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OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION (INTERVENING)

FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: VICTORIA

DIVISION: GENERAL **No WAD397/2019**

KDSP

Appellant

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Respondent

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PART I INTRODUCTION

1. The following submissions are made by the Australian Human Rights Commission (**Commission**), broadly in support of the reasoning of Rares J in *BAL19 v Minister for Home Affairs* (***BAL19***) on the "inconsistency" issue.[1] Shortly stated, that issue is whether s 36(1C) of the *Migration Act 1958* (Cth) (**Act**) has the effect of confining the circumstances in which the Minister may refuse to grant a "protection visa" pursuant to s 501(1) of the Act.

2. For the reasons explained below, in the Commission's submission, the answer to that question is "yes". The power in s 501(1) is not available to be exercised to refuse to grant a person a protection visa in circumstances where:

   2.1. the person has satisfied the criterion in s 36(1C)(b); and

   2.2. the purported basis for the exercise of the power in s 501(1) is that the person does not pass the character test because of s 501(6)(a) (that is, because the person has a "substantial criminal record").

3. For the purpose of this case, the Commission only advances the narrow submission above. That said, the analysis is likely to be very similar with respect to the relationship between s 36(1C) and other limbs of s 501(6).[2] However, it is not necessary to explore all of those relationships in detail in this proceeding, because they do not arise on the facts.[3]

PART II PRINCIPLE OF HARMONIOUS CONSTRUCTION

4. The "inconsistency" issue is one of statutory construction. Its resolution therefore depends on a proper analysis of the text, context and purpose of the relevant provisions.[4] Importantly, that analysis is assisted by the well-established principle of statutory construction, conveniently described as the principle of "harmonious construction".[5]

5. The rationale for that principle is the "understanding that a legislature ordinarily intends to pursue its purposes by coherent means".[6] In a case such as this one, where the issue concerns the relationship between two provisions in the same statute, the principle is to the effect that "[w]here conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to

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1 See [2019] FCA 2189 at [56]-[88].
2 Noting that *BAL19* concerned the relationship between s 501(6)(d)(v) and s 36(1C)(b): see [2019] FCA 2189 at [22]. See also the relationship between s 36(1B) and s 506(6)(g), which both concern adverse security assessments.
3 See Appellant's Outline of Submissions at [1].
4 *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 (***SAS Trustee***) at [20] (Kiefel CJ, Bell and Nettle JJ), [41] (Gageler J), [64] (Edelman J). See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at [54] (Gummow and Hayne JJ).
5 See *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [78] (Crennan, Kiefel and Bell JJ), [98] (Gageler J). See generally Leeming, *Resolving Conflicts of Laws* (2011) at [3.2] and the authorities there referred to.
6 *SAS Trustee* (2018) 92 ALJR 1064 at [41] (Gageler J).

achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions".[7]

6. Moreover, where the text read in context permits a "constructional choice" between meanings, the choice may ultimately "turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies".[8] That is to emphasise the importance of the identification of the statutory purpose and the correlative "mischief" to the resolution of an issue of statutory construction.[9]

7. Those overarching principles manifest themselves in further (more precisely expressed) principles of construction. In *BAL19*, Rares J identified one such principle — being the so-called *Anthony Hordern*[10] principle.[11] While that principle is concerned with the relationship between statutory powers, it is important to appreciate that it reflects a broader underlying notion. As Gummow and Hayne JJ made plain in *Nystrom*,[12] it rests upon the discernment of a parliamentary design involving "exclusive operation" of a particular provision — captured in the well-known observation in *Boilermakers*[13] that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise. For the reasons identified below, that correctly explains the relationship between s 36(1C) and s 501(1). More precisely, the generally applicable power conferred by the latter provision to refuse to grant a visa is not available to be exercised to refuse to grant a person a "protection visa" in circumstances where:

   7.1. the person satisfies the criterion in s 36(1C)(b); and

   7.2. the purported basis for the exercise of the power in s 501(1) is that the person does not pass the character test because of s 501(6)(a).

8. Before explaining that conclusion, it is necessary to say something further about each of the relevant provisions and the broader statutory context.

