IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S89 of 2014

B E T W E E N

PLAINTIFF S89 OF 2014

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S OUTLINE OF SUBMISSIONS

Filed on behalf of the Plaintiff by:

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PART 1 – FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the Internet.

PART 2 – ISSUES

2. The issue is whether clause 866.222 of Schedule 2 of the *Migration Act Regulations 1994* (Cth) was, during its period of purported operation, invalid or of no effect.

PART 3 – SECTION 78B NOTICES

3. The plaintiff does not consider that notice is required by section 78B of the *Judiciary Act 1903* (Cth).

PART 4 – MATERIAL FACTS

4. The material facts for the purpose of this case are, by reason of the respondents' demurrer, as set out in the statement of claim found at page 3 of the demurrer book. The allegations of fact therein are to be taken to be admitted for the purpose of the disposal of that demurrer.

5. The plaintiff is a national of Afghanistan who arrived in Australia on 11 July 2012.[1] The plaintiff did not, at the time of his entry into Australia, hold a valid visa.[2] For that reason, on entry into Australia the plaintiff was an unlawful non-citizen. On and from 1 July 2013, by reason of amendments to the Migration Act,[3] the plaintiff became an unauthorised maritime arrival within the meaning of section 5AA(1) of the Migration Act.

6. On 25 October 2012 the Minister made a determination under s 46A(2) of the Migration Act to permit the plaintiff to, among other things, make a valid application for a Protection (Class XA) visa.[4] On 6 December 2012 the plaintiff made such a valid application (the **PV Application**).[5] The plaintiff has done all things necessary for the purpose of having that application determined by the Minister in accordance with s 65 of the Migration Act.[6]

7. On 13 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (the **PPV Regulation)** was made. The PPV Regulation purported to take effect on 14 December 2013.[7] The PPV Regulation introduced new clause 866.222 into Schedule 2 of the *Migration Regulations 1994* (Cth) (the **Regulations**), which purportedly provided for additional criteria for the grant of a protection visa. The plaintiff did not satisfy any of the additional criteria. On 5 February 2014 a delegate of the Minister,

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1 Statement of claim [1(a)] and [4].
2 Statement of claim [5].
3 The amendments were effected by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).
4 Statement of claim [6].
5 Statement of claim [7].
6 Statement of claim [12].
7 *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), s 2; statement of claim [25-26].

having considered the PV Application, purported to refuse to grant the plaintiff a Protection (Class XA) visa pursuant to s 65(1)(b) of the Migration Act (the **Refusal Decision**) for the sole reason that the plaintiff did not satisfy the criteria prescribed by the new clause 866.222.[8]

8. On 27 March 2014, the Senate disallowed the PPV Regulation. By operation of s 42(1) of the *Legislative Instruments Act 2003* (Cth) the PPV Regulation ceased to have effect on and from that disallowance (the **Disallowance**). The Disallowance did not affect the operation of the PPV Regulation in the period in which it was purportedly in operation.

PART 5 - ARGUMENT

A: SUMMARY OF THE PLAINTIFF'S SUBMISSIONS

9. The effect of the criteria in clause 866.222 was to exclude a class of persons from eligibility for a protection visa not by reference to the primary question of whether Australia owes them protection obligations but by the discrimen of the circumstances in which they came to be "non-citizens in Australia". As such, the criterion in s 36(2) (non-citizens in Australia) was narrowed to persons who were, or had been, lawful non-citizens in Australia who were immigration cleared on their last entry into Australia, other than unauthorised maritime arrivals. That involved an invalid exercise of power in the following respects:

a. the Migration Act evinces an intention that the requirement in s 36(2)(a) that an applicant for a protection visa be "in Australia" is to apply as the sole rule regulating the relevant subject matter (presence in Australia and the circumstances associated with that presence). Clause 866.222 was, by reason that it carved out from the express statutory criterion and imposed additional criteria relating to that subject matter, necessarily inconsistent with the Migration Act in that respect;

b. properly construed the Migration Act does not permit the imposition of exclusionary criteria in addition to those founded upon Articles 1, 32 or 33 of the Refugees Convention. Clause 866.222 involved the imposition of such criteria in a manner inconsistent with the Migration Act; and

c. the making of clause 866.222 involved an unreasonable and therefore invalid exercise of power in that the prescription of those criteria was not capable of being considered to be proportionate to the pursuit of the relevant enabling purpose or object.

10. Further or alternatively, the PPV Regulation was made in contravention of s 48(1) of the *Legislative Instruments Act 2003* (Cth) (**LIA**) and, by operation of s 48(2) of that Act was of no effect.

B: SUBMISSIONS

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[8] Statement of claim [13]-[14], [29].

Regulation-making power

11. The resolution of the first and second issues in paragraph 9 above, turns on the limits to be discerned from the Migration Act upon the power conferred by ss 504 and 31(3) to make regulations prescribing criteria for the grant of protection visas. Section 504 is the source of that regulation-making power but does not in terms provide that the regulations may prescribe criteria for visas; that function is played by s 31(3) which provides that regulations (made pursuant to the power under s 504) may prescribe criteria for a visa or visas of a specified class, including protection visas.

12. It was held by a majority of this Court in *Plaintiff M47/2012 v Director General of Security*[9] (***M47***) that, although the power there conferred may be "expressed as a textually unbounded power to prescribe criteria for the grant of a protection visa", that is not its legal meaning.[10] Attention is rather required to the scheme of the Act as a whole and to the words of limitation in s 504, which make clear that the power extends only to making regulations "not inconsistent with" the Migration Act.

