Federal Court of Australia

AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 114

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| Appeal from: | *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1105 |
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| File number: | VID 582 of 2021 |
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| Judgment of: | **KENNY, O’CALLAGHAN AND THAWLEY JJ** |
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| Date of judgment: | 6 July 2022 |
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| Catchwords: | **MIGRATION** – appeal: whether Tribunal failed to comply with cl 14(1)(a) of Direction 65 by failing to consider for itself “international non-refoulement obligations” – appeal dismissed – cross-appeal: whether second judicial review application precluded by reason of res judicata, *Anshun* estoppel, abuse of process – cross appeal dismissed |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 31A(2)  *Federal Court Rules 2011* (Cth), r 26.01 |
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| Cases cited: | *Applicant A321 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 306  *Applicants S311 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 45  *BC v Minister for Immigration and Multicultural Affairs* [2001] FCA 1669; 67 ALD 6  *Bryant v Commonwealth Bank of Australia* (1995) 57 FCR 287; 130 ALR 129  *Clayton v Bant* [2020] HCA 44; 95 ALJR 34; 385 ALR 41  *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19  *Macquarie Bank Ltd v National Mutual Life Association of Australasia Ltd* (1996) 40 NSWLR 543  *Matson v Attorney-General (Cth)* [2021] FCA 161  *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* [2006] HCA 53; 231 CLR 1  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 395 ALR 403  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441  *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417  *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; 147 CLR 589 at 597  *Re Ruddock; Ex parte LX*[2003] FCA 561  *S307 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 650  *S635 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 65  *Somanader v Minister for Immigration and Multicultural Affairs* [2000] FCA 1192; 178 ALR 677  *Thayananthan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1054; (2003) 132 FCR 222  *Thoday v Thoday* [1964] P 181  *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 36 FCR 406 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | [85] |
|  |  |
| Date of hearing: | 24 May 2022 |
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| Counsel for the Appellant: | Mr D Hooke SC (pro bono) and Mr S Hartford Davis (pro bono) |
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| Solicitor for the Appellant: | Hearn Legal (pro bono) |
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| Counsel for the First Respondent: | Mr Greg Johnson |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | VID 582 of 2021 |
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| BETWEEN: | AIO21  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | KENNY, O’CALLAGHAN AND THAWLEY JJ |
| DATE OF ORDER: | 6 July 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal as agreed or assessed.
3. The cross-appeal be dismissed.
4. The first respondent pay the appellant’s costs of the cross-appeal as agreed or assessed.

Note:    Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The appellant, a citizen of Algeria, appeals from orders made by the primary judge, extending time to bring, but dismissing, an application for judicial review: *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1105 (hereafter “**J**”). The respondent **Minister** cross-appeals from the primary judge’s order the effect of which was to dismiss an interlocutory application for summary dismissal of the appellant’s application.
2. The focus of the primary judge’s decision, and this appeal, is a decision of the Administrative Appeals **Tribunal** to affirm a delegate’s decision under s 501CA(4) of the *Migration* ***Act*** 1958 (Cth) to refuse to revoke a decision made under s 501(3A) to cancel the appellant’s protection visa: *NVDC and Minister for Immigration and Border Protection (Migration)* [2018] AATA 457 (hereafter “**T**”). In the performance of its duties and exercise of its powers under the Act, the Tribunal was bound to “comply” with Ministerial **Direction 65**, *Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*: s 499(1) and (2A). Clause 14(1)(a) in Part C of Direction 65 required the Tribunal to take “international non-refoulement obligations” into account in deciding whether to revoke a visa cancellation under s 501CA(4). Clause 14.1 explains what “international non-refoulement obligations” are and provides directions in relation to the consideration of those obligations in the context of making a decision under s 501CA(4).
3. There are two central issues:
4. On the appellant’s appeal the issue is whether the primary judge erred in failing to conclude that the Tribunal, in its consideration of “international non-refoulement obligations”, had to be satisfied that there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C of the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (**Refugee Convention**).
5. On the Minister’s cross-appeal the issue is whether the primary judge erred in failing summarily to dismiss the appellant’s application for an extension of time on the basis that: (a) there was a res judicata which barred the appellant’s proposed judicial review application; (b) the principles in *Port of Melbourne Authority v* ***Anshun*** *Pty Ltd* [1981] HCA 45; 147 CLR 589 at 597 would apply to the proposed judicial review application; or (c) the proposed application for judicial review was an abuse of process. The Minister did not cross-appeal from the primary judge’s order granting an extension of time.
6. For the reasons which follow, the primary judge was correct to conclude that the appellant failed to discharge his onus of establishing jurisdictional error on the part of the Tribunal on the ground advanced. As to the cross-appeal, no error has been demonstrated in the primary judge’s refusal to dismiss summarily the appellant’s application for an extension of time.

# FACTS

1. The appellant was granted a protection visa on 7 June 2001. In around 2002, the appellant began using drugs and became addicted. He has committed over 100 offences, his first conviction occurring in 2004.
2. On 22 February 2016, the appellant’s visa was cancelled by a decision made under s 501(3A). At the time the appellant was serving sentences of full-time imprisonment at Loddon Prison in Victoria, as a consequence of which the appellant’s visa was subject to mandatory cancellation under that provision. The appellant applied for revocation of the cancellation decision under s 501CA(4). The appellant made representations in accordance with s 501CA(4)(a). There was no issue that the appellant did not pass the character test for the purposes of s 501CA(4)(b)(i). The question for the Minister (or his delegate) was whether there was “another reason” within the meaning of s 501CA(4)(b)(ii) to revoke the visa cancellation.
3. The delegate was bound to comply with Direction 65: s 499(2A) of the Act. Clause 14(1)(a) of Direction 65 provides:

**14. Other considerations – revocation requests**

(1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

a) International non-refoulement obligations; …

1. Clause 14.1 includes:

**14.1 International non-refoulement obligations**

(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia’s interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.

