HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 22 Feb 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S102/2022
File Title:	ENT19 v. Minister for Home Affairs & Anor
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Plaintiff
Date filed:	22 Feb 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **ENT19**
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

REPLY SUBMISSIONS OF THE PLAINTIFF

(Filed pursuant to paragraph 6 of the orders made on 8 December 2022)

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

II. REPLY

A. The national interest criterion

A-1 "Subordinate legislation … made by Parliament"

2. The defendants' submissions (**DS**) at **[6]-[8]** advance an assertion, novel and unsupported by authority, that a clause inserted into the Regulations by statute, rather than by the Governor-General pursuant to s 504(1), cannot be ultra vires the Act by reason of repugnancy or inconsistency. The submission is misconceived. It is not a question of whether Parliament had power under s 51 of the Constitution to enact the law inserting cl 790.227 into the Regulations (cf **DS [7]**). It is whether cl 790.227, a clause found in statutory rules made and registered under the Act, is repugnant to its parent Act. "Ultra vires … is a perfectly respectable shorthand to identify that legal defect or vice which consists in the making of a subordinate instrument which is not authorised by the text of its supposed parent in main legislation".

3. By enacting items 18D[1] and 18E[2] of Pt 1 to Sch 2 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the **Legacy Caseload Act**), what Parliament did was to make subordinate legislation. So much is accepted by the defendants at **DS [7]**. Once the Regulations as so amended by items 18D and 18E were registered (which they were, on 14 January 2015), then at and from that date, by force of s 5(3) of the *Legislative Instruments Act 2013* (Cth),[3] Subclass 790, including cl 790.227, had effect as subordinate legislation, registered as statutory rules made under the Act. Parliament had confirmed this at the time of enacting the Legacy Caseload Act, by s 3(2) of that Act; it provided that the "amendment of any regulation under subsection (1)[4] does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General".

4. Parliament did not make any amendment to the Act itself to give effect to cl 790.227 as a statutory criterion for a protection visa (though it could have).

5. Clause 790.227 is thus to be construed according to the principle that, even without any expressed constraint (such as that found in s 504(1)), it cannot be repugnant to the primary Act, and will be ultra vires the Act if it is.[5]

6. Given the exceptional circumstances of Parliament itself enacting "subordinate legislation", it is not helpful to analogise by reference to instances where Parliament has sought retrospectively to cure invalid regulations made by the Executive (cf **DS fn 2**).[6] To the extent an analogy is thought useful, the proposition advanced by the plaintiff finds some support in the approach taken in several decisions, including decisions of this Court, to regulations that have been deemed by legislation to have force and effect *as if they had been enacted in the primary Act*. Those cases establish that, notwithstanding Parliament's evident will that the impugned regulations are to have force as if enacted in the primary

---

[1] Item 18D inserted Safe Haven Enterprise (Class XE) into Sch 1 to the Regulations as a class of visa.
[2] Item 18E inserted cl 790 into Sch 2 to the Regulations.
[3] Section 5(3) of the *Legislative Instruments Act* then provided that "[a]n instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument".
[4] Section 3(1) of the Legacy Caseload Act relevantly provided that "any other item in a Schedule to this Act has effect according to its terms".
[5] *Plaintiff M47* (2012) 251 CLR 1 at 41 [54] (French CJ).
[6] The three cases cited at **DS fn 2** involve instances where Parliament has, by subsequent legislation, deemed a regulation to be valid. This analogy is inapt. The better analogy is where Parliament has legislated that regulations made have full force and effect as if made under an Act: see Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at 330-332 [13.200].

Act, inconsistency between the primary Act and the regulations will give rise to invalidity, or otherwise render the subordinate legislation inoperative or of no effect.[7]

A-2 Clause 790.227 is inconsistent with the Act

7. The plaintiff otherwise responds to the balance of the defendants' submissions with respect to inconsistency as follows.

8. None of the "contextual matters" identified at **DS [9]-[16]** overcome the specific inconsistency that arises. The reliance on Gummow J's dissenting judgment in *Plaintiff M47* at **DS [9]** overlooks that s 504 of the Act is not the only prohibition on inconsistency between a statute and delegated legislation. Even without the expressed constraint in s 504(1), delegated legislation may not be repugnant to the Act under which it is made.[8]

9. In any event, the invocation of s 504(1) of the Act is difficult to follow, given the submission at **DS [7]** that cl 790.227 is an act of legislative power. If the defendants' primary position is that cl 790.227 is of legislative force, then the relevance of ss 31(3) and 504(1) is not clear, as it would follow that cl 790.227 is not in truth a criterion "prescribed by" the Regulations, but a criterion set by Parliament. At **DS [31]** it is said that cl 790.227 forms part of the Act to be construed as a whole. Earlier, however, it is said that by enacting cl 790.227, Parliament "confirmed that the power to prescribe visa criteria in s 31(3) includes the power to prescribe a 'national interest' criterion" (**DS [15]**).

