IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN:

No P6 OF 2015

SUKHBINDER KAUR
Plaintiff

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

PLAINTIFF'S SUBMISSIONS

Part I: PUBLICATION

1. This document is in a form suitable for publication on the Internet.

Part II: ISSUES

2. The issues the Plaintiff contends that the application presents are:

(1) whether the Delegate of the Defendant constructively failed to exercise the jurisdiction to make a decision or acted unreasonably in making the decision refusing the application for a visa by concluding that the plaintiff was not in a de facto relationship on the basis that the Plaintiff had not provided any evidence to substantiate her statement that she had declared her de facto status to Centrelink in October 2011, when the Delegate did not inform her that her statement as to that declaration was a critical fact in the decision to be made, and was not going to be accepted without further evidence to substantiate it and did not take any step to facilitate an obvious inquiry to substantiate that fact.

(2) whether the Delegate of the Defendant constructively failed to exercise the jurisdiction to make a decision by making an incorrect finding on a critical fact to the finding that in the 12 months prior to the application the parties to the relationship did not have a mutual commitment to a shared life together when it was incorrectly found that the Plaintiff departed Australia on 1 March 2014 for two months without her sponsor.

(3) whether the Delegate of the Defendant failed to provide procedural fairness to the Plaintiff by failing to identify to the Plaintiff the specific issues of fact which the Delegate regarded as critical to the decision and provide an opportunity to the Plaintiff to provide evidence relevant to those issues.

(4) whether the Delegate of the Defendant made a jurisdictional error by failing to comply with s 57(2) of the *Migration Act 1958* when it failed to give the

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Plaintiff an opportunity to comment upon a Departmental record as to the Plaintiff's departure from Australia on 1 March 2014 for two months, which the Delegate took into account as relevant information.

Part III: SECTION 78B NOTICES

3. The Plaintiff has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and has concluded that no such notice is necessary.

Part IV: CITATIONS

4. This is an application for prerogative relief from this Court in its original jurisdiction from an administrative decision of a delegate of the Defendant whose reasons for decision are at pages 188 to 192 of the Affidavit of Peter John Corbould affirmed 2 June 2015 and filed in this matter on behalf of the Defendant.

Part V: FACTS

5. The Plaintiff on 1 October 2013 made an application for Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence)(Class BS) (Subclass 801) visa on the grounds of being in a de facto relationship with an Australian citizen sponsor.

6. A delegated decision maker under s 65 of the *Migration Act 1958* (Cth) on 13 November 2014 concluded that the criteria for the grant of the visa were not met.

7. The decision-maker identified that, in order to be granted the visa, the applicant was obliged to satisfy the requirements of one sub-clause of clause 820.211 of Schedule 2 to the *Migration Regulations 1994* (Cth). The decision-maker found that the only applicable sub-clause was sub-clause (2) which required that, at the time of the application, the applicant was the spouse or de facto partner of the sponsor.

8. The definition of 'de facto partner' in section 5CB of the *Migration Act* is as follows –

> *(1) For the purposes of this Act, a person is the* ***de facto partner*** *of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.*
>
> *De facto relationship*
>
> *(2) For the purposes of subsection (1), a person is in a* ***de facto relationship*** *with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:*
>
> *(a) they have a mutual commitment to a shared life to the exclusion of all others; and*
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> *(b) the relationship between them is genuine and continuing; and*
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> *(c) they:*
>
> *(i) live together; or*
>
> *(ii) do not live separately and apart on a permanent basis; and*
>
> *(d) they are not related by family (see subsection (4)).*

9. Regulation 1.09A of the *Migration Regulations* further provides that –

(1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

Note 1: See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2: The effect of subsection 5CB(1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB(2) sets out conditions about whether a de facto relationship exists, and subsection 5CB(3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

10. Regulation 203A provides that -

(1) In addition to the criteria prescribed by regulations 2.03 and 2.03AA, if a person claims to be in a de facto relationship for the purposes of a visa application, the criteria in subregulations (2) and (3) are prescribed.

(2) If a person mentioned in subregulation (1) applies for a visa:

(a) the applicant is at least 18; and

(b) the person with whom the applicant claims to be in a de facto relationship is at least 18.

(3) Subject to subregulations (4) and (5), if:

(a) a person mentioned in subregulation (1) applies for:

(i) a permanent visa; or

(ii) a Business Skills (Provisional) (Class UR) visa; or

(iia) a Business Skills (Provisional) (Class EB) visa; or

(iii) a Student (Temporary) (Class TU) visa; or

(iv) a Partner (Provisional) (Class UF) visa; or

(v) a Partner (Temporary) (Class UK) visa; or

(vi) a General Skilled Migration visa; and

(b) the applicant cannot establish compelling and compassionate circumstances for the grant of the visa;

the Minister must be satisfied that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application.

