IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M64 of 2015

BETWEEN

PLAINTIFF M64/2015

Plaintiff

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

ANNOTATED PLAINTIFF'S REPLY SUBMISSIONS

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Part I: Internet publication

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

Part II: Submissions in reply

The Delegate's reasons for decision

2. Even where there is no legal obligation on a decision-maker to give reasons, a court may make findings and draw inferences as to 'what were in fact the reasons for the impugned administrative decision'.[1] The IRIS case notes and the notification letter[2] constitute a contemporaneous record of the basis on which the Delegate reached his decision, and may be examined to determine whether they reveal error in the exercise of power.[3]

Questions 1 and 2: Individual circumstances of visa applicants

3. Paragraph 202.222(2)(d) is directed to the capacity of the Australian community to provide for the permanent settlement of 'persons such as the applicant' in Australia. This cannot be equated to capacity to provide for the permanent settlement of all applicants for Subclass 202 visas, nor as being directed to the 'outer limit' of the capacity of the Australian community.[4] Contrary to the Defendant's Submissions, the class of persons to which paragraph 202.222(2)(d) is directed is not the entire class of SHP visa applicants.

   (a) First, this is not a natural reading of the words used in paragraph 202.222(2)(d), which suggest that the circumstances of the applicant are relevant.

   (b) Second, paragraph 202.222(2)(d) could easily have been drafted differently if it had been intended to have the meaning and effect for which the Defendant contends – *e.g.* referring to the capacity to provide for the permanent settlement of applicants for a Subclass 202 visa, or applicants for a Refugee and Humanitarian (Class XB) visa.

   (c) Third, paragraph 202.222(2)(d) has since been amended so as to replace the words 'persons such as the applicant' with 'the applicant', but without any

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1 *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [16]-[17] (Heerey, Stone and Edmonds JJ).

2 [SCB 253-262].

3 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at [225]-[228], referring to *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261 at 264; *Qu v Minister for Immigration and Multicultural Affairs* (2001) FCA 1299 at [9]; see also *Fairfield City Council v Liquor Administration Board* [2001] NSWSC 870 at [23].

4 *Cf.* Defendant's Submissions (**DS**), para [30.2], [31.1], [40]. Contrary to the Defendant's Submissions at para [30], the Delegate did not make a finding that the Australian community had the capacity to provide for permanent settlement of 5,000 Subclass 202 visa holders in 2014-15. Rather, he proceeded on the basis that there were 'only around 5,000 places available in the [SHP] for 2014-15'. See [SCB 261].

suggestion in the extrinsic materials that this amendment has brought about any substantive change in the meaning or operation of that provision.[5]

4. Accordingly, it would not be correct to instruct decision-makers that the 'primary indicator' of capacity for the purposes of clause 202.222(2)(d) is the Government's annual decision on the size and composition of the Humanitarian Programme or the SHP.[6] Of itself, the overall size of the Humanitarian Programme or the SHP provides no basis on which to identify particular cases in which there are compelling reasons for giving special consideration to the grant of visas. Such cases must ultimately be identified by reference to the factors set out in clause 202.222(2) – for example, by giving 'priority' to applications made by immediate family members over those made by friends or distant relatives,[7] or based upon the degree of discrimination to which the visa applicants are subject in their home country.

5. It is open to draw an inference that the Delegate failed to consider the particular circumstances regarding support available to the visa applicants from individuals and groups in the community. The 'letters of support' referred to in the Delegate's case notes at [SCB 254] are clearly identifiable as those which appear at [SCB 193] and [SCB 206-207]. However, neither the case notes nor the notification letter refer to or deal with the critical material directed to community support which appears at [SCB 249-251].[8] Generalised assertions by the Delegate that he had considered all of the information provided are no more than an 'all-embracing and self-serving statement of conclusion'[9] and do not preclude an inference that particular claims or material were overlooked, or were not given real and genuine consideration.

6. In so far as the Delegate incorrectly described the support available from the proposer as being limited to 'short term' accommodation, the Defendant has not identified any evidentiary basis for this finding, but seeks to brush it off as a mere 'factual error'.[10]

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5 *Migration Amendment Regulation 2013 (No 2)* (SLI 2013 No 75), item [26] (applicable to visa applications made on or after 1 June 2013); see Explanatory Statement (SLI 2013 No 75), p 15.

6 *Cf.* DS, para [30.2], fn 45.

7 Compare the 'other priorities' referred to in PAM 3 at [SCB 150-151].

8 This material was provided following an invitation to provide additional information on the March 2014 changes to the split family provisions by which the application became subject to the 'four-factor' compelling reasons criterion in clause 202.222(2), including paragraph 202.222(2)(d).

9 *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at 244 [111] (Kirby J).

10 DS, para [32] fn 50.

Questions 3 and 4: Irrelevant considerations

7. Contrary to the Defendant's submissions,[11] paragraph 202.222(d) does not require the decision maker to have regard to the 'limited capacity of the Australian community', let alone the quantification of such limits by the number of available 'places' in the SHP. The insertion of the term 'limited' is an unjustified gloss on the terms of the provision, which refers only to the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant.

Questions 5 and 6: The Priorities

8. The Plaintiff's suggestion that the Delegate applied an idiosyncratic policy is not based on his failure to refer to PAM 3,[12] but on the Delegate's own summary of the government's priorities in terms that were materially different from those contained in the Policy.