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7 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).
8 *SAS Trustee* (2018) 92 ALJR 1064 at [20] (Kiefel CJ, Bell and Nettle JJ).
9 See, eg, *A2 v The Queen* (2019) 93 ALJR 1106 at [31]-[37] (Kiefel CJ and Keane J, with whom Nettle and Gordon JJ generally agreed).
10 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1.
11 See *BAL19* [2019] FCA 2189 at [68], [72]-[73], [85], [88].
12 *Nystrom* (2006) 228 CLR 566 at [54].
13 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

PART III RELEVANT STATUTORY PROVISIONS

Section 36(1A)

9. Section 36(1A) provides that an applicant for a protection visa must satisfy both of the criteria in s 36(1B) and s 36(1C), as well as at least one of the criteria in s 36(2).

Refugee — s 36(2)(a) and s 5H

10. Relevantly, one of the criteria in s 36(2), provided for in para (a), is that the person is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has "protection obligations" because the person is a "refugee". The term "refugee" is, in turn, defined in s 5H. This definition was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**2014 Amendment Act**). It has an inclusive component and an exclusive component.

11. The **inclusive** aspect of the definition requires consideration of whether the person "is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country" (s 5H(1)(a)). As was explained at the time that s 5H was inserted, this component is intended to reflect Australia's interpretation of Art 1A(2) of the Refugees Convention.[14]

12. But the person is nevertheless **excluded** from the statutory concept of "refugee" if the Minister has serious reasons for considering that the person has committed certain crimes (including "a serious non-political crime" before entering Australia) or has been guilty of acts contrary to the purposes and principles of the United Nations (s 5H(2)). This component of the definition reflects Australia's interpretation of Art 1F of the Refugees Convention; indeed, the terms of s 5H(2) reflect those of Art 1F.[15]

Section 36(1B) and (1C)

13. Section 36(1B) provides that it is a criterion for a protection visa that the applicant is <u>not</u> the subject of an adverse security assessment by the Australian Security Intelligence Organisation.

14. Section 36(1C) provides that it is a criterion for a protection visa that the applicant is <u>not</u> a person whom the Minister considers, on reasonable grounds: (a) "is a danger to Australia's security"; or (b) "having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community". The focus for present purposes is para (b), which directs attention to an applicant's criminal record.

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[14] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Explanatory Memorandum**) at 10, 169-170 [1167]-[1170].

[15] Explanatory Memorandum at 10, 170 [1171]-[1175].

15. The term "particularly serious crime" is defined separately in s 5M, and includes a reference to a crime that consists of the commission of a "serious Australian offence" or a "serious foreign offence".[16] Both of those terms are also separately defined. To be a "serious Australian offence", the offence must meet two conditions. **First**, it must be an offence that "involves violence against a person"; or is a "serious drug offence"; or "involves serious damage to property"; or is an offence against s 197A or 197B of the Act.[17] **Second**, it must be an offence that is punishable by imprisonment for life; or for a fixed term of not less than 3 years; or imprisonment for a maximum term of not less than three years.

16. When read together with s 36(1A), the effect of s 36(1C), if not satisfied, is to exclude a person who meets the statutory definition "refugee" from the grant of a protection visa".[18] However, by permitting that outcome, s 36(1A) does no more than reflect the operation of the Refugees Convention. Section 36(1C), like the statutory definition of "refugee", was inserted by the 2014 Amendment Act. Its insertion was "intended to codify Article 33(2) of the Refugees Convention which provides for an exception to the principle of *non-refoulement* in Article 33(1)[19] of the Refugees Convention".[20] So much is evident when the text of s 36(1C) is compared against the text of Art 33(2), which is relevantly identical.[21]

Section 197C and non-refoulement obligations

17. It is also important to note two other significant changes to the Act made by the 2014 Amendment Act. The first was the insertion of s 197C, which relevantly provides that for the purposes of s 198 of the Act, "it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". It will be recalled that s 198 is the source of the obligation to remove from Australia an unlawful non-citizen as soon as reasonably practicable.

