IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No M77 of 2012**

BETWEEN:

JAVED HUSSAIN TAHIRI

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

SUBMISSIONS OF THE DEFENDANT

Filed on behalf of the Defendants by:

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I. PUBLICATION ON THE INTERNET

1. The Defendant certifies that these submissions are in a form suitable for publication on the Internet.

II. STATEMENT OF THE ISSUES

2. The Defendant submits that the questions for determination are:

   2.1. Did the delegate make a jurisdictional error in finding that, for the purposes of public interest criterion (**PIC**) 4015(a), the 'home country' of each additional applicant was Afghanistan?

   2.2. Did the delegate make a jurisdictional error in finding that, for the purposes of PIC 4015(b), there were persons other than the Plaintiff's mother who could lawfully determine where each of the additional applicants is to live?

   2.3. Did the delegate accord procedural fairness to the Plaintiff's mother in relation to her failure to satisfy clause 202.228 and PIC 4015?

III. SECTION 78B NOTICES

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

IV. MATERIAL FACTS

4. The facts and documents necessary to enable the Court to decide the questions reserved for the opinion of the Full Court are contained in the Special Case dated 30 October 2012 (the **Special Case**).

V. APPLICABLE LEGISLATION

5. The Defendant accepts the Plaintiff's statement of applicable legislation set out in paragraph 66 of the Plaintiff's Submissions. The Defendant will also refer to the *Migration Regulations 1989*, regs 100-105, the *Migration Regulations (Amendment) 1997* (No 137 of 1997), and the *Migration Amendment Regulations 2000 (No 2)* (No 62 of 2000).

VI. ARGUMENT

6. In summary, the Defendant submits that:

   6.1. It was open to the delegate to find that the home country of each of the children was Afghanistan. Accordingly, on the material before the delegate, the delegate's finding that he was not satisfied that the law of Afghanistan would permit the removal of the children does not reveal any jurisdictional error in the application of PIC 4015(a).

6.2. The delegate found that, under Afghan law and custom, either the father or persons on the father's side would have a right to determine where his children were to live. Accordingly, it has not been established that there was jurisdictional error in the delegate concluding that the consent of the Plaintiff's mother alone was not sufficient to satisfy PIC 4015(b).

6.3. The delegate accorded procedural fairness to the Plaintiff's mother. The mother was invited to comment and respond on the issue of PIC 4015, and was aware of the critical issues on which the decision might turn. The delegate was not required to presume that the Plaintiff's father was dead, as opposed to accepting that he was missing but alive at an unspecified location.

The delegate's decision

7. The delegate's decision was notified to the Plaintiff's mother by letter dated 9 January 2012.[1] The notification of the decision was required to specify the criterion for the visa that the applicant did not satisfy: *Migration Act 1958*, s 66(2)(a). However, the notification was not required to contain reasons why the relevant criterion was not satisfied: s 66(2)(c), (3). Accordingly, the delegate was not required to set out his findings on material questions of fact or to refer to the evidence or other material on which those findings were based.[2]

8. Nevertheless, the Court can 'receive evidence and enquire into what were in fact the reasons for the impugned administrative decision'.[3] Whether or not a particular document records what were the decision-maker's reasons for the decision is a question of fact.[4] While internal documents may record the process leading to the decision, including the decision-maker's preliminary thoughts or working notes, '[s]uch documents will not necessarily record <u>why</u> the decision-maker made the decision, that is to say the mental process by which he or she actually reached the decision in question'.[5]

9. In the present case, the entry made by the delegate in the Department's Records System on 2 January 2012 provides an obvious focus for ascertaining the delegate's reasons for the decision.[6] On its face, that entry records the making of the decision ('Application refused accordingly'), identifies the criteria for the visa that the Plaintiff's mother did not satisfy ('I am not satisfied that the public interest criterion 4015 is met

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1 Special Case [SC]: para [41]; Attachment T [P210-211].

2 *Cf. Acts Interpretation Act 1901* (Cth), s 25D.

3 *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [16] (Heerey, Stone and Edmonds JJ); see e.g. *Asghar v Minister for Immigration* [2012] FMCA 256 at [4]-[8] (Lindsay FM); *SZMNF v Minister for Immigration* [2008] FMCA 983 at [44] (Smith FM).

4 *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 125 FCR 152 at [56] (Allsop J).

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

6 Attachment J [SCB 133-134].

in relation to this case, therefore 200.228, 201.228, 202.228, 203.228 and 204.228 are not met'), and summarises the delegate's consideration after reviewing the content of the file.

