IN THE HIGH COURT OF AUSTRALIA No M47 OF 2012
MELBOURNE REGISTRY

B E T W E E N

PLAINTIFF M47/2012
Plaintiff
and
DIRECTOR GENERAL OF SECURITY
First Defendant
THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION
Second Defendant
SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Third Defendant
MINISTER FOR IMMIGRATION AND CITIZENSHIP
Fourth Defendant
COMMONWEALTH OF AUSTRALIA
Fifth Defendant

FURTHER SUBMISSIONS OF THE PLAINTIFF
(Filed pursuant to the direction of the Court)

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Filed on behalf of: The Plaintiff

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

2. As outlined in the Plaintiff's written and oral submissions, the Plaintiff's first submission is that PIC 4002 is capable of operating consistently with the *Migration Act 1958* (Cth) (the **Act**) so long as the scheme of the Act is understood as follows:

   2.1. Section 198 operates only upon the class of persons the Act identifies as "unlawful non-citizens" – that is, a non-citizen in the migration zone who does not hold a visa: ss 13 and 14.

   2.2. A person cannot be both a person to whom Australia owes protection obligations within the meaning of s 36(2) of the Act and an unlawful non-citizen within the meaning of s 14 of the Act unless there has been a decision under the Act to refuse or to cancel a protection visa.

   2.3. The Act provides for a special kind of decision and associated review regime dealing with the refusal and cancellation of protection visas relying on arts 32 or 33 of the Convention (ie ss 500, 501).

   2.4. If that route is followed, a person to whom Australia owes protection obligations can be removed under s 198 (which would be engaged upon the refusal or cancellation decision, subject to the outcome of any appeal) without breaching Australia's protection obligations under the Act.

   2.5. The general power of removal under s 198(2) and (6) is not engaged by a decision to refuse or to cancel a protection visa without deploying that special process and allowing that special kind of review.

   2.6. On that approach, the validity of PIC 4002 does not arise. If those administering the Act rely upon PIC 4002 to refuse a visa to a person to whom Australia owes protection obligations, the person concerned cannot be removed (with the consequence that they may no longer be lawfully detained). That is not to say that such a decision is without consequence. For there are benefits other than liberty and immunity from removal associated with a visa – for example, an unlawful non-citizen who performs work in Australia commits an offence: see s 235(3) of the Act. It is also not to say that that person can never be removed – the Minister retains a discretionary power to grant a visa to regularise the status of a person in the position of the

plaintiff (s 417), which would again enliven the special decision making powers relying on arts 32 or 33 of the Convention.

2.7. On the other hand, if those administering the Act rely upon arts 32 or 33 of the Convention in a decision made under s 501 of the Act, the person concerned can be removed.

2.8. A decision to pursue one procedure over the other gives rise to issues of administration of the Act, the resolution of which would presumably be guided by the different consequences flowing from each procedure.

3. The Plaintiff contends that if PIC 4002 cannot be understood in the way set out in paragraph [2], then it is repugnant to the Act and is invalid. The remainder of these submissions address this second aspect of the Plaintiff's argument. The submissions are structured as follows:

3.1. the scheme of the Act;

3.2. the principles concerning repugnancy;

3.3. the repugnancy of PIC 4002 in light of the scheme;

3.4. the reasons why the construction of the Act (and hence the validity of PIC 4002) for which the Commonwealth contends is incorrect.

The scheme established by the Act

4. Relevantly for present purposes, the Act erects a scheme by which Australia gives effect to its obligations under the Refugees Convention as amended by the Refugees Protocol (the **Convention**). The first and most fundamental aspect of the scheme is the provision, in s 36, for protection visas, a mandatory criterion for the grant of which is that the non-citizen is a person to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

5. Section 65 requires the Minister to grant a visa to a person if he or she is satisfied that the conditions there set out are satisfied. Section 65 applies to all classes of visa, not simply to protection visas. One of the matters that it requires satisfaction of is whether s 501 of the Act prevents the grant of a visa. Another matter is that prescribed (and valid) criteria are satisfied.

6. Section 501 provides that the Minister may refuse to grant, or may cancel, a visa if the person fails to satisfy the Minister that the person passes the character test.

7. Section 501(6) sets out the circumstances in which a person does not pass the character test, relevantly including s 501(6)(d)(v), which provides as follows:

> For the purposes of this section a person does not pass the character test if:
>
> ...
>
> (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
>
> ...
>
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

8. The phrase "represent a danger" was explained in the Explanatory Memorandum to the Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth) as being of broad import and as including "an assessment that a person is a risk to Australia's national security".