18. The second change, related to the first, was the insertion of a definition of "non-refoulement obligations" in s 5(1).[22] Those obligations include, but are not limited to:

    (a) non-refoulement obligations that may arise because Australia is a party to:
        (i) the Refugees Convention; or

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16 This definition was also inserted by the 2014 Amendment Act: see Explanatory Memorandum at 179 [1225]-[1229].
17 Being offences relating to offences in immigration detention.
18 Explanatory Memorandum at 180 [1235], [1237].
19 Article 33(1) provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".
20 See Explanatory Memorandum at 12, 180 [1236]. See also *BAL19* [2019] FCA 2189 at [65] (Rares J).
21 Article 33(2) provides: "The benefit of the [Art 33] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". See also *DOB18 v Minister for Home Affairs* [2019] FCAFC 63 at [51] (Logan J).
22 See *BAL19* [2019] FCA 2189 at [77].

(ii) the Covenant[23] or
(iii) the Convention Against Torture; and

(b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a).

19. That non-exhaustive definition was "intended to be read broadly to include current and future *non-refoulement* obligations", including those arising outside the international instruments specified in the definition.[24] Accordingly, the definition plainly includes the obligation under Art 33(1) of the Refugees Convention, subject to Art 33(2).

Section 501

20. Section 501(1) provides that the Minister "may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Relevantly, pursuant to s 501(6)(a), a person does not pass the character test if "the person has a substantial criminal record". By s 501(7), a person has a "substantial criminal record" if:

(a) the person has been sentenced to death; or
(b) the person has been sentenced to imprisonment for life; or
(c) the person has been sentenced to a term of imprisonment of 12 months or more; or
(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
(f) the person has:
(i) been found by a court to not be fit to plead, in relation to an offence; and
(ii) the court has nonetheless found that on the evidence available the person committed the offence; and
(iii) as a result, the person has been detained in a facility or institution.

PART IV THE PROBLEM

21. It can immediately be observed that a person might be taken to have a "substantial criminal record" within the meaning of s 501(7) in circumstances where the person does not have a criminal record that would cause the person to not satisfy the criterion in s 36(1C)(b): compare paragraphs 15 and 20 above.

22. That lack of congruency was the source of the difficulty or "inconsistency" identified by Rares J in *BAL19*, particularly having regard to the legislative purpose as revealed by the text and context. As noted above, the legislative history to the 2014 Amendment Act reveals that the purpose of inserting s 36(1C) and s 5H was to codify Australia's "interpretation of its

23 International Covenant on Civil and Political Rights: see Act, s 5(1).
24 See Explanatory Memorandum at 164 [1126].

protection obligations" under the Refugees Convention.[25] This is not a situation where there is some "very general purpose" that does not provide much assistance for the construction of a particular provision.[26] To the contrary, the purpose of s 36(1C) and s 5H could not be more clear. As Rares J stated in *BAL19*, in relation to s 36(1C)(b):[27]

> the legislative purpose of that stipulation was to ensure that such a person would not be refouled (subject, of course, to other protective criteria in s 36(1B), (1C)(a) and (2)), despite the danger he or she may be to the Australian community, because that person, in those prescribed circumstances, consistently with Art 33(2) of the Refugees Convention, was not to be exposed to the real chance of persecution of which he or she had a well-founded fear.

23. After observing the broader circumstances in which a person might be taken to have a "substantial criminal record",[28] his Honour correctly concluded:[29]

> There would be no intelligible statutory purpose for the mandatory criterion for a grant of a protection visa in s 36(1C), reflecting as it does the Parliament's interpretation of Art 33(2) of the Refugees Convention, if the Minister were free to apply a less stringent criterion under s 501(1) and its analogues, involving his exercising a very broad discretion, to refuse to grant the very same visa.