10. The earlier entries made by the delegate and other officers of the Department during the course of the visa application process might have some relevance in drawing inferences as to the delegate's reasons for the decision made on 2 January 2012. However, those entries do not themselves constitute reasons for the decision.

11. In examining whether the delegate's decision was affected by jurisdictional error, the reasons recorded by the delegate in the Department's Records System should not be "construed minutely and finely with an eye keenly attuned to the perception of error".[7] This approach is even more apposite in a case such as the present, where there is no requirement to give written reasons for the decision. As Kenny J observed in *Ly v Minister for Immigration and Multicultural Affairs*:[8]

> *'Finally, the nature of the notification is to be again considered. There was, as already noted, no requirement for written reasons. If (as the authorities establish) it would be wrong to scrutinise overzealously the language of a statement of reasons given by a decision-maker pursuant to some statutory provision like s 420 of the Act, then it would also be wrong so to scrutinise a notification given under s 66(2)(a) of the Act: cf Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ and 291 per Kirby J.'*

12. Further, in the absence of a duty to provide written reasons, an inference cannot be drawn from an absence of discussion by the delegate of evidence or submissions that the delegate did not have regard to those matters.[9]

13. Against that background, the entry made by the delegate on 2 January 2012 establishes that the decision to refuse to grant the visa was made because the delegate was not satisfied that PIC 4015 was met, and therefore (relevantly) clause 202.228 was not met. In reaching this finding, the delegate addressed each of the alternative requirements of PIC 4015.

13.1. In considering PIC 4015(a), the delegate was 'not satisfied that the law of Afghanistan would permit the removal of the children in the circumstances claimed'.

(a) This is consistent with a finding by the delegate that the 'home country' of each of the children (the additional applicants) was Afghanistan.

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7 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271, quoting *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

8 [2000] FCA 15 at [27]; see also *Qu v Minister for Immigration and Multicultural Affairs* [2001] FCA 1299 at [9] (Gray J).

9 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, French CJ and Kiefel J at 605-606 [31]-[32], Gummow J at 616-617 [69]-[70], Heydon J at 623 [91], Crennan J at 623 [92] *Vishnumolakala v Minister for Immigration and Multicultural Affairs* [2007] FCA 248 at [9]-[16] (Finn J); *Vishnumolakala v Minister for Immigration and Multicultural Affairs* [2007] FCA 594 at [3] (Finn J); *Yang v Minister for Immigration and Multicultural and Indigenous* (2003) 132 FCR 571 at 584 [54] (Downes J)

(b) The delegate noted that the Plaintiff's mother had been given the opportunity to present documents or evidence with regard to her ability under the law of Afghanistan to remove the children. He found that the documents provided by the Plaintiff's mother in response were not genuine, and (accepting that 'documents are not important in Afghan custom') he placed 'little weight on these documents positive or negative'.

13.2. In considering PIC 4015(b), the delegate noted that 'we do not have any evidence as to the consent of persons who have the right to determine where the child will live'.

(a) The delegate did not necessarily determine that the mother was not a person who can lawfully determine where each of the children are to live.[10] At most, the delegate noted that "[t]here are concerns as to the child custody provision, namely as to the right for the [Plaintiff's mother] to determine where the minor children will live". However, the issue was whether there were any *other* persons who had such rights. If so, it would be necessary to establish that such persons also consented to the grant of the visa, because PIC 4015(b) requires the consent of *each* person who can lawfully determine where the additional applicant is to live.

(b) The delegate referred to the Plaintiff's mother's claim at interview that, 7 years ago, her husband had gone to Kandahar for work and never returned. However, the delegate did not find that the husband was dead, stating that '[t]he applicant did not present any evidence to suggest that the husband is deceased and from what we know about the movement and migration for work and asylum seeking purposes, there are several possible scenarios with regard to his current location'.

(c) Alternatively, the delegate found that '[i]n both Afghan law and custom, the custody of the minor children would fall to the father's side if there were credible and substantial evidence of the death of the father'.

(d) Accordingly, on the findings made by the delegate, PIC 4015(b) was not satisfied because there was no evidence that the Plaintiff's father consented to the grant of the visa, or alternatively, if the father was deceased, there was no evidence that persons on his father's side under Afghan law and custom consented to the grant of the visa.

13.3. In considering PIC 4015(c), the delegate noted that there was no evidence of an Australian child order. This finding is not the subject of challenge in these proceedings.

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[10] *Cf.* Plaintiff's Submissions, para 28(r).