13. It is "settled" that a provision in the terms of s 504(1) precludes the making of regulations that vary or depart from positive provisions made by the relevant Act or regulations that "go outside the field of operation which the Act marks out for itself".[11]

14. As regards the latter possibility (which bears some obvious analogy with so called "indirect" inconsistency in the context of s 109 of the Constitution), the question of whether such limits have been exceeded requires, as an important consideration, analysis of the degree to which the legislature has disclosed an 'intention'[12] of dealing with the subject with which the statute is concerned.[13] In that regard, and as with s109, the metaphor of "covering the field" is apt to mislead and does not sufficiently describe the underlying principle.[14] Rather, the question is one of construction. As King CJ observed in *Tucker v Dickson*[15]:

> ...it is a question of ascertaining the meaning and effect of the legislation which is to prevail in case of inconsistency. If its true meaning and effect is that it is to apply as the sole rule regulating the particular subject matter and to the exclusion of all other rules, then the other rules are necessarily inconsistent with it and must give way.

15. In other words, there is, for the purposes of both 'species' of inconsistency, a single enquiry, being whether the regulation alters, impairs or detracts from the

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9 (2012) 86 ALJR 1372.

10 *M47* at 1412-1413, [171], [173] per Hayne J.

11 See, referring to *Morton v Union Steamship Co of New Zealand Limited* (1951) 83 CLR 403 (***Morton***), *M47* at 1393, [54] per French CJ, 1413, [174] per Hayne J; 1452-1453, [382] per Crennan J and see also Kiefel J at 1461, [434].

12 As with s 109, the "intention" of the legislature is determined objectively. See, in the context of s 109 *Momcilovic* (2011) 245 CLR 1 (***Momcilovic***) at 120-121 [271], read with 85 [146](v) (Gummow J, with Bell J agreeing), 133-134 [315] (Hayne J, dissenting and with French CJ agreeing on this point), 189 [474] (Heydon J), 235 [638] (Crennan and Kiefel JJ); see also *Dickson v R* (2010) 241 CLR 491 at 506-507 [32] (the Court).

13 *M47* at 1393, [54] per French CJ, *Morton at* 410.

14 *M47* at 1413, [174] per Hayne J.

15 [1981] 27 SASR 315 at 329 (with Sangster J agreeing and Legoe J agreeing on this point).

provisions of the enactment,[16] the object being to discern whether there exists a 'real conflict'.[17]

16. In undertaking that enquiry, a wider ambit for the regulation making power may be discerned if the enactment "lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation".[18] On the other hand, a more narrowly drawn power may be evident where Parliament deals in detail with the subject matter to which the statute is addressed. For the reasons below, in dealing with protection visas, the Migration Act falls within the latter category.

Section 36(2)(a) contains an exhaustive statement of the protection visa criteria regarding presence in Australia and the circumstances associated with that presence

17. The scheme of the Migration Act provides, in essence and subject to a number of presently unimportant qualifications, for binary outcomes in relation to non-citizens present in Australia. A non-citizen in Australia is either a lawful non-citizen or an unlawful non-citizen. A lawful non-citizen is a non-citizen in the migration zone who holds a visa that is in effect.[19] An unlawful non-citizen is any non-citizen in the migration zone who is not a lawful non-citizen.[20] That strict dichotomy was erected by the *Migration Reform Act 1992* (Cth) (**1992 Reform Act**), which eliminated an earlier intermediate category of "exempt non-citizens".[21] For reasons developed below, that historical context is important. It confirms a number of matters that appear from the text and consideration of the statutory design.[22]

18. In its current form, the Migration Act provides no middle ground between being a lawful non-citizen (entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen, who generally must be detained and who (assuming there is no pending consideration of a valid visa application) must be removed from Australia as soon as reasonably practicable.[23] An individual's status as a lawful or unlawful non-citizen is conditioned by the power reposed in the Minister, or his or her delegate, to determine any application made by the individual for the issue of a visa, including an application for a protection visa.[24]

19. Provision for that visa class was also added to the Migration Act by the 1992 Reform Act - see now s 36 of the Act, formerly s 26B(2) of the Act. Section 36(2)(a) prescribes a criterion for the grant of such a visa that the applicant is:

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16 *M47* at 1413, [174] per Hayne J and note Momcilovic at 111, [242] (Gummow J, with Bell J agreeing on this point).

17 See, by way of analogy, *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525, [42] (the Court).

18 *Morton* at 410.

19 Migration Act, s 13.

20 Migration Act, s 14.

21 As to which, see Migration Act (Act No. 62 of 1958 as amended, taking into account amendments up to Act No. 61 of 1989), ss 4, 9, 14, 15, 16, 47, 64, 77, 78.

22 *Theiss v Collector of Customs* [2014] HCA 12 at [23] and [30].

23 *M47* at 1413-1414 [176]-[178] per Hayne J; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 at 161, [116]-[118] per Hayne J.

24 Migration Act, s 65.

> ...a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

20. That criterion involves a compound of concepts. First, as has been said by this Court, it focuses upon the definition of 'refugee' in the Refugees Convention as the 'criterion of operation of the protection visa system'.[25] The Minister or her or his delegate must arrive at the specified state of satisfaction concerning that matter. That state of satisfaction is a jurisdictional fact[26] and requires that attention is directed to article 1 of the Convention (as amended by the Protocol).

21. But there is a second aspect to the criterion in s 36(2), being one that assumes some importance in the current matter. It requires attention to a particular circumstance – that is, whether the applicant is *'a non-citizen in Australia'*. That, this Court has said, means no more than that the applicant must be 'present in Australia'.[27]

22. It is necessary to notice a number of matters as regards that requirement. First, it straddles both sides of the binary divide entrenched by the 1992 Reform Act. Second, the criterion embraces any non-citizen 'in Australia', regardless of the circumstances in which the particular applicant came to be present in Australia.

