and Citizenship* [2008] FCAFC 73, [33]-[35]; (2008) 167 FCR 578, 585 (Tamberlin J, Gyles and Besanko JJ agreeing).
[10] Cf. *Miller v Minister for Immigration* [2024] HCA 13, [37].
[11] Part 7 was repealed by Item 228 of Sch 2 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth). This is raised in **RS** footnote 2.
[12] Explanatory Memorandum to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth).

will inform the future operation of s 351. The Explanatory Memorandum relevantly provides:

> 559. The Minister's discretion under subsection 351(1) to substitute a more favourable decision on grounds of public interest is updated to include a reference to clause 105 of the ART Bill. (Tribunal decision on review of reviewable decision), alongside section 349 of the Migration Act.
>
> 560. These updates do not affect the operation or effect of the provision.

Dated: 11 November 2024

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