The applicable regulations

14. Clause 202.228 of Schedule 2 of the *Migration Regulations* requires that, as a criterion to be satisfied at the time of decision:

> *202.228 If a person (in this clause called the **additional applicant**):*
>
> *(a) is a member of the family unit of the applicant; and*
>
> *(b) has not turned 18; and*
>
> *(c) made a combined application with the applicant —*
>
> *public interest criteria 4015 and 4016 are satisfied in relation to the additional applicant.*

15. PIC 4015 provides:

> *4015 The Minister is satisfied of 1 of the following:*
>
> *(a) the law of the additional applicant's home country permits the removal of the additional applicant;*
>
> *(b) each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;*
>
> *(c) the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.*

16. The expression 'home country' is defined in reg 1.03:

> ***home country**, in relation to a person, means:*
>
> *(a) the country of which the person is a citizen; or*
>
> *(b) if the person is not usually resident in that country, the country of which the person is usually a resident.*

17. The requirements of PIC 4015 are not confined to Class XB (Refugee and Humanitarian) visas, but are applicable to a wide variety of visa classes and sub-classes. In general terms, the requirements are directed to objectives which overlap with those of the Hague Convention on the Civil Aspects of International Child Abduction (the **Hague Convention**), by seeking to ensure that visas are not granted to a minor in circumstances which would conflict with parental rights and responsibilities under the law of the minor's home country.[11] The fact that PIC 4015

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[11] See *Procedures Advice Manual (**PAM3**): s 5G – Relationships and family members – Custody (parental responsibility) for minor children*, para [3.3]. One of the objects of the Hague Convention is 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' (Article 1(b)), and Contracting States are under an obligation to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention' (Article 2)

is not limited in operation to countries which are signatories to the Hague Convention does not detract from those general objectives.[12]

18. Class XB (Refugee and Humanitarian) contains 5 subclasses – subclasses 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue) and 204 (Woman at Risk).[13] In the present case, only subclass 202 was relevant, because that is the only subclass in which the 'split family' provisions allow the proposer to be the holder of a subclass 866 (Protection) visa.[14]

19. The significant stages in the evolution of the current provisions may be summarised as follows.

Migration Regulations 1989

20. Regulations 100 to 105 of the *Migration Regulations 1989* prescribed criteria in respect of various kinds of refugee and humanitarian visas, including global special humanitarian program visas (reg 103).

20.1. Regulation 103(a) required an applicant to be 'a person subject to discrimination'. Regulation 100(2) relevantly provided that a person was taken to be a person subject to discrimination if the Minister was satisfied that there were compelling reasons for giving special consideration to granting to the person a permanent entry visa or permanent entry permit, having regard to a range of factors including:

> *(c) the degree of discrimination experienced by the person:*
>
> *(i) in the country of which the person is a citizen; or*
>
> *(ii) if the person is not usually a resident of that country – in the person's usual country of residence.*

20.2. Regulation 103(b) required that the applicant was living in the country of which he or she was a citizen or, if not usually a resident of that country, in his or her usual country of residence.

20.3. Further, it was a prescribed criterion for a global special humanitarian program visa that:[15]

> *it is established … if the person is a dependent child – that the Minister is satisfied that the grant of the visa or entry permit would not prejudice the rights and interests of any person who has custody or guardianship.*

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12 *Cf.* Plaintiff's submissions, para 39. It may be noted that the principles under the Hague Convention may still be relevant in relation to abductions from countries that are not signatories to the Convention: see Nygh's Conflict of Laws in Australia (8th ed 2010), 595-596 [28.42], fnt 121.

13 SC: Attachment C [P63].

14 See clause 202.211(2)(b)(ii). In the other applicable subclasses, the proposer must hold or have held a visa of the same subclass

15 *Migration Regulations 1989*, reg 41(2), Schedules 1 and 2.

21. Thus, while the Regulations did not use the expression 'home country', they incorporated analogous requirements.

Migration Regulations 1994

22. When first introduced, clauses 202.211 and 202.212 of the *Migration Regulations 1994* provided.

> *202.21 Criteria to be satisfied at time of application*
>
> *202.211 The applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country.*
>
> *202.212 The applicant is living in a country other than the applicant's home country.*

23. The definition of 'home country' in reg 1.03 was in the same form as the current definition.

24. The criteria to be satisfied at the time of decision included that the applicant continue to satisfy clauses 202.211 and 202.212 (clause 202.221), and the 'compelling reasons' requirement in clause 202.222 (which required the Minister to have regard to, among other things, 'the degree of discrimination to which the applicant is subject in the applicant's home country').

