HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions
Note: see rule 44.08.2

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **MOUNIB ISMAIL**
Plaintiff

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
Defendant

DEFENDANT'S OUTLINE OF ORAL ARGUMENT

PART I CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. Decision-making under s 501(1) of the *Migration Act 1958* (Cth) involves two stages: *first*, consideration of whether the person the subject of any decision has satisfied the decision-maker that the person passes the character test; and *second*, if the person does not satisfy the decision-maker that the person passes the character test, the exercise of discretion to refuse, or not to refuse, to grant a visa to the person.

3. In respect of the second stage, the Migration Act does not set out considerations which, in exercising the discretion, a decision-maker is bound to take into account. Subject to implication of any mandatory relevant considerations from the subject-matter, scope and purpose of the Migration Act, the discretion is otherwise unconfined by the terms of the statute. In this regard, s 4 of the Act provides that the object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".

4. By *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, the Minister gave a written direction under s 499(1) about the exercise of power by decision-makers pursuant to those provisions. In respect of the exercise of the discretion in s 501(1), the Direction gave guidance to decision-makers about what permissible "considerations" must be taken into account, where relevant to a given case: see, eg, paragraphs 5.1(4) and 5.2.

5. Nothing said by the plaintiff establishes that the Direction is inconsistent with the Migration Act or the *Migration Regulations 1994* (Cth): see s 499(2). In particular:

(a) the considerations set out in the Direction are not stated to be exhaustive; nor are they required to be given particular weight in every case: see, eg, paragraphs 7(2) and 9(1);

(b) the considerations do not concern matters which, on a proper construction of s 501(1), a decision-maker is bound *not* to take into account; and

(c) the considerations are to be taken into account *where relevant* to the circumstances of the case: see, eg, paragraphs 5.1(2), 5.2 and 6.

Ground 1 – no erroneous consideration of best interests of minor children

6. In making the decision to refuse to grant the plaintiff a visa, the Minister's delegate did not misapply paragraph 8.3(1) of the Direction. In particular:

(a) paragraph 8.3(1) relevantly provides that decision-makers must make a determination "about" whether refusal to grant a visa under s 501 is, or is not, in the best interests of a child affected by the decision [**DS [33]**];

(b) such a determination may validly be that refusal to grant a visa is neither:

(i) in the bests interests of a child; nor

(ii) not in the best interests of a child;

(c) there may be cases where the evidence before the decision-maker is such that the only determination which can be made is that refusal is, in effect, neutral [**DS [33]**];

(d) the delegate made such a determination about the best interests of Mariam Chakik [**DS [35]-[36]**]; and

(e) having regard to the materials put before the delegate by the plaintiff and his legal representative [**DS [24]-[32]**], paragraph 8.3(1) did not, on its proper construction, prevent the delegate from lawfully proceeding in that way [**DS [33]-[34]**].[1]

7. Before making the decision, the delegate did not make inquiries of the plaintiff about Mariam Chakik, but the delegate did not have an obligation to do so, because:

(a) it was for the plaintiff and his legal representative to put forward the matters they wished the delegate to consider, along with materials in support of those matters; and the delegate was entitled to make a decision on the basis of what had been put forward, including the limited information about Mariam Chakik [**DS [37]**];

(b) even if:

(i) the delegate could have made a particular inquiry; or

(ii) it might now be said to have been desirable for the delegate to do so;

it does not follow that the lack of such an inquiry is legally unreasonable or otherwise gives rise to jurisdictional error [**DS [39]**];

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1 Any misapplication of paragraph 8.3(1) (which is denied) would, in any event, not have been material to the outcome of the delegate's decision [**DS fn 32**].

(c) among other things, Mariam Chakik's age was not a "critical fact" [**DS [40]**], because knowledge of that fact would not have revealed anything about:

(i) the nature of the plaintiff's relationship, if any, with her; and

(ii) how, if at all, she might have been said to be affected by any visa refusal; and

(d) in reality, the plaintiff's argument must be that the delegate should have conducted a general inquiry into the nature and circumstances of his relationship with Mariam Chakik and the potential effect of visa refusal on her; no such obligation arose here [**DS [41]**].

Ground 2 – no "repetitive" weighing of family violence "in an identical way"

8. The Direction provides guidance on, and a framework for, the exercise of the discretion in s 501(1) of the Migration Act. That guidance does not compel the decision-maker to reach a particular decision [**DS [43]**]. The Direction does not fetter the discretion of the decision-maker; nor does it purport to do so.

9. The matters to be taken into account in respect of the primary and other considerations identified in the Direction can and do overlap [**DS [44]**]. In respect of family violence, the potential for overlap between the considerations in paragraphs 8.1, 8.2 and 8.4 is recognised by the terms of the Direction itself. However, each of those considerations refers to family violence in different ways. The mere fact of potential overlap between these considerations does not mean that a decision-maker will repetitiously give weight to family violence in an "identical way", for an "identical reason". An administrative decision-maker is not prohibited from taking into account a particular fact, issue or matter in relation to more than one relevant consideration, where the decision-maker perceives that it is relevant to each consideration [**DS [45]-[46]**]. The weight to be attributed to that fact, issue or matter is for the decision-maker to determine.

10. In the circumstances, the plaintiff has not identified any proper basis upon which it might be said that the Direction is invalid [**DS [50]**]. Further, the delegate's consideration of family violence committed by the plaintiff was not illogical, irrational or unreasonable [**DS [47]**]. It was open to the delegate to consider, and give weight to, family violence committed by the plaintiff, both in its own right (as a matter of Australian Government concern) and to the extent that it informed considerations of the protection of the community and the expectations of the community [**DS [48]**].

Ground 3 – no "punitive" or "irrelevant" weighing of family violence

11. Nothing in the delegate's decision, read fairly as a whole, suggests that the delegate approached the exercise of power in s 501(1) with any punitive purpose or in any other "irrelevant way" [**DS [53]**]. Nor did the Direction impermissibly require as much. The delegate was entitled to consider the past conduct of the plaintiff in assessing considerations relating to protection of the Australian community, family violence, and expectations of the community [**DS [55]-[56]**]. That was done for the purpose of deciding whether, as a matter of discretion, the plaintiff should be granted a visa to enter Australia. It was not undertaken for any purpose of punishment for past conduct.

Ground 4 – no failure to consider personal circumstances

12. The delegate's reasoning in respect of the consideration concerning expectations of the community was orthodox and in accordance with paragraph 8.4 of the Direction [**DS [58]**]. Nothing in paragraphs 8.4(1)-(4) identified any countervailing matters that the delegate was obliged to assess against the community expectations identified in the Direction [**DS [59]**]. Indeed, paragraph 8.4(4) stated that this consideration is about the expectations of the community "as a whole" and, for purposes of paragraph 8.4, decision-makers should proceed "without independently assessing the community's expectations in the particular case".

13. Further, and in any event, the plaintiff does not point to any submission made by him or his legal representative that the expectations of the Australian community were to be assessed and weighed against his own personal circumstances [**DS [59]**]. It cannot be said that the delegate misunderstood the case put forward by the plaintiff and his representative.

14. The plaintiff's argument also fails to read the delegate's reasons fairly and as a whole. The delegate took into account matters raised by the plaintiff about his personal circumstances and weighed those matters in favour of not refusing to grant the plaintiff a visa [**DS [60]**]. Contrary to what might be suggested by the plaintiff, there was no failure by the delegate to weigh the Australian community expectations against the plaintiff's personal circumstances [**DS [62]**].

Dated: 6 September 2023

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