IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

B E T W E E N:

PLAINTIFF S297/2013

Plaintiff

and

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MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

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PLAINTIFF'S SUPPLEMENTARY SUBMISSIONS

Filed pursuant to leave granted on 9 and 11 December 2014

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A CERTIFICATION

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

B INTRODUCTION

2. Pursuant to leave granted at the conclusion of the hearing on 9 December 2014 and by letter dated 11 December 2014, these supplementary submissions address:
   a. matters in reply to the defendants' supplementary submissions (**DSS**); and
   b. the relevance, if any, of s 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth).
3. The plaintiff otherwise maintains the submissions previously advanced.

C CRITERIA FOR A VISA

4. The plaintiff agrees that the meaning of the expression "criteria for a visa" in s 31(3) of the Migration Act was correctly analysed by the Full Federal Court in *Pillay v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 368 at [29]-[34] (**DSS** [7]). A criterion is a standard or principle by which something is judged.
5. The vice of clause 866.226 is that it does not prescribe a criterion for a visa: the national interest embraces all possible criteria for a visa. The practical effect of the clause is that, for any given visa application, the Minister or a delegate in his or her discretion will select one or more aspects of the national interest to judge as criteria for the visa, and will consider the application by reference to those criteria. The criteria considered by the Minister or the delegate might be the same as, or different to, the criteria considered with respect to other applications for the same visa.
6. The criteria to be considered are not found in clause 866.226. The national interest in regulating the grant of a visa to a non-citizen (s 4(1)) permits consideration of every criterion that might lawfully be prescribed for the visa, and the universe of criteria that might lawfully be prescribed for the visa is bounded by the same national interest.
7. What is important is not that reasonable minds may differ as to whether clause 866.226 is satisfied in a particular case (cf. **DSS** [6], [12]), but that reasonable minds may differ *as to the content of the criteria prescribed by clause 866.226*. That kind of uncertainty about the content of delegated legislation is not authorised by s 31(3) of the Migration Act.
8. The defendants call in aid the observation of Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* that a provision that turns on a discretion involving the public interest is "neither arbitrary nor completely unlimited" (**DSS** [15]).[1] But as his Honour concluded: "it is certainly undefined", referring to the remarks previously made by his Honour in the *Swan Hill* case.
9. In that case, Dixon J considered a local government statute which authorised by-laws "regulating and restraining the erection and construction of buildings", and a by-law that purported to prohibit the erection of any building "unless with the approval of the council". His Honour illustrated the width of the "undefined" discretion under the

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1 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

by-law in remarking that "no reason would, I think, be held outside the scope and purpose of the by-law unless it had no relation to municipal government".[2]

10. Importantly for present purposes, Dixon J then considered a paragraph which provided that any such by-laws "may leave any matter or thing to be from time to time determined" by an authorised officer "in any particular case". His Honour said that:[3]

> *the paragraph could not justify a by-law committing the whole subject matter of the power to a discretionary authority exercisable in each particular case and prohibiting the individual from acting at all unless with the council's prior approval.*

11. The power to prescribe criteria for visas in s 31(3) similarly does not authorise the prescription of an undefined administrative discretion having that effect. The national interest in clause 866.226 commits to the Minister the whole subject matter of the power to determine the criteria for a visa, exercisable in each particular case and prohibiting the grant of a visa at all unless with the Minister's approval.

12. The defendants accept that the national interest involves a discretionary value judgment "to be made by reference to undefined factual matters" (**DSS** [16]-[17]). The defendants' case must be that such an undefined administrative discretion might lawfully be prescribed in the guise of a national interest 'criterion' for every class of visa, the content of which may vary between delegates, visa classes and applicants, and which content may be located from time to time in such non-binding guidelines as may be determined by the Minister. For the reasons given above, that should be rejected.

13. A criterion must be able to perform the role indicated by other provisions of the Act, such as those pertaining to merits review. For example, where a decision to refuse to grant a protection visa is made relying on a criterion and the applicant applies to the RRT for review of the decision, the criterion must be able to be judged by the RRT. In the case of a national interest criterion, the RRT might reasonably form the view that, where the review applicant is a refugee, it is not relevant to the national interest whether the refugee arrived by boat.[4] Had that occurred here, it would be mere sophistry to suggest that the Minister and the RRT had not considered the plaintiff's application against different criteria. The criterion adopted by the Minister was that protection visa applicants not be unauthorised maritime arrivals. The Minister's policy in that respect, cloaked in various guises, has been the driving force for this entire proceeding.