23. A starkly different approach was adopted in the 1992 Reform Act to the bridging visa class. Such visas were only to be granted to a 'detention non-citizen' which term was defined to be a person who, amongst other things, 'has been immigration cleared' or was in a prescribed class (see former s26ZN(a)(i)).[28]

24. As recorded in the extrinsic materials, that reflected an approach whereby 'people who arrive in Australia without authority' would not be eligible for a bridging visa and thus would be required to be detained 'until any claim they wish to make has been resolved'.[29] During the Senate Debates, there was discussion of the position of those arriving without lawful authority and who later sought to apply for protection visas. The Minister representing the Immigration Minister observed in that regard that:

> ...under this Bill most of those who are initially detained under the

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25 *M47* at 1383 [12] per French CJ and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 (***QAAH***) at 14-15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

26 *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at 651 per Gummow J.

27 *QAAH* at 6 [4].

28 The concept of 'immigration clearance' and the procedures governing the circumstances in which a person is immigration cleared or refused immigration clearance were also added to the Migration Act by the 1992 Reform Act (see former Division 4 of Part 2, now Division 5 of Part 2). The object of those amendments was identified in the explanatory memorandum as being to 'enhance the powers in the Principal Act to control the processing and identification of persons arriving in or departing from Australia'.

29 See the Second Reading Speech to the Bill that became the 1992 Reform Act, House of Representatives Hansard, 4 November 1992, 2620, Mr Hand.

> provisions of the Act, as it will become, will be able to apply for a bridging visa and therefore move into the general Australian community. Those who will be unable to do so are a very small group of those who arrive without any lawful authority and are held in custody while their application—usually for recognition of refugee status—is considered.[30]

25. That observation suggests that, in contrast to applications for a bridging visa, applications for 'recognition of refugee status' (such 'recognition' involving the grant of a protection visa) would be 'considered' under the Act, notwithstanding the fact that a person entered Australia without 'any lawful authority'.

26. Section 36(2) gave effect to that legislative design by leaving open an area of operation for protection visas that, as is revealed by a comparison of the relevant provisions, was 'closed up' in respect of bridging visas. The regulation making power does not support the prescription of criteria that close up that which Parliament designedly left open.[31] That is what each of the criteria in disallowed sub-clause 866.222 sought to do.[32]

27. That is, the meaning and effect of the scheme of the Act was that the requirement in s 36(2)(a) that an applicant for a protection visa be "in Australia" is to apply as the sole rule regulating the relevant subject matter (both presence in Australia and the circumstances associated with that presence). Each of the criteria in clause 866.222 of Schedule 2 to the Regulations speak directly to that statutory criterion, which the context shows was deliberately wide enough to catch all non-citizens in Australia. They derogate from the amplitude of the criterion by limiting the scope to non-citizens whose presence in Australia is attended by particular circumstances in connection with their last entry. The Act provides that a person will meet that criterion if he or she is a non-citizen but the criteria in clause 866.222 provide otherwise if the applicant was, at the time of entry, an unlawful non-citizen.

28. The sub-clause was invalid for repugnancy for those reasons.

The plaintiff's argument is supported by the context

29. The proposition just identified is supported by consideration of a number of other features of the statutory scheme.

30. For example, the Act now provides for the grant of a bridging visa to an 'eligible non-citizen' (see s 73). As was the case when that visa class was first introduced in 1992, that term is defined to include a non-citizen who has been immigration cleared (s 72(1)(b)). However, it also includes a person the Minister has 'determined to be an eligible non-citizen' (s 72(1)(c)).[33] The

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30 Commonwealth, *Parliamentary Debates,* Senate, 8 December 1992, 4462, Senator Tate.

31 See, by way of analogy, *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120, *Dickson v R* (2010) 241 CLR 491 at 505 [25] and *Momcilovic* at 122 [276].

32 See, as regards 866.222(b), the definition of the term "unauthorised maritime arrival" in s 5AA(1) – particularly sub-para (b).

33 That determination making power was added to the Migration Act by the *Migration Legislation Amendment Act No 5* 1995 (Cth), and was said to further implement recommendations 10 and 11 made

Minister can only make such a determination if, amongst other things:

a. the non-citizen was an unlawful non-citizen when she or he entered the migration zone - necessarily meaning that that person did not hold a visa that was in effect on that entry;[34] would be,[35] if they 'entered Australia by sea'[36] an 'unauthorised maritime arrival';[37] and would have been unable to have been immigration cleared;[38] and

b. the non-citizen made a valid application for a protection visa after she or he arrived in Australia.[39]

31. That is, the express terms of the Migration Act contemplated that a person could apply for a protection visa notwithstanding that their entry involved the very circumstances to which the exclusionary criteria in disallowed clause 866.222 were directed.

32. It would be a strange result if the Migration Act were to be construed so as to permit the prescription of such exclusionary criteria. Such a construction would mean that the terms of the Act require (as a condition for the grant of a bridging visa) participation in an application process that may be rendered entirely futile by the regulations. Parliament should not readily be assumed to have legislated for a procedural charade of that nature.

33. A similar textual indicium suggesting that the regulation making power does not extend to the prescription of provisions in the form of disallowed clause 866.222 may be seen in the exclusionary provisions in subdivision AI of Part 2, Division 3 of the Act (dealing with safe third countries). Those provisions are directed, inter alia, to the validity of an application for a protection visa made by a non-citizen 'who has not been immigration cleared at that time': 91E(a).[40] If the subdivision applies to a non-citizen at the time she or he makes an application for a protection visa, the effect of s 91E is that, subject to 91F, the application is not a valid one.

34. Again, that reflects an understanding that a protection visa could otherwise be required by s 65(1) to be granted to a person who has entered Australia without being immigration cleared (including those who were refused immigration clearance because they were unable to present evidence to a clearance authority of a visa that was in effect) and who became an 'unauthorised maritime arrival' within the meaning of s 5AA(1) upon that entry.