24. In other words, if the operation of s 501(1) is not confined, the result would be incoherence in the statutory scheme, at odds with the principle of harmonious construction identified above. It was in that sense that Rares J correctly identified that result as (internally) "inconsistent" — if not confined, the relevant provisions of s 501 could not operate "in harmony with s 36(1C)".[30]

25. The nature and extent of that disharmonious operation (and resulting incoherency) is revealed by further consideration of the context and history: at the time the 2014 Amendment Act was enacted, it was emphasised that it was "not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention".[31] Thus, the Minister at the time was able to say that "[a]sylum seekers will not be removed in breach of any non-refoulement obligations".[32]

26. However, precisely the opposite situation will be true unless s 501(1) is confined so as to not be "susceptible"[33] to exercise in the circumstances set out at paragraph 7 above. Contrary to the clear purpose of s 36(1C) and s 5H, if the scope of s 501(1) is not so confined, the Minister will be permitted to exercise that power in a manner that would lead to Australia breaching its

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25 See Explanatory Memorandum at 2, 4, 10, 169 [1165], 180 [1236]. See also House of Representatives, *Parliamentary Debates* (25 September 2014) at 10547.
26 Cf *A2 v The Queen* (2019) 93 ALJR 1106 at [34]-[36].
27 *BAL19* [2019] FCA 2189 at [65].
28 *BAL19* [2019] FCA 2189 at [66], see also [62], [64].
29 *BAL19* [2019] FCA 2189 at [67].
30 *BAL19* [2019] FCA 2189 at [82] — see also his Honour's description of the "inconsistency issue" at [3].
31 Explanatory Memorandum at 10.
32 House of Representatives, *Parliamentary Debates* (25 September 2014) at 10547.
33 *Nystrom* (2006) 228 CLR 566 at [51] (Gummow and Hayne JJ).

non-refoulment obligations under the Refugees Convention.[34] That would arise because, on this hypothesis:

26.1. the person meets the statutory definition of "refugee" in s 5H and, as a consequence, also meets the definition of "refugee" under Art 1A of the Refugees Convention;

26.2. because the person satisfies s 36(1C)(b) (and assuming they also satisfy sub-s (1C)(a) and sub-s (1B)), the person does not fall within the exception to the non-refoulement principle contained in Art 33(2) of the Refugees Convention;

26.3. the Minister exercises the power to refuse to grant a visa under s 501(1) on the basis of the person's "substantial criminal record", which exercise will necessarily be by reference to a criminal record that does not cause the person to not satisfy the criterion in s 36(1C)(b);

26.4. the person will be an unlawful non-citizen and liable to be detained under s 189;

26.5. that will inevitably engage the obligation in s 198 to remove the person from Australia as soon as reasonably practicable; and

26.6. on the current Full Court authority regarding the operation of s 197C,[35] the person will thus be required to be removed from Australia in breach of Australia's "non-refoulment obligations" as defined in the Act (namely, the obligations that arise under the Refugees Convention because the person meets the definition of "refugee" and does not fall within the exception in Art 33(2)).[36]

27. Given the obvious purpose of the definition of "refugee" in s 5H and the criterion in s 36(1C)(b), a construction of s 501(1) and (6)(a) that permitted that outcome would be absurd.[37] It would also be in tension with the principle that a statute is to be construed, so far as its language permits, so that it is in conformity with Australia's international obligations.[38]

PART V THE SOLUTION

28. Those strains in the statutory scheme are avoided by application of the approach or principle discussed at paragraph 7 above. As we have said, in *BAL19*, Rares J applied a similar approach

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34 See *BAL19* [2019] FCA 2189 at [71].

35 See *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27 at [17], [22], [25] (Besanko and Thawley JJ). Although their Honours allowed a cross-appeal from *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944 at [80]-[81] (Moshinksy J), their Honours held the same view about the effect of s 197C. See also *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 at [26] (North ACJ); *FRH18 v Minister for Home Affairs* (2018) 266 FCR 413 (***FRH18***) at [59]-[60] (Rares J).

36 Unless the Minister uses some "alternative management option" under the Act: see *FRH18* (2018) 266 FCR 413 at [57] (Rares J).

37 See *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 (Gibbs CJ), 320 (Mason and Wilson JJ). See also *Acts Interpretation Act 1901* (Cth), s 15AB(1)(b)(ii).

