IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S297/2013

BETWEEN:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

DEFENDANTS' SUPPLEMENTARY WRITTEN SUBMISSIONS

(pursuant to leave given on 9 December 2014)

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PART I: CERTIFICATION

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

PART II: SUPPLEMENTARY ARGUMENT

A. INTRODUCTION

2. These supplementary submissions are made pursuant to the leave given by the Court on 9 December 2014. Abbreviations adopted in the defendants' annotated written submissions filed 18 November 2014 (**defendants' submissions**) are adopted in these submissions.

3. These supplementary submissions address two topics.

4. *First*, the plaintiff's annotated reply filed 25 November 2014 (**plaintiff's reply**) at [1]–[5] suggested, for the first time, that cl 866.226 of sched 2 to the Migration Regulations was not a "criteri[on] for a visa" within the meaning of s 31(3) of the Migration Act. Though not expressed in the reply as a separate basis for the plaintiff's contention that cl 866.226 was invalid, that was the submission developed in oral argument before the Court. For the reasons set out in section B below, that submission should be rejected.

5. *Secondly*, by letter dated 11 December 2014, the Senior Registrar stated that the Court would be assisted by submissions on the relevance, if any, of s 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**). The defendants assume that this point is directed to the application to the plaintiff of reg 2.08F, which was inserted into the Migration Regulations by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**Amendment Act**). The Amendment Act received Royal Assent on 15 December 2014, and reg 2.08F commenced on 16 December 2014. For the reasons set out in section C below, having regard to the terms of reg 2.08F, the provisions of the Acts Interpretation Act identified above are not relevant.

B. "CRITERI[ON] FOR A VISA"

(a) Relevant principles

6. While reasonable minds may differ as to what is "in the national interest" in any particular case, that is not a basis to conclude that cl 866.226 is invalid.

7. The relevant question is whether cl 866.226 is, or is not, a "criteri[on] for a visa" within the meaning of s 31(3) of the Migration Act. The Full Court of the Federal Court correctly analysed the meaning of "criteria" in s 31(3) in *Pillay v Minister for Immigration and Multicultural Affairs*,[1] concluding that that word should be given a broad construction (so as to embrace, in that case, a time limit for the lodging of a visa application). Among other things, the Court noted the ordinary meaning of the word "criterion" which supported this conclusion:[2]

> The *Oxford English Dictionary* (2nd ed, 1989), Vol IV, p 29 defines "criterion" as meaning "a test, principle, rule, canon or standard, by which anything is judged or estimated". The *Macquarie Dictionary* (revised ed, 1985), p 437

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1 (2000) 96 FCR 368 (FC).

2 (2000) 96 FCR 368 (FC) at 373 [32] per *curiam*.

defines "criterion" as "a standard of judgment or criticism; an established rule or principle for testing anything". (emphasis added)

8. There are cases where the fact that the application of a standard prescribed in regulations to particular facts is uncertain or debatable may mean that the standard prescribed falls outside the terms of the relevant empowering provision. For example, in *King Gee Clothing Co Pty Ltd v The Commonwealth*,[3] where a statutory provision empowered regulations fixing prices, this Court held that a regulation which involved too great a degree of estimation or approximation in its application to given facts was beyond power because it did not in truth fix prices.

9. Importantly, however, in *King Gee* the Court emphasised that there is no principle that regulations whose application to particular facts is uncertain or debatable are invalid on that account.[4] Thus, the use of language in regulations whose application to particular facts may be open to differences of opinion, such as "substantially", does not lead to invalidity.[5] Consistently with that approach, the existence of scope for differences of opinion as to when the grant of a visa will be "in the national interest" does not mean that "the national interest" cannot be used as a criterion for the grant of a visa.

(b) Application to cl 866.226

10. In light of the above principles, for the following reasons, the Court should conclude that cl 866.226 is a "criteri[on] for a visa" within the meaning of s 31(3) of the Migration Act.

11. *First*, cl 866.226 falls within the ordinary meaning of the term "criterion". It states, in terms, a standard which must be met for an applicant to be granted a Protection (Class XA) (Subclass 866) visa. It is no less a standard because it depends on the formation of an opinion by the Minister. Many visa criteria require the formation of such opinions. For example, each of ss 32(2), 36(1B), 36(2) and 158[6] of the Migration Act describe as "criteria" standards set out in the Act itself which require the formation of an opinion. The terms of s 505 clearly contemplate the prescription of criteria which require the Minister to form an opinion. Many such criteria have been prescribed.

