IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

B E T W E E N:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

PLAINTIFF'S ANNOTATED REPLY

Dated: 25 November 2014

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A FUNDAMENTAL MATTERS OF STATUTORY CONSTRUCTION

1. The defendants submit that in order to achieve the object of the Migration Act stated in s 4(1), that is, to regulate, in the national interest, the coming into and presence in Australia of non-citizens, "*it may be necessary for the Minister to refuse a visa on national interest grounds in circumstances that have nothing whatsoever to do with the character of a visa applicant*" (DS [29]).

2. If the "*national interest*" is "*largely a political question*" (DS [32]); "*an evaluative one*" "*entrusted by the legislature to the Minister*"[1] (DS [33]); and "*of the broadest ambit*" such that "*[i]t is not readily to be supposed that any matters are to be excluded*" (DS [59]), the submission appears to be that it may be necessary for the Minister to refuse a protection visa on such grounds as may be politically expedient.

3. On that approach, clause 866.226 would be "*not indicative of a factual criterion or class description limited by any intelligible boundary*", "*almost entirely normative*" and "*legislative in character*".[2] It would ask the Minister to do what the Governor-General is empowered to do, that is, determine a test or standard[3] by which the coming into and presence in Australia of refugees is, in the national interest, to be regulated (s 4(1)).

4. The defendants' submissions are reminiscent of the suggestion offered by the Solicitor-General for the Commonwealth in *Plaintiff S157* to the effect that the Parliament might validly delegate to the Minister "*the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia*", subject only to this Court deciding any dispute as to the "*constitutional fact*" of alien status.[4]

5. In light of the special place given to protection visas in the Migration Act, and the textual requirement in s 31(3) that what is prescribed answer the description of "*criteria*", it should not be assumed that the regulation-making power authorises the administration of the Act in that way. Any ambiguity about the reach of the power in that respect should be resolved in a way that confines rather than expands the power.

B REGULATORY HISTORY OF NATIONAL INTEREST CRITERION

6. The matters pointed to by the defendants in relation to the entry permits and visas that existed from 1991 to 1994 (DS [15]-[18]), prior to the commencement of the Reform Act, are of no assistance in determining whether clause 866.226 was inconsistent with the provisions of the Migration Act at the time that clause was purportedly made or subsequently.

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1 In this case, the evaluation of the national interest was not entrusted by the legislature to the Minister, but was (purportedly) entrusted by the Governor-General to the Minister.

2 See, by analogy, *Turner v Owen* (1990) 26 FCR 366 at 389 (French J); *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460 at 481 (Gibbs J with whom Stephen, Mason and Wilson JJ agreed).

3 *Pillay v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 368 at [32] (Carr, Sackville and Nicholson JJ); *Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal* (1985) 156 CLR 1 at 4 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

4 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 at [86]-[88] (Hayne J).

7. The proposition that historical provisions of the Migration Regulations may be read with the Migration Act "*to identify the nature of a legislative scheme which they comprise*"[5] (DS [14]) does not permit their use "*to construe, and expand*" the terms of the Act[6] by reference to the wording of regulations made under it.[7] In particular, the submission that "*the national interest criterion ... has always been part of the [legislative] scheme*" (DS [14]) mistakes the permissible use of the regulatory history and does not proceed at an appropriate level of generality. It is only the "*nature*" of the legislative scheme that may be identified by reading an Act with regulations made under it. In the case of the Migration Act, the nature of the legislative scheme has been sufficiently identified in the previous decisions of this Court.

8. That criteria very similar to the national interest criterion have been prescribed for other refugee and humanitarian entry permits and visas before and after the Reform Act is of no consequence, as none of those classes of visa were created and controlled by statute in the same manner as the class of protection visas provided for by s 36(1).

C SECTIONS 501(3) AND 501C OF THE MIGRATION ACT

9. The defendants submit that s 501(3) "*is not properly characterised as a power to refuse visas on national interest grounds*" (DS [26]), but a condition for the exercise of that power is that the Minister is satisfied that "*the refusal ... is in the national interest*".