25. In relation to minors, clause 202.228 provided:

> *202.228 If the family unit of the applicant includes a dependent child whose application was combined with the applicant's, the Minister is satisfied that the grant of the visa to the child would not prejudice the rights and interests of any other person who has custody or guardianship of, or access to, the child.*

26. Thus, the expression 'home country' was originally used in requirements relating to the existence of substantial discrimination (in the home country), the place where the applicant had to be living (out of the home country), and the existence of 'compelling reasons' for granting a permanent visa (concerning the extent of discrimination in the home country). The expression was not at that time used in relation to the requirements in clause 202.228, which applied to children as additional applicants.

Migration Regulations (Amendment) 1997 – 'split family' applications

27. From 1 July 1997, amendments were made to the *Migration Regulations* to provide for 'split family' applications, that is, to 'allow humanitarian visa holders who are permanent residents to propose members of their immediate family for grant of a visa'.[16]

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[16] Explanatory Statement to *Migration Regulations (Amendment) 1997* (No 137 of 1997).

28. Relevantly, clauses 202.211 and 202.212 were replaced with a new clause 202.211. Under the new clause, an applicant can meet the criterion in clause 202.211 if *either*:

28.1. the applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; or

28.2. the applicant's entry is proposed by the holder of a subclass 202 or subclass 866 (Protection) visa and the applicant is a member of the immediate family of the proposer.

Migration Amendment Regulations 2000 (No 2) – the introduction of PIC 4015

29. From 1 July 2000, the *Migration Regulations* were amended so as to replace the previous custody provisions such as clause 202.228 (which were based on prejudice to the rights and interests of any other person who has custody or guardianship of, or access to, the child) with a new custody criterion contained in PIC 4015. The purpose of this amendment as identified in the Explanatory Statement to the amending regulation was 'to provide a more objective test for decision-makers'.

Question 1 – Public Interest Criterion 4015(a)

30. In addressing PIC 4015(a), it was necessary for the delegate to identify the home country of the children (the additional applicants), and to ask whether the law of that country permitted their removal.

31. The definition of 'home country' in reg 1.03 has two alternative limbs. The primary limb of the definition is the country of which the person is a citizen. The country of citizenship will be the home country unless paragraph (b) of the definition applies. Paragraph (b) provides that, if the person is not usually resident in the country of citizenship, home country means 'the country of which the person is usually a resident'.

32. Paragraph (b) of the definition of 'home country' cannot sensibly apply unless the person is usually a resident of a country other than the country of citizenship. In other words, paragraph (b) is not directed to a situation in which the person is no longer usually resident in his or her country of citizenship, but has not yet become usually resident in any other country.[17] Otherwise, this would result in the person having no 'home country' – which would not only deprive PIC 4015(a) of any content, but would also preclude an applicant from being able to satisfy the requirements of clause 202.211(1)(a) (*i.e.* in applications other than 'split family' applications) or from placing any reliance on the factor in clause 202.222(a) in order to establish compelling reasons for giving special consideration for granting a visa to the applicant.

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17 *Cf. LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 594 [25], 595 [32], where the Court contemplated the possibility that a person might cease to reside habitually in one place without acquiring a new place of habitual residence.

33. Accordingly, the preferable construction of paragraph (b) of the definition of 'home country' is to read it as if it contained the words 'if the person is not usually resident in that country [*and is usually a resident of another country*], the country of which the person is usually a resident'.[18] If the relevant person has abandoned his or her country of citizenship with no intention to return, and is no longer usually resident in that country, the country of citizenship will remain his or her home country unless and until the person becomes usually resident in another country.[19] Such a construction both advances the purpose of the relevant provisions (the definition and the criteria in which it is used) and avoids what would otherwise be absurd consequences or results.

34. This still leaves the question whether a person who has left his country of citizenship has become 'usually a resident' of a new country. As with the term 'habitual residence', the question whether a person is usually resident in a country or place will 'fall for decision in a very wide range of circumstances',[20] and requires a 'broad factual inquiry' which 'should take into account all relevant factors'.[21] Relevant considerations will include elements of physical residency and elements of intention.[22] While an examination of the person's intentions will be important, it is not necessarily determinative or to be given 'controlling weight'.[23]

35. It is important to recognise that the meaning of the words 'usually resident' in the definition of 'home country' is influenced by the context of that definition, and the provisions of the *Migration Regulations* in which it is employed. As Gummow J noted in *Gautiez* in relation to 'usually resides', the phrase 'takes significant colour from the particular legislative context in which it appears'.[24] And in *LK v Director-General, Department of Community Services*,[25] the Court stated that '[i]n deciding where a child was habitually resident at an identified time it is, no doubt, important to consider the context in which the inquiry is required.'