12. *Secondly*, cl 866.226 is no less a "criterion" because the scope of the "national interest" is such that it may be open to wide differences of opinion. The same may be said of the standards expressly described as "criteria" in, for example, ss 36(1B) and 158 of the Migration Act. It is also true of many of the criteria long prescribed in the Migration Regulations.[7] Nothing in s 31(3) limits the "criteria" which may be prescribed to matters which are capable of objective and certain ascertainment. That would be a radical limitation to read into s 31(3), entirely unsupported by matters of

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3 (1945) 71 CLR 184.

4 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195 per Dixon J.

5 *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 114 per Latham CJ, 123 per Starke J, 128 per Dixon J, 131 per McTiernan J, 137–138 per Williams J.

6 Section 158 identifies a "criterion" of a criminal justice visa as being that the Minister, having had regard to, inter alia, "the safety of individuals and people generally" and "any other matters that the Minister considers relevant", has "decided, in the Minister's absolute discretion, that it is appropriate for the visa to be granted". The word "criteria" in the Act therefore plainly has a very broad meaning, embracing a subjective judgment by the Minister (albeit one that must be formed reasonably). There is no basis to give that word a more confined reading in s 31(3) of the Act, in the context of the criteria that can be specified in regulations.

7 See, eg, Public Interest Criteria 4003, 4014, 4018.

context. A requirement that visa criteria have objective operation would invalidate criteria that apply to many different classes of visas.

13. *Thirdly*, however broad it may be, the "national interest" in cl 866.226 is not unbounded. As French, O'Loughlin and Whitlam JJ emphasised in *Madafferi v Minister for Immigration and Multicultural Affairs*,[8] the formation of an opinion as to what is in the national interest requires an evaluative judgment by the Minister, but that judgment is amenable to review for legal unreasonableness. It would also be amenable to review on other grounds, including bias and, perhaps, the inflexible application of policy.

10 14. For that reason, contrary to the plaintiff's reply at [4], cl 866.226 is not tantamount to the hypothetical Act, suggested in argument by the Solicitor-General in *Plaintiff S157/2002 v The Commonwealth*, being an Act that conferred power to exercise a totally open-ended discretion upon the Minister as to what aliens can and what aliens cannot come to and stay in Australia, the other provisions of the Act providing only "non-binding "guidelines".[9] The Court doubted the validity of such a hypothetical Act. But an argument based directly on those doubts that was directed to the power given to the Minister by s 46A(2), being a power that turns on the Minister's view of "the public interest", was unanimously rejected by this Court in *Plaintiff M61/2010E v The Commonwealth*. The Court said:[10]

20 > neither s 46A as a whole, nor s 46A(7) in particular, is a provision which is of so little content as not to constitute an exercise of legislative power or to be a "law" as a rule of conduct or a declaration as to power, right or duty.

15. In the present context there is no reason to distinguish between the Minister's view of the "public interest" and his view of the "national interest". Both concepts have sufficient "content" so as not to engage the possible limitation discussed in *Plaintiff S157*. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, a provision that turns on the public interest is "neither arbitrary nor completely unlimited".[11]

16. When used in a statute, this Court has repeatedly accepted that the expression
30 "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters.[12] That judgment is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view".[13] Yet despite its width, the Minister's view of the "public interest" has sufficient content to operate as a condition upon which the availability of a statutory power depends.

17. There is no basis to adopt any different view with respect to the Minister's view of the "national interest". Indeed, the Court accepted as much in *Plaintiff S156-2013 v*

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8 (2002) 118 FCR 326 (FC) at [89].

9 (2003) 211 CLR 476 at [101] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

10 (2010) 243 CLR 319 at [56].

11 (1947) 74 CLR 492 at 505.

12 See, eg, *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 401 [42]; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [57], 323 [137]; *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 at 329 [13].

13 (1947) 74 CLR 492 at 505 per Dixon J.

Minister for Immigration and Border Protection,[14] when it upheld the validity of s 198AB(1) of the Migration Act. That provision confers upon the Minister power to designate a country as a regional processing country subject to the precondition that the Minister thinks this to be "in the national interest". The effect of a designation is to compel the taking of unauthorised maritime arrivals who arrived after a certain date to the designated regional processing country (s 198AD) unless the Minister exercises the personal, non-compellable power in s 198AE to determine that s 198AD does not apply. The effect of the scheme is thus that the question whether an unauthorised maritime arrival is subject to regional processing, and thus not able to apply for a protection visa, depends on the Minister's determination of the "national interest". In upholding the validity of s 198AB, there was no suggestion that this condition lacked ascertainable legal content, such that it did not define a legal standard or test. Yet if the "national interest" provides such a legal test or standard for the purpose of conditioning the exercise of statutory power under s 198AB, it can equally specify a legal test or standard (i.e. a criterion) for the grant or refusal of a visa.

