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

RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUE PRESENTED BY THE APPEAL

2. The issue that is presented by the appeal is whether s 48A of the *Migration **Act** 1958* (Cth) operates to prevent a visa applicant making a second application for a Protection visa where:

   (a) the visa applicant had previously made a valid first application for a Protection visa;

   (b) that first Protection visa application was refused by a delegate of the respondent pursuant to s 65(1)(b) of the Act;

   (c) the Administrative Appeals **Tribunal** affirmed the delegate's refusal decision pursuant to s 415(2)(a) of the Act;

   (d) the Minister (or, as here, Assistant Minister) exercised the power in s 417(1) of the Act to "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" and granted the visa applicant a different visa (here, a Visitor visa for 3 months with a "no further stay" condition);[1] and

(e) the visa applicant, without leaving the migration zone, lodged a second application for a Protection visa.

3. So expressed, the issue in the appeal is stated in similar terms to the issue identified in the appellant's written submissions filed 24 September 2024 (**AS**) at [8]. However, the respondent observes that the reference in the first sentence of AS[8] to an "application for a protection visa under s 65 of the [Act]" is apt to mislead – s 65 does not confer the right to make a visa application, rather it imposes upon the Minister the obligation to determine a valid visa application (*cf* s 45 of the Act).

PART III: NOTICES UNDER S 78B OF THE JUDICIARY ACT

4. The respondent does not consider that notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

5. The relevant factual background is set out in the judgment of Judge Laing in *FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 4 at [2]-[6] **CAB 16** and by Abraham and Halley JJ in *FEL17 v Minister for Immigration, Citizenship and Multicultural* Affairs (2023) 299 FCR 356 at [10]-[15] **CAB 37-38** (Snaden J accepting at [1] **CAB 34** the majority's summary).

6. There are no factual matters in dispute, although the facts of the Tribunal's decision and claims made in the second Protection visa application, which the appellant summarises at AS[6]-[7] and the final sentence of [8], do not bear on the disposition of the issue of statutory construction that arises on the appeal.

[1] *"The holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia": Migration Regulations 1994* (Cth), Sch 8, cl 8503.

PART V: ARGUMENT

Applicable legislation

7. Section 45 of the Act provides that a non-citizen "who wants a visa must apply for a visa of a particular class".

8. The Minister has a duty to consider a valid visa application (s 47(1)), which continues until, relevantly, "the application is withdrawn [or] the visa is granted or refused" (s 47(2)).

9. The ability of a non-citizen to make a valid visa application is, however, circumscribed by various provisions of the Act, including ss 48 and 48A. Section 48 places a limit on the types of visa for which a non-citizen in the migration zone may apply for after having a visa refused or cancelled in particular circumstances. More relevantly to the current case, s 48A relevantly provides:

> **48A No further applications for protection visa after refusal or cancellation**
>
> (1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:
>
> (a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
>
> (b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);
>
> may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.
>
> …

10. The preclusion in s 48A(1) is qualified by s 48B(1), which confers upon the Minister the non-compellable discretion to disapply s 48A(1) if the Minister thinks it is in the public interest to do so.

11. Section 65 of the Act relevantly provides, in effect, that if the Minister is satisfied that the criteria for the grant of the visa are met (and the grant of the visa is not otherwise prevented by law) the Minister must grant the visa, but if not so satisfied, the Minister is required to refuse the visa.

12. Part 7 of the Act creates a regime for the review by the Tribunal of decisions of the Minister in relation to Protection visas. Section 415 of the Act was the operative

provision giving effect to the decision of the Tribunal.[2] In terms familiar to legislation creating rights of merits review, s 415 provided:

> **415 Tribunal powers on review of Part 7-reviewable decisions**
>
> (1) The Tribunal may, for the purposes of the review of a Part 7-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.
>
> (2) The Tribunal may:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) if the decision relates to a prescribed matter--remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or
>
> (d) set the decision aside and substitute a new decision; or
>
> (e) if the applicant fails to appear--exercise a power under section 426A in relation to the dismissal or reinstatement of an application.
>
> (3) If the Tribunal:
>
> (a) varies the decision; or
>
> (b) sets aside the decision and substitutes a new decision;
>
> the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.
>
> (4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.

