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 ANNOTATED WRITTEN SUBMISSIONS IN REPLY

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PART 1 – FORM OF SUBMISSIONS

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

PART 2 – ARGUMENT

'Unqualified words' are in fact qualified

2. The defendants' submissions regarding the construction of the *Migration Act 1958* (Cth) (**Migration Act**) overstate the significance of what they characterise as the 'unqualified words' of ss 31(3) and 504. While those 'unqualified words' may at first sight appear to confer a textually unbounded power to prescribe criteria for protection visas, that is not the legal meaning of those words (see PS [12]): they are subject to constraints discerned from the text and the context. One (now uncontroversial) limitation is that discerned by this Court in *M47/2012 v Director General of Security* (***M47***).[1] But it is not alone. Further consideration of the text and structure of the Migration Act reveals that the regulation making power, as it applies to protection visas, is hedged all around by constraints. And that is so notwithstanding that none of those constraints are the subject of 'express' 'prohibitions' directed to the regulation making power (cf DS [26]).

3. There is, for example, no 'express' provision in the Migration Act that 'in its terms prohibits' the making of a regulation that purports to operate upon the balance of the subject matter of the criterion in s 36(2)(a) (being the Minister's state of satisfaction concerning Australia's protection obligations in respect of the particular applicant). Is it therefore to be supposed that the executive could, say, exclude applicants whose protection claims are founded upon a particular convention ground – eg race or membership of a particular social group? Surely not.

4. To take a further example, there is no 'express' prohibition on the making of a regulation that provides that all applicants for a protection visa must have arrived prior to a particular specified date. Is it then to be supposed that the executive could effectively provide, by regulation, for a criterion effectively excluding applications for a protection visa made by persons arriving in Australia after that date? Again, surely not.

5. Or could it be the case that the regulation making power extends to the making of a regulation imposing a criterion excluding applicants who originate from, or have certain connections to, a particular Nation State? Again, the answer must be no.

6. An aspect of the reason that neither the first nor the third examples would be permissible is that the Migration Act deals elsewhere, and in some detail, with the same or similar subject matter. For example, ss 91R-91U qualify or define for the purposes of the Migration Act the Convention concepts of 'being persecuted', 'membership of a particular social group', 'non-political crime' and 'particularly serious crime'. And s 36(3) and sub-division AI deal with applications for protection visas made by persons with certain connections to third countries (see PS [58]). As the plaintiff submitted at PS [16] and [59], those features of the legislative design suggest that the regulation making power has a relatively narrow field of operation as regards protection visas. They give rise to what the plaintiff has referred to as an 'implicit negative proposition' about the reach of that power (PS [35]).

7. But there is a further aspect to the plaintiff's construction argument, being the 'positive proposition' discerned by this Court from the text and structure of the

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[1] (2012) 86 ALJR 1372.

Migration Act in *M61/2010E v The Commonwealth*[2] (***M61***) at [27]. That is, that the text and structure of the Migration 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'.

8. Each of the three examples identified above cannot stand with that 'positive proposition' because they involve a form of self-abnegation that would effectively frustrate that reflexive mechanism: it would enervate the power which Parliament intended would be 'responsive' to a valid application for a protection visa by an applicant 'in Australia' (be they from a particular country, advancing claims on a particular ground or at a particular time). And the same is true of the criteria imposed by former clause 866.222. As submitted at PS [17]-[64], the relevant repugnancy may be identified in one of two ways: by reference to the words 'in Australia' in s 36(2)(a) or more broadly, having regard to the comprehensive nature of the statutory scheme.

'In Australia'

9. For the reasons given at PS [17]-[46] the legislative history and the context suggests that (in contrast to the position that applied to and continues to apply to bridging visas) Parliament has used the term 'in Australia' to embrace both sides of the binary divide erected by the *Migration Reform Act 1992* (Cth), which amending enactment also inserted s 36(2)(a). That is, that term extends to any non-citizen in Australia, regardless of the circumstances in which that person came to be in Australia. Section 866.222 should therefore be understood as invalidly purporting to close up the area of operation for protection visas that Parliament designedly left open.

10. The defendants' response is essentially three-fold. First, it is said that the terms of s 36(2)(a) mean nothing more than that the criterion is 'capable of applying to persons who enter Australia as either lawful or unlawful non-citizens [and] does not confine the regulation making power so as to prohibit any regulation that impinges upon that capacity' (original emphasis) (DS [23]). But, to return to the first of the examples given above, the same would be true of the balance of the text of s 36(2)(a). And so it would equally follow from the defendants' argument that while that criterion is 'capable' of applying to all persons in respect of whom the Minister reaches the requisite state of satisfaction, that is no barrier to a regulation purporting to 'impinge' on that 'capacity' by excluding those whose protection claims are, say, founded upon race or membership of a particular social group. For the reasons given above, that submission should not be accepted.