…

(4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.

(5) If, however, the visa that was cancelled was a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (section 501E of the Act and regulation 2.12A of the Regulations refers). The person will also be prevented by section 48A of the Act from making a further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – sections 48A and 48B of the Act refer).

(6) In these circumstances, decision-makers should seek an assessment of Australia’s international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen’s criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person’s Protection visa remains cancelled, they would face the prospect of indefinite immigration detention.

1. In apparent compliance with cl 14.1(6) of Direction 65, an “International Treaties Obligations Assessment” (**ITOA**) was carried out. It is contained in a report dated 14 July 2017.
2. On 29 November 2017, a delegate of the Minister decided not to revoke the visa cancellation. The delegate accepted the conclusions of the ITOA and found that the appellant did not engage Australia’s protection obligations.
3. The appellant applied for review in the Tribunal, where he was unrepresented. The Tribunal affirmed the decision not to revoke the visa cancellation on 26 February 2018.
4. On 30 May 2018, the appellant applied in the original jurisdiction of this Court for an extension of time to seek judicial review of the Tribunal’s decision. He was represented by counsel. No issue was raised by him in relation to the Tribunal’s consideration of “international non-refoulement obligations” as required by cl 14(1)(a) of Direction 65. On 17 April 2019, Steward J extended time to bring, but dismissed, the judicial review application. An appeal to the Full Court was dismissed on 7 February 2020. An application for special leave to appeal was dismissed on 5 November 2020.
5. On 4 February 2021, the appellant again applied to this Court for an extension of time to commence an application for judicial review of the Tribunal’s decision. This is the application determined by the primary judge which is the subject of this appeal. The proposed ground in this second proceeding was that the Tribunal erred in a manner going to jurisdiction in its consideration under cl 14(1)(a) of Direction 65 of “international non-refoulement obligations”. The ground was explained by four particulars, each of which was different to any previous argument about jurisdictional error which had been considered in the first proceeding.
6. The Minister applied for the proceeding to be dismissed summarily pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) or r 26.01 of the *Federal Court Rules 2011* (Cth) on the basis of res judicata, *Anshun* estoppel or abuse of process. The primary judge considered and determined the appellant’s application and the Minister’s interlocutory application for summary dismissal at the one hearing. The primary judge: (a) dismissed the Minister’s application for summary dismissal: (b) granted the appellant’s application for an extension of time to seek judicial review; and (c) dismissed that application for judicial review. These orders reflected the primary judge’s conclusions that:
7. there was no relevant res judicata: J[37];
8. special circumstances existed with the result that, according to the principles expressed in *Anshun*, the applicant should not be prevented from pursuing his application for an extension of time to bring an application for judicial review: J[44];
9. the proceeding was not an abuse of process: J[45];
10. an extension of time should be granted: J[46]; and
11. the appellant had failed to establish jurisdictional error with the result that the judicial review application should be dismissed: J[47], [75].

# THE APPEAL

1. The appellant pressed only one of his two grounds of appeal, namely Ground 2, which was in the following terms:

The Court below erred (especially at [70] to [71]) in not finding that the Tribunal had to be satisfied that there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C of the *Refugees Convention*.

1. In his written submissions, the appellant contended that:
2. the Tribunal did not consider for itself the consideration it was required by cl 14(1)(a) of Direction 65 to consider, namely “international non-refoulement obligations”; rather, it adopted “wholesale” the findings and reasoning contained in the ITOA; and
3. the reasoning in the ITOA was erroneous with the result that the Tribunal’s decision was infected by the same errors.
4. By Ground 1 in his notice of appeal, the appellant had contended that the primary judge erred in failing to find that the Tribunal had erred in concluding that the appellant had “resiled” from his protection claims. This ground was, however, not pressed. Notwithstanding that Ground 1 was abandoned, in the context of his argument on Ground 2, the appellant submitted that the Tribunal “seriously over-stated” the effect of the appellant’s evidence when the Tribunal stated at T[130] that the appellant “ultimately resiled from” any fear for his safety should he be returned to Algeria. This submission is addressed when considering the appellant’s first contention.

## The appellant’s first contention

1. The Tribunal was required by s 499(2A) to comply with Direction 65. It was not in dispute that a failure to comply with directions made under s 499(1) of the Act could amount to jurisdictional error, consistently with the position adopted by the Minister in *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19 (O’Callaghan, Colvin and Derrington JJ).
2. Clause 14.1(6) of Direction 65 states that decision-makers should seek an assessment of Australia’s international treaty obligations in a case such as the appellant’s. There was no dispute that the ITOA was such an assessment.
3. The Tribunal’s consideration of “international non-refoulement obligations” is reflected in its reasons at T[119] to [131]. The Tribunal commenced by summarising by reference to Direction 65 what a non-refoulement obligation was: at T[119]. The Tribunal then referred to aspects of the ITOA at T[120] to [121]:

A non-refoulement obligation assessment is provided in relation to the Applicant in a document entitled International Treaties Obligations Assessment, dated 14 July 2017 … The [ITOA] concludes that Australia does not have non-refoulement obligations in respect of the Applicant.

The [ITOA] details the Applicant’s claim that in:

September 1996 he witnessed a massacre in his home area in Algeria. He had been driving his taxi home when he was stopped by plainclothes men and asked for identification. Whilst being detained, he could see three men lying face down on the ground and after he was allowed to continue on his way, he heard gunshots. He later returned to the scene of the massacre where he saw eight bodies which had been shot and mutilated. He fears the Algerian authorities will persecute him because he revealed his knowledge of extrajudicial killings by the government authorities.