35. Each of those matters further supports the implicit negative proposition

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by the Joint Standing Committee on Migration in its report entitled *Asylum, border control and detention* AGPS (1994) regarding the release of unauthorized arrivals from immigration detention (see para [4] of the explanatory memorandum).

34 See former 866.222(a).

35 Unless an 'excluded maritime arrival': see s 5AA(3) of the Migration Act.

36 Section 5AA(2) of the Migration Act.

37 See s 5AA(1) of the Migration Act and former 866.222(b).

38 See s 172(1) and (3) read with s 166(1)(a)(ii) of the Migration Act and former 866.222(c).

39 See s 72(2) (a) and (b) of the Migration Act.

40 See also, although operating more generally upon all applications for visas, s 91P(1) (which appears in sub-division AK – non-citizens with access to protection from third countries).

identified above:[41] that is, that s 36(2)(a) leaves open for protection visas an area of operation that 866.222 sought to circumscribe.

The presence of section 46A supports the construction

36. For somewhat different reasons, s 46A further supports the plaintiff's proposed construction. That section is directed to the same class of persons to whom subclause 866.222(b) was directed (unauthorised maritime arrivals).

37. Section 46A(1) provides that a visa application is not a valid application if made by an unauthorised maritime arrival who is in Australia and who is an unlawful non-citizen. That section operates to prevent such a person from making a valid application for any class of visa, including a protection visa. Section 46A(2) provides that the Minister may, by written notice, determine that subsection (1) does not apply, such that the person may make a valid application for a visa of the class, or classes, specified in the written notice (and only that class or classes).

38. The effect of clause 866.222 was that a determination under s 46A that specified a protection visa as the class of visa for which the person could make a valid application would be futile. While that person would be permitted to make a valid application for a protection visa, that application would necessarily be refused by reason of subclause 866.222(b).

39. It is true that s 46A(2) is not directed only to protection visas: the Minister may specify any class of visa in the written notice. However, as this Court said, and then reiterated,[42] the changes to the Migration Act effected by the enactment of s 46A (and the consequential addition of s 198A) reflected 'a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act' (see further below). It did so in two ways, identified in *M61* by reference to a Departmental document (see at 341 [34]): **first**, by providing a 'framework to enable the [Minister] to decide whether to allow an application for a visa to be made by ['offshore entry persons'] (while in Australia), following consideration of protection obligations under the relevant United Nations Conventions', and, **secondly**, by providing (as an alternative procedure) for people in that class to be taken to another country, where their claims for refugee status will be assessed (see now Part 2, Division 8, Subdivision B). Thus, s 46A operates on the basis that the Minister could be required by operation of s 65(1) of the Migration Act to grant a protection visa to a person to whom s 46A(1) applies.

40. Accordingly, if the regulation making power supports the making of a regulation in the form of clause 866.222, the result would be that the executive has been empowered to erase the first route from the Migration Act in a manner that would deviate from the legislative intention discerned by this Court. That result is avoided if the construction proposed by the plaintiff is

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41 See by way of analogy *Momcilovic* at 116 [261] and 122 [276] per Gummow J.

42 *Plaintiff M61/2010E v The Commonwealth* (***M61***) (2010) 243 CLR 319 at 341 [34]; *Plaintiff M70 v The Commonwealth and Another* (2011) 244 CLR 144 (***M70***) at 160 [10], 176 [49], 192 [96], 223, [212] and 228 [226] and in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 (***M76***) at 151, [59].

adopted.

41. In advancing that submission, it is necessary to note that the dispensing power conferred by s 46A(2) is not a power to grant a visa. It is merely a power to permit the making of a valid application for a visa: the relevant criteria remain to be satisfied.[43] And so it is not to the point that there are other powers, subject to different conditions (including, in the case of s 195A, that an unlawful non-citizen is detained), by which the Minister may achieve a similar end result. The task of construction is to be approached on the basis that none of the elements of a statute shall prove superfluous, void, or insignificant, if by '*any* other construction they may all be made useful and pertinent'.[44]

Underlying statutory design

42. There are deeper substantive considerations that both explain the statutory design underlying the features of the Migration Act identified above and further support the construction of the regulation making power for which the plaintiff contends. As this Court said in Plaintiff *M61/2010E v The Commonwealth*[45] (***M61***) (in a passage that has been reiterated in *Plaintiff M70 v The Commonwealth and Another*[46] (***M70***) and in M47), read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol (and proceeds, in important respects, from the assumption that Australia has protection obligations to individuals). And consistent with that assumption, the text and structure of the Act proceed on the footing that the Migration Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

43. Although it is well established that the Convention does not impose an obligation on Contracting States to grant asylum to refugees arriving at their borders or a right to reside in those states, Australia has protection obligations under the Convention to persons who answer the description "refugee" even if those persons are non-citizens who entered Australia without a visa in effect and were therefore unable to be immigration cleared and so attracted the statutory description 'unauthorised maritime arrivals'.[47] In particular, subject only to the condition in article 33(2), those protection obligations include the obligation of non-refoulement – an obligation that applies to refugees whether lawfully or unlawfully within the host territory.[48]

44. The notion that the Act provides power to respond to those obligations by

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43 *M76* at 155, [84] per Hayne J.

44 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (**Project Blue Sky**) at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ (emphasis added); *Plaintiff M47-2012 v Director General of Security* (2012) 86 ALJR 1372 (**M47**) at [41] per French CJ, [171] and [193] per Hayne J.

45 (2010) 243 CLR 319 at [27].

46 (2011) 244 CLR 144.