13. Section 417(1) conferred upon the Minister a further non-compellable power to "substitute for a decision of the Tribunal …another decision, being a decision more favourable to the applicant, whether or not the Tribunal had the power to make that or the other decision".

The proper starting point

14. The appellant's substantive submissions commence with an analysis of s 417 (AS[14]-[26]) and proceed to examine the interaction of ss 415 and 417 (AS[27]-[41]). That is the wrong starting point. The issue in the case turns on whether the preclusion in s 48A is engaged in the particular circumstances, so the starting point must be s 48A itself.

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[2] Part 7 of the *Migration Act 1958* (Cth), which contained ss 415 and 417, was repealed by Item 228 of Sch 2 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth), which commenced on 14 October 2024. See *Migration Act 1958* (Cth) s 351 (as at the current date).

15. Section 48A is relevantly engaged where "the grant of the visa has been refused (*whether or not the application has been finally determined*)" (emphasis added). The term "finally determined" is defined in s 5(9) and s 5(9A) of the Act. That definition is in terms which make clear that the application is not "finally determined" where merits review procedures under, relevantly, Part 7 of the Act are ongoing. Thus, it is apparent that the operation of the preclusion in s 48A is triggered by the "refusal" to grant a visa and does not depend on finalisation of any merits review procedure. That is, the "refusal" of the Protection visa rather than any subsequent affirmation of that decision by the Tribunal is the event upon which the operation of the preclusion depends.

The nature of the Tribunal's decision to affirm the decision of the delegate

16. Having established that the operation of s 48A depends upon the "refusal" of a Protection visa, it is useful to next consider the interaction between:

    (a) the delegate's decision under s 65 to *refuse* the appellant's application for a protection visa; and

    (b) the decision of the Tribunal to *affirm* the delegate's decision.

17. Plainly, the Tribunal in this case did not *refuse* to grant the appellant a Protection visa (*cf* s 48A "where the grant of the visa has been refused"). The Tribunal *affirmed* the decision of the delegate (s 415(2)(a)) who had previously *refused* to grant the appellant a Protection visa (s 65(1)(b)). The delegate's refusal decision in this case engaged the preclusion in s 48A immediately upon the delegate's decision being made. The Tribunal's affirmation of that decision was not a further decision to "refuse" to grant a visa under s 65. Rather, it constituted a separate exercise of power[3] under s 415(2)(a). This position is established by a long and hitherto unquestioned line of authority in the Federal Court,[4] which was cited by the

[3] In this context, it may be necessary to distinguish between the Tribunal's jurisdiction to conduct a review (which was, at the relevant time, conferred by s 414 of the Act) and its power to make a decision (conferred by s 415).

[4] *Szajntop v Gerber* (1992) 28 ALD 187 (Hill J); *Daher v Minister for Immigration* (1996) 70 FCR 585 at 587-589 (North J); *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1 at 12 (French J); *Madafferi v Minister for Immigration* (2002) 118 FCR 326 at [68] (the Court); *SLGS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 179 ALD 156 at [78]-[80] (Abraham J).

majority in the Full Court.[5] The logic of this position has been described as "unarguable".[6]

18. Nothing in this Court's decision in ***Plaintiff M174/2016*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 217 demands a different conclusion. In *Plaintiff M174*,[7] this Court applied *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 24 ALR 307 in holding that it is within the Immigration Assessment Authority's jurisdiction to review a decision to refuse to grant a Protection visa to a fast track applicant regardless of whether or not that decision was affected by jurisdictional error.

19. That is the context in which paragraphs [18] and [70] of the judgment of the plurality, and Edelman J at [92], must be read. At [52] and [69] Gageler, Keane and Nettle JJ relevantly found that the fast track reviewable decision (the delegate's decision) was "nothing more than a decision to refuse to grant a protection visa to [the plaintiff] that is made in fact" and therefore the challenge to the delegate's decision had to fail, "unless the plaintiff's challenge to the Authority's decision can succeed on an independent ground". This led to the conclusion at [70] that "[o]nce affirmed by the Authority, the decision of the Minister or delegate has no independent continuing legal operation by force of s 65 of the Act".