18. *Fourthly*, it is wrong to conceive of cl 866.226 as "overriding" every other criteria for a protection visa. It is true that, if cl 866.226 is not satisfied, then s 65 will require the refusal of an application for a subclass 866 visa. But if any criterion is not satisfied, the visa to which that criterion applies cannot be granted. In that sense, the non-satisfaction of any criterion will "override" the satisfaction of all the others. There may of course be cases where all criteria but cl 866.226 are satisfied, but there will equally be cases where cl 866.226 is satisfied yet some other criteria are not.

19. *Fifthly*, before the commencement of the Reform Act, criteria identical to cl 866.226, and expressly described as "criteria", were to be found in the previous regulations for the grant of entry permits and protection visas which were the direct predecessors to the protection visa (see the defendant's submissions at [15]–[19], which were expanded in oral argument). So too, it was a criterion, described as such, for the grant of various other refugee and humanitarian visas and entry permits that the Minister be satisfied that the settlement of the applicant in Australia would not be contrary to the interests of Australia (see the defendant's submissions at [20]).

20. It is unlikely in the extreme that the commencement of the Reform Act would preclude the continued prescription of such criteria. The use of the same word — "criteria" — in s 31(3) as inserted by the Reform Act suggests precisely to the contrary. The historical prescription and description of these matters as "criteria" tells strongly against the conclusion that these matters no longer met the definition of "criteria" upon the commencement of the Reform Act.

C. SECTIONS 7(2)(c) AND (e) OF THE ACTS INTERPRETATION ACT

21. Section 7(2) of the Acts Interpretation Act addresses the effect of the repeal or the amendment of an Act.

22. Equivalent provision was previously made in respect of the repeal or amendment of legislative instruments by s 15 of the *Legislative Instruments Act 2003* (Cth) (**Legislative Instruments Act**). That section was repealed by item 27 of sched 1 to the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* (Cth). It may well be that that repeal did not have any relevant legal effect, because s 7(2) of the Acts Interpretation Act applies to the repeal or amendment of legislative

[14] (2014) 88 ALJR 690; (2014) 309 ALR 29.

instruments by reason of s 13(1) of the Legislative Instruments Act.[15] However, for the reasons that follow, it is unnecessary to decide that point.

23. *First*, s 45AA(8)(b) provides, in terms, that s 7(2) of the Acts Interpretation Act does not apply to a "conversion regulation" (as defined in s 45AA(3)) "including a conversation regulation enacted by the Parliament". Accordingly, the potential application of s 7(2) of the Acts Interpretation Act to reg 2.08F is expressly negated.

24. *Secondly*, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen*,[16] McHugh J, sitting as a single judge of this Court, held that upon making an application for a visa, the applicant obtained a "right" to the determination of his or her application which was preserved by the predecessor to s 15 of the Legislative Instruments Act. However, McHugh J noted that the application of that provision could be displaced by a contrary intention manifested by the amending regulation.[17] No such contrary intention was apparent in that case. Accordingly, McHugh J held that an amendment to the Migration Regulations made subsequent to the application for a visa did not apply to the applicant.

25. Consistently with McHugh J's approach, s 2(2) of the Acts Interpretation Act acknowledges that the application of that Act is "subject to a contrary intention". That is critical in this case, because reg 2.08F, which was enacted by the Parliament itself, expressly addresses the transitional application of the amendments introduced by the Amendment Act to undetermined visa applications.

26. In the events to which reg 2.08F refers, it mandates the application of the amendments to the undetermined visa applications that it identifies. It provides, in terms, for a result contrary to s 7(2) of the Acts Interpretation Act. It thus displaces the operation of s 7(2) in the circumstances in which it operates.[18]

27. For the reasons submitted by the defendants during oral argument, reg 2.08F applies to the plaintiff's visa application. Accordingly, it displaces any operation which s 7(2) of the Acts Interpretation Act would otherwise have in respect of that application.

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[15] That was assumed in the Explanatory Memorandum to the Legislative Instruments Amendment (Sunsetting Measures) Bill 2012 (Cth) at p 14.

[16] (2001) 75 ALJR 542; 177 ALR 473.

[17] (2001) 75 ALJR 542; 177 ALR 473 at [28]–[29].

[18] See similarly *GF Heublein & Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 161–162 per *curiam*; *Farbenfabriken Bayer AG v Bayer Pharma Pty Ltd* (1965) 113 CLR 520 at 526 per *curiam*; *Attorney-General (Qld) v Australian Industrial Relations Commn* (2002) 213 CLR 485 at [65] per Gaudron, McHugh, Gummow and Hayne JJ at [65]; *ADCO Constructions Pty Ltd v Goudappel* (2014) 88 ALJR 624 at [11], [20], [32] per French CJ, Crennan, Kiefel and Keane JJ, [65] per Gageler J.