HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **FEL17**
Appellant

and

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

# RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

## PART I: INTERNET PUBLICATION

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

### The interaction between ss 48A and 417

2. Section 48A(1)(a) of the *Migration **Act** 1958* (Cth) (**JBA Vol 1 Tab 3.90**) is engaged where, relevantly, the grant of the visa has been 'refused'.

3. The Assistant Minister's delegate *refused* the appellant's Protection visa application, pursuant to s 65(1)(b) (**JBA Vol 1 Tab 3.95**). The preclusion in s 48A applied as from the date of that decision (**BFM 15[2], CAB 16[3]**).

4. The protection visa application was finally determined, within the meaning of s 5(9) (**JBA Vol 1 Tab 3.81**) upon the Administrative Appeals **Tribunal** affirming the delegate's decision (**BFM 33**). The preclusion thus continued in force from that date (**RS [15]**). The appellant concedes as much (**Reply [5]**). Whether the preclusion continues depends on the operation of, and interaction between, ss 415 and 417.

### The effect of a decision to affirm the decision under review - s 415(2)(a)

5. The Tribunal did not 'refuse' to grant the appellant a Protection visa. The Tribunal did not exercise the power under s 65. It exercised the separate power under s 415(2)(a). The decision to affirm – unlike a decision vary or set aside – is not deemed to be a decision of the Minister: s 415(3) (**JBA Vol 1 Tab 3.103**; **RS [17], [24]**).

6. Upon the Tribunal's affirmation, the delegate's decision 'no longer solely' constitutes the determination of the visa application as it 'has no independent continuing legal operation by force of s 65': *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [18] and [70] (**JBA Vol 3 Tab 16.432 and 448**). That does not convert the Tribunal's decision into a 'refusal' for the purpose of s 48A. Nor does it mean that the delegate's decision ceases to have any legal consequence (**RS [19]-[20]**).

7. The preclusion in s 48A depends on a valid and effective refusal decision; that is, a decision that is not affected by jurisdictional error and which has not been set aside. Neither feature is present in this case. The delegate's decision has not been set aside nor quashed by a court (cf **Reply [12]**; *Al Tekriti v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 138 FCR 60 (**JBA Vol 4 Tab 21**)).

**The effect of a decision under s 417 - 'substituted' but not 'set aside'**

8. The appellant frames the 'dispositive issue' in terms which assumes (in his favour) that an exercise of power under s 417(1) (**JBA Vol 1 Tab 3.104**) operates retrospectively so as to set aside the decision of the Tribunal and remove any legal consequence it may have (**Reply [6]**). That is contrary to the text and the legislative history.

9. Textually, s 417(1) conferred a power on the Minister to 'substitute for a decision of the Tribunal under section 415 another decision…'. The power is not expressed as a power to 'set aside and substitute', or 'set aside', either the decision of the delegate or the Tribunal: cf s 415(2); s 501A(2). The appellant invites the Court to read words into the statute (**RS [27]-[28]**).

10. To 'substitute' a decision does not require that the decision replaced cease to have any legal consequences (i.e. it is to be treated as no decision at all). The new decision does not operate retrospectively, nor does it operate as a decision of the Tribunal itself: cf s 415(3). This is demonstrated by the facts of this case. The Tribunal's decision was made on 11 September 2015 (**BFM 14**). The Assistant Minister exercised the power in s 417 on 12 September 2017 and granted the appellant a Visitor visa valid from this date (**BFM 33**) (**RS [27]**).

11. Earlier iterations of s 417 conferred a power expressed in terms which allowed the Minister 'set aside' a decision of the Tribunal and 'substitute' a more favourable decision. When the power was amended to permit the Minister the flexibility to make decisions that the Tribunal had no power to make, the provision took its modern form and omitted reference to setting aside the decision of the Tribunal (**JBA Vol 2 Tab 7.271**). The appellant seeks to reintroduce this wording (**RS [28]**).

12. The Minister's case does not depend on the 'reviving' or 'resurrecting' the delegate's decision (*contra* Snaden J in dissent in the Court below **CAB 35 at [6]; AS [35]**). This reflects the fact that there can be a legal consequence attributed to the delegate's refusal decision as affirmed by the Tribunal that is not taken away by the exercise of the power in s 417 (**RS [29]; CAB 53 at [64]-[65]**).

**Harmonious construction**

13. The clear legislative intention of s 48A is to prevent repeat applications for a Protection visa by a person who remains in the migration zone. The appellant seeks to defeat this intention notwithstanding the fact his protection claims have been finally determined. Section 48A is expressly subject only to the Minister's personal power in s 48B (**JBA Vol 1 Tab 3.93**). It would make no sense to permit a separate personal power, s 417, to also operate to disapply s 48A (**RS [33]**).

14. This does not offend the binary nature of the visa decision making process (*contra* **Reply [3]**). That the exercise of power under s 417 can result in the consequence that there is a refusal of a Protection visa but the grant of another type of visa (in this case a Visitor visa) is a consequence of the Minister's power under s 417 not being subject to the same constraints as apply to the Tribunal.

**Patrick Knowles** **Katherine Hooper**

Dated: 6 December 2024