9. There are two (and only two) articles in the Refugees Convention that provide for expulsion or return of a person to whom a state owes protection obligations.

9.1. Article 32 of the Convention expressly contemplates that a person to whom a state party owes protection obligations may be expelled on grounds of national security or public order.

9.2. Art 33(2) expressly contemplates that a person to whom a state party owes protection obligations may be expelled or returned where "there are reasonable grounds for regarding as a danger to the security of the country in which he is".

10. These articles of the Convention are expressly invoked in ss 500, 502 and 503 of the Act. Of immediate relevance is s 500, which provides for a special review process where a person is refused a visa relying on on art 1F, 32 or 33(2).[1]

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[1] This process is consistent with the obligations under article 32(2) of the Convention as to due process for expulsion and should be understood as intended to give effect to those obligations. Those obligations were described in the *travaux preparatoire* as chosen "to avoid the possibility of [expulsion] on the decision of a mere policeman" (Hathaway, *The Rights of Refugees Under International Law* (2005) at 671). Hathaway also observes (at 672) that article 32(2) requires that "the body entrusted with the ultimate decision-making on expulsion should, at the very

11. Decisions "relying on" arts 32 or 33(2) are not reviewable under Part 5 or 7 of the Act (s 500(4)). The effect of 500(1)(c) read with ss 25(1) and (4) of the *Administrative Appeals Tribunal Act 1975* (Cth) is to confer on the Tribunal power to review those decisions. The nature of the review, appeals from any decision of the Tribunal and the special regimes that apply as regards material that would prejudice the security of Australia are dealt with in the note handed up by the Plaintiff on 19 June 2012.

12. Section 502 provides for a varied process where Minister acts personally and issues a certificate that a person is an "excluded person"; however such a step carries with it an additional procedural requirement, namely that the Minister's decision under s 502(1) be laid before each House of Parliament within 15 sitting days.

13. Sections 500(1)(c), 500(4)(c), 502(1)(a)(iii) and 503(1)(c) reflect an express legislative intention that the Minister be permitted to refuse to grant, or to cancel, a protection visa relying on art 32 or 33(2). The Plaintiff contends that the source of the power is found in s 501, which prevents the grant of the visa under s 65 whether or not the person otherwise satisfies all the criteria: see s 65(1)(a)(iii).[2]

14. As the Defendants accepted, a decision to refuse to grant a protection visa to a person in reliance on arts 32 or 33(2) of the Convention "would always fall within the scope of" subsection 501(6)(d)(v)[3] (assuming power to make such a decision was conferred by the Act, which the Defendants do not accept).

15. Finally, reference should be made to the provisions of the Act dealing with removal of unlawful non-citizens. Section 198 in terms requires the removal of an unlawful non-citizen in various circumstances there set out. However, s 198 is qualified by s 198A such that a person whose claim to be a person to whom Australia owes protection obligations has not been assessed cannot be removed pursuant to

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least, be explicitly empowered to take account of all the circumstances of the case" and must have "real authority over the expulsion process".

[2] Alternatively, if ss 65 and 501 are not the source of power to refuse or cancel a visa on art 32 or 33(2) grounds, the power could be implied from s 500(1)(c) itself (see *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-3).

[3] Ts 85, lines 3695-3702.

s 198.[4] The Plaintiff's primary argument (and, indeed, the Defendants' argument) proceeds on the basis that s 198 is subject to an additional implied constraint (although the parties disagree as to the nature of the constraint).

16. The alternative argument (the subject of these submissions) commences at the other end, namely the point of decision and not the point of removal. On this approach, the only basis for denying a protection visa on grounds of national security is s 501 (relying on articles 32 and 33(1)). If a visa is refused in reliance on those articles then s 198 authorises the removal of a person to whom Australia owes protection obligations, and such removal is Convention compliant. The only restraint on removal imposed by the Refugees Convention on this analysis, is the express constraint imposed by articles 32(1) and 33(2) (and the due process protections they impose) and the manner in which the Act recognises and gives effect to these constraints through s 501.

17. If this is the construction, at least in so far as the security of the nation is involved, there is no need for an additional constraint at the point of s 198 because the decision would be one relying on article 32 or 33(2) and the removal would necessarily be compliant with the Convention. (There remains the question — which does not arise in this case — of the extent to which s198 may be constrained in circumstances where a visa is refused based on a criterion that is not related to the Convention).