1. Importantly to the submission that the Tribunal simply adopted what was contained in the ITOA, the Tribunal then compared this to the evidence which the appellant had given before the Tribunal, stating at T[122]:

The Applicant gave a similar account orally. The Respondent put to the Applicant various differences in the accounts that the Applicant has given of the incident but I do not assign much weight to these discrepancies as memories fade in relation to an event so far in the past. It is relevant in this regard that the Applicant successfully obtained a protection visa on the basis of his account of this incident.

1. The Tribunal then referred to other aspects of the ITOA including the consideration contained in it of the history and politics of Algeria: T[123] to [125]. The Tribunal referred at T[126] to [128] to various statements which the appellant had made at various times during the decision-making process before referring at T[130] to his evidence to the Tribunal:

The Applicant initially gave evidence that he feared for his safety should he be returned to Algeria. He said that he had a fear of harm and persecution by the soldiers whom he witnessed committing serious crimes or otherwise because of a general fear and distrust of the Algerian police. The Applicant ultimately resiled from that position by accepting that he did not truly have a fear for his safety upon return to Algeria but was requesting revocation of the cancellation of his visa principally on the ground of the impact it would have on his wife and daughter.

1. As noted above, the appellant did not press Ground 1 of his appeal, which asserted error on the part of the primary judge in not finding jurisdictional error in the Tribunal’s incorrect finding that the appellant had “resiled” from his protection claims. In this respect, the primary judge stated at J[62] to [63]:

… [W]hile it might have been something of an overreach in language for the Tribunal to describe, at [130], the applicant as *resiling* (implicitly, entirely) from any claims about fears for his safety in Algeria, it was nevertheless open to the Tribunal to see those issues as very much secondary in the applicant’s own perspective to the issues about his family, and his own health. In this context, and given the express questioning of the applicant about the ITOA, I see no error in the Tribunal placing some weight on the opinions expressed in the ITOA as part of reaching its own conclusions.

The applicant’s submissions have not persuaded me there was any legal error in the Tribunal’s findings about the position taken by the applicant during its review about his fears concerning return to Algeria. It was open to the Tribunal to make the findings it did, especially given it had the chance of seeing and listening to the applicant over an extended hearing, with full and fair questioning from the Minister’s lawyer.

1. It is as well to observe that the appellant did state to the Tribunal, after being taken through the ITOA, that he thought there had been a change in Algeria and that his problem was not Algeria – see: J[60].
2. At T[131] the Tribunal stated its conclusion that “Australia does not have non-refoulement obligations in respect of the Applicant because of the conclusions of the [ITOA] and the evidence of the Applicant”.
3. The Tribunal accordingly took the ITOA into account, but it did not do so to the exclusion of its own consideration of the question it was required by cl 14(1)(a) to consider. The weight to be given to the ITOA was a matter for the Tribunal.
4. The appellant’s first contention is not made out.

## The appellant’s second contention and Ground 2 of the appeal

1. At the time the appellant was granted a protection visa on 7 June 2001, s 36(2) of the Act provided:

A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

1. Australia’s obligations under the Refugees Convention arise in respect of a person who is a “refugee” as described in Art 1A of the Refugee Convention. By Art 1A(2), a “refugee” includes a person who:

… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1. Art 1C(5) of the Refugee Convention provides (omitting a presently irrelevant proviso):

This Convention shall cease to apply to any person falling under the terms of section A if:

….

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

1. Before the primary judge, the appellant contended that (see J[21]):
2. the correct question so far as concerned the ITOA was whether the cessation clauses in Art 1C of the Refugee Convention applied, such that the appellant was no longer owed the non-refoulement obligations he had previously been found to have been owed (by the grant of the protection visa);
3. the author of the ITOA either impermissibly found that Art 1C(5) was not satisfied with the result that the author should have concluded the applicant was still a refugee; or the ITOA author impermissibly concluded that Art 1C was not engaged;
4. the Tribunal simply adopted the findings of the ITOA, such that any error in the ITOA infected the Tribunal’s reasoning;
5. because the appellant had advanced Australia’s existing non-refoulement obligations to him as “another reason” the visa cancellation should be revoked, the Tribunal was required to consider whether the circumstances in connection with which he has been recognised as a refugee have ceased to exist and it did not do so.
6. In addressing these contentions, the primary judge referred at J[68] to *Minister for Immigration and Multicultural and Indigenous Affairs v* ***QAAH*** [2006] HCA 53; 231 CLR 1. That case concerned a citizen of Afghanistan, QAAH, who had been granted a temporary protection visa which was valid for three years. QAAH applied for a permanent protection visa. The Refugee Review Tribunal (**RRT**) affirmed a decision refusing to grant him a permanent protection visa, finding that:
7. the circumstances in connection with which he had been recognised as a refugee had ceased to exist and that Art 1C(5) of the Refugee Convention applied; and
8. the applicant did not have a well-founded fear of persecution for a Convention reason if he returned to Afghanistan in the reasonably foreseeable future.
9. Dowsett J dismissed an application for judicial review of the RRT’s decision brought in the original jurisdiction of this Court. His Honour considered that the only question for the RRT was whether QAAH had a well-founded fear of persecution for a Convention reason and it was not strictly necessary to consider whether a cessation clause had been engaged: *QAAH* at [9].
10. The Full Court, by majority, allowed an appeal and ordered the matter be remitted to the RRT. Wilcox J (with whom Madgwick J agreed) took the view that the Minister bore an onus of proving that QAAH was no longer a “refugee” for the purposes of the Act: *QAAH* at [11]. Lander J dissented, in substance agreeing with the reasons of Dowsett J: *QAAH* at [13].
11. The High Court granted special leave. The principal question in the appeal was whether a person who had been granted a temporary protection visa was entitled to assert that he continues to be a person to whom Australia owed protection obligations on expiry of the visa, notwithstanding improvement in the conditions of the relevant country: *QAAH* at [1].
12. The majority (Gummow ACJ, Callinan, Heydon and Crennan JJ) stated at [38] to [39]:

Having regard to the sections of the Act and Regulations under it to which we have referred, and which are concerned with the duration of visas, these conclusions follow. A visa subsists for only the period of it, or until an event, if any, specified in it occurs (ss 28, 29(3), 67, 68(3) and 116). When the visa expires, the holder of it must make a fresh application for another visa, in this case, another protection visa, because otherwise that person would have no entitlement to remain in Australia: and, a, or the relevant criterion for the grant of a protection visa at that time is that the non-citizen, the applicant, is a person to whom Australia has (not, it may be observed, “in the past had, or owed”) protection obligations under the Convention (s 36(2) and (4)).