20. To say of a refusal decision that, once affirmed on merits review, it ceases to have "independent continuing legal operation" does not answer the question of whether in those circumstances, the refusal decision ceases to have any legal consequence. The answer to any question about the legal consequences of a decision "may depend upon the purpose for which the question is asked".[8] Nothing said in *Plaintiff M174* was directed at the operation of s 48A. Indeed, *Plaintiff M174* confirms that even an invalid decision may be given legal consequences.[9]

21. Nor did the reasoning *Plaintiff M174* question the authorities of the Federal Court[10] holding that the affirmation of a delegate's decision in merits review proceedings

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[5] FC[41]-[43] (**CAB 48**).
[6] *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 370 at [92] (the Court).
[7] at [52] (Gageler, Keane and Nettle JJ).
[8] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [11] (Gleeson CJ).
[9] *Plaintiff M174/2016* at [39] (Gageler, Keane and Nettle JJ).
[10] See footnote 4 above.

does not involve an exercise of the same power as was exercised by the delegate. On the contrary, the plurality at [40] cited the decision in ***Kim*** *v Minister for Immigration and Citizenship* (2008) 167 FCR 578 without disapproval. In *Kim* at [23] and [34], Tamberlin J (with whom Besanko J agreed at [42]) held:

> It is now settled law that an affirmation of a decision of the delegate by the Tribunal has the effect that the decision of the delegate is the original decision which continues to operate and is not substituted by the later decision of the Tribunal.
>
> …
>
> [I]n this case the affirmation of the cancellation decision by the Tribunal left in place the original decision of the delegate to cancel the visa so that, at the time of its expiry, the visa had been lawfully cancelled

22. As the majority in the Full Court held[11], *Kim* is not inconsistent with *Plaintiff M174*. Rather, to say that the decision of the delegate "continues to operate" after it is affirmed is simply to say that the delegate's decision is not substituted by the Tribunal's decision.

23. The proposition that the Tribunal does not exercise the power of the Minister under s 65 is not undermined by s 415(3). That provision provides that, in cases where the Tribunal varies the primary decision (s 415(2)(b)) or sets the primary decision aside and substitutes a new decision (s 415(2)(d)), the Tribunal's decision is "taken …to be a decision of the Minister". However, even where that deeming provision applies, the provision does not "requir[e] an exercise of power by the AAT to be treated as no more than an exercise of power by the primary decisionmaker".[12] Descriptive labels referring to the Tribunal's task as to "stand in the shoes" of the primary decision-maker,[13] or to "do over again"[14] should not confuse the nature of the power being exercised by the Tribunal, which is not the power under s 65 to grant or refuse a visa.

24. Contrary to AS[41], the effect of s 415(3) was not "to align the legal effect of substitution or variation with that of affirmation". The purpose of s 415(3) was "to bring finality to the administrative decision-making process"[15] by giving the Tribunal's decision to set aside or vary a decision the force of a decision of the

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[11] FC[59] (**CAB 52**).
[12] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at [51] (the Court).
[13] *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [51].
[14] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [100] (Hayne and Heydon JJ) citing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502.
[15] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at [51] (the Court).

Minister under s 65. Section 415(3) said nothing about either the actual or deemed effect of a decision to affirm under s 415(2)(a). The majority in the Full Court was correct to so hold.[16] The position remains therefore 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.

The effect of the decision under s 417

25. There could be no doubt that immediately prior to the Assistant Minister's decision to exercise the power under s 417, s 48A(1) operated to preclude the appellant from making a further Protection visa application. That is because it remained the case that the grant of a Protection visa had been "refused" within the meaning of s 48A, even after the Minister's decision had been affirmed by the Tribunal. That is, the delegate's *refusal* decision under s 65 remained capable of triggering the preclusion even though the Tribunal's decision to affirm it under s 415(2)(a) meant that the refusal ceased to have any independent continuing legal operation.

26. The question in this case is whether the decision of the Assistant Minister to exercise the power in s 417 could change this position. For the reasons that follow, it could not.

27. The text of s 417(1) stated that the Minister "may substitute for a decision of the Tribunal under s 415 another decision" provided that decision is "more favourable to the applicant". That substituted decision is not itself expressed to become a decision of the Tribunal under s 415. Specifically, a decision under s 417 was not an exercise of the power in s 415(2)(d) allowing the Tribunal to set aside the primary decision. The Assistant Minister did not, therefore, "set aside" the decision of the delegate.