47 James C Hathaway, *The Rights of Refugees under International Law* (2005) 657; Guy S Goodwin Gill and Jane McAdam, *The Refugee in International Law* (3rd Ed, 2007) 524; *Minister for Immigration v Khawar* (2002) 210 CLR 1 at 15-16 [43]-[44].

48 See, for example, *M47* per French CJ at 1390 [39].

granting a protection visa in an appropriate case points to the reason Parliament did not require, in s 36(2)(a), that an applicant's presence have originated with lawful entry. To do so would have hampered rather than facilitated Australia's capacity to respond to and comply with those obligations. In that regard, it is notorious that many people seeking to invoke Australia's protection obligations enter the migration zone without a visa that is in effect (see also, in that regard, the allegations in the statement of claim at [34] and [35], DB 343). Indeed, as the extrinsic materials extracted above indicate, that was understood to be the case from the time protection visas came to be provided for in the Act (the 'very small group' of those arriving 'without any lawful authority' were said to make applications 'usually for recognition of refugee status'). The legislative mischief to which the Migration Act was addressed in that regard encompassed the capacity to respond to protection claims made by the very class of people the criteria in clause 866.222 now purport to exclude.

45. Accordingly, and for that further reason, the regulation making power should not be construed as authorizing regulations in the nature of clause 866.222. To do so would be inconsistent with the legislative intention evident from the scheme of the Act as a whole: namely, that its provisions are intended to facilitate Australia's compliance with the obligations under the Refugees Convention.[49]

46. Again, it closes up that which Parliament has (for the reasons just identified) designedly left open.

Section 40

47. None of that is altered by the terms of s 40, which provides that the regulations may provide that visas of a specified class may only be granted in specified circumstances. Amongst the non-exhaustive examples given in s 40(2) is the circumstance that when the person was granted the visa the person is in the migration zone and on last entering Australia was immigration cleared. However, that provision is to be read in a harmonious fashion[50] with the more specific provisions of the Act identified above, which plainly contemplate that a protection visa may be granted notwithstanding the absence of such a circumstance. Equally, the circumstance identified in s 40(2)(a) ('the person...is outside Australia') could have no application to the class of protection visas.

48. Section 40(2)(a) does not apply in an undifferentiated and absolute fashion to the prescription of criteria for protection visas; this Court held, in *M47*, that the same is true of s 31.[51] In this case, the more general provisions, applicable to all visa classes, must yield to the terms of s 36(2)(a), which deal with the more specific subject matter of the criteria applicable to protection visas.

The Act does not authorise exclusionary criteria other than those founded in Articles 1F, 32 or 33 of the Convention

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49 *M70* at [98] per Gummow, Hayne, Crennan and Bell CJ.
50 *Project Blue Sky* at 382, [70].
51 *M47* per Hayne J at 1421, [221].

49. If the argument outlined above is accepted the plaintiff is entitled to the relief he seeks. Alternatively, there is a further, broader, argument arising from the proper construction of the Migration Act, which also has the effect that clause 866.222 is invalid for repugnancy. That is, that properly construed, the Migration Act does not permit the imposition of exclusionary criteria for protection visas in addition to those founded upon Articles 1, 32 or 33 of the Refugees Convention at all, or alternatively, at least to the extent that they apply to all visas within the class erected by s 36.

50. That submission commences with the observation that the criterion in s 36(2)(a) is to be accorded primacy amongst the other criteria that apply to that visa class. As submitted above, the reference in that section to the Minister's state of satisfaction concerning Australia's protection obligations under the Convention in the particular case supplies what this Court has termed 'the criterion of operation of the protection visa system'.[52]

51. The importance of that criterion also follows from the acceptance by this Court that there is an obligation under the Refugees Convention to determine whether an asylum seeker is a refugee for the purposes of the Convention and that the Migration Act may be seen to give effect to that obligation.[53] Indeed, the power of removal in s 198 cannot be engaged until such a determination is made.[54] The course 'contemplated by the Migration Act'[55] for the making of that determination is for the Minister or her or his delegate to consider whether to grant a protection visa.

52. Of course, s 65 of the Migration Act conditions the grant of protection visas on the satisfaction of various other requirements, all of which are important.[56] However, that does not mean that each of those requirements is of the same nature or of the same importance in the scheme of the Act.

53. The primary criterion in s 36(2) is one that involves the application of a discrimen to differentiate between particular classes of people - those to whom the Minister is satisfied Australia owes protection obligations are to be differentiated from those in respect of whom the Minister does not hold that state of satisfaction. As was held in *NAGV*, amongst those who are potentially thereby excluded are those in respect of whom article 1F of the Refugees Convention is engaged.[57]

54. The Migration Act also expressly recognises, in s 501(1), that protection visas may be refused 'relying on' one or more of articles 1F, 32 or 33(2). Different views were expressed in *M47* as to whether a decision under s 501 to refuse to

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52 See again *M47* at 1383, [12] per French CJ and *QAAH* at 14-15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ (emphasis added).

53 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300 per Mason, Dean and Dawson JJ, 304-306 per Brennan J; *M70* at 224-225 [215], [217]-[218] per Kiefel J and *M47* at 1461 [435] per Kiefel J.

54 *M47* at 1461 [435] per Kiefel J; *M70* at 178 [54] per French CJ; 192 [98] per Gummow, Hayne Crennan and Bell JJ and at 231 [239] per Kiefel J.

55 See *M47* at 1461 [436], per Kiefel J.

56 *M47* at 1414 [180] per Hayne J.