11. Secondly, it is said by the defendants that the criterion in s 36(2)(a) refers only to an applicant being 'in Australia' and says nothing about the circumstances associated with that presence. But that is the very point the plaintiff seeks to make. And, in that sense, the presence of s 40 is indeed decisive here; but it is the defendants' submission that 'founders' upon that rock (cf DS [26]). In respect of protection visas, Parliament has expressly dealt with one, but only one, of the 'specified circumstances' contemplated by s 40(1) as a requirement for the grant of a visa: see s 40(2)(a). That, together with the comprehensive nature of the scheme that applies to the consideration, grant and refusal of protection visas (see further below), suggests a legislative choice that such 'circumstances' will not otherwise inhibit the grant of a protection visa. The general terms of s 40 do not intersect with the more

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[2] (2010) 243 CLR 319.

specific terms of s 36.

12. Thirdly, the defendants place considerable reliance upon s 46A,[3] insofar as it prevents certain non-citizens from applying for a protection visa by reference to the circumstances by which they come to be in Australia (DS [24]). But that submission depends, critically, upon an elision between the capacity to apply for a visa and the question of what criteria may lawfully be prescribed as a condition of its grant. In pursuit of the legislative objective identified in *M61*, s 46A is addressed only to the first matter, such that it remains the case (even where s 46A(1) is engaged) that the Migration Act provides power to respond to Australia's international obligations by granting a protection visa where the Minister determines to lift the bar.[4]

Exhaustive statement of exclusionary criteria for protection visas

13. The plaintiff's broader submission is that the Migration Act does not authorize the prescription of exclusionary criteria for protection visas in addition to those founded upon articles 1, 32 or 33 of the Refugees Convention (PS [49]-[64]).

14. The defendants' answer to that submission appears to rely largely upon the historical exercise of the regulation making power as evidence of its reach. But that argument is unpersuasive. Indeed, the authority relied on by the defendants makes clear that while it 'may be useful to read together regulations and the Act with which they were made, in order to identify the nature of a legislative scheme which they comprise' this does not warrant the use of regulations to construe and expand the terms of the Act.[5]

15. It is also said by the defendants that a 'similar argument was advanced in Plaintiff *M47*, although it was not accepted by any member of the Court': DS [36]. Perhaps more material is the fact that the correctness of that submission is yet to be authoritatively determined by this Court and is consistent with the passage from the reasons of French CJ in *M47* at [65] extracted at PS [56]: it is, as his Honour observed, the Act that creates the statutory scheme the purpose of which is to, inter alia, provide for cases in which Australia's obligations under the Convention are limited or qualified. And it is those qualifications, being qualifications that inhere within the text of the Act, to which Hayne J was referring in the passage extracted by the defendants at DS [40] from his Honour's reasons in *Plaintiff M76 v Minister for Immigration and Citizenship*.[6] Additional exclusionary limitations or qualifications would go outside the field of operation that the Migration Act marks out for itself: see PS [13].

16. The defendants' reliance upon s 46A, Subdivisions AI and AK of Division 3 of Part 2 and Subdivision B of Division 8 of Part 2 are not to the point: see DS [43]-[47]. It can be accepted that the Migration Act now envisages various means by which Australia can comply with its international obligations. But the making of a valid application for a protection visa triggers a particular statutory procedure, and enlivens a number of carefully crafted statutory duties: see ss 47(1), 47(2), 54(1), 55(1), 56(1), 57(2), 63(2)-(4), 65 and 65A.

17. Notably, the defendants make no attempt to wrestle with the various matters identified at PS [53]-[59] to which the Migration Act requires the Minister's attention in the course of that procedure. As submitted at PS [59], those features of the Act may be seen to be an exhaustive traverse of the Convention criteria prescribing the

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[3] Read with the definition of 'unauthorised maritime arrival' in s5AA.
[4] *M61* at [34] read with [27] and *M70 v the Commonwealth and Another*(2011) 244 CLR 144 (***M70***) at [226].
[5] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19] 109-110. See also *M47* at 1393 [56] per French CJ (Heydon J, to whom the defendants refer in footnote 26, was in dissent).
[6] (2013) 88 ALJR 324 at 346 [120].

circumstances in which Australia owes protection obligations, and the limitations imposed on, and the exceptions and qualifications to, those criteria. The prescription of additional criteria by regulation must fit within the interstices of that detailed legislative scheme in the manner identified by the plaintiff at PS [63]-[64].

Legislative Instruments Act

18. The only issue to be determined in relation to s 48 of the *Legislative Instruments Act 2003* (Cth) (**LIA**) is whether the relevant provisions of the two legislative instruments were "the same in substance". It is conceded by the defendants that both legislative instruments had the effect that a certain class of persons (the same class of persons) could not obtain a permanent protection visa: DS at [60]. That is, the effect in substance of each of those instruments was that that class of persons could not obtain the permanent visa for which they applied, and by reason of a criterion expressed in materially identical terms.