14. Where a visa is refused because the applicant did not satisfy a criterion for the visa, notification of the decision must specify the criterion (s 66(2)(a)) and give written reasons why the criterion was not satisfied (s 66(2)(c)). The reasons must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.[5] The reasons given by the Minister show the criterion he adopted in this case. (**SC** [25]-[26], 148-151)

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2 *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746 at 758 (Dixon J).

3 *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746 at 760 (Dixon J).

4 The practice between 1994 and 2013 of granting permanent protection visas to refugees who pass the character test and are not a risk to security suggests that this view of the national interest is not novel.

5 *Acts Interpretation Act 1901* (Cth) s 25D; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [241] (Hayne J).

15. In *Turner v Owen*, French J considered a statutory provision which contemplated that the Governor-General would "by regulation prohibit the importation of goods into Australia". The impugned regulation prohibited "goods which in the opinion of the Minister, are of a dangerous character and a menace to the community". His Honour observed that the latter words, being almost entirely normative, "are not indicative of a factual criterion".[6] "On any functional analysis of the regulation it effectively places the power of prohibition in the hands of the Minister."[7] His Honour held that the regulation was not a valid exercise of the regulation-making power. The power to prescribe "criteria" for a visa under s 31(3) of the Migration Act is similarly limited.

16. In *Herald-Sun TV*, in considering a statutory function of determining a "standard" for television programmes, this Court saw as significant whether the provision "refers to general criteria fixed in advance" or involves "the application of a predetermined standard".[8] The Court held: "The power to fix a standard which is to be generally applied is quite different from a power to decide ad hoc, from case to case ... [a] power of the latter kind is not a power to fix standards." Sections 31(3) and 65(1) of the Migration Act assume a similar distinction between the power of the Governor-General to prescribe criteria for visas and the duty of the Minister to decide whether a visa must be granted by reference to the criteria prescribed and the other matters in s 65(1)(a).

17. The defendants seek to avoid invalidity by describing the national interest as "not unbounded" and "neither arbitrary nor completely unlimited", noting that the Minister's opinion of the national interest "is amenable to review for legal unreasonableness" (**DSS** [13], [15]), but those submissions do no more than restate presumptions that are generally applicable to any form of statutory executive power. If the national interest does not define criteria for a visa, it is no answer to say that the Minister's opinion of it must be reasonable.

18. Contrary to the defendants' submissions, the class of criminal justice visas is sui generis and has no significance for the issues in this proceeding (cf. **DSS** [12]). Criminal justice visas are granted in the "absolute discretion" of the Minister (s 159(2)) rather than by an application for a visa (s 45) followed by a ministerial decision (s 65(1)). There is no statutory duty to grant or refuse to grant a criminal justice visa. No criteria can be prescribed for the class of criminal justice visas provided for by s 38, whether under s 31(3) or otherwise, and the statutory criterion stated in s 158(b) does not assist in determining the regulatory "criteria" authorised by s 31(3).

19. The defendants' reliance on *Plaintiff S156* is misplaced (cf. **DSS** [17]). That s 198AB has sufficient content to be a valid law of the Commonwealth under s 51(xix) of the Constitution does not shed any light on whether clause 866.226 prescribes a criterion for a visa within the meaning of s 31(3) of the Migration Act.

20. To say that the non-satisfaction of any criterion "will 'override' the satisfaction of all the others" misses the point (cf. **DSS** [18]). The defendants fail to recognise that the width of the discretion involved in the national interest subsumes all possible criteria for

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6 *Turner v Owen* (1990) 26 FCR 366 at 389 (French J).

7 *Turner v Owen* (1990) 26 FCR 366 at 389 (French J).

8 *Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal* (1985) 156 CLR 1 at 4 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

a visa. Clause 866.226 'overrides' the prescribed criteria because in giving an undefined discretion as to whether a non-citizen will be granted a visa it authorises consideration of criteria that have not been and might never be prescribed in law.

21. The defendants' submissions with respect to other regulations predating the Reform Act involve an appeal to tradition and are not compelling (**DSS** [19]). Criteria similar to PIC 4002 had purportedly been in existence for much the same period of time as clause 866.226,[9] and PIC 4002 was held invalid by this Court in *Plaintiff M47*.