57 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 177 [47].

grant a protection visa invoking an aspect of the character test in s 501(6)(d)(v)[58] (or perhaps that in s 501(6)(c)(ii)[59]) could be a decision that meets that description, or whether the power to refuse a protection visa relying on one or more of those articles was rather to be implied from the text of the Act.[60] If the former, then, in a case to which s 500(1)(c) applies, the Minister could not be satisfied that the grant of the visa was not prevented by s 501 for the purposes of s 65(1)(a)(iii). If the latter, then in such a case the Minister could not be satisfied that the grant of the visa was not prevented by "any other provision of this Act" for the purposes of that same sub-section.[61]

10 55. On either analysis, what is involved are criteria that:

(a) like the criterion in s 36(2)(a), have their genesis in the provisions of the Refugees Convention;

(b) also like the criterion in s 36(2)(a), involve the application of a discrimen to exclude a particular class of people from the grant of a protection visa; and

(c) where relied upon for the purposes of a decision to refuse a protection visa, are subject to specific rights of review: as to which see ss 500(1)(c), 502(1)(a)(iii), 503(1)(c) and 500(4)(c).

56. As French CJ observed in *M47* at [65], taken together, those features of the
20 Migration Act may be regarded as creating a statutory scheme the purpose of which is to:

> ... give effect to Australia's obligations under the Convention and to provide for cases in which those obligations are limited or qualified. It provides, in ss 36 and 65, for the grant of protection visas to persons to whom Australia owes protection obligations. It provides for the refusal or cancellation of such visas in respect of persons to whom Australia owes obligations where:
>
> - the person may nevertheless be expelled from the country for "compelling reasons of national security" pursuant to Art 32;
>
> 30 - the person may be removed from the country where "there are reasonable grounds for regarding [the person] as a danger to the security of the country in which [the person] is" pursuant to Art 33(2).

57. The statutory design includes other limitations or qualifications in addition to those just identified that shape the definition of persons to whom Australia's obligations are responsive. Section 36 itself, after prescribing a criterion in

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58 *M47* at 1390-1391, [36]-[45] per French CJ; 1415-1416 [188]-[194] per Hayne J; and at 1453-1454 [389] per Crennan J.
59 *M47* at 1454 [389] per Crennan J.
60 *M47* at 1463 [443] per Kiefel J.
61 *M47* at 1462 [440] per Kiefel J.

36(2), carves out from that definition persons falling within the scope of ss 36(2)(C) and 36(3). Persons falling within the scope of those subsections are taken to be persons to whom Australia does not owe protection obligations.

58. Subdivision AI of Part 2, headed 'Safe third countries', provides that certain non-citizens who are covered by the CPA,[62] or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. The subdivision operates in relation to non-citizens who are present in Australia and in respect of whom the balance of the criteria in subsection 91C(1) is met. Subdivision AK also contains statutory modifications or explanations as to the operation of the Convention as adopted in the Migration Act. For example, sections 91R-91T deal with the concepts of persecution, social group and non-political crime. Section 91P operates to prevent non-citizens to whom the subdivision applies, who are in the migration zone and who have not been immigration cleared from making a valid application for a visa – including a protection visa. The presence of these provisions reinforces the point that the operation of the Convention is regulated entirely by the Migration Act.

59. The criterion in s 36 and the exclusionary criteria described above are an exhaustive traverse of the Convention criteria prescribing the circumstances in which Australia owes protection obligations, and the limitations imposed on, and the exceptions and qualifications to, those obligations. The making of regulations which provide for additional exclusionary criteria, unrelated to Australia's obligations under the Convention, departs from the statutory object, and thereby goes outside the field of operation which the Act marks out for itself.

60. The criteria in 866.222 do not relate to, and operate independently of the obligations and qualifications just identified and the circumstances in which a protection visa might be refused in reliance on criteria deriving from Article 1, 32 or 33. In circumstances where the Act comprehensively provides for cases in which those obligations are limited or qualified, the criteria in clause 866.222 alter, impair or detract from the provisions of the Act read as a whole. Accordingly, that provision is invalid for repugnancy.

61. Indeed, were it otherwise, anomalous results would follow. In particular, the nature of the criteria in clause 866.222 has the consequence that an assessment of whether or not a person is one to whom Australia owes protection obligations need not necessarily be undertaken, and may in fact not be undertaken, in the course of considering a person's protection visa application. Yet, as submitted above, the removal of such a person from Australia that would otherwise be required by s 198(2)(c)(ii)[63] could not take place until such an assessment is made. It follows that the effect of clause 866.222 (if valid) would be to chart a different course to that which, as was

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62 The Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989: see Migration Act s 91B(1).

63 Their visa application having been finally determined, after being foreclosed by the application of the exclusionary provisions of cl 866.222.

submitted above, is the course 'contemplated by the Migration Act'.[64] That is, instead of the necessary determination of refugee status being made by the Minister or her or his delegate in the course of considering whether to grant a protection visa, that determination would presumably be made in an ad hoc fashion by the "officer" (who cannot be the Minister and may be a relatively junior public official– see s 5) exercising power under s 198(2).

62. A further specific anomaly arises as regards clause 866.222(c). A person may be refused immigration clearance (so as to not be immigration cleared on their last entry into Australia) by a 'clearance officer', who may be an 'officer' (see again the definition in s 5) or 'any person' authorized by the Minister to perform duties for the purposes of Part 2, Division 5. As in *M47*,[65] the effect of the imposition of that exclusionary criteria is therefore to effectively repose the determination of a person's application for a protection visa in the hands of that officer, rather than in the hands of the Minister or her or his delegate. Further, the outcome of that determination thereby comes to rest upon the essentially mechanical process in s 172(1) and (3), which involves no assessment of Australia's protection obligations or whether those obligations are limited or qualified in the particular case. Again, this outcome departs from the course 'contemplated by the Migration Act'.

