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Details of Filing

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SUPPLEMENTARY SUBMISSIONS 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 REPLY

1. These supplementary submissions are filed in response to paragraphs 40 to 44 of the Respondent's further written submissions dated 6 March 2020 (**RFS**), pursuant to the orders made by Justice Bromberg on 26 March 2020. The Commission makes **eight** points.

2. ***First***, by stating that the Commission "acknowledges that reliance on *Anthony Hordern* is not available" (**RFS [40]**), the respondent glosses over the important point that, as explained at **AHRC [7]**, the *Anthony Hordern* principle is simply a manifestation of a broader principle captured in the extract from *Boilermakers.*[1]

3. ***Second***, the respondent contends that there is no "lack of congruency" between s 36(1C)(b) and s 501(1) because he says that s 36(1C)(b) is a matter of eligibility for, not entitlement to, a protection visa (**RFS [40]**). The Commission agrees that s 36(1C)(b) can be characterised as a "matter of eligibility". However, that is equally true of the "character test" in s 501(1) insofar as it is applied to refusal decisions. The respondent's characterisation of s 36(1C)(b) therefore only serves to highlight the direct conflict between two provisions directed to the same thing. The only way to avoid that conflict is to adopt the Commission's construction of s 501(1).

4. ***Third***, although it is a "matter of eligibility", s 36(1C) is a criterion that, if satisfied (together with the other criteria in s 65 applicable to protection visas), does ultimately result in an entitlement to a visa — if the criteria in s 65 are met, the applicant must be granted a visa (**AHRC [28]**, cf **RFS [43]**). The Minister's suggested dichotomy between "eligibility" and "entitlement" is porous and of little analytical assistance.

5. ***Fourth***, the specific relationship between ss 65 and 501 is governed by the terms of s 65(a)(iii), which provides that the grant of the visa must not be "prevented" by ss 91WA, 91WB or 501 (**AHRC fn 46**). There is no doubt that the grant of a protection visa may be prevented by ss 91WA or 91WB (cf **RS [43]**). As the respondent points out (**RS [43]**), those provisions only have relevance to protection visas. And, as a consequence of those provisions, it is possible that a person that satisfies s 36(1C) may be refouled contrary to Australia's non-refoulement obligations (cf **RS [44]**). However, that consequence flows from the *express language* of ss 91WA and 91WB, which is absent from s 501(1) (see also **AFS [3]**)[2]. Indeed, the presence of ss 91WA and 91WB in s 65(a)(iii) illustrates that the fact a provision is referred to in s 65(a)(iii) does not mean that the provision is relevant to any and all visas. Just as ss 91WA and 91WB have no application in relation to non-protection visas, the Commission's submission is that s 501 has no application in relation to the refusal of protection visas.

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1 See again (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
2 Appellant's Further Outline of Submissions in Reply, dated 13 March 2020.

6. ***Fifth***, the respondent advances the *in terrorem* argument that the consequence of the Commission's construction of s 501(1) is that a refugee who satisfied the criterion in s 36(1C) can never be removed from Australia. That misconceives the Commission's submission. It does not contend that there is a "dichotomous choice" (cf **RS [44]**). As noted at paragraph 5 above, the express terms of ss 91WA and 91WB contemplate that there may be scenarios in which a person who satisfies s 36(1C) may be removed from Australia in breach of Australia's non-refoulement obligations. Likewise, a person may also satisfy the criterion in s 36(1C), yet fail to satisfy one of the other (applicable) criteria in s 65(1)(a).

7. The Commission's argument rather involves the proposition that attention to the text and context points to statutory limits which govern the circumstances in which Australia will be placed in a position where it is required to breach its non-refoulement obligations by force of s 197C (read with s 198). No doubt s 197C contemplates that there will be such occasions. But, given the clear intention to "codify" Australia's "interpretation of its protection obligations" under the Refugees Convention (see **AHRC [11], [16]** and **[22]**) it is logical to presume that Parliament intended that those occasions should arise only rarely and in the way *specified* in that "code". It will be recalled that the 2014 Amendment Act inserted both ss 36(1C) and 197C. That legislative history is entirely consistent with the construction advanced by the Commission: see also **AHRC [11]-[12], [16], [17]-[19]** and **[34]-[36]**.