36. In this regard, some attention should be paid to the wording of paragraph (b) of the definition, which requires an identification of 'the country **of** which the person is usually **a** resident' (emphasis added). This is not necessarily the same question as asking whether a person is 'usually resident in' a particular place or country (*cf* the

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18 See generally *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

19 To this extent, the Defendant disagrees with the Plaintiff's submission that the definition of 'home country' provides for 'mutually exclusive alternatives', such that '[i]f a person is a citizen of country X, but not usually resident in that country, then country X cannot be the person's home country': Plaintiff's submissions, paragraph 41.

20 *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 596 [35].

21 *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 599 [44], referring to *P v Secretary for Justice* [2007] 1 NZLR 40 at 61-62 and *In re J (Abduction)* [1990] 2 AC 562 at 578.

22 *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at 265 [21].

23 *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 594 [28].

24 *Gautiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512 at 521.

25 (2009) 237 CLR 582 at 594 [26].

preceding words which condition the application of paragraph (b) 'if the person is not usually resident in' the country of which the person is a citizen). The derivation of the language used in paragraph (b) of the definition of 'home country' can perhaps be traced back to regs 100(2)(c)(ii) and 103(b)(ii) of the predecessor *Migration Regulations 1989*, which used the words 'if the person is not usually a resident of that country [the country of which the person is a citizen] – in the person's usual country of residence'; however, the current formulation in paragraph (b) of the 'home country' definition differs from that language.[26]

37. There are other important contextual considerations.

37.1. In addition to PIC 4015(a), the term 'home country' is used elsewhere in the criteria for the grant of a Class XB visa.[27]

37.2. In relation to subclass 202, prior to the introduction of the 'split family' provisions in 1997, applicants were required to establish that they were subject to substantial discrimination, amounting to gross violation of human rights, in their home country, and that they were living in a country other than their home country: clauses 202.211, 202.212. Those criteria continue to apply under clause 202.211(1)(a) in respect of applicants other than those relying on the 'split family' provisions.

37.3. As a consequence, where a person flees from a country of persecution or discrimination and relocates to a country of refuge, a conclusion that the person is 'usually a resident' of the country of refuge will often have an adverse effect on his or her ability to meet the criteria for a Refugee and Humanitarian (Class XB) visa.

38. Accordingly, in the context in which the factual inquiry is engaged for the purposes of an application for a Class XB visa, there may be particular factors that weigh against a conclusion that an applicant has become usually a resident of a country other than his or her country of citizenship, such as a country to which the person has fled from persecution or discrimination. While the person might live in the other country for a significant period of time, the circumstances including the person's intentions may not indicate that they had become 'usually a resident' of that country. The terms of criteria such as clause 202.211(1)(a), which requires an applicant to be 'living in a

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26 For example, the phrase 'usually a resident' was used in the opening words of regs 100(2)(c)(ii) and 103(b)(ii), whereas the opening words of paragraph (b) of 'home country' now use the term 'usually resident'. The reference to 'usual country of residence' in regs 100(2)(c)(ii) and 103(b)(ii) has been replaced with 'the country of which the person is usually a resident'.

27 In addition, the term 'home country' is used in several other places in the *Migration Regulations*: *e.g.* in relation to student visas, clause 580.111 refers to 'travel costs' of a student visa applicant returning to his or her home country at the end of his or her stay in Australia; clauses 580.112(c) and 580.113(c) refer to loans from the government of the applicant's home country; see also the evidentiary requirements for student visas set out in Schedule 5A. Regulation 2.43(1)(e)(iv) and (v) prescribe grounds for the cancellation of certain visas under s.116(1)(g) which reflect the terms of PIC 4015. Regulations 2.07AJ(3)(f) and 2.07AK(3)(f) deal with witness protection visas. See also Schedule 2, Parts 447 and 451.

country other than the applicant's home country', suggest that more is required to change a person's home country than that the person is 'living' in a different country.