63. That is not to say that there is no room for the prescription of additional criteria under s 31(3) (including a "health criterion" within the meaning of ss 5 and 65(1)(a)(i)) for the purposes of the class of protection visas. In the first place, but subject to the limitations identified in *M47*, the power would extend to criteria involving decisions that "rely upon" articles 32 or 33 of the Convention. Such decisions would attract the review rights identified above.[66] Further, it may be (as was the case when there existed a sub-class of temporary protection visas) that a particular criterion applicable to only one sub-class of protection visa does not result in an applicant being "excluded from protection" and therefore does not depart from the legislative scheme.[67]

64. In addition, the regulation making power extends to the prescription of incidental administrative, facilitative or process requirements, such as the existing health criterion that requires applicants to undergo medical and chest x-ray examinations.[68] As Kiefel J observed in *M47*, that may result in the applicant being placed under medical supervision if she or he presents a threat to public health in Australia, but a visa is not required to be refused on the basis of the results of such an examination.

The criteria in clause 866.222 are void for unreasonableness

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64 See again *M47* at 1461 [436] per Kiefel J.

65 *M47* at 1397 [71] per French CJ, 1455 [396] per Crennan J and at 1465 [456], [458] per Kiefel J.

66 An issue that does not arise in these proceedings, but which was the subject of some controversy during the drafting of the Convention, was whether public health could fall within the notion of "public order" so as to enliven the exception in article 32. The better view appears to be that it does not (see Hathaway, op cit at 687).

67 See the reasoning of Crennan J at first instance, extracted with approval by the Full Federal Court, in *VWOK v Minister for Immigration* (2005) 147 FCR 135 at [140].

68 Clauses 866.223-866.224B of Schedule 2 to the Regulations.

65. Further or alternatively to the plaintiff's first argument, the plaintiff contends that the making of clause 866.222 was not sufficiently connected with the subject matter of the enabling power and therefore void for unreasonableness. That test of unreasonableness, in the context of delegated legislation, has been said to bear an obvious affinity with a test of proportionality and involves an analysis of means and ends.[69] In that regard, it requires consideration of whether the regulation is 'capable of being considered to be proportionate to the pursuit of the relevant enabling purpose or object'.[70]

66. While this Court is yet to finally determine that proportionality supplies the (or a) relevant criterion of invalidity in the context of a challenge to the validity of delegated legislation founded upon unreasonableness, it should now be accepted as the doctrine of this Court. Such a view accords with the observations made by three members of this Court in *Corneloup* and the assumption made by four members of this Court in *Tanner*.[71]

67. The first step in that analysis is the identification of the true nature and purpose of the regulation making power.[72]

68. It is true, at a level of generality, that the objects of the Migration Act (including the regulation making power conferred by ss 504 and read with s31(3)) include the regulation, in the national interest, of the presence in Australia of aliens.[73] However, more precision is required as regards that aspect of the regulation making power in issue in the current matter, dealing as it does with the prescription of criteria for 'visas of a specified class': s31(3). The relevant object is that identified by French CJ in the passage extracted above from his Honour's reasons in *M47* – that is, to give effect to Australia's obligations under the Convention and to provide for cases in which those obligations are limited or qualified.

69. The matters identified above in connection with the plaintiff's first and second arguments are sufficient to conclude that the criteria in clause 866.222 are incapable of being considered to be proportionate to the pursuit of that object. There is simply no rational relationship between that object and clause 866.222, given that they do not relate to and operate independently of the circumstances in which a protection visa might be refused in reliance on criteria deriving from the Convention. Nor could those subclauses be said to bear some form of rational relationship to that object by providing for matters that may be regarded as incidental or ancillary to its achievement – the requirement for a medical assessment which could form the basis for the supervisory arrangements the subject of clause 866.224B is an example of a provision of

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69 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 (***Corneloup***) at 334-335 [198]-[201] per Crennan and Kiefel JJ.

70 *South Australia v Tanner* (1989) 166 CLR 161 (***Tanner***) at 165 per Wilson, Dawson, Toohey and Gaudron JJ and *Corneloup* at 309 [58] per French CJ and at 334-335 [198]-[201] per Crennan and Kiefel JJ.

71 *Tanner* at 167-168 per Wilson, Dawson, Toohey and Gaudron JJ and *Corneloup* at 309-310 [58] per French CJ and at 334-335 [198]-[201] per Crennan and Kiefel JJ. See also, by way of analogy, *Minister for Immigration v Li* (2013) 87 ALJR 618 at 631 [30] per French CJ and at 639 [74] per Hayne, Keifel and Bell JJ.

72 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 per Dixon J.

73 *M47* at 1406 [133] per Gummow J (in dissent on the issue of the validity of the impugned provision).

that nature. In contrast, the impugned subclauses potentially preclude consideration of Australia's obligations under the Convention, and the limitations or qualifications to those obligations.

70. The lack of such a relationship is further revealed by an examination of the operation of those provisions in the area they are intended to apply.[74] In that regard, as submitted above, the class of persons whose claims are potentially excluded from that assessment includes people who would be, or might reasonably be expected to be, the subject of protection obligations under the Act.[75]

Invalid by operation of section 48 of the *Legislative Instruments Act 2003* (Cth)

71. Section 48 of the LIA has existed in its present form since the LIA was enacted. The LIA was introduced in response to the recommendations of the Rule Making by Commonwealth Agencies Report[76] and was intended, among other things, to provide a comprehensive regime for Parliamentary scrutiny (via tabling and disallowance mechanisms) of legislative instruments.[77]

72. In relation to disallowance, the LIA substantially re-enacted those parts of the *Acts Interpretation Act* 1901 (Cth) (the **AIA**) as related to regulations and disallowable instruments and extended their operation to all legislative instruments.[78] Section 48 of the LIA is a reenactment of sub-s 48(1) of the AIA (as it then was) and is in materially identical terms. Following the passage of the LIA, the AIA was consequentially amended such that the comparative provision applied thereafter only to non-legislative instruments.