8. ***Sixth***, as the respondent observes, the Commission advanced a narrow submission in chief, focusing on s 501(6)(a). Nonetheless, the Commission accepts that its construction would have broader consequences. The point being made was that, in this proceeding, it is not necessary for the Court to attempt to resolve every permutation and combination of the way in which the criterion in s 36(1C) might intersect with s 501. But it is useful to clarify one important matter — namely, what the consequence of the Commission's construction is in relation to *cancellation*. To be clear, the Commission does *not* contend that satisfaction of the criterion in s 36(1C) grants some sort of immunity from later cancellation (cf **RS [42]**). For example, the appellant at **AFS [24]-[29]** explains how cancellation might occur under s 116(1)(a) in circumstances where the person no longer satisfies the criterion in s 36(1C). Relatedly, the Commission acknowledges that it would naturally follow from its construction that s 501(2) could not be exercised to cancel a protection visa immediately following its grant (by reason of an essentially similar implied constraint to that identified at **AHRC [30]-[33]**). A question may nevertheless arise about whether that power might be exercised at some later point in time, on the basis of "new facts or different considerations". An analogous question was recently considered by a five-judge bench in *Minister for Home Affairs v Brown* [2020]

FCAFC 1722 at [115]. That decision, which involved three separate reasons for judgment from a five-judge bench, illustrates the complexity of such questions, and highlights why it is not necessarily helpful to consider all such matters in the abstract, in the absence of a concrete dispute which raises the issue. That is why the Commission has adopted the approach that it has in this matter.

9. ***Seventh***, it is necessary to say something about the respondent's suggestion that a person who has been refused a protection visa under s 501(1) might be granted a visa under s 195A, or might otherwise be removed to a third country. As to the possibility of s 195A, as Rares J cogently explained in *BAL19* at [42] (see also at **AHRC [33]**):

> [T]he Minister's finding that the risk that the applicant currently posed, on which the Minister acted under s 501(1), necessarily entailed that no reasonable or rational person in the Minister's position could grant the applicant any visa in the foreseeable future. That is because the grant of any visa would court the very risk that the Minister found decisive in refusing the protection visa. And, indefinite detention to see if, at an indeterminate future time, the applicant's circumstances had changed materially, is unlawful and precluded by ss 197C and 198.

10. *BAL19* concerned a different limb of the "character test" than the one at issue in this case. But the logic of his Honour's reasoning on this point is not impeachable on that basis. Indeed, it is even more persuasive. If the person fails the character test under s 501(1) and (6)(a) on the basis of the person's "substantial criminal record" as defined in s 501(7), the person cannot remove themselves from that definition (absent, perhaps, a subsequent acquittal on appeal). Therefore, no matter how long the Minister waits to consider whether to grant a visa (which delay would be unlawful because of ss 197C and 198 in any event), the person will retain that substantial criminal record. Having exercised the discretion under s 501(1) to refuse to grant a protection visa on the basis of that record, how can the Minister reasonably or rationally conclude that it is in the public interest to grant the person another visa while that status still exists? If the Minister had in mind granting a visa under s 195A, why would he exercise the *discretion* to refuse to grant a protection visa in the first place? As to the possibility of removal to a third country, a similar question arises: why would a third country accept a person that has been refused a visa on character grounds? The inherent improbability of these matters coming to pass is a further matter suggesting the Commission's construction is correct.

11. ***Finally***, although strictly outside the scope of these submissions, the Commission observes that the respondent's explanation of what the High Court decided in *SZOQQ* is incorrect. It did not overturn *NAGV*, as explained at **AHRC [34]-[35]**.[3]

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[3] See further the submission recorded in *SZOQQ* at [28], and rejected at [30]-[31]. The Court in *SZOQQ* repeatedly observed that that no one challenged the correctness of *NAGV*: see at [18], [28], [35]. See also *NAGV* at [57].