The Act does not pose the question which the majority of the Full Court posed as a relevant question, whether, at the time of an application for a permanent protection visa, there have occurred in the applicant’s country changes of a substantial, effective and durable kind. True it may be that if the non-citizen did, before entering Australia, suffer persecution or had a well-founded fear of it in that other country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will in all probability continue to be one to whom Australia owes protection obligations, but to put the question in the way in which the majority of the Full Court did, and to hold that there was, in effect, an onus upon the appellant to establish the occurrence of substantial, effective and durable change, was to fail to give effect to the rule of Australian law that the Act, and the holdings of this Court that the proceedings under it in the Tribunal, are not adversarial.

1. The primary judge applied this reasoning at J[70] and [71], being the paragraphs specifically challenged by Ground 2 of this appeal. Her Honour said:

Although the present situation concerns a review of a decision not to revoke a visa cancellation, I accept the Minister’s submission that the position outlined in *QAAH* should be applied. Before the Tribunal, the applicant was without a visa: not because his visa expired (as for the respondent in *QAAH*) but because it had been cancelled. While what he sought was not a “new” visa, and in that sense the ratio of the High Court in *QAAH* might not apply, the same underlying point as that made by the majority in *QAAH* can be made. The Tribunal was required to apply the terms of the Act to its review task, which concerned the manner in which it was to consider whether to affirm or set aside the decision not to revoke the cancellation of the applicant’s visa. While the applicant could, and did, raise both “reasons” concerning his safety in Algeria, and Australia’s non-refoulement obligations, those issues were not to be approached from the perspective that the Minister had to establish, or even that the Tribunal had to be satisfied, that there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C. The majority in *QAAH* also found that the work Art 1C has to do is generally as a provision to be invoked by a State party, against a refugee: see [44]-[46]. While the High Court’s approach in *QAAH* has been the subject of some criticism (see for example Hathaway J and Foster M, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) at 477-490) it represents the law to be applied by this Court.

There was no legal error in the approach taken by the Tribunal to the other reasons for revocation raised by the applicant which related to protection claims against Algeria, such as they were.

### The appellant’s position on cancellation under s 501(3A)

1. The appellant’s visa had been cancelled by a decision made under s 501(3A). Because his protection visa had been cancelled, the appellant was not entitled to apply for a protection visa whilst in the migration zone: s 48A(1B). Apart from seeking revocation of the cancellation decision under s 501CA, the appellant could have:
2. applied for a bridging visa – see s 501E of the Act; and
3. requested the Minister to consider exercising the power in s 48B of the Act to determine that s 48A not apply to prevent an application for a protection visa. If the Minister exercised the power under s 48B, of his own initiative or having been asked by the appellant to do so, the appellant could then apply for a protection visa in accordance with s 48B and the Act more generally.
4. If the Minister had exercised the power under s 48B, and the appellant had applied for a protection visa, the Minister would have had to refuse to grant a visa unless he was satisfied that each criteria for the grant of the visa was satisfied (see s 65(1)(a)(i) and (ii)) and that the grant of the visa was not prevented by any of the matters identified in s 65(1)(a)(iii): s 65(1)(b). The criteria for grant of a protection visa relevantly include:

36(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm;

1. In *QAAH* at [38], the majority observed that “[a] visa subsists for only the period of it, or until an event, if any, specified in it occurs” and “[w]hen the visa expires, the holder must make a fresh application for another visa, in this case, another protection visa, because otherwise that person would have no entitlement to remain in Australia”.
2. A person whose visa is cancelled is in an equivalent position to the person whose visa expires. The appellant’s visa was not cancelled on the basis of a domestic law, such as s 116(1)(a) of the Act, which might permit cancellation on a basis equivalent to that contemplated by Art 1C(5). The appellant’s visa was cancelled on the basis of a domestic law which required cancellation by reason of the existence of the circumstances contemplated by s 501(3A). The domestic law provided various options from this point, including revocation and a request to the Minister to permit an application for a further protection visa.

### Did the author of the ITOA err?

1. The author of the ITOA stated that its purpose was to assess whether Australia had non-refoulement obligations. The author carried out the assessment by asking whether the appellant was a refugee, referring to Art 1A(2) of the Refugee Convention and ss 5H and 5J of the Act. The author: found that the appellant was a national of Algeria; was satisfied that his claims were credible; concluded that political opinion was the reason for the feared harm; and found that the harm was serious harm and involved systematic and serious conduct.
2. In considering whether the appellant’s fear of harm was well-founded, the author stated that the question whether Australia has protection obligations was to be assessed upon the facts as they exist (inferentially at the time of the ITOA), acknowledging that this also required a consideration of the issue in relation to the reasonably foreseeable future. The author noted that it had been a considerable time since the appellant had left Algeria and that the country had seen considerable improvement. The author examined a considerable amount of country information in reaching this conclusion. The author did not accept that the appellant would face a real chance of persecution upon his return to Algeria or that he would experience harm or be targeted for a Convention reason. The author concluded that the appellant did not have a well-founded fear of being persecuted.
3. The author also concluded that the cessation clauses in Art 1C did not apply. As to this, the primary judge stated at J[73]:

There was some discussion at hearing about how this should be understood. The applicant sought to use this finding as evidence of the failure of the Tribunal to deal with Art 1C, since (he contended) this statement demonstrated the author of the ITOA had also failed to apply Art 1C to the applicant’s circumstances, or had misunderstood it. In my opinion, this statement should be understood in the context of the finding in the ITOA which immediately precedes it; namely that the applicant did not have a well-founded fear of persecution in Algeria for a Convention reason. That adverse finding meant that the cessation clause could not apply, as it only applies to persons who have been recognised as having a well-founded fear of persecution.