9. The Policy as to processing priorities did not involve a 'rebalancing' of the SHP in the manner recommended by the Expert Panel.[13] In particular, the Policy departs from the Expert Panel's report by subjugating pre-existing split family applications proposed by minors who arrived in Australia by boat, and giving them 'lowest priority'.[14]

10. Whether an area is one of 'high-volume decision-making' should be assessed by reference to the number of decisions made, rather than the number of outstanding applications at any given time.[15] It had long been a feature of split family applications for Subclass 202 visas that lengthy processing times were to be expected.[16] In the present case, the Visa Applicants waited almost 3 years for a decision. If the Visa Application had been decided prior to March 2014, it is more likely than not it would have been granted.[17]

Inflexible application of policy

11. The distinction sought to be drawn by the Defendant between the exercise of discretion on the one hand and an 'evaluative judgment' on the other is a deflection from the real issue raised by question 6(b) of the Special Case.[18]

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11 DS, para [39.2].

12 *Cf.* DS, para [48].

13 *Cf.* DS, para [57].

14 *Cf.* [SCB 58-59], para [3.15].

15 *Cf.* DS, para [59.1].

16 See *e.g.* [SCB 132.6]: 'Regardless of the changes to the processing priorities, all SHP applicants should expect lengthy processing times for their applications to be decided'. See also [SCB 187.2, 215.6].

17 *Cf.* [SCB 124.4].

18 *Cf.* DS, para [63].

12. The evaluative judgment involved in the application of a general standard (such as 'compelling reasons for giving special consideration') to the facts of a particular case is akin to the exercise of discretion.[19] And the rule against fettering which precludes the rigid application of policy guidelines is equally applicable in such a context.[20]

13. Whether characterised as 'discretionary' or 'evaluative', the fact remains that an inflexible policy (or a policy inflexibly applied) cannot reduce or narrow the scope of the visa criteria. To do so would be inconsistent with the Regulations, and would be asking the wrong question by substituting the policy for the prescribed visa criteria. To the extent that the policy was inflexible, it would be inconsistent with the Regulations. To the extent that the policy was inflexibly applied, the delegate would have failed to identify the correct issue or ask the correct question.

14. In the present case, the Plaintiff relies not only on the absence in the IRIS case notes and the notification letter of any consideration being given to whether there were exceptional circumstances or cogent reasons not to apply the Policy, but also on the express statement made by the Delegate in the notification letter that '[o]nly the highest priority applications will be successful'.[21] Nowhere in the Defendant's submissions is this statement explained or addressed. In circumstances where he was proceeding on the basis that the Visa Application ought to receive the lowest 'priority',[22] the Delegate's reasoning was that the application could not be successful for that reason irrespective of any other consideration (such as the degree of discrimination faced by the Visa Applicants in their home country or the strength of their links to Australia).

15. The Delegate's obligation to consider whether to depart from the Policy was not conditional on the Visa Applicants making an express submission that the Policy should not be applied.[23] In any event, the Visa Applicants' representatives had made detailed submissions as to the specific facts and circumstances which amounted to compelling reasons in their particular case.[24] It should also be noted that the letter from the Department inviting the Visa Applicants to provide such further information

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19 See D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), pp 9-11, 114-115; compare, in a different context, *Comcare v PVYW* (2013) 250 CLR 246 at 295 [138]-[139] (Gageler J, dissenting in the result); *Singer v Berghouse* (1994) 181 CLR 201 at 226 (Gaudron J); *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42].

20 Compare, *e.g. Green v Daniels* (1977) 13 ALR 1; *Braganza v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 170 at [29]-[35] (concluding that the Migration Review Tribunal had not inflexibly applied a policy as to the length of a 'reasonable period' for the purposes of a particular visa criterion).

21 [SCB 262].

22 This appears to be accepted by the Defendant: see DS, para [27].

23 *Cf.* DS, para [65].

24 [SCB 218-247].

made no mention of the Policy and did not specifically invite submissions about the application of the Policy.[25]

'Broader context'

16. The 'broader context' discussed in paragraphs [9]-[15] of the Defendant's Submissions does not shed any light on the legal issues raised for determination by the Special Case. In particular, the 'political judgments' as to who should be able to resettle in Australia are embodied in the prescribed visa criteria contained in the Regulations. The application of those criteria does not call for any 'political' judgment to be exercised by the delegate in any individual case. To the extent that the delegate is permitted to have regard to broader government policies (on the assumption that they are not inconsistent with the applicable statutory criteria), such policies cannot be treated as binding or conclusive and cannot be inflexibly applied.[26]

17. In contrast to the Government's decision on the size of the Humanitarian Programme and the SHP, there is no evidence that the processing priorities sought to be implemented by the Policy were subject to any public consultation process. Rather, the evidence suggests that no such consultation occurred.[27]

18. The present case is concerned only with 'split family' applications by immediate family members of proposers in Australia who hold or held a Subclass 866 (Protection) visa – which is only a small fraction of both the global population of refugees and displaced persons seeking resettlement and 'the number of persons who could potentially apply for a Subclass 202 visa'.[28]

Dated: 21 October 2015

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25 [SCB 212-216].

26 Compare *Singer v Statutory and Other Offices Remuneration Tribunal* (1986) 5 NSWLR 646 at 650-651, 656-658.

27 [SCB 120 and 125 [27-30].

28 Cf. DS, paras [12]-[13].