39. As acknowledged in *Gautiez*, the meaning of a phrase such as 'usually resides' is 'such as to make the result in a given case depend largely on matters of fact and degree'.[28] Unless a misapprehension of the meaning of the provision is disclosed in any reasons given for the decision, the decision 'will not involve a question of law unless the facts before the [decision-maker] were incapable of the legal complexion placed upon them',[29] or if the decision-maker 'reached a conclusion that was incapable of supporting the finding which it made'.[30]

40. In the present case, it was open to the delegate on the material before him to find that the home country of the children remained their country of citizenship, *i.e.* Afghanistan. Whether or not the children were properly regarded as usually resident in Afghanistan, it was open to find that each of them was not usually a resident of Pakistan, having regard to factors such as their status as illegal residents,[31] the circumstances which led to their relocation, the extent of their ties with Pakistan, their recent travel to Afghanistan to obtain passports and identity documents,[32] and their intentions in relation to future migration outcomes.[33]

41. Significantly, the Plaintiff's mother was invited to comment on the operation of PIC 4015 on the basis that Afghanistan was the home country of the additional applicants.[34] The mother did not put in issue the correctness of that approach. In fact, in responding to the invitation, she provided a document purporting to show that the removal of the children was permitted under the law of Afghanistan.[35]

Question 2 – Public Interest Criterion 4015(b)

42. PIC 4015(b) requires that 'each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa'. The terms of paragraph (b) echo the definition of 'rights of custody' under Article 5 of the Hague

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28 *Gautiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512 at 519.

29 *Gautiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512 at 519.

30 *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at 267 [26].

31 Although unlawful status in a country may not necessarily preclude usual residence in that country, it nevertheless remains a relevant factor in determining the country in which a person is usually resident.

32 [P163-166].

33 Compare the inclusive list of relevant factors in *P v Secretary for Justice* [2007] 1 NZLR 40 at 61-62, referred to by the Court in *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 599 [44]: the inquiry 'should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration'.

34 SC: para [29]; Attachment L [P14, 168-170].

35 SC: para [30]; Attachment M [P14, 172].

Convention, which includes 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.[36]

43. The determination of who can 'lawfully' determine where a child is to live requires reference to the applicable system or systems of law governing such matters.[37] Similarly, the definition of 'guardian' in reg 1.03, on which the Plaintiff apparently relies, itself directs attention to the 'law or custom' by which powers, rights or duties are vested in the guardian – there is no reason why this could not include the law or custom of another country or countries.[38]

44. The object of PIC 4015(b) is to protect parental rights of custody from being prejudiced by the grant of a visa permitting a child to enter and remain in Australia. It would not advance that object if the persons who may 'lawfully' determine where the child is to live were somehow to be assessed solely by reference to Australian law, notwithstanding that the child is not in Australia and matters involving the child's welfare are governed by foreign laws.[39] Further, the definitions of 'custody' and 'guardian' in reg 1.03 are not framed in terms of a right to determine where a child is to live; rather, they are based on a division between the responsibility for the long-term welfare of the child and the right to have the daily care and control of the child.

45. In the present case, having found that the Plaintiff's mother and siblings were not usually resident in Pakistan, the delegate correctly had regard to the law and custom of Afghanistan in assessing who had the right to determine where each of the children were to live. It has not been established that it was not open to the delegate to conclude that, if the Plaintiff's father was alive, he would be a person who had such a right, and therefore his consent was required in order to satisfy PIC 4015(b). Similarly, it has not been established that it was not open to the delegate to conclude that, if the Plaintiff's father was dead, the right to determine where his children were to live could be exercised by persons on his father's side in accordance with Afghan law and custom. In either case, the consent of the Plaintiff's mother alone was not sufficient to satisfy PIC 4015(b).[40]

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36 See also *Family Law (Child Abduction Convention) Regulations 1986*, reg 4(2).

37 See, for example, *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 (Dixon J): 'in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law'. See also *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345 at [17]; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 399 at [4].

38 Indeed, if this were not the case, it is difficult to conceive what would be meant by the reference to 'custom' in relation to Australia.

39 Compare reg 1A(2) of the *Family Law (Child Abduction Convention) Regulations* 1986; see *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 586 [6].

40 See generally PAM3: *s 5G – Relationships and family members – Custody (parental responsibility) for minor children*, paras [18.2] and [18.3]. In assessing PIC 4015(b), officers are instructed to 'satisfy themselves that there is no other person (for example, the other parent or a grandparent) who has custody/residence responsibilities'. The policy guidelines also note that '[t]he mere fact (or claim) that a non-custodial parent has had no contact with the child for a long time (or cannot be located) does not negate that person's rights with regard to the child and officers cannot assume that this person consents to the grant of a visa'.

46. Accordingly, in the absence of an Australian child order for the purposes of PIC 4015(c), the Plaintiff's mother did not satisfy PIC 4015 or clause 202.228.