Her Honour’s interpretation or understanding should be accepted.

1. As noted earlier, the Tribunal did not adopt “wholesale” the reasoning of the author of the ITOA. Accordingly, it is not necessary to answer the question whether the author of the ITOA erred in what he or she did. That does not, however, dispose of Ground 2 which asserts that the Tribunal had “to be satisfied that there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C of the Refugees Convention”.

### Did the Tribunal err?

1. The Tribunal’s task revolved around the application of s 501CA(4). The operation of ss 501(3A) and 501CA(4) have been recently described by the High Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane***[2021] HCA 41; 395 ALR 403 at [13] and ***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417 at [10] to [16].
2. In *Viane* at [13], the High Court stated (citations omitted):

The relevant statutory scheme mandated by s 501CA of the Act comprises: the giving of relevant information to a person whose visa has been cancelled; inviting that person to make representations about why that cancellation decision should be revoked; the receipt of representations by the Minister made in accordance with that invitation; and, thereafter, the formation of a state of satisfaction, or not, by the Minister that the cancellation decision should be revoked. That scheme necessarily requires the Minister to consider and understand the representations received. What is “another reason” is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case. It follows that there may be few mandatorily relevant matters that the Minister must consider in applying s 501CA(4)(b)(ii). Thus, the Minister is not obliged to take account of any non‑refoulement obligations, as expressed in the Act or otherwise, when determining whether there is another reason to revoke a cancellation decision where the materials “do not include, or the circumstances do not suggest, a non-refoulement claim”. The power must otherwise be exercised reasonably and in good faith.

1. The Court returned to s 501CA(4)(b)(ii) of the Act in *Plaintiff M1*, which concerned the cancellation of a visa which was not a protection visa. Plaintiff M1 sought revocation of the cancellation decision on bases which included that he would face persecution, torture and death if returned to South Sudan: *M1* at [3]. The delegate, to whom Direction 65 applied, stated that it was unnecessary to determine whether non‑refoulement obligations were owed because the plaintiff could still make a valid application for a protection visa and the existence or otherwise of non‑refoulement obligations would be fully assessed in the course of processing that application: *M1* at [5].
2. A majority (Kiefel CJ, Keane, Gordon and Steward JJ) of the High Court agreed, holding at [9] that:

in deciding whether there was “another reason” to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act*, where the plaintiff remained free to apply for a protection visa under the *Migration Act*:

(1) the Delegate was required to read, identify, understand and evaluate the plaintiff’s representations made in response to the invitation issued to him under s 501CA(3)(b) that raised a potential breach of Australia’s international non‑refoulement obligations;

(2) Australia’s international non‑refoulement obligations unenacted in Australia were not a mandatory relevant consideration; and

(3) to the extent Australia’s international non‑refoulement obligations are given effect in the *Migration Act*, one available outcome for the Delegate was to defer assessment of whether the plaintiff was owed those non-refoulement obligations on the basis that it was open to the plaintiff to apply for a protection visa under the *Migration Act*.

1. The present case is different to *Plaintiff M1* in at least two relevant ways. First, the visa which was cancelled was a protection visa and the appellant was not entitled to apply for a protection visa unless the Minister first exercised the discretion in s 48B to determine that s 48A should not apply. Secondly, in any event, the Tribunal did not defer its consideration of the issue on the basis that the appellant could seek to ask the Minister to exercise the discretion under s 48B.
2. Whilst the present case and *Plaintiff M1* concern materially different situations, the Tribunal in the present case, in considering whether there was “another reason” to revoke the cancellation decision pursuant to s 501CA(4)(b)(ii), was not required to take Australia’s international non‑refoulement obligations unenacted in Australia into account as a mandatory relevant consideration: see *Plaintiff M1* at [9(2)]; [17] to [20]. The Tribunal was not required “to be satisfied that there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C of the Refugees Convention” in considering Australia’s international non‑refoulement obligations as required by Direction 65.
3. There was no other asserted basis for the Tribunal being required to consider whether “there had been changes of circumstances in Algeria that were both fundamental and durable so as to engage Art 1C of the Refugees Convention” or to be satisfied that there had been such changes.
4. It follows that Ground 2 has not been made out.

# THE CROSS-APPEAL

1. It is not strictly necessary to address the cross-appeal. Nevertheless, it is appropriate that it be addressed briefly.

## Res judicata

1. In *Anshun* at 597, Gibbs CJ, Mason and Aickin JJ observed that, with respect to “res judicata (cause of action estoppel)”, “[t]he rule as to res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding”. This form of estoppel reflects the principle that, once a court has held that there is or is not a cause of action, that outcome cannot be challenged in later proceedings, other than by way of appeal. As French CJ, Bell, Gageler and Keane JJ said in *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 507 at [22], cause of action estoppel is “largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment”.
2. Earlier cases drew a distinction between the situation where a cause of action has been found to exist and the situation where the cause of action has been found not to exist.