38 See *Momcilovic v The Queen* (2011) 245 CLR 1 at [18] (French CJ) and the authorities there cited.

by reference to *Anthony Hordern*. Yet, as was also noted above, that principle is concerned with the relationship between statutory powers. And s 36(1C)(b), read together with s 36(1A), does not confer a "power" on any person. It merely identifies a mandatory criterion for a protection visa. Once all of the criteria in s 36(1A) are satisfied, then the person will "satisfy the other criteria prescribed" by the Act, for the purposes of a visa being granted pursuant to s 65 of the Act. A visa is to be granted pursuant to s 65 if the criteria in that section are satisfied.

29. It follows that it is not strictly accurate to characterise s 36(1C) as "a conferral of power".[39] Nor, for that reason, is the *Anthony Hordern* principle directly applicable to resolve any conflict or tension between that provision and s 501.[40] However, that is really beside the point. As submitted above by reference to the reasons of Gummow and Hayne JJ in *Nystrom*, the notion underlying the *Anthony Hordern* principle is of broader application, encapsulated in the passage their Honours cited from *Boilermakers*. It reflects what the High Court has described as a "common sense" proposition that "Parliament having before it two apparently conflicting sections at the same time cannot have intended the general provision to have deprived the specific provision of effect".[41] In those circumstances, the particular provision is given a legal meaning which impliedly excludes the general.[42] That is no mere mechanical application of a maxim: as Spigelman CJ has explained, it is the "very generality of the words [of the general provision] which indicates that the legislature is not able to identify or even anticipate every circumstance in which it may apply".[43] Unsurprisingly, as his Honour went on to observe, in those circumstances, Parliament is "taken not to have intended to impinge upon its own comprehensive regime of a specific character".

30. Section 36(1C) creates a comprehensive regime of that nature. It states (with precision and exhaustively) the consequences that attach to a person's criminal history for the purposes of a protection visa application: the consequences being that, in the carefully circumscribed cases identified in s 36(1C)(b) read with s 5M, the person ceases to be eligible for such a visa: see s 36(1A)(a).

31. The general words of s 501 should not be construed as permitting the minister to *add to* those consequences, which the Parliament has identified with some care and with an eye to the precise contours of Australia's international obligations. They should not be so construed because, returning to the point made in *Boilermakers*, the affirmative statements in s 36(1A)(a)

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39 Cf *BAL19* [2019] FCA 2189 at [83].
40 Cf Applicant's Further Outline of Submissions at [6].
41 *Smith v R* (1994) 181 CLR 338 at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).
42 Leeming, *Resolving Conflicts of Laws* (2011) at 59.
43 *Ombudsman v Laughton* (2005) 64 NSWLR 114 at [19].

of those consequences appoint or limit an order or form of things in a way which has an implicit negative force. Although it was dealing with the relationship between the Act and the Regulations, the position is similar to that identified by the High Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*.[44]

32. Importantly, once s 36(1C)(b) is characterised as a mandatory criterion, rather than a power, it is no answer to that argument to say that s 501H(1) expressly provides that the power in s 501 "to refuse to grant a visa to a person … is in addition to any other power under this Act … to refuse to grant a visa to a person".[45] The question of construction does not depend upon the relationship between powers.[46]

33. If the Commission's argument is accepted, the meaning of s 501(1) (with sub-s (6)(a)) is to be adjusted in the manner identified at paragraph 7 above. By adjusting the meaning in that way, Australia will be able to "continue to meet its *non-refoulement* obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act".[47] In particular, as was contemplated at the time the 2014 Amendment Act was enacted, "Australia's *non-refoulement* obligations will be met through the visa application process".[48]

34. That, in turn, points to another feature of the broader context which coheres with the Commission's proposed construction. Previously, as was held in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, s 36(2) of the Act was only directed to the question of whether a person met the description of a "refugee" within the meaning of Art 1 of the Refugees Convention[49] (including the limiting effect of Art 1F).[50] It was not concerned with Art 33(1) or (2). As French CJ explained in *Plaintiff M47*, because Art 33 "does not qualify the reach of Art 1" it therefore did "not play a part in the application of the criterion in s 36(2)(a).[51]

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44 (2015) 255 CLR 231 at [21] (the Court).