28. Nor, properly analysed, did the Assistant Minister "set aside" the decision of the Tribunal. The decision of the Tribunal is substituted for that of the Minister. However, that more favourable decision does not become "the decision on the review" (cf AS[19]) because substitution of the Minister's decision does not equate to the setting aside of the Tribunal's decision. Where the legislation confers a power on the Minister to "set aside" a decision it says so expressly (eg ss 501A(2)

[16] FC[54] (**CAB 51**).

and (3)). This distinction between substitution and setting aside is also confirmed by the legislative history. A statutory predecessor of s 417 conferred a power to both "set aside a decision of the Tribunal" and "substitute" a more favourable decision.[17] The statutory predecessor in that form did not contain any provision allowing the Minister to make a decision that was beyond the power of the Tribunal to make. When that flexibility was introduced into the legislation,[18] the refence to the decision of the Tribunal being "set aside" was removed, leaving only the power to "substitute". The inference being that, in its form at the relevant time, a decision under s 417 did not operate as a decision under s 415.

29. It follows that the delegate's decision needed no "resurrection" or "resuscitation" (cf AS[35]); it was still there as a decision as a matter of fact and not vitiated by jurisdictional error. Nothing in the Act deprived the delegate's refusal decision of its legal character as a "refusal" which engaged s 48A. That was so even after the decision was affirmed by the Tribunal under s 415, and remained the case after the Assistant Minister's decision was substituted by operation of s 417.

30. The appellant advances no argument in aid of the conclusion at AS[21] that the Minister, when substituting a decision under s 417(1) is "taken to intend" that the legal consequence of that will be the erasing of the consequences that attach to the decision of the delegate to refuse to grant the appellant a Protection visa. It may be accepted that the substitution of a decision granting a different type of visa (e.g. a Visitor visa as in this case)[19] brings with it the legal consequences associated with that Class and Subclass of visa, not the Protection visa for which the appellant applied (AS[24]). However, contrary to the assertion at AS[25], it does not follow that "the legal consequences attaching to the refusal of [the appellant's] Protection visa application as affirmed by the Tribunal" ceased to operate.

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[17] Section 64U of the Act, introduced by the *Migration Legislation Amendment Act 1989* (Cth) and renumbered s 137 by the same amending Act.
[18] Section 137 was repealed by the *Migration Reform Act 1992* (Cth) and a new s 121 was substituted (ss 23 and 24 of the *Migration Reform Act 1992*). That section was renumbered to become s 351 by s 83 of the *Migration Legislation Amendment Act 1994* (Cth). Section 351 is cognate to s 417 but applies to reviews conducted under Part 5. The *Migration Reform Act 1992* (Cth) also introduced the immediate predecessor of s 417, s 166BE (which, like s 351, was given its present numbering by s 83 of the *Migration Legislation Amendment Act 1994* (Cth)).
[19] Class FA Subclass 600 and note the definition of "substituted Subclass 600 visa" in reg 1.03 of the Regulations.

31. For the reasons explained, the Tribunal did not exercise the power to refuse under s 65 and nor did the Assistant Minister. The exercise of power under s 417 did not erase all legal consequences of the earlier refusal. Nor did the exercise of that power depend on the Assistant Minister making an assessment of appellant's eligibility for a Protection visa. Rather, in this case, it simply gave the appellant the more favourable outcome of the grant of a different class of visa than that for which he had applied. That was an outcome that could not have been achieved by a decision under s 65 or s 415. It is thus incorrect to describe the exercise of the power in s 417 as forming part of the process of merits review of the decision to refuse to grant the protection visa (*cf* AS[35], [40]). That process was complete when the Tribunal made its decision and the visa application became "finally determined" (s 5(9A)(c) of the Act).

32. The above is a sufficient basis to dismiss the appeal. However, four additional matters should be noted.

33. *First,* a relevant feature of the statutory context, not referred to by the appellant in his submissions, is s 48B. That provision is exclusively concerned with when a non-citizen can be permitted to lodge a second Protection visa application without leaving the migration zone. It is an exceptional power, exercisable only by the Minister acting personally in the public interest. The preclusion in s 48A is expressed to be subject only to s 48B: s 48A(1). It is not subject to any other provision and, importantly, it is not made subject to s 417 (or s 351). Thus, s 48A and 48B, on the one hand, and s 417, on the other, do not concern the same subject-matter. Section 417 was not concerned with when a person to whom s 48A applies can be permitted to apply again for a Protection visa following a prior refusal. Properly construed, the Act confers only one power to grant a non-citizen such permission and that is s 48B. The appellant's argument would leave ss 48A and 48B without work to do in a case where, as here, there is a favourable exercise of power under s 417 to grant a non-Protection visa after a Protection visa has previously been refused.

