HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **Mounib Ismail**
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
Defendant

PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Preliminary

2. The Plaintiff moves on the amended application filed on 1 September 2023. He reads the affidavits in support of the application to extend time at AB 364–97. On the substantive application, he reads the affidavit of Halima Chakik filed on 28 June 2023.
3. For the reasons given at PS [16]–[22], it is necessary in the interests of justice to extend the time in which the Plaintiff can apply for a remedy in this Court's original jurisdiction. The Defendant does not oppose the extension: DS [21].

Ground 1 – Failure to make obvious inquiry

4. The delegate's treatment of Mariam Chakik's best interests is found at AB 56 [75].
5. The delegate was not engaged in adversarial proceedings but in an inquisitorial role: compare *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [18] (**JBA vol 3 tab 19**).

Failure to make an obvious inquiry

6. Statutory powers ordinarily require decision-makers to make an obvious inquiry about a critical fact, the existence of which is easily ascertainable and could supply a sufficient link to the outcome: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 289–90 (**JBA vol 2 tab 4**); *SZIAI* [25] (**JBA vol 3 tab 19**); *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, [61]–[66] (**JBA vol 2 tab 5**); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [49] (**JBA vol 2 tab 6**).
7. Whether or not an inquiry was required by the statutory power depends on the statutory and factual context (PS [31]) as well as the importance of the decision and the consequences of the person: *Videto and Another v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167, 178 (**JBA vol 5 tab 37**).
8. Two significant features of the factual context were:
   a. the decision-making process was a dynamic and informal one – the Department was in email contact with the Plaintiff's legal advisors (and the Plaintiff himself AB 146) and those exchanges were responsive and prompt: AB 104–8, 268–74; and
   b. the delegate had Mariam's mother's contact details: AB 160.
9. The inquiry could have yielded a useful result (Agreed facts [15]–[16]; affidavit of Halima Chakik, 28 June 2023).

Failure to comply with Direction 90

10. The delegate also failed to comply with paragraph 8.3 of Direction 90 (**JBA vol 6 tab 42**). This consideration remained 'relevant' even if the Applicant had not made it 'a positive part of his case' because the delegate was aware of Mariam and that she was said to be a minor child: *Uelese* [61], [64] (**JBA vol 2 tab 5**).

Ground 2 – Repetitious weighing of family violence

11. There is a difference between weighing a single factual matter repetitiously, and considering a single matter to be relevant in different ways to different legal considerations: PS [49]–[50], citing *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646, [26] (**JBA vol 3 tab 9**).
12. What occurred here was repetitious weighing: PS [52]–[54]. The delegate attributed independent weight to family violence at (at least) three points in the reasons having only identified two different ways in which the family violence was legally relevant (namely,

relevant to protection and expectations): PS [55]. See especially the delegate's reasons at paragraphs 33 (and 52), 67 and 79.

13. Repetitious weighing is illogical, irrational or otherwise unreasonable: PS [58].
14. Direction 90 should be read not to permit or require repetitious weighing: PS [57]–[59].
15. Alternatively, if Direction 90 does purport to permit or require repetitious weighing it is invalid: PS [60]–[62].

Ground 3 – Punitive or otherwise irrelevant treatment of family violence

16. Ground 3 is in the alternative to ground 2, and thus proceeds on the assumption that the delegate attributed weight to family violence under paragraph 8.2 of Direction 90 for some reason other than protection or expectations of the Australian community.
17. The Defendant submits in this Court that family violence was permissibly given weight 'in its own right' (DS [48]), without explaining what that means.
18. The delegate's analysis to that weighting was purely backward looking, which supports the characterisation of it as punitive: *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [192] (**JBA vol 3 tab 22**).

Ground 4 – Erroneous approach to expectations of the Australian community

19. As a matter of principle, consideration of the expectations of the Australian community must involve calibration of the weight to be given to that matter according to the specific circumstances particular to the Plaintiff:
    a. *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396, [97]–[101], [107]–[108] (**JBA vol 3 tab 15**);
    b. *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559, [70], [84]–[91] (**JBA vol 3 tab 8**).
20. That reading of Direction 90 brings together paragraph 8.4 with paragraphs 5.1(2) and 5.2(5).
21. Here, the Plaintiff did not direct a submission to the expectations of the Australian community in terms, but he did make a number of submissions about his particular circumstances – especially his health, his commitments in Australia and the dire circumstances in Lebanon – and on the stated basis that they were relevant to 'various considerations in Direction no. 90' (AB 139 [48]).

Dated: 5 September 2023

David Hooke SC **Jason Donnelly** **Julian R Murphy**