18. In summary, the statutory scheme operates to give effect to Australia's obligations under the Refugees Convention, both in respect of protection obligations (ss 36 and 65) and in respect of removal of refugees who constitute a threat to national security (ss 500, 501, 502). The scheme ensures that a person to whom Australia owes protection obligations is only removed on the ground of risk or danger to national security in conformity with the procedural requirements set out in ss 500, 501 and 502. If those requirements are followed, however, the refugee may be removed.

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[4] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

Principles concerning repugnancy of subordinate legislation

19. As is expressly contemplated by the terms of s 504 (and as would be the case in any event), the Regulations must not be inconsistent with the Act.

20. Such inconsistency will relevantly arise where the enactment deals specifically with a given subject matter and the subordinate legislation purports to deal with that same subject matter in a different way. In such cases, the purported exercise of the regulation making power involves the taking of a "new step in policy" so as to interfere with the expressed wishes of the legislature: *Morton v Union Steamship of New Zealand Limited* (1951) 83 CLR 402 at 412 and *R v Commissioner of Patents; Ex Parte Martin* (1953) 89 CLR 381 at 407. Further, as was observed in *Shanahan v Scott* (1957) 96 CLR 245 at 250, a regulation making power:

> will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

21. The Court went on to hold that the regulation there in issue was "an attempt not to complement but to supplement the plan of the legislation" (see also *Carbines v Powell* (1925) 36 CLR 88 at 92).

22. Repugnancy may also arise where a regulation limits or negates a right conferred by an Act.[5] For example, a regulation which imposed a limitation upon the time in which a right may be asserted (where the Act provided for no such limitation) was held to be void in that it made "an addition to the law" rather than merely giving effect to the rights conferred.[6] Similarly, repugnancy will result if a power to make regulations specifying time limits for the review of a visa decision is exercised in a manner which effectively renders nugatory the rights of review provided for by the Act.[7]

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[5] See *Edwards v Olsen* (1996) 67 SASR 266 at 276 per Olsson J.

[6] *Ira, L & AC Berk Ltd v Commonwealth* (1930) 30 SR (NSW) 119 at 122.

[7] *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 77 at [48], [51] per O'Connor and Mansfield JJ.

Repugnancy of PIC 4002

23. Section 33 does not authorise the making of a criterion that is repugnant to the Act. The Plaintiff contends that PIC 4002 is repugnant to the Act and its scheme on the following basis.[8]

24. By reason of item 866.225(a) of schedule 2 of the Regulations, PIC 4002 imposes a criterion on the class of visa established by s 36(1) of the Act.

25. PIC 4002 deals with a topic that the Act deals with specifically and by reference to the Convention,[9] namely whether the person represents a danger to the Australian community in any way (see s 501(6)(d)(v)). Section 500(1)(c) is the lead or dominant provision; and the regulation-making power in s 504 (read with s 31(3)) is the subordinate provision.[10]

26. PIC 4002 deals with that topic differently from the manner in which it is dealt with in s 501(6)(d)(v) (informed by s 500(1)(c)):

    26.1. The first difference is that the subject matter of PIC 4002 is wider than that of articles 32 and 33(1) as given effect in the Act. Thus PIC 4002 would permit the refusal to grant, or cancellation of, a protection visa in a wider set of circumstances than are permitted under the provisions of the Act. As the Defendants accepted in oral argument, the concept of security in s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) is wider than that employed in articles 32 and 33(2), as picked up by s 500(1)(c): see transcript 96-7, lines 4189-4215. Thus PIC 4002 erects a barrier to entry on the same topic as s 500(6)(d)(v) (and articles 32 and 33(2) of the Convention) but is broader in reach. It imposes a different test in relation to the same subject matter. Indeed, in pointing to "the risk [such] a person may pose to an ally" (T96.4195-8) the Defendants appear to contemplate that one might, in the

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[8] This argument is not inconsistent with *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 336 (first instance); (2005) 147 FCR 135 because the architecture of the Act has fundamentally changed since that case was decided and the decision was concerned with a different aspect of the scheme.

[9] This aspect of the argument is perhaps analogous to the argument based on *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, accepted in *M70* (or at least animated by a similar principle of construction).

[10] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

current case, have regard under PIC 4002 to such a "risk" *vis a vis* Sri Lanka. That is self evidently foreign to the whole rationale of the Convention.

26.2. The second difference is that PIC 4002 interposes a different decision maker (namely ASIO) from the repository of power contemplated by the Act (namely, the Minister or her or his delegate). The possibility of disconformity of views between different arms of the Executive on the same subject matter arises in those circumstances. Such a disconformity in fact occurred in this case: see Ts 30-31, lines 1278-1285.