10. The principal proposition advanced by the defendants is that s 501(3) "*says nothing ... about the circumstances in which visas can or cannot be refused in the national interest with respect to non-citizens who pass the character test*". (DS [26]) That proposition cannot be correct. It is true that a non-citizen whose application for a visa is refused under s 501(3) may or may not be a person who passes the character, but as a description of the character of the power given by s 501(3), that observation is incomplete and does not pay sufficient regard to s 501C. The effect of s 501C(4) is that, even if the non-citizen satisfies the Minister that he or she passes the character test, the Minister may in the national interest allow the refusal decision to stand. It is in that way that s 501(3) speaks to the refusal in the national interest of visas to non-citizens who "*pass*" the character test.

11. The defendants submit that the role of the national interest condition in s 501(3)(d) is to "*confine the Minister's personal power to refuse a visa on character grounds without according natural justice*" (DS [27]). The difficulty is that s 501(3) cannot be a power to refuse a visa "*on character grounds*", because ultimately whether the visa is refused or not does not depend on the character test. Although the power cannot be exercised unless the Minister reasonably suspects that the person does not pass character test, the Minister's suspicion may turn out to be right or wrong. If it is shown to be wrong, it is a permissible outcome under s 501C(4) that a decision to refuse a visa to a person may be left to stand for no reason other than that the Minister remained satisfied that the refusal was in the national interest. Once the non-citizen has satisfied the Minister under s 501C(4)(b) that he or she passes the character test, subsections (8) and (11) make plain that the Minister may nevertheless decide "*not to revoke*" the refusal decision. The

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5 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ).

6 Ibid

7 *Alphaharm Pty Ltd v H Lundbeck A-S* [2014] HCA 42 at [39] (Crennan, Bell and Gageler JJ).

structure of ss 501(3) and 501C requires that a decision not to revoke under s 501C(4) be made by reference to the national interest identified in s 501(3)(d).[8]

12. It is not the case that the Minister can use the power in s 501(3) to refuse a visa on character grounds in any case in which he personally does not wish to accord natural justice. To say that the concept of the national interest is "*irrelevant*" except to the extent that it may reflect the Minister's personal wish not to accord natural justice (DS [28]) is to disregard the requirement that the Minister be satisfied that "*the refusal*" of the particular visa to the particular applicant is in the national interest. Whether the Minister wishes to accord or not to accord natural justice is a discretion that arises only if both the powers in s 501(1) and 501(3) are available. According natural justice may have consequences for the national interest in a particular case, but that is the most that can be said about the statutory relationship between those concepts.

13. Contrary to the defendants' submission that s 501(3) has a "*useful and pertinent*" operation whether or not clause 866.226 is valid (DS [38]), the validity of the criterion prescribed by clause 866.226 for protection visas entails the validity of the same criterion if it were to be prescribed for all visas. The defendants' construction thus leads to a situation in which the Migration Act "*can be administered in a way*" that gives s 501(3) no work to do.[9]

D SECTIONS 36(2), 501 AND THE LEGISLATIVE SCHEME FOR PROTECTION VISAS

14. The defendants submit, without authority, that "*s 36 cannot now be regarded as the only – or even the principal – mechanism by which the Migration Act responds to Australia's international obligations under the Refugees Convention*" (DS [51]). Leaving aside those who are subject to the more recent regional processing provisions, for a person in the position of the plaintiff, s 36 remains as significant as was indicated by the judgments of this Court in the *Offshore Processing Case* and subsequent cases.

15. Whether it is in the national interest for a person who is found to be a refugee to be granted a protection visa is not a matter that the Parliament intended to leave to the evaluation of the Executive Government on a case-by-case basis. That judgment was made by the Parliament in enacting s 36(1), which provided for the class of protection visas, and in enacting s 36(2) subject to s 501, which gave to that class irreducible content.

16. The observation that one of the objects of the Act identified in s 4(1) is to regulate "*in the national interest*" the coming into and presence in Australia of non-citizens (DS [12]) supports the applicant's submission that s 36(2) reflects a legislative judgment that the national interest requires the grant of protection visas to refugees except where the person fails the character test or such other prescribed criteria as are compatible with the Parliament's intention that s 36 be the principal mechanism by which Australia responds to its international protection obligations.

17. The legislative history of the Act shows that where specific exception from that underlying premise was seen by the Parliament to be required, it made amendments (for example, ss 36(3)-(7), 91A-91G and 91M-91Q). Those amendments were, however,

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8 This conclusion is reinforced by the text of the related powers given by ss 501A(2)-(3) and 501B(2).

9 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [206] (Hayne J).

specific and confined. They could not have been made by regulation: amendment to the Act was required.