* Where an applicant succeeds in an action, the cause of action has been found to exist and is said to “merge” in the judgment. The cause of action no longer has an existence independently of the judgment. From the time of judgment, the applicant has a new and different set of rights arising from the judgment into which the cause of action has merged, including rights of enforcement. In this situation, res judicata prevents further proceedings being maintained on the cause of action as opposed to on the judgment. In *Jackson v Goldsmith* (1950) 81 CLR 446 at 466, in a passage set out by the majority in *Anshun* at 597, Fullagar J considered this was not so much a case of estoppel as a rule based on the principle of finality of litigation. A consequence of the doctrine of merger is that an applicant who has succeeded on a cause of action and who does not challenge the outcome by appeal may not bring another action on the cause of action.
* Where an applicant fails in an action, the cause of action has been determined not to exist and, on one view, there is nothing to merge in the dismissal of the proceeding; the res judicata doctrine operates as a true cause of action estoppel, preventing the applicant from asserting that the cause of action exists: *Thoday v Thoday* [1964] P 181 at 197-198 (Diplock LJ); *Macquarie Bank Ltd v National Mutual Life Association of Australasia Ltd* (1996) 40 NSWLR 543 at 556 (Clarke JA, with whom Priestley JA agreed); ***BC*** *v Minister for Immigration and Multicultural Affairs* [2001] FCA 1669; 67 ALD 6 at [19] (Sackville J).

1. It is well settled that the res judicata doctrine applies to judicial review proceedings: see, for example, ***Somanader*** *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1192; 178 ALR 677 at [54]; *Thayananthan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1054; 132 FCR 222 at 236 at [48]; ***Re Ruddock****; Ex parte LX*[2003] FCA 561 at [48]-[50]; *Applicants S311 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 45 at [44]; *Applicant A321 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 306 at [18]; *S635 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 65 at [1], [62], [114]; and *S307 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 650 at [12].
2. While there is little contest about the content of the res judicata doctrine, its application can give rise to difficulties, in particular in the identification of the “cause of action”. In ***Trawl Industries*** *of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 418, Gummow J observed:

It is said that for the [cause of action] estoppel to operate, the cause of action in each proceeding must be the same ... But, as Brennan J pointed out in *Anshun* (at 610-613) the phrase “cause of action” is used imprecisely and in several senses. These include:

(i) the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;

(ii) the legal right which has been infringed; and

(iii) the substance of the action as distinct from its form.

1. ***Clayton*** *v Bant* [2020] HCA 44; 95 ALJR 34; 385 ALR 41 is illustrative of the difficulty which may arise from time to time in this regard. The case concerned the potential effect of rulings made by the Personal Status Court of Dubai (**Dubai Court**) in divorce proceedings brought by a husband with respect to the exercise of statutory rights under the *Family Law Act 1975* (Cth) by his wife. Kiefel CJ, Bell and Gageler JJ held, at [26], that the rulings of the Dubai Court could not give rise to res judicata:

Once it is appreciated that the rights in issue in the property settlement proceedings and in the spousal maintenance proceedings are the statutory rights of the wife to seek orders under ss 79(1) and 74(1) of the Act, it is apparent that the ruling made by the Dubai Court cannot give rise to a res judicata in the strict sense in which that term continues to be used in Australia. The rights created by ss 79(1) and 74(1) cannot “merge” in any judicial orders other than final orders of a court having jurisdiction under the Actto make orders under those sections. The rights of the wife to seek orders under ss 79(1) and 74(1) continue to have separate existence unless and until the powers to make those orders are exercised on a final basis and thereby exhausted.

1. The only way in which the orders of the Dubai Court could have precluded the wife from pursuing her property settlement and spousal maintenance proceedings under the Act was through the operation of the common law doctrine of estoppel: *Clayton* at [27]. Their Honours stated at [28]:

Two forms of estoppel are potentially applicable. One is that sometimes referred to as “cause of action” estoppel. The terminology has been recognised as problematic given the range of senses in which the expression “cause of action” tends to be used. The relevant sense is that of title to the legal right established or claimed. Especially in a statutory context such as the present, the form of estoppel would be better referred to by the more generic description of “claim” estoppel. The other form of estoppel is most commonly referred to in Australia as “*Anshun* estoppel”, after *Port of Melbourne Authority v Anshun Pty Ltd* ...

(Footnotes omitted)

1. Their Honours observed that “claim” estoppel (their preferred description of “cause of action” estoppel) and *Anshun* estoppel, if applicable, operated in different ways: “claim” estoppel would operate to preclude an assertion by the wife of any right, the non-existence of which was asserted by the husband in the Dubai proceedings and finally determined by the ruling of the Dubai Court: *Clayton* at [29]; *Anshun* estoppel, on the other hand, would preclude an assertion by the wife of any right which she could have asserted in the Dubai proceedings but which she chose to refrain from asserting in circumstances which made that choice unreasonable in the context of the Dubai proceedings: *Clayton* at [29].
2. Their Honours identified the principal problem with the husband’s reliance on either form of estoppel (at [32]) as:

… his failure to establish the requisite correspondence between the rights asserted by the wife in the property settlement proceedings and the spousal maintenance proceedings and any right the existence or non-existence of which was or might have been both asserted in the Dubai proceedings and finally determined by the Dubai Court. Absent such a correspondence of rights, neither form of estoppel can have any operation.

1. Common law estoppel (encompassing both “claim” estoppel and *Anshun* estoppel) was founded, so their Honours said at [34], on the “twin policies of ensuring finality in litigation (thereby promoting respect for and efficient use of courts as well as avoiding inconsistent judgments) and of ensuring fairness to litigants (by sparing them the stress and expense of duplicative proceedings)”. Citing *Trawl Industries*, their Honours confirmed that common law estoppel was concerned with “substance rather than form”: *Clayton* at [34]. Their Honours continued:

The doctrine looks not for absolute identity between the sources and incidents of rights asserted or capable of being asserted in consecutive proceedings. The doctrine looks rather for substantial correspondence between those rights. Enough for its operation is that the rights are of a substantially equivalent nature and cover substantially the same subject matter. A common law right to damages for negligent misstatement has been held to correspond to a statutory right to damages for misleading and deceptive conduct, for example, whereas a common law right to damages for personal injury has been held not to correspond to a common law right to damages for property damage arising from the same negligent conduct given that damage is a necessary element of a cause of action in negligence.

