IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

B E T W E E N:

PLAINTIFF S297/2013

Plaintiff

and

10

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

20

PLAINTIFF'S REPLY

30

Filed: 5 May 2014

Farid Varess
Fragomen
Level 19, 201 Elizabeth Street
SYDNEY NSW 2000

Tel: (02) 8224 8585
Fax: (02) 8224 8500
Ref: 757261
Email: fvaress@fragomen.com

A THE MINISTER'S MARCH 2014 DETERMINATION IS INVALID

1. The Minister does not have a discretion to prolong the plaintiff's detention

1. As the Minister accepts, "those applicants principally affected by the determination are those whom the Minister is satisfied should be granted the visa applied for".[1] For each of the applicants "principally affected", the Minister has completed his duty to consider the relevant application (s 47) and has formed the state of satisfaction required by s 65(1), favourable to each applicant, that all relevant criteria are satisfied and there is no ground upon which the visa can or should be refused. There is neither power nor duty to remove the person. The person must be granted the visa (s 65(1)). Nothing is left to be done other than to record the grant of the visa (s 67).

2. The Minister's case is that ss 85 and 86, read with s 196(1)(c), authorise the Minister to continue to hold in detention persons whom the Minister is satisfied must be granted visas, and potentially to make repeated determinations under s 85 prolonging detention from year to year, until the Minister revokes his determinations. The language of s 196(1)(c), read with ss 47 and 61, does not require that construction. It would be consistent with the history of this proceeding for the Minister to determine on 30 June 2014, in relation to the next financial year, that the maximum number of protection visas is nil or one.

2. Subdivision AH never applied to protection visas

3. Plaintiff S297 does not advance any absolute proposition that "there is a legislative policy that those who satisfy the criterion in s 36(2) are entitled to protection visas".[2] Protection visas may be refused in accordance with the Act, including s 501, but that is a distraction. The focus in this case is on those applicants to whom visas must be granted, being the persons "principally affected" by the Minister's determination.[3]

4. It is in those circumstances that s 36(2) is "the enactment by the Parliament of a statutory duty to grant protection visas in response to Australia's international obligations".[4] The response to Australia's international obligations presently required by law is the grant of permanent residence. Every protection visa applicant must be "in Australia",[5] and there is neither duty nor power to remove the person from Australia. The nature of that response, being the grant of permanent residence to refugee applicants in Australia who satisfy the relevant criteria, precludes its deferral for reasons unconnected to processing. The refugee is either residing lawfully in the community, or is unlawful and must be detained: in neither case is there any reason to defer the grant of permanent residence. Reference to planning levels for the annual migration programme may obscure that conclusion, but does not alter it. Power under s 85 may not be exercised to defer the grant of permanent residence to refugee applicants who must be granted protection visas.

3. Section 65A effected an implied partial repeal of Subdiv AH

5. The Minister submits that "[w]here s 65(1) does not require a decision to be made by reason of the operation of ss 85 and 86, s 65A is not contravened", with the result that

---

1 Defendants' submissions at [38].

2 Defendants' submissions at [40].

3 Defendants' submissions at [38].

4 Plaintiff S297's submissions at [38]; cf defendants' submissions at [41].

5 Section 36(2) of the Migration Act; clause 866.411 of sch 2 of the Migration Regulations.

inconsistency between ss 65A and 86 disappears.[6] The submission proceeds from a false premise about the operation of ss 65(1) and 65A, and involves a measure of sophistry.

6. Section 65(1) requires the Minister after considering an application for a visa to grant or refuse to grant the visa, but the provision is silent as to the time at which or within which that must be done. Implicitly, it must be done within a reasonable time, subject to the other provisions of the Act. Sections 85 and 86 do not relieve the Minister of the duty to grant or refuse to grant the visa: those sections require that, where the Minister must grant a visa of a class subject to a limit under s 85 that has been reached, the Minister not grant that visa sooner than the next financial year. The Minister nevertheless remains subject at all times to a duty to grant the visa; the only question is when that should occur. For those reasons, it is incorrect to say that "s 86 prohibits the Minister from making the decision otherwise required by s 65(1)".[7] Section 86 merely overrides the timeframe otherwise implicit in s 65(1). That was the scheme applicable to all classes of visa prior to the enactment of s 65A. Section 65A modified that scheme specifically for protection visas.

7. There can be no doubt that s 65A continues to operate where there is a determination under s 85. That is because a decision to *refuse* to grant a protection visa must still be made within the time specified by s 65A. Sections 85 and 86 do not regulate the refusal of visas. The Minister does not explain why s 65A should be given a bifurcated operation, always applying in the case of a decision to refuse, but only applying in the case of a decision to grant where there is no limit reached under s 85. The more harmonious construction is to read the general requirements of ss 65(1), 85 and 86 as subject to the later and more specific requirements of s 65A: a provision designed to regulate the timing within which protection visa applicants will receive visas and thus be released from detention.