45 See *BAL19* [2019] FCA 2189 at [87].

46 It should also be noted that the relationship between ss 65 and 501 is governed by the terms of s 65(1)(a)(iii). But those terms likewise say nothing about the specific relationship between the s 36(1C)(b) and s 501(1) and (6)(a): see *BAL19* [2019] FCA 2189 at [69].

47 Explanatory Memorandum at 166 [1142].

48 Explanatory Memorandum at [1142] (emphasis added). The visa application process was just one example given. The other examples given were s 46A (permitting an application to be made), s 195A (public interest power) and 417 (substitution of more favourable decision). But as to whether those powers might realistically be exercised, see *FRH18* (2018) 266 FCR 413 at [57] (Rares J); *BAL19* [2019] FCA 2189 at [41]-[52].

49 See (2005) 222 CLR 161 (***NAGV***) at [32]-[33], [42] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

50 See *NAGV* (2005) 222 CLR 161 at [56]-[57] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 (***Plaintiff M47***) at [37] (French CJ).

51 (2012) 251 CLR 1 at [38], see also at [190] (Hayne J); *NAGV* (2005) 222 CLR 161 at [42], [57], [59] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

35. That position was, in effect, affirmed by the High Court in *SZOQQ v Minister for Immigration and Citizenship*.[52] Section 91U provided a definition of "particularly serious crime" for the purposes of interpreting Art 33(2) of the Refugees Convention.[53] The Court observed that s 91U was "not expressed in terms which [were] apt to translate into the terms of s 36(2) the operation of Art 33(2) of the Refugees Convention to provide for the extinguishment of the non-refoulement obligation in Art 33(1)".[54] It did not alter the operation of 36(2)(a) from that identified in *NAGV*.[55]

36. Thus, prior to the 2014 Amendment Act, a person might have satisfied the criteria in s 36(2) for the grant of a protection visa, but might also have been a person who was within the scope of Art 33(2). There was no necessary correspondence between meeting the criteria in s 36 and being a person to whom Australia owed non-refoulement obligations. Therefore, it was possible for a decision to refuse to grant a visa under s 501(1) to be consistent with Australia's obligations under the Refugees Convention, because such a decision could be made by reference to matters that would also satisfy the "disentitling criteria" under Art 33(2).[56] However, as Rares J correctly observed in *BAL19*,[57] that is no longer the case. As his Honour also said, it would be erroneous to approach the statutory construction task on the basis of preconceived ideas about what was the position under the Act prior to those amendments.[58] That would be to overlook what is apparent from the 2014 Amendment Act: Parliament has, by design, placed those matters on a distinctly different statutory footing. They are now addressed in the course of considering the criteria specified in s 36.

Date: 4 March 2020

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52 (2013) 251 CLR 577 (***SZOQQ***).

53 This provision was inserted in 2001 and commenced after the time the decision that was the subject of *NAGV* was made: see *SZOQQ* (2013) 251 CLR 577 at [28] (Keane J).

54 *SZOQQ* (2013) 251 CLR 577 at [31] (Keane J). This was altered by the 2014 Amendment Act — the point of moving the substance of former s 91U into s 5M was so the definition could "form part of the statutory framework relating to refugees": see Explanatory Memorandum at 179-180 [1128]-[1129].

55 *SZOQQ* (2013) 251 CLR 577 at [29]-[30], [33] (Keane J).

56 *Plaintiff M47* (2012) 251 CLR 1 at [42] (French CJ), see also at [191]-[192] (Hayne J), [389] (Crennan J). Note that French CJ at [42] suggests a visa might be refused or cancelled in circumstances that overlap with Art 33, but when referring to the overlap between s 501 and Art 1F refers only to *cancellation*. That supports the Commission's argument here, because it suggests that s 501 was not available to *refuse to grant* a visa in circumstances if the person fell within the scope of Art 1F (that being dealt with by s 36(2)(a)), but cf at [457] (Kiefel J).

57 See [2019] FCA 2189 at [84]-[85].

58 See *BAL19* [2019] FCA 2189 at [84]-[88] and *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at [40] (McHugh, Gummow and Heydon JJ).