(Footnotes omitted)

1. The question whether a common law estoppel arises requires: (i) identification of the actual rights, the existence or non-existence of which were or might have been asserted and finally determined in the earlier proceedings; and (ii) determination of whether there is “correspondence between those rights and the rights asserted in the later proceedings: *Clayton* at [37]. In *Clayton*, the later rights were the statutory rights asserted by the wife.
2. So far as concerns “claim” estoppel, the question in judicial review proceedings of the present kind is whether:
3. the “cause of action” or “claim” (*Clayton* at [28]) should be viewed as the claim for relief for jurisdictional error in relation to the impugned decision, with the result that the doctrine would operate to prevent a second application even on a ground of judicial review which had not been advanced or determined; or
4. different grounds of jurisdictional error can be seen as separate causes of action or claims arising out of the one decision.
5. We consider that the latter is the better view. If, in a subsequent judicial review application concerning a decision previously the subject of an unsuccessful judicial review application, an applicant asserts that the decision-maker exceeded the jurisdiction conferred by the statute (*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441 at [29]) on a ground which, as a matter of substance, has not previously been determined, then the subsequent application is not barred by “claim” estoppel. As Heerey J stated in *Re Ruddock* at [48], referring to the decision of Merkel J in *Somanader* at [52], “the question whether there is identity between the earlier cause of action and the ones raised in the proceeding said to be the subject of the plea is to be determined by matters of substance rather than the form of the particular proceeding or the way in which it is pleaded”.
6. Of course, we accept that, as Sackville J observed in *BC* at [30], the application of a “substance” test might prove difficult in particular cases. In the present case, however, the asserted ground of jurisdictional error was one which was clearly not considered or determined by Steward J in the first unsuccessful judicial review application concerning the Tribunal’s decision. No “claim” estoppel can arise, and no res judicata could apply. Since the claim was not made, it could not merge in the earlier judgment.
7. In support of the contrary conclusion, the Minister referred to the decision of White J in ***Matson*** *v Attorney-General (Cth)* [2021] FCA 161, where his Honour observed at [57] that:

… a claim for relief is subject to the doctrine of *res judicata* even if the relief be sought in the later proceedings on new or additional grounds or information.

1. White J stated at [96] that “[a]n orthodox application of the principles of *res judicata* precludes the applicant from agitating the claim … for a second time … even though some of the grounds … are different from” those in the earlier application. It is important to note, however, that Mr Matson had impugned the relevant decision in the earlier proceedings on some 23 grounds. These included grounds alleging lawless conduct, denial of natural justice, bad faith and lack of good faith, non‑disclosure of relevant documents, legal unreasonableness, irrationality, acting under dictation, bias, infringement of implied Constitutional rights, deliberate delay, errors of law, improper purpose, abuse of process, and failure to have regard to Australia’s obligations under international treaties: *Matson* at [95]. Only some of these grounds were pursued before the Full Court. It could not be said that the grounds advanced in the second proceeding were clearly different in substance to the grounds which had earlier been advanced. On an application for leave to appeal, Collier J found that White J had correctly stated and applied the principles of resjudicata: *Matson v Attorney-General (No 2)* [2022] FCA 213 at [41]-[47]. Insofar as it may be relevant, we also note that neither Collier J nor White J were apparently referred to Sackville J’s decision in *BC*.
2. The primary judge did not err in concluding that the appellant was not barred by the res judicata doctrine from bringing the second judicial review proceeding.
3. At a practical level, where an applicant brings a second application for judicial review, seeking relief in relation to a decision that has already been the subject of an application for judicial review, the real issue will often be whether, even if the ground of review is substantially different: (a) the ground could *and should* (*Clayton* at [31]) have been raised in the first proceeding such that *Anshun* principles apply; or (b) the second proceeding is otherwise an abuse of process. We turn to consider these alternative possibilities.

## Anshun estoppel

1. The Minister argued in submissions that whether *Anshun* estoppel barred the appellant from bringing the second judicial review proceeding involved the question “whether the primary judge fell into error in finding that special circumstances justified a finding that the appellant was not estopped from raising the new grounds of review”, rather than as involving the question whether the appellant should have brought the new ground of review in the first proceeding, in the sense that it was unreasonable for the appellant not to have done so: *Clayton* at [31].
2. This resembles the error identified in *Clayton* at [31], where the respondent husband’s case for the existence of *Anshun* estoppel was apparently to the effect that “the fact that the wife could have asserted a right in the Dubai proceedings meant that she should have asserted that right in the Dubai proceedings in the sense that it was unreasonable for her not to have done so”. Their Honours said at [31] that:

That approach to *Anshun* estoppel has rightly been said to involve “fundamental error”. As was pointed out in *Anshun*, “there are a variety of circumstances ... why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few”.

1. The Minister bore the onus of establishing the factual basis for the operation of *Anshun* estoppel. In framing the issue as the Minister did in this case, the Minister’s argument incorrectly assumed that if the appellant *could* have raised the new ground in his first judicial review proceeding, then the Minister had discharged his onus of establishing that the ground *should* have been brought forward in the first proceeding, in the sense that it was unreasonable for the appellant not to have done so. This is not so. In the present context, the principal inquiry is whether the ground of review *should* have been brought forward in the first proceeding, in the sense that it was unreasonable for the appellant not to have done so.
2. In any event, in this appeal both parties proceeded on the basis that there was a “special circumstances” exception to the *Anshun* principle of the kind referred to by the Full Court of this Court in *Bryant v Commonwealth Bank of Australia* (1995) 57 FCR 287; 130 ALR 129 at 140, which, if applicable, justified not applying the *Anshun* principle in the interests of justice. As to whether there was an *Anshun* estoppel precluding the appellant from bringing the second judicial review application on the ground discussed earlier, the appeal before us was argued on the sole basis that the primary judge erred in concluding that the “special circumstances” exception applied on the facts of the appellant’s case.
3. The primary judge at J[38] extracted (and accepted as correct at J[40]) the following passage from the decision of Sackville J in *BC* at [26]:

The authorities emphasise that the *Anshun* principle, since it shuts out a litigant from pursuing a cause of action, should be applied only after a “scrupulous examination of all the circumstances”: *Bryant v Commonwealth Bank* at FCR 296; ALR 138, citing *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590; *Ling v Commonwealth* (1996) 68 FCR 180 at 182; 139 ALR 159 at 160, per Wilcox J; *Gibbs v Kinna* at 29, per Kenny JA. Moreover, the *Anshun* principle is subject to the “special circumstances” exception. In *Bryant v Commonwealth Bank*, the Full Court seemed to accept (at FCR 296, 298–9; ALR 138, 140–1) that the exception:

… comprehend[s] situations where, for broad discretionary considerations related to notions of justice, [the principle] should not be applied with full rigour.

See also *Stuart v Sanderson* at [32]–[36], per Madgwick J; *Port of Melbourne Authority v Anshun Pty Ltd (No 2)* [1981] VR 81 at 89, per curiam.

1. Her Honour noted at J[40] that, if the appellant were to succeed in the second application, there would be conflicting *relief* in relation to the Tribunal’s decision, but that “the reasons for that relief would not be conflicting, at least not at the level of analysis at which judicial review invariably occurs – that is, the precise way in which an exercise of public power is said to have miscarried so as to have a material effect on the outcome of the exercise of that power”.
2. The primary judge then stated at [41], [43] and [44]:

In circumstances such as those facing the applicant, there is good reason for caution before accepting the applicant is estopped. The applicant’s position in Australia, where he has lived for the last 24 years, is perilous. He has a partner and a family here, from whom he will almost certainly be permanently separated if he is compelled to leave Australia. As the material before the Tribunal demonstrated, as well as the material referred to in the ITOA, the situation in Algeria is such that it is unlikely a parent and her (now) young adult daughter would volunteer to move their lives there from Australia. The applicant was initially assessed as a person to whom Australia owed protection obligations. While it is the case that it is his criminal conduct which has put him in his current predicament, and that conduct has been assessed as serious, neither the visa cancellation decision nor the question whether it should be revoked have any aspect of punitive purpose about them. It would be quite wrong to conceive of the decision-making process in that way. The Australian legal system has punished the applicant for his crimes, and he has undergone that punishment. The applicant would no doubt have watched others with whom he was incarcerated, and who may have been incarcerated for even more serious offending and for much longer periods, complete their sentences and walk free, able to resume a life in Australia, with the only difference being their citizenship.

…

The applicant is not a young man, and he is afflicted by a number of medical and psychiatric conditions. He did not have the benefit of any legal representation before the Tribunal, but it might be hoped that would not be the case on any remitter.

Recognising the applicant’s circumstances as sufficiently special to justify, as Sackville J said, *Anshun* not being applied with its full rigour, does no more than allow the applicant a further opportunity to persuade a Court that the Tribunal’s exercise of public power miscarried. The Court was required to hear the extension of time application and the Minister’s strike out application, and the full hearing took perhaps an hour or two more than these matters alone would have taken. The additional expenditure in resources by all concerned was modest: compare, for example, the operation of *Anshun* in a situation where parties may be put to the cost and delays of another full trial, on witness evidence. Given the Tribunal’s review concerned a matter of such significance for him, and the arguments sought to be put have merit, in my opinion there are special circumstances which justify a finding that the applicant is not estopped from raising the current grounds of review.

1. The Minister submitted that the primary judge “failed to appreciate the exceptional nature of the existence of circumstances that would overcome the *Anshun* preclusion”. There is nothing in the primary judge’s reasoning which indicates such a failure.
2. The Minister submitted that “[a]ll of the circumstances (not just the circumstances pertaining to the appellant) needed to be taken into account”. The Minister then submitted:

Pertinent to the existence of special circumstances is that the appellant has sought to re-agitate a judicial review in this Court notwithstanding he has (with the benefit of legal representation) sought to establish jurisdictional error in the Tribunal’s decision”.

There is no question that the primary judge took this matter into account: this was the reason her Honour addressed the question whether *Anshun* principles should preclude the second application.

1. The Minister also invited this Court to infer that the appellant and his advisors “made a forensic choice not to advance the ground the subject of the proceedings before [Steward J]”. This is not a correct question on this appeal. The primary judge did not draw that inference and no argument was advanced as to how the primary judge’s failure to draw that inference was affected by error. Another, and we consider stronger, inference is that the appellant’s advisors simply did not conceive of the point at the time the proceeding was argued before Steward J.
2. The Minister has not established any error in the primary judge’s reasoning or conclusion that *Anshun* principles did not require the judicial review application to be summarily dismissed.

## Abuse of process

1. The primary judge stated at J[45]:

Although I accept there may be circumstances where an independent contention that a proceeding is an abuse of process might be accepted, in my opinion this is not one of them. The factors which have persuaded the Court to grant an extension of time, and to find special circumstances justifying the non-application of the *Anshun* principle, mean that it would not be appropriate to then find the proceeding to be an abuse of process. In any event, the proceeding has been brought relatively quickly after the denial of special leave in November last year; it has been conducted efficiently and reasonably, and as I have found, in reality occupied very little extra time from what would have been necessary to deal with the Minister’s applications in any event. This argument fails.

1. The Minister has not established any error in this reasoning.

# CONCLUSION

1. The appeal and cross-appeal should be dismissed, each with costs.

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| I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Kenny, O'Callaghan and Thawley. |

Associate:

Dated: 6 July 2022