8. The plaintiff's construction is to be preferred. The timeframe fixed by s 65A gives rise to actual contrariety and irreconcilable inconsistency with ss 85 and 86 for the grant of protection visas. Both ss 65A and 86 purport to regulate the time within which the duty imposed by s 65(1) is to be performed. Section 65A is the later provision and the more specific provision, and the plaintiff's construction best addresses the mischief to which it was directed, namely, delays in determining protection visa applications.[8]

4. Gazette

9. The Minister asserts but does not demonstrate that the March 2014 determination was a legislative instrument within the meaning of s 56 of the LI Act.[9] But registration alone does not enliven s 56, and the determination does not determine the law or alter the content of the law.[10] Even if the determination were a legislative instrument, s 56 only applies to enabling legislation which requires "the text of the instrument, or particulars of its making, **to be published** in the Gazette", which is not engaged by the terms of s 85.

10. Although the Minister asserts that the plaintiff's submissions "would defeat the object of s 56(1) of the LI Act, which on that approach would not apply to the many Commonwealth provisions expressed in the same form as s 85 of the Migration Act",[11] it is apparent that

---

6 Defendants' submissions at [27].

7 Defendants' submissions at [24].

8 Plaintiff S297's submissions at [60]-[61].

9 Defendants' submissions at [68].

10 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 633-636 (Gummow J).

11 Defendants' submissions at [66].

many Commonwealth officers outside immigration do in fact use the Gazette for provisions expressed in the same form as s 85, including in the areas of customs,[12] indigenous affairs,[13] acquisition of lands,[14] treasury[15] and by the first law officer of the Commonwealth.[16]

B IMPROPER PURPOSE

1. Applicable principles

11. The Minister incorrectly submits that an improper purpose will vitiate an exercise of power "only" if the power would not have been exercised but for the improper purpose.[17] That is a sufficient but not a necessary condition. Limiting review to circumstances which satisfy a 'but for' test has been described as "wrong in principle".[18] It is sufficient that the improper purpose was a "substantial purpose" in the sense that the power might not have been exercised, or might have been exercised differently, had the decision-maker been acting lawfully.[19] If relief is granted, the decision-maker may decide whether to re-exercise the power for lawful purposes in the circumstances then prevailing. That approach is in conformity with the approach taken to other grounds of judicial review. The plaintiff submits that both tests are satisfied in this case in any event.

2. The circumstances in which the Minister made the March 2014 determination

12. It is artificial to confine consideration of the Minister's purpose in making the determination to the departmental submission which immediately preceded it.[20] Consideration of the Minister's purpose in making the March 2014 determination is to be informed by the circumstances which led to its making and the Minister's policy of denying permanent protection visa to unauthorised maritime arrivals otherwise entitled to them.

13. The sequence and timing of the TPV Regulation, the December 2013 determination, the UMA Regulation and the March 2014 determination, and the result which they achieved, point to the Minister's purpose. Those steps (if valid) brought about a situation in which the

---

12 See, for example, Gazette notices C2014G00669 and C2013G01447 made by officers acting under s 161J of the *Customs Act 1901* (Cth) ("the CEO may specify, by notice published in the Gazette" certain rates).

13 See, for example, Gazette notice C2013G01159 made by the then Minister for Indigenous Affairs acting under s 4(2B) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("The Minister may, by notice published in the Gazette, establish Aboriginal Land Trusts …").

14 See, for example, Gazette notice C2013G01355 made by a delegate of the Minister for Finance acting under s 123(1) of the *Lands Acquisition Act 1989* (Cth) ("the Minister may, by notice published in the Gazette, extinguish the easement").

15 See, for example, Gazette notice C2014G00660 made by the Acting Assistant Treasurer acting under s 30-85(2) of the *Income Tax Assessment Act 1997* (Cth) ("The Treasurer may, by notice in the Gazette, declare a public fund to be a developing country relief fund …").

16 See, for example, Gazette notice C2014G00023 made by the Attorney-General acting under s 5AA of the *Telecommunications (Interception and Access) Act 1979* (Cth) ("The Minister may, by notice published in the Gazette, declare a Commonwealth Royal Commission to be an eligible Commonwealth authority …"); Gazette notice C2013G00835 made under s 10A(1)(c) of the *Copyright Act 1968* (Cth) ("The Attorney-General may, by notice in writing published in the Gazette … declare an institution to be …").

17 Defendants' submissions at [73], citing *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 (Williams, Webb and Kitto JJ); *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467 at 468-469.

18 Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (5th ed, 2013) at [5.570].

19 See, for example, *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at [341] (Ashley and Redlich JJA); *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 at [287] (Spender J); *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 (Dixon CJ).

20 Defendants' submissions at [85]-[86].

Minister no longer had any need to fear the grant of permanent protection visas to unauthorised maritime arrivals for the foreseeable future, despite the disallowance of both the TPV and UMA Regulations and the revocation of the December 2013 determination.

14. It should be inferred that the Minister intended that result. For the reasons given in the next section, a substantial purpose of those steps, including the making of the March 2014 determination, was to deny permanent protection visas to unauthorised maritime arrivals who are otherwise be entitled to them.