73. At the heart of s 48 of the LIA lies the comparison required by the term 'same in substance'. As the terms of s 48 make clear,[79] that comparison may operate at more than one level: it may be at the level of particular 'provisions' in each legislative instrument; alternatively, it may be at the level of the set of provisions constituting each 'legislative instrument' as a whole.

74. The reason for that flexible approach is two-fold. First, a comparison between each instrument as a whole may reveal the circumstance identified by Latham CJ in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (**Women's Employment Regulations Case**) at 360-361: that is, that while 'no single one of the new regulations was the same in substance as any particular disallowed regulation', the 'effect of the new re-drafted and re-arranged regulations, taken as a whole, might be the same as that of the regulations which had been disallowed'. The fact that those two instruments would then differ in form would not be sufficient to defeat the apparent object of s 48.

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74 In that regard, as Crennan and Kiefel JJ observed in *Corneloup* at 334 [199], it is often necessary to examine the operation of the delegated legislation in the area in which it is intended to apply.

75 See again the statement of claim at [34] [35].

76 Administrative Review Council, *Rule Making by Commonwealth Agencies,* Commonwealth of Australia (1992).

77 Explanatory Memorandum, Legislative Instruments Bill 2003 (Cth), 1.

78 Ibid.

79 And as was accepted to be the case in respect of the predecessor provision in the AIA: see *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 347 (***Women's Employment Regulations Case***) at 360 per Latham CJ and 388-389 per McTiernan J.

75. Secondly, by permitting a comparison at the level of individual provisions, Parliament has sought to ensure that the consequences of disallowance cannot be evaded by adopting the device of preserving an area in which the new and disallowed instrument has the 'same operation', but adding to (or subtracting from[80]) the matters otherwise covered by the disallowed instrument: see Latham CJ's reasons at 361. As His Honour there observed, if permissible, that would reduce the provision to a 'complete futility'.

76. This case invites a comparison at the level of two particular provisions.[81] Each of those provisions is, of course, to be construed in the context of the whole of the instrument of which they form a part. But that is no more than an aspect of the orthodox manner in which legal meaning is attributed to a legal text (be it a statute or delegated legislation), guided by common law principles, which require attention to the text, objective purpose and the context, including the context of the legislation under which they are made.[82]

77. The text of clause 9 of schedule 1 to the TPV Regulation, and the context (including in particular the fact that it purportedly provided a criterion for the specified visa sub-class), suggests that the objective purpose is that succinctly identified in the explanatory statement:

> The purpose of this amendment is to ensure that a Subclass 866 (Protection) visa is no longer available to a person who is an unauthorised maritime arrival, did not hold a visa on their last entry to Australia, was not immigration cleared on their last entry to Australia, or who holds or has held a Subclass 785 (Temporary Protection) visa since last entering Australia. This amendment reflects the Government's intention that such a person will not be granted a permanent protection visa.

78. That is the 'real purpose and effect' of that clause which, as Williams J observed in the *Women's Employment Regulations Case*, equates to its 'substance'.[83] Viewed thus, it can readily be seen that clause 9 has the same purpose and effect – and is, therefore, the same in substance - as clause 1 of schedule 1 to the PPV Regulation.

79. It is immaterial that other provisions of the TPV Regulation provided for another visa class, for which an applicant for a visa may have been eligible. The disqualifying effect of the provisions in both the TPV Regulation and the impugned regulation (clause 9 and clause 1 respectively) were in their terms and effect the same: the visa described by clause 866 was not available to an applicant covered by those clauses. But every criterion in the Migration Regulations takes its place in a milieu of visa classes, sub-classes and

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80 See, in that regard, Latham CJ's reference at 361.5 to similar considerations applying where the ground of disallowance is that the 'regulations are too extensive in their operation'.

81 Being clause 9 of schedule 1 to the *Migration Amendment (Temporary Protection Visa) Amendment Regulation 2013* (Cth) (the **TPV Regulation**) and clause 1 of schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (the **PPV Regulation**).

82 See e.g. *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 110 [19] per curiam.

83 *Women's Employment Regulations Case* at 406 and 408.

associated criteria.[84] Considered at the level of the particular provisions, the substance here is materially identical: the persons there specified cannot be granted a Subclass 866 (Protection) visa.

80. It is also necessary to bear in mind that there are a number of possible avenues available to the Government in the event that it wishes to re-cast a disallowed legislative instrument in narrower form. That includes, in particular, by way of the Senate rescinding the disallowance motion pursuant to s 48(1), thereby removing any obstacle to the later, narrower, instrument being passed.

10 81. The Act envisages that that is the course that will be followed, rather than seeking to invite the Court to seek to decipher from an inscrutable disallowance motion whether one part, or another or the whole of a disallowed legislative instrument was considered obnoxious by the Senate.[85]

82. It follows that the PPV Regulation was made in contravention of s 48(1) of the LIA and, by operation of s 48(2) of that Act, was, during the period of its purported operation, of no effect.

PART 6 – Applicable constitutional provisions, statutes and regulations

83. The applicable provisions of the relevant statutes and legislative instruments are set out in annexure A.

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PART 7 – Precise form of orders sought

84. The plaintiff seeks the following orders:

a. The demurrer be overruled with costs; and

b. The proceeding be referred to a single Justice for the disposition of the balance of the proceeding.

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84 Indeed, the application of clause 866.222 to the plaintiff, and the resulting refusal of his application for a protection visa, has led to the Minister considering his eligibility for other temporary visas: see para 15 of the statement of claim.

85 See Latham CJ in the *Women's Employment Regulations Case* at 362-363.

PART 8 – Estimate of time

85. The plaintiff estimates that he will require 1.5 hours for the presentation of his oral argument.

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