22. Finally, the defendants' concession that the Minister's opinion of the national interest is "perhaps" amenable to review for "the inflexible application of policy" (**DSS** [13]) may also have significance for the plaintiff's case having regard to the matters raised during oral argument.[10]

23. Clause 866.226 was invalid or not engaged in the circumstances.

D THE ACTS INTERPRETATION ACT 1901

24. The plaintiff agrees that the relevant provisions of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), including reg 2.08F, commenced on 16 December 2014 (**DSS** [5]). But the disapplication to conversion regulations of s 7(2) of the *Acts Interpretation Act 1901* (Cth) by s 45AA(8)(b) of the Migration Act does not assist the defendants.

25. Sections 7(2)(c) and (e) preserve "any right" or "obligation" "accrued or incurred" under the affected Act, as well as any "legal proceeding or remedy" in respect of such right or obligation, and provide that any such legal proceeding or remedy may be "continued or enforced" as if the affected part had not been repealed or amended.

26. The plaintiff accrued a right to a protection visa provided for by s 36(1), and the Minister incurred an obligation to grant that visa, under ss 65(1) and 65A(1) of the Migration Act. In *Plaintiff S297 (No 1)*, this Court held that the Minister had "failed to perform the duty imposed by s 65 in compliance with s 65A of the Act" (**A25** at [67]), the relevant period of 90 days having expired in August 2013. On 4 July 2014, this Court issued a writ of mandamus to the Minister (**SC** [19]), and on 17 July 2014, the Minister was satisfied that the requirements of s 65(1)(a) were met (**SC** [26]).

27. Nothing in s 45AA(8)(b) disapplies s 7(2)(c) and (e) to provisions outside s 45AA or the conversion regulation. Relevantly, it may be that the disapplication of s 7(2) of the Acts Interpretation Act in conjunction with a conversion regulation which operates to alter the nature of a visa application that has been made prevents the duty to consider a valid application from arising (see s 47), or at least alters the content of that duty to be one to consider the deemed application. However, in the present case, the matter had progressed well beyond duties to consider valid applications (in s 47) and had reached the point where a duty to grant a visa of a particular class had crystallised (under s 65). The disapplication of s 7(2) to "the enactment of [s 45AA] or the making of a conversion regulation" does not extend to crystallised duties to grant a visa, which had already been the subject of curial relief. The issue of a peremptory writ of mandamus is

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9 *Plaintiff M47* at [60] (French CJ),

10 T30.1302-1309, T62.2750-2784, T63.2832-2865, T70.3132-3151, T74.3303-3321.

required to give effect to the provisions of the Act as they apply to the continuation of this proceeding and the enforcement of the initial writ.

28. Alternatively, the disapplication of s 7(2)(c) and (e) to the conversion regulation simply means that reg 2.08F falls to be construed in accordance with common law principles of statutory construction,[11] including the principle of legality. There is nothing in reg 2.08F to suggest that it was intended to affect proceedings to enforce a writ of mandamus issued by this Court before the commencement of the regulation.

29. Insofar as the defendants submit that reg 2.08F "expressly addresses the transitional application of the amendments introduced by the Amendment Act to undetermined visa applications" (**DSS** [25]), this submission mistakes the circumstances to which reg 2.08F(3) is directed.

30. The premise upon which para (b) of reg 2.08F(3) proceeds is that para (a) does not apply to the application because the Minister made a decision in relation to the application before 16 December 2014. If the decision contemplated by that premise is limited to a valid decision, as the Minister submits, subpara (b)(iii) has no work to do: valid migration decisions cannot be quashed by a court. Subparagraph (b)(iii) requires the conclusion that para (b) applies to an application in relation to which the Minister made an invalid decision before 16 December 2014, as occurred in this case.

31. It follows that reg 2.08F(3) cannot apply to the plaintiff's application unless and until subpara (b)(iii) is satisfied, namely, at such time on or after 16 December 2014 as this Court quashes a decision of the Minister in relation to the application and orders the Minister to reconsider the application in accordance with the law. The primary relief sought by the plaintiff is a peremptory mandamus. In those circumstances, there is no occasion to consider whether reg 2.08F manifests a contrary intention with respect to the plaintiff's application (cf. **DSS** [24]-[27]).

Dated: 19 January 2015

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[11] Section 7(1) of the *Acts Interpretation Act 1901* (Cth), which negates the common law rule that the common law revives upon the repeal of an Act that itself had altered the common law, has no application in circumstances where certain provisions are not repealed but are merely disapplied to a regulation. In other words, to the extent that s 7(2)(c) and (e) altered common law principles of statutory construction, the disapplication of those paragraphs to reg 2.08F revives those common law principles.