34. *Secondly*, there is no equivalent to s 48B in relation to s 48. That is, where s 48 applies to bar a non-citizen for making a further visa application from within the migration zone, there is no Ministerial discretion to permit a second visa application of a non-prescribed kind. Yet, if the appellant's argument in this appeal is accepted,

and that non-citizen was the beneficiary of an exercise of discretion pursuant to ss 351 or 417, he or she could then apply for a further visa of a non-prescribed kind, avoiding the operation of s 48. Again, s 48 is also not expressed to be subject to s 351 or 417.

35. *Thirdly,* although "a" purpose of s 417 can be accepted to be the one identified at AS[18] that description states the position too narrowly. Section 417 and other "dispensing provisions" of the Act (which include s 48B) were described in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [30] as having the function of conferring "upon the Minister a degree of flexibility allowing him or her to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements". The exercise of power under s 417 does not, therefore, involve revisiting the s 65 decision. Further, as has been submitted above, the dispensing provision which is uniquely and solely concerned with removing the legal consequence of the refusal of a Protection visa under s 48A, is s 48B (FC[67]).[20] Contrary to AS[26], the appellant's construction does not cohere to the purpose of s 48A. It allows for "repeat applications" for a protection visa by bypassing the gateway of s 48B.

36. *Fourthly,* the necessary consequence of accepting the appellant's argument is that there is no decision with legal effect refusing the appellant a Protection visa and his first application for a Protection visa therefore remains undecided (*cf* AS[36]). The legislative scheme is binary. Section 65 requires a valid application for a visa which has not been withdrawn to be either granted or refused. There is no scope for the appellant's Protection visa application to remain undetermined, particularly where, on his construction, he has now lodged a valid application for a second such visa.

Conclusion

37. Applying *Plaintiff M174* to the present facts, the delegate's decision does not have "*independent* continuing legal operation by force of s 65" (emphasis added). However, it still exists as a matter of fact and has legal consequences. The delegate's decision has not been set aside for jurisdictional error and is not alleged to be subject to jurisdictional error. Even if such allegation had been made, the

[20] **CAB 54**.

Tribunal's decision under s 415(2)(a) gives the refusal decision continuing legal effect. The Tribunal's decision has not been "set aside" by the decision of the Assistant Minister under s 417, rather it has been "substituted". The delegate's decision under s 65 of the Act to refuse the grant of a Protection visa enlivened the preclusion in s 48A of the Act. That proposition remains unaltered by either the Tribunal's affirmation of the refusal decision under s 415 or the substituted decision of the Assistant Minister under s 417. Both the decision of the Tribunal and the decision of the Assistant Minister involved the exercise of a separate powers, and neither of those decisions operated to remove all legal consequences of the refusal decision.

PART VI: ESTIMATE

38. The respondent estimates that his oral submissions will take approximately 1 hour.

Dated 21 October 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **FEL17**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

1. Pursuant to Practice Direction No 1 of 2019 the respondent provides the following list of constitutional provisions, statutes and statutory instruments referred to in the submissions.

No	Description	Version	Sections
1.	*Migration Act 1958* (Cth)	Compilation No. 135	ss 5, 45, 47, 48, 48A, 48B, 65, 349, 351, 415, 417, 501A
2.	*Migration Act 1958* (Cth)	Compilation No. 162	s 351
3.	*Migration Legislation Amendment Act 1989* (Cth)	As enacted	ss 26, 35
4.	*Migration Reform Act 1992* (Cth)	As enacted	ss 23, 24

5.	*Migration Legislation Amendment Act 1994* (Cth)	As enacted	s 83
6.	*Migration Regulations 1994* (Cth)	Compilation No. 185	reg 1.03, Sch 1 Class FA, Sch 2 Subclass 600, Sch 8 Condition 8503
7.	*Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth)	As enacted	Item 228 of Sch 2