Question 3 – Natural justice

47. The delegate's decision to refuse to grant a visa to the Plaintiff's mother was based on a finding that she did not meet clause 202.228 and PIC 4015. On 6 September 2011, the delegate resolved to request information from the Plaintiff's mother with regard to the custody provision,[41] and sent her an invitation to comment and respond on the issues raised by PIC 4015, which letter set out both the criterion and PIC 4015 in full.[42] The letter relevantly stated:

> 'There is no evidence to hand that you are able to satisfy the public interest criterion with regard to child custody in relation to the included minor children. There is no evidence that:
>
> - The law of Afghanistan permits the removal of the children.
> - Each person who can determine where the children will live has given their consent; or
> - There is an Australian child order in place with regard to the children.
>
> The relevant criteria are outlined below.'

48. Accordingly, the Plaintiff's mother was made aware of the issues critical to the decision.[43] In response to the invitation, she provided a document which was purportedly a translation from Persian of an order issued by the 'Aram High Court, Kabul, Afghanistan' dated 10 September 2011.[44] The document stated that the children 'live here without any Guardian' (it is unclear whether this is meant to refer to Afghanistan or somewhere else), referred to the Plaintiff's mother's claim that her husband 'was missing from eight years ago', and asserted that '[t]herefore, the High Court, Afghanistan thinks that he is there legal and lawful Guardian and do not have any objection on there leaving Afghanistan for any country'. The document was presumably obtained and provided by the Plaintiff's mother in order to demonstrate that the law of Afghanistan permitted the removal of the children, and to establish the consent of each person who could determine where the children were to live.

49. The 'Aram High Court' document was sent by an officer of the Department for verification 'in an effort to confirm whether there [was] a ruling by Aram High Court, Kabul, Afghanistan with regard to the custody of the concerned minors on the application'.[45] However, it was not possible to conduct checks on the document

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41 SC: [28].

42 SC: [29]; Attachment L [P14, 168-169].

43 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 (Northrop, Miles and French JJ); *Kioa v West* (1985) 159 CLR 550 at 507 (Mason J); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32].

44 SC: [30]; Attachment M [P14, 172]

45 SC: [34]; Attachment Q [P16, 204].

without a document reference number and in the absence of an original document issued in Persian (the Plaintiff had informed the Department that the document had been issued in English by the Afghan Consulate in Quetta and that there was no document issued in Persian).[46]

50. On 20 October 2011, an officer of the Department again contacted the Plaintiff's mother and requested 'the original document which was issued in Persian by Aram High Court, Kabul, Afghanistan *and/or other information with regard to custody* as per our request which was sent to you by e-mail on 06/09/2011' (emphasis added).[47]

51. On 24 November 2011, an officer of the Department conducted a further interview with the Plaintiff's mother in relation to the documents that she had provided in relation to custody.[48]

52. The Plaintiff's mother was therefore given an opportunity to provide information addressed to the question whether PIC 4015 was satisfied in relation to each of her children. Her responses accepted the relevance of the law of Afghanistan in determining custody issues, and did not advance any claim that her husband was dead. The delegate proceeded on the basis that the Plaintiff's mother had not heard from her husband since 2003 – it was therefore unnecessary for him to put to the Plaintiff's mother anything 'contradicting' that claim.[49] In so far as the delegate considered that there might be 'several possible scenarios' with regard to the current location of the husband, this was an aspect of the delegate's opinions or thought processes and was not required to be put to the Plaintiff's mother for comment.[50] Any 'knowledge' possessed by the delegate about movement and migration was not information personal to the Plaintiff's mother,[51] and did not contradict the claim that her husband was missing. In any event, it is not clear what if anything the Plaintiff's mother would have been able to say anything in response to the 'possible scenarios' about the current location of her husband,[52] or whether the plaintiff's mother suffered any 'practical injustice'.[53]

53. The Plaintiff submits that the delegate should in the circumstances have found that the Plaintiff's father was presumed to be dead in accordance with the common law presumption of death, and that the failure to do so involved a denial of procedural

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46 SC: [33], [35] [P15-16].

47 SC: [36]; Attachment P [P15, 202].

48 SC: [39]; Attachment S [P17, 208].

49 *Cf.* Plaintiff's Submissions, paragraph 58.

50 See e.g. *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 at [413] (Kiefel J), with whom Crennan J agreed at [380].

51 *Kioa v West* (1985) 159 CLR 550 at 587; *cf. NARV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 89 at [14]-[18].

52 *NARV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 89 at [18].