19. The defendants nevertheless seek to identify a point of differentiation to avoid the conclusion that the provisions are the 'same in substance'. To that end, it is said that the relevant effect of the *Migration Amendment (Temporary Protection Visa) Amendment Regulation 2013* (**TPV Regulation**) was also to separate protection visa applicants into two classes, with the members of both classes eligible for a visa of a sub-class of the visa class. As such, it is said, the TPV Regulation 'did not prevent any person from obtaining a Protection (Class XA) visa'. In contrast, it is said, the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**PPV Regulation)** required that those who did not satisfy the criterion in clause 866.222 be refused any form of protection visa.

20. But, as submitted at PS [79], every criterion added to *Migration Regulations 1994* (Cth) takes its place in a milieu of visa classes, sub-classes and associated criteria. The operation of a particular criterion to refuse an application for a particular visa will leave open the possibility that the applicant may obtain a visa of another class or sub-class. Indeed, that is what happened in the current matter. The application of clause 866.222 to the plaintiff has led to the Minister considering the plaintiff's eligibility for other temporary visas.[7] And, as is plain from the explanatory statement to the PPV Regulation, that outcome (which does not differ in substance from the supposed point of differentiation relied upon by the defendants in respect of the TPV Regulation) was the very thing the Executive government contemplated.[8] Whether such alternatives are or are not given the label 'protection visas' of a particular subclass is no more than a matter of form. It is irrelevant to the inquiry as to whether the particular provisions that in each case added clause 866.222 are the 'same in substance'. That inquiry is answered affirmatively by the observation that under both the TPV Regulation and the PPV Regulation, applicants in the position of the plaintiff are required to be refused grant of the permanent visa to which they are otherwise entitled.

21. Moreover, the defendants' submission invites the Court to permit the very device that Latham CJ cautioned against in the *Women's Employment Case*[9]: that of reintroducing a legislative instrument that preserves one area of an earlier instrument while subtracting another from it. And that, in turn, points to the fact that

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[7] See footnote 84 of the Plaintiff's submissions in chief.
[8] It was there said: 'It is expected that UMAs and UAAs who are found to engage Australia's protection obligations but who are affected by these amendments will continue to hold a Bridging visa with the same work rights and travel conditions that they currently hold': see Attachment B to the explanatory statement to the UMA Regulation.
[9] *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 347 (***Women's Employment Case***)

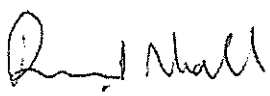
the defendants are approaching the question posed by s 48 at the wrong level of generality: the inquiry here is at the level of the particular provisions in each legislative instrument; not the set of provisions constituting the legislative instrument as a whole.

Unreasonableness

22. As to the question of unreasonableness, the defendants misstate the object advanced by the plaintiff. The object advanced by the plaintiff at [68] of his written submissions is to give effect to Australia's obligations under the Convention **and** to provide for cases in which those obligations are limited or qualified. Both limbs of that object inform the plaintiff's argument.

23. The defendants advance essentially three points as regards unreasonableness. **First**, it is said, that the Court is yet to 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. While that may be so, it should now be accepted as the doctrine of this Court. It 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.*[10] The defendants advance no reasons of principle for preferring a contrary view. **Secondly**, it is said that the doctrine, if it applies, should be restricted to 'purposive' powers. But, as Professor Pearce has persuasively argued, all delegated legislation making power may be seen to be 'purposive' – although the degree of specificity of that purpose will, of course, vary according to the terms of the empowering provision.[11] **Thirdly**, the defendants seek to invoke the broad statement of purpose identified by Gummow J in *M47* at 1406 [133]. But, for the reasons given by the plaintiff at PS[68], more specificity is required, particularly given that the power is conferred in terms of the prescription of criteria for 'visas of a specified class'. The relevant object is that identified at PS [68]. The defendants do not seek to argue that the impugned regulation is capable of being considered proportionate to that object and it is not.

24. Underlying that approach is an erroneous understanding of what was held by Latham CJ at 360-361 (see particularly DS [65(c)]). His Honour did not say that 'it is necessary' to undertake a comparison of each legislative instrument as a whole. Rather, reflecting the flexible or ambulatory approach identified at PS [73], [74], his Honour said that it 'might appear' from a comparison at that level that the two instruments are the same in substance, notwithstanding that the requisite degree of substantive equivalence is not apparent from a comparison at the level of the particular provisions. But here that further inquiry is not necessary.



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[10] *South Australia v Tanner* (1989) 166 CLR 161 at 167-168 and *Attorney-General (SA) v Adelaide CC* (2013) 87 ALJR 289 (***Corneloup***) at 309-310 [58] per French CJ and at 334-335 [198]-[201] per Crennan and Kiefel JJ.

[11] Pearce and Argument '*Delegated Legislation in Australia*' (2012) LexisNexis Butterworths at 320-321 and at 340. French CJ's reference in *Corneloup* to 'purposive powers' at [58] is to be understood in that light.