3. The longstanding policy of the Government

15. It is common ground that "it is the intention of the Government, and the Minister, that unauthorised maritime arrivals should not be granted permanent protection visas", and that the Government and the Minister have taken steps directed to that purpose.[21] The Minister claims that it has been a "longstanding policy of the Government, since before it was elected, that the number of permanent protection visas granted in the 2013-2014 financial year would be 2,750".[22] So much may be accepted. But denying permanent protection visas to unauthorised maritime arrivals otherwise entitled to them was a substantial purpose of that longstanding policy.

16. That purpose is seen from a proper consideration of the joint press release on 23 November 2012; the booklet released in January 2013;[23] the booklet released in August 2013;[24] the information paper dated December 2013;[25] the Mid-Year Economic and Fiscal Outlook.[26]

17. The Minister appears to proceed on the basis that there is some clear dichotomy between the number of 11,000 places being "reserved" or "quarantined" for persons outside Australia, and the objective of denying permanent protection visas to unauthorised maritime arrivals in Australia. But upon a review of the material in the special case, those policies are intimately connected; one is a reflection of the other. The purpose of the March 2014 determination was to give effect to the Government's longstanding policy, but a central plank of that policy was the denial of permanent visas to the plaintiff and others like him.

18. The Minister could have allocated the places in the Humanitarian Programme other than for that purpose, but they were not so allocated here. It is in this way that both the March 2014 determination and the Minister's previous exercises of power may be seen as steps towards the improper purpose alleged by the plaintiff. The result is that it must be inferred that the determination would not have been made absent that purpose.

4. The Minister's claimed purpose is nevertheless an improper purpose

19. Even if contrary to the foregoing submissions the Court infers that the only substantial purpose of the Minister in making the March 2014 determination was to give effect to a decision that the Humanitarian Program for 2013-14 "would have 13,750 places, with a minimum of 11,000 places offshore and the balance of 2,750 for permanent protection visas granted onshore", without reaching the conclusions sought by the plaintiff above, that purpose was nevertheless an improper purpose.

---

21 Defendants' submissions at [71].

22 Defendants' submissions at [81].

23 SC at 249.27, 249.45-50.

24 SC at 255.40-45, 256.20-25, 259.32, 256.10, 256.12, 260.

25 SC at 231.10-20.

26 SC at 245.38-50.

20. The Executive Government has power to prescribe classes of humanitarian visas for persons outside Australia, and has done so by the creation of Class XB and the maintenance of the Humanitarian Program. But Australia does not owe protection obligations in respect of persons outside its jurisdiction and control: those persons do not engage Australia's international obligations.

21. In a context where the legislative scheme reveals a purpose that protection visa applicants in Australia, in respect of whom protection obligations *are* owed, should generally not be detained beyond 90 days, the following may be said. For so long as the Executive Government is prepared to offer places to refugees, the legislative determination reflected in s 36 requires that those places be offered in the first instance to refugees in Australia, namely, protection visas applicants who satisfy the criteria. The purposes for which power may be exercised under s 85 do not extend to taking places from refugees in Australia for the purpose of giving them to offshore applicants while leaving the first class in detention.

22. This point is distinct from the plaintiff's other submissions on the construction of s 85 and on implied repeal. The exercise of power under s 85 for the "dominating, actuating reason" of giving priority to offshore applicants over refugees in Australia is outside its "scope and purpose" and "real object",[27] having regard to the policy reflected in s 36.

C THE APPROPRIATE RELIEF

1. Injunction

23. There is nothing extraordinary about the exercise of judicial power to restrain the exercise of unlawful executive power.[28] The plaintiff apprehends a breach of his legal rights because the Minister intends to "take every step necessary" to deny those rights.[29] The Minister concedes that he has that intention.[30] The relief sought by the plaintiff would not restrain the lawful exercise of power for proper purposes.

2. Costs

24. The plaintiff accepts the Minister's submission that should he be wholly unsuccessful on the special case, the parties should bear their own costs.[31] Should the plaintiff be successful on the special case, he is entitled to the costs of the aborted hearing by reason of order 8 made by French CJ on 6 March 2014. The plaintiff maintains his submission that he is entitled to costs in respect of the original challenge to the (revoked) December 2013 determination, in relation to which it should be noted that the Minister has admitted the purpose which the plaintiff alleged at that time and continues to allege was improper. The obvious invalidity of the UMA Regulation may be seen from the submissions previously filed by the parties.

Stephen Lloyd
Sixth Floor Selborne Chambers
(02) 9235 3753
stephen.lloyd@sixthfloor.com.au

James King
Sixth Floor Selborne Chambers
(02) 8067 6913
jking@sixthfloor.com.au

---

27 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 (Dixon CJ).

28 Cf defendants' submissions at [92].

29 Plaintiff S297's submissions at [109].

30 Defendants' submissions at [71].

31 Defendants' submissions at [98].