18. The point at which the line is drawn between a criterion for a visa that is consistent with the scheme and one that is not has already been indicated (cf. DS [40]). The test is whether the criterion is incompatible with the Parliament's intention that s 36 be the principal mechanism by which Australia responds to its international obligations, having regard to such exceptions as have been sanctioned by the Parliament.[10]

E LEGISLATIVE HISTORY OF SECTION 46A

19. The defendants point to the focus of s 46A on the validity of an application for a visa rather than the grant or refusal of a visa (DS [61]-[64]) as a reason for distinguishing the public interest in s 46A from the national interest in clause 866.226, but the legislative conferral of the Minister's public interest discretion in s 46A was a balance against the mischief that s 46A was otherwise designed to remedy, being the same mischief relied upon by the Minister in the decision under review. In this way, the reliance on the national interest criterion in the present case undermined the existence and exercise of the discretionary power conferred on the Minister under s 46A.

20. Section 46A was inserted into the Migration Act with effect from 27 September 2001 by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) which, together with the other five amending Acts passed at the same time, amended the Migration Act "*to change the way in which persons who arrived in, or sought to enter, Australian territory without a valid visa were to be dealt with*".[11]

21. Many of the reasons given by the Minister in this case for refusing a protection visa to the plaintiff in the national interest were given by the then Minister in 2001 as reasons for the enactment of s 46A:

    a. "*The government is determined to stop these smugglers, and this package of bills is an important measure in achieving these goals.*"[12]

    b. "*But we will not tolerate violation of our sovereignty and we are determined to combat organised criminal attempts to land people illegally on our shores.*"[13]

    c. "*[This package of bills] will significantly reduce incentives for people to make hazardous voyages to Australian territories. It will help ensure that life is made as difficult as possible for those criminals engaged in the people smuggling trade.*"[14]

22. Section 198AA, introduced by the *Migration Amendment (Unauthorised Maritime Arrival and Other Measures) Act 2013* (Cth) (which also made minor amendments to s 46A), expressly provides that the regional processing subdivision was enacted "*because the Parliament considers that ... people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and ... unauthorised maritime arrivals, including unauthorised maritime*

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10 Plaintiff's submissions at [53]-[55].

11 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [29].

12 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30870 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

13 Ibid at 30871

14 Ibid.

arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country".[15] The Act also introduced s 4(5), which provides that, "*[t]o advance its object*" of regulating "*in the national interest*" the coming into and presence in Australia of non-citizens, "*this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country*".

23. All of these matters reveal "*the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned*".[16] What the national interest requires in respect of unauthorised maritime arrivals has been comprehensively addressed by the Parliament.

24. The defendants dispute that the criterion can be read down in the manner suggested by the plaintiff (DS [65]). While this is denied, if it be true, this leads only to the conclusion that the criterion that is repugnant to s 46A is wholly invalid.

25. Each of the reasons given by the Minister for refusing a protection visa to the plaintiff is founded upon his status as an unauthorised maritime arrival (**SC 150**). The plaintiff's status as an unauthorised maritime arrival was a condition for the exercise of power under s 46A(2), and must have been known in September 2012 when power under that section was exercised to permit the plaintiff to apply for a protection visa. Even after being found to be a refugee in May 2013, the plaintiff was kept in detention for a further one year and two months until July 2014 (**SC 2** [8], [12]). The Minister has now refused his application because of the same status he was known to have had when the Minister permitted him to make the application in September 2012. The Migration Act cannot lawfully be administered in that way.

F RELIEF

26. Contrary to the defendants' submissions (DS [69]), there should be no further delay in this matter. If the plaintiff succeeds, the Minister remains in breach of the duty imposed by s 65A(1). Unless the law changes in a manner that the Full Court considers might affect the answers to be given (in which case the parties will need to have an opportunity to address any such changes), the questions should be answered and relief granted.

Dated: 25 November 2014

Stephen Lloyd **James King**

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15 See also Commonwealth, *Parliamentary Debates*, Senate, 5 February 2013, 87 (David Feeney, Parliamentary Secretary for Defence): "*The application of the 'no advantage' principle is to ensure that no benefit is gained through circumventing regular migration pathways. This, combined with an increased refugee intake from offshore, is designed to remove the attractiveness of attempting an expensive and dangerous irregular boat journey to Australia.*" And "*[This bill] removes the incentive for asylum seekers to take greater risks with their lives to reach the Australian mainland.*"

16 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [54] (French CJ), citing *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.