11. The decision-maker concluded that the Plaintiff had not established that she had been in a de facto relationship with the sponsor for 12 months at the time of the application for the visa[1] and so was not the de facto partner of the sponsor, as defined by s 5CB of the *Migration Act.*

12. That conclusion was based on findings that the decision-maker was not satisfied in relation to the Plaintiff and the sponsor as to:

(a) Joint assets or joint purchases: see Reg. 109A(3)(a)(i);

(b) Shared ongoing financial responsibilities: see Reg. 109A(3)(a)(ii) and (iii);

(c) A shared household with shared responsibilities for running the household: see Reg. 109A(3)(a)(v) and (b)(iii);

(d) Presenting themselves as a de facto couple to family and the wider community or undertaking regular joint social activities, attendance of significant events together or belonging to organisations or groups: cp Reg. 109A(3)(c)(i) and (iii);

(e) Commitment to a shared life together, including seeing the relationship as a long-term one 12 months prior to the application lodgement: cp Reg. 109A(3)(d)(iv).

[1] The circumstances which might allow for a waiver of the 12 month period, pursuant to paragraph (3) of Regulation 2.03A did not apply.

Part VI:

Issue 1 (Application Ground 3)

13. In *Minister for Immigration and Citizenship v SZIAI & Anor* [2009] HCA 39; (2009) 259 ALR 429 at [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, their Honours held that the duty imposed upon the Tribunal by the Migration Act is a duty to review. They opined that it may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.

14. The decision-maker had an obligation under Regulation 1.09(A)(3)(d) to consider "the nature of the persons' commitment to each other, including:(i) the duration of the relationship; and (ii) the length of time during which the persons have lived together ; and .....(iv) whether the persons see the relationship as a long-term one".

15. The facts referred to by the decision-maker as affecting the negative conclusion in relation to that matter were set out in the Decision Record at p 4[2], lines 22-24 and lines 35-37. They were:

(a) A statement by the Plaintiff that she had declared her de facto status to Centrelink in October 2011 without providing any evidence to substantiate that claim;
(b) A health letter dated 23/07/2013 showing she paid for her health insurance as "Single cover"; and
(c) Departmental records showing that the Plaintiff departed Australia on 01/03/2014 for two months without her sponsor and listed someone else as her emergency contact person on her Incoming Passenger Card dated 03/05/2014.

16. An obvious inquiry about a fact which critically affected the consideration of the matters to be considered pursuant to Regulation 1.09(A)(3)(d) was an inquiry as to whether the Plaintiff declared her de-facto relationship status to Centrelink in 2011. No inquiry was made as to that fact either of Centrelink or the Plaintiff. Instead, the decision-maker did no more than note the Plaintiff's 'personal statement' that she declared her de facto status to Centrelink in October 2011, and that she had not 'provided any evidence to substantiate' the claim.[3]

17. The decision-maker gave no indication to the Plaintiff that her statement was not going to be accepted as sufficient evidence of that fact and that substantiation of her statement would be required of her statement in order for it to be accepted as a statement of fact.

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[2] Affidavit of Peter John Corbould, Affirmed 2 June 2015, p 191.
[3] Decision Record, at Affidavit of Peter John Corbould, Affirmed 2 June 2015, p 191, line 24.

18. The decision-maker did not make any inquiry or draw to the applicant's attention to the fact that a lack of substantiation of that claim was a critical fact upon which the decision was likely to turn and provide an opportunity for the applicant to deal with that by providing some substantiation: McHugh and Gummow JJ *Minister for Immigration and Multicultural Affairs ex parte Lam* (2003) 195 ALR 502 at 522.

Issue 2 (Application Ground 4)

19. Mere factual error by the decision-maker will not ground judicial review unless it relates to a jurisdictional fact, or is a manifestation of some error of law, substantive or procedural, which constitutes jurisdictional error and thereby vitiates the purported decision: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323.

20. As Kirby J said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30

In *Minister for Immigration and Multicultural Affairs v Eshetu*, Gummow J referred to the decision-maker's satisfaction regarding the status of an applicant for a protection visa, as a "jurisdictional fact" upon which the exercise of the power depended[100][4]. The reference to "jurisdictional fact" in this area of discourse presents a somewhat awkward concept[101][5]. It encompasses a set of legal, factual, evidentiary and procedural considerations about the way in which the administrative decision-maker went about reaching the opinion (or satisfaction) that supplied the foundation for his or her jurisdiction.

> 125. As Latham CJ explained in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*[102][6], on review a court's inquiry is limited to determining "whether the opinion required by the relevant legislative provision has really been formed". Where the decision and the reasons and critical findings of fact that form the basis of that decision are recorded (as was obligatory under the Act in the present case[103][7]) the Tribunal's reasoning may disclose a misconception about the nature of the fact-finding process required by the Act. It may then become apparent that the fact-finding has miscarried to a significant degree, in the sense that it does not conform to the requirements, express or implied, in the empowering statute. In such circumstances it may be concluded that the opinion or satisfaction reached was not the kind of opinion contemplated by the statute. In each case, the identified pre-condition for the exercise of the power conferred would not be fulfilled.