53 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37].

fairness to the Plaintiff's mother.[54] This submission should be rejected for several reasons.

53.1. First, the Plaintiff's mother never claimed that her husband was dead, nor that he was missing and presumed to be dead. She claimed that he was 'missing' in that she had not heard from him since he left for Kandahar in 2003. Nevertheless, she stated in her visa application that she was legally married, as opposed to widowed.[55]

53.2. The common law presumption was expressed as follows by Dixon J in *Axon v Axon*:[56]

> *'If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living, then, in the absence of evidence to the contrary, it should be found that he is dead.'*

53.3. The Defendant denies that the common law presumption of death was applicable to an administrative decision-making process, such as that carried out by the delegate, as opposed to a proceeding in which 'the issue whether a man is alive or dead must be judicially determined'.

53.4. Further, the presumption 'only applies where it is shown that persons who might have been expected to hear of the continued existence of the person whose death is in question have failed to hear of him'.[57] In the present case, it is quite possible that the Plaintiff's father was unaware of the whereabouts of his family after they left Afghanistan, and therefore has been unable to contact them.[58] This significantly diminishes the strength of any presumption or inference that the absence of communication from the Plaintiff's father suggests that he is dead.[59]

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54 Plaintiff's Submissions, paragraph [62].

55 [P36].

56 (1937) 59 CLR 395 at 404; see also *Chard v Chard* [1956] P 259 at 272 (Sachs J).

57 *Axon v Axon* (1937) 59 CLR 395 at 401.

58 *Cf.* Plaintiff's Submissions, paragraph 60 – the submission that Quetta was 'the logical place for [the father] to consider searching for his family' goes beyond the facts in the special case, and involves speculation. Equally, there is no evidence that the Plaintiff or his mother have made any attempts to search for the Plaintiff's father in Afghanistan or elsewhere. Failure to make all due inquiries can prevent the common law presumption from arising: compare *Chard v Chard* [1956] P 259 at 272; *Bradshaw v Bradshaw* [1956] P 274 at 282; see also Stone, 'The Presumption of Death: A Redundant Concept?' (1981) 44 *Modern Law Review* 516 at 518.

59 *Cf.* Plaintiff's Submissions, paragraph 61 – the submission that circumstances in Afghanistan in 2003 involved a danger to life of Hazara men which tends 'to support the improbability of living' goes beyond the facts in the special case, and is speculative. Further, and in any event, such facts would be irrelevant to the operation of the common law presumption, as opposed to whether an inference of death could be drawn.

53.5. The present case may be compared to *Narayan v Minister for Immigration and Multicultural Affairs*,[60] in which Sackville J concluded that the Migration Review Tribunal was not legally required to invoke or rely on the presumption of death:

> *'As the MRT pointed out, there was no positive evidence that any of the husband's parents or siblings had died and indeed the applicant never suggested to the MRT that any had. Mr de Robillard did not explain why, on the facts found by the MRT, the presumption of death (a rebuttable presumption of law: Cross on Evidence (6th Aust ed), at [7275]) would arise. It is difficult to see why it would, since it was hardly to be expected that the husband would hear from his Canadian relatives, bearing in mind that he had lost contact with them many years earlier. Thus even if the presumption of death applies to proceedings before the MRT, a matter on which I express no view (cf Migration Act, s 353(2)(a)), the MRT did not err in law in not invoking the presumption in the present case.'*

Answers to questions

54. The Defendant submits that the questions stated in the Special Case should be answered as follows.

Q1. Did the Delegate make a jurisdictional error in finding that paragraph (a) of PIC 4015 was not satisfied in relation to each additional applicant?

No.

Q2. Did the Delegate make a jurisdictional error in finding that paragraph (b) of PIC 4015 was not satisfied in relation to each additional applicant?

No.

Q3. Was the Decision made in breach of the rules of natural justice?

No.

Q4. Who should pay the costs of this special case?

The Plaintiff.

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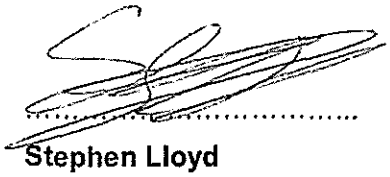
60 [2001] FCA 789 at [32]-[34]; see also on appeal *Narayan v Minister for Immigration and Multicultural Affairs* [2001] FCA 1745 at [28]-[31], [49].

VI. ARGUMENT

55. The Defendant estimates that around 1 ½ hours will be required for the presentation of the Defendant's oral argument.

Dated: 21 November 2012



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