26.3. The third difference is that PIC 4002, although expressed as requiring the satisfaction of the decision-maker, does not require that the decision-maker be satisfied as to the substantive content of the security assessment. In contrast, s 501 requires the decision-maker to be satisfied that the person in question as a matter of substance passes the character test (which reflects, in part, articles 32 and 33(1) of the Convention). There is an (admittedly inexact) analogy to be drawn with the decisions of the Full Federal Court in *Minister for Immigration v Seligman* (1999) 85 FCR 115 at [55], [58] and [63] and *Bui v Minister for Immigration & Multicultural Affairs* (1999) 85 FCR 134 at [50], where the impugned regulation required an opinion to be formed in a manner which was at odds with the nature of the opinion contemplated by the terms of the Act (s505).

26.4. The final difference is that s 500 provides for a special process of review of decisions based on articles 32 or 33(2) of the Convention; whereas, PIC 4002 permits the circumvention or negation of that special process, potentially rendering it nugatory.[11] Indeed, it relocates the security issue such that it comes to fall for consideration in a scheme without merits review, and with the most limited of judicial review.

27. It is no part of the Plaintiff's argument that criteria additional to those found in the Act can never be imposed by regulation in relation to protection visas pursuant to ss 504 and 31(3). Rather, the argument is that additional criteria may not be imposed if they undermine or negate the terms or scheme of the Act, or constraints

[11] See *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 77 at 89 [44].

imposed on states by the Convention – unless and until parliament expressly and clearly evinces an intention to disavow the obligations Australia has under the Convention and to reduce the protections the Convention (and the Act in its present form) offers a refugee by not permitting expulsion expect in very specific circumstances. For example, health criteria (being a topic left by the Act to be prescribed by the Regulations and a matter not the subject of treatment in the Convention) are unlikely to give rise to such issues of repugnancy.

Problems with the Defendants' approach to the statutory scheme

28. The Defendants' approach to the statutory scheme (and hence to the validity of PIC 4002) has several problems.

29. First, the approach of the Defendants assumes an error in sections 500, 502 and 503 of the Act. It is inherently unlikely that the Parliament misspoke on three separate occasions (and failed to correct its mistake on the occasions those provisions have since been amended, including after *NAGV*). Further, it is "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".[12] In accordance with that principle, the Plaintiff's approach to the statutory scheme involves giving full meaning and effect to the terms in ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and 503(1)(c).

30. Secondly, as noted above and in the Plaintiff's written submissions, the Defendants' approach depends critically upon a strained construction of s 198, which requires the Court to re-write the terms of the Act.

31. Thirdly, and relatedly, the Defendants' approach to s 198 involves selective "cherry-picking" of only one Convention obligation (namely, that in article 33(1) of the Convention) as the basis for its proffered construction of s 198; but as the majority observed in *Plaintiff M70*, the Convention involves a number of obligations; and relevantly here, involves obligations concerning procedures relevant to expulsion of refugees under article 32(2) and (3).

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[12] *R v Berchet* (1688) 1 Show KB 106 [89 ER 480], quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382.

32. Fourthly, the Defendants' approach to s 198 fails to accommodate the complementary protections (implementing Australia's obligations under the Convention Against Torture) now embodied in s 36(2)(aa) of the Act.[13]

33. Fifthly, the Defendants' approach is based upon a misreading of *NAGV*. The Court in that case clearly refrained from determining the possible locus of the power to make a decision "relying on" arts 32 or 33(2). It was unnecessary for it to do so because, in contrast to the express references to those articles appearing in ss 500, 502 and 503, the Act did not "expressly ... adopt Art 33(1)". It was upon a particular construction of Art 33(1), with the implied obligation to afford asylum and its qualification with respect to safe third states, that the Minister relied (see [57]). The rejection of the Minister's argument involved no more than the conclusion that those matters do not form an element of the criterion in s 36(2) (see [42], [57], [59]). The Court said nothing of whether a decision to refuse to grant, or to cancel, a protection visa may not be made relying on arts 32 or 33(2) through the mechanism of s 501. No argument was addressed to that question and the possibilities raised by the Court at [57] do not suggest their Honours were seeking to determine it.

ANSWER TO QUESTION 2A SPECIAL CASE

34. Question 2A should be answered "yes".

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[13] The Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth) explained the complementary protection amendments in this way (at p 14 [90]): "In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a *non-refoulement* obligation, such a person will not be removed from Australia while the real risk of suffering serious harm continues, but will be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia's *non-refoulement* obligations; and the individual circumstances of their case."