21. The decision-maker in considering the 'nature of the commitment' of the Plaintiff and the sponsor to one another, an obligatory consideration under Regulation 1.099A)(3)(d), made an error of fact which was critical to arriving at the conclusion that a de facto relationship did not exist between the Plaintiff and the sponsor. The error of fact was in finding that the Plaintiff had departed Australia on 1 March 2014 for two

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[4] (1999) 197 CLR 611 ("*Eshetu*") at 650 [127].
[5] (1999) 197 CLR 611 at 651 [130].
[6] [1944] HCA 42; (1944) 69 CLR 407 at 432.
[7] See the Act, s 430(1).

months without her sponsor on the basis of departmental records and a recording of a third party as an emergency contact person on an Incoming Passenger Card dated 3 May 2014.

22. The error of fact is conceded by the Defendant.[8] The Department's records show that the sponsor did travel at the same time as the Plaintiff between 1 March 2014 and 3 May 2014.[9]

23. The Defendant argues[10] that the factual error did not amount to jurisdictional error because it was not an error in relation to a fact which was critical to the decision, because the travel occurred in 2014, after the 12 month prior to the application being lodged on 01/10/2013 in relation to which the decision-maker was considering whether the Plaintiff had established that she was in a committed de facto relationship with the sponsor.

24. The Plaintiff responds that the fact of the travel occurred is one of the few facts referred to by the decision-maker in the reasons for the decision on the issue the commitment to the relationship, and was clearly regarded by the decision-maker as critical to the conclusion on that issue.

25. The decision-maker clearly and reasonably took into account the travel event occurring 5 months after the relevant period as an event which might demonstrate a continuing commitment beyond the period under consideration and as relevant to drawing an inference as to the commitment which existed during the relevant period.

Issue 3 (Application Ground 5)

26. The decision-maker in determining the application on the basis of the documentary material only, and without communicating to the Plaintiff the facts which were of particular concern in arriving at the decision, adopted a process which failed to accord procedural fairness because it did not provide for a process which drew the applicant's attention to critical issues or factors upon which the decision was likely to turn and provide an opportunity for the applicant to deal with those matters: McHugh and Gummow JJ *Minister for Immigration and Multicultural Affairs ex parte Lam* (2003) 195 ALR 502 at 522.

27. The terms of the statutory provisions under which the decision was being made and the generalised indication of the requirements to be satisfied pursuant to those provisions were not sufficient to make it apparent to the Plaintiff[11] that the decision-maker would make the decision upon several of the bases it did, being:

(a) A conclusion that the applicant had not shown that she and her sponsor shared day-to-day living expenses by bank statements that showed that money had been transferred from the Plaintiff to her sponsor;

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[8] Outline of submissions of the Defendant 7 August 2015, [36].
[9] Affidavit of Peter John Corbould, Affirmed 2 June 2015, Annexure "PJC2", pp 150-4.
[10] Outline of submissions of the Defendant 7 August 2015, [37].
[11] See *Commissioner for ACT Revenue v Alphaone* (1994) 49 FCR 576 at 590-1.

(b) A conclusion that the evidence was insufficient to demonstrate a genuine and continuing relationship, based in part upon a finding that the Plaintiff and sponsor have some financial commitments did not have joint assets, had not made joint purchases and did not share any ongoing financial responsibilities;

(c) A conclusion that there was no convincing evidence that 12 months prior to the application being lodged on 1 October 2013 the Plaintiff saw it as a long term relationship or that they had a commitment to share life together, while being satisfied that the Plaintiff and sponsor claimed to be in a de facto relationship in November 2010 and committed to share a life together to the exclusion of all others on 11 November 2011, apparently because –

(i) No evidence was provided to substantiate the Plaintiff's declaration of her de facto status to Centrelink in October 2011;
(ii) The Plaintiff's health letter dated 23 July 2013 shows she paid for her health insurance as "Single Cover"; and
(iii) The Department of Immigration and Border Protection records show that the Plaintiff departed Australia on 1 March for two months without her sponsor and listed someone else as emergency contact person on her Incoming Passenger Card dated 3 May 2014;

(d) A conclusion that while the Plaintiff and sponsor provided evidence that they present themselves as a couple to family and friends, there was no evidence that that they presented themselves as a de facto couple to family or the wider community, that they undertook regular social activities, attended any significant events together or belonged to any organisations or groups.

Issue 4 (Application Ground 6)

28. Section 57(2) of the *Migration Act 1958* (Cth) provides that the Minister must give particulars of 'relevant information' to the applicant, ensure the applicant understands why it is relevant and invite the applicant to comment on it. Sub-section (1) defines 'relevant information' as information not given by the applicant that the Minister considers would be the reason, or part of the reason for refusing to grant a visa.

29. The decision-maker purported to rely upon a Departmental record showing that the Plaintiff departed Australia on 1 March 2014 for two months without her sponsor in refusing to grant the visa.[12]

30. The information was 'relevant information' within the terms of s 57. It was one of the few facts which the decision-maker referred to as reasons for concluding that the Plaintiff and sponsor did not have a commitment to a shared life together, and so were not in a de facto relationship.

31. The decision-maker did not provide the Plaintiff with any notice that the information would be relied upon or provide the Plaintiff with any opportunity to comment upon it.

[12] Decision Record, at Affidavit of Peter John Corbould, Affirmed 2 June 2015, p 191, lines 35-37..

32. This constitutes a failure to comply with a statutory pre-condition to the making of a lawful decision pursuant to the *Migration Act* and thus vitiates the decision.

33. The failure to give notice of an intention to rely upon this Departmental record and allow an opportunity to comment upon it otherwise amounts to a denial of natural justice, by denying an opportunity to comment upon adverse material, which vitiates the decision. The decision-maker was obliged to disclose the Departmental record upon which it intended to rely, it being 'not evidently not credible, relevant and significant to the decision'.[13] The likelihood that disclosure of the record may have exposed the fact that it had been incorrectly understood by the decision-maker reinforces the lack of procedural fairness in the failure to disclose.

Part VII: AUTHORITIES AND APPLICABLE PROVISIONS

34. The Plaintiff relies upon those authorities set out in the List of Authorities filed with these submissions in accordance with Practice Direction No 1 of 2013.

35. The applicable statutory provisions and regulations as they existed at the relevant time and as they are at the date of making the submission are set out in an annexure to these submissions.

Part VIII: ORDERS SOUGHT

36. The Plaintiff seeks the following orders:

(1) A writ of certiorari issue quashing the decision of the delegate of the Defendant on 13 November refusing to grant the Plaintiff a UK Partner (Temporary) and BS Partner (Residence) visa.

(2) A writ of mandamus issue directing the Defendant to determine the visa application of the Plaintiff made on 1 October 2013 according to law.

(3) The Defendant pay the Plaintiff's costs of this application.

Part IX: TIME ESTIMATE (ORAL ARGUMENT)

37. The Plaintiff estimates that approximately 1 hour will be required for the presentation of the Plaintiff's argument.

Dated: 4 September 2015

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[13] *Veal v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; *Kioa v West* (1985) 159 CLR 550.

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

Applicable statutory provisions from the Plaintiff's list of authorities as they existed or exist at the relevant times

MIGRATION ACT 1958 (CTH)		
Applicable Section (in order listed in Plaintiff's List of Authorities)	**Prior Version of the Act** **Start date: 04 Nov 2014** **Registration: 12 Nov 2014** **End Date: 10 Dec 2014** [In effect when Defendant's delegate made its decision on 13 Nov 2014]	**Current Version** **Start date: 01 Jul 2015** **Registration: 21 Jul 2015** [In effect as at the date of making the submissions]
5CB	**Still in force in the same form**	
5F	**Still in force in the same form**	
57(1)	**In force**	**In force with amendments**
57(2)	**In force**	**In force with amendments**
65	**In force**	**In force with amendments**
Part 5 (ss 336M to 379G)	**In force in part (eg; s336M not in force)**	**In force with amendments (and since enacted)**
430(1)	**In force**	**In force with amendments**
474(2)	**Still in force in the same form**	
474(3)(b)	**Still in force in the same form**	
476(2)(a)	**Still in force in the same form**	
476(4)(b)	**Still in force in the same form**	
484	**Still in force in the same form**	
494(C)	**Still in force in the same form**	

Applicable regulations from the Plaintiff's list of authorities as they existed or exist at the relevant times

MIGRATION REGULATIONS 1994 (CTH)		
Applicable Regulation (in order listed in Plaintiff's List of Authorities)	**Prior Version of Regulations** **Start date: 06 Oct 2014** **Registration: 07 Oct 2014** **End Date: 22 Nov 2014** [In effect when the delegate made its decision on 13 Nov 2014]	**Current Version** **Start date: 01 Jul 2015** **Registration: 21 Jul 2015** [In effect as at the date of making the submissions]
1.09A	**Still in force in the same form**	
2.03	**Still in force in the same form**	
2.03A	**In force**	**In force with amendments**
2.03AA	**Not in force**	**Since enacted**
4.10	**In force**	**In force with amendments** (references to "MRT" changed to "Part 5")
Schedule 2 clause 820.211	**Still in force in the same form**	