10. The overall effect of these submissions, which are in some tension with one another, seems to be that because cl 790.227 was enacted by Parliament, there can be no inconsistency between it and the provisions of the Act. But of course, cl 790.227 is not and never was part of the Act; rather, it was included in the Legacy Caseload Act.

11. **DS [11]** is non-responsive to **PS [22]**, which observes that it is implicit in s 4(1) that the Act, read as a whole, already reflects Parliament's calibration of what the national interest requires. Section 4(1) supports the asserted inconsistency, rather than undermines it.

12. Neither the length of time the national interest criterion has been a criterion for the grant of protection visas under the Regulations, nor the existence of a similar criterion in refugee and humanitarian visas prior to the Reform Act, bears on the question of

---

[7] See, eg, *Duncan v Theodore* (1917) 23 CLR 510 at 524 (Barton J); *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460 at 481-482 (Gibbs J), referring to *In Re a Solicitor* [1953] St R Qd 149 at 159-162; *Foster v Aloni* [1951] VLR 481 at 483-484 (Lowe A-CJ); *Concore Pty Ltd v Mulgrave Shire Council* [1988] 2 Qd R 395 at 404 (Derrington J).

[8] See, eg, *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588 (Dixon J); *Plaintiff M47* (2012) 251 CLR 1 at 41 [54] (French CJ).

inconsistency between cl 790.227 and the Act as it is currently in force (cf **DS [12]-[14]**). Although *legislative* history may be relevant to the question of construction of regulations, as a matter indicative of the general purpose and policy *of the Act,* the reverse does not follow: it is not permissible to expand the operation of an Act by reference to regulations, as the plaintiff submitted in chief (**PS [7]**). The starting point for ascertaining inconsistency is to construe the statute itself, including the scope of the provision authorising the making of regulations, to consider whether a regulation made under the Act is impermissibly inconsistent with it.

13. The submission at **DS [18]** that each of s 36(1C), s 501(3) and cl 790.227 impose cumulative requirements for the grant of a SHEV simply does not confront the plaintiff's submission that this renders otiose the tightly controlled scheme of discretions and powers found in the Act itself, particularly in relation to the grant of a protection visa, nor the instances of direct inconsistency that arise between the provisions of s 501 and cl 790.227, nor the inconsistency with the purposes of the Act as a whole. To repeat, drawing on the language used in *KDSP*, it is not that cl 790.227 provides "an additional hurdle" that renders it impermissibly inconsistent with the Act. It is that cl 790.227 circumvents or dispenses with the tightly controlled criteria in the Act, in particular ss 36(1C) and 501(3), by providing a lower bar for refusal of a protection visa that renders nugatory those provisions of the Act and is inconsistent with the expressed statutory purpose.

14. The argument developed at **DS [19]-[23]**, and the defendants' reliance on the decision of the Full Court of the Federal Court in *VWOK*,[9] faces a number of difficulties. First, for the reasons already addressed above, as well as those raised in chief (**PS [18]**), cl 790.227 is subordinate to the provisions of the Act and is to be construed as such. More fundamentally, however, the argument is premised upon cl 790.227 being directed at a different subject matter than ss 36(1C) and 501(3). Yet the defendants concede that the plaintiff's offending in this case was the "reason" for the Decision under cl 790.227 (**DS [33]**). This strongly suggests, contrary to the defendants' submission, that cl 790.227 has the same overlapping field of operation as ss 36(1C) and 501(3) – dealing with "essentially the same mischief and each requir[ing] an assessment of essentially the same subject"[10] – but with cl 790.227 occuping a different, subordinate, position with respect to ss 36(1C) and 501.

[9] (2005) 147 FCR 135.
[10] *KDSP* (2020) 279 FCR 1 at 25 [93] (Bromberg J).

15. The submission at **DS [24]** is misconceived. Given that *KDSP* established that s 501 applies to protection visas, it would render s 501 ineffective and redundant in its application to protection visas if cl 790.227 were valid.

16. For the reasons explained at **PS [22]-[23]**, the Act exhaustively regulates the subject matter of the national interest (cf **DS [26]**).

17. **DS [30]** is wholly non-responsive to the plaintiff's submission at **PS [26]** and the cases relied upon, which distinguish between a power to prescribe a standard or criterion for a visa, and a power to decide on an ad hoc and subjective basis whether to grant a visa in a particular case. By its nature, cl 790.227 is a power of the latter kind; it is thus not within the scope of s 31(3) of the Act.

18. In regards to cl 790.227 impermissibly providing for a further liability for the plaintiff's offending in addition to that provided for by the Act, the defendants' concession at **DS [33]** that the plaintiff's offending was the "reason" for the Decision is important. It has consequences for the plaintiff's submission that the exercise of the power was punitive, so as to contravene Ch III.

19. Finally, the submissions at **DS [33]-[34]** suggest the defendants misunderstand the plaintiff's submission. The plaintiff's submission is that the consequences for offending under ss 233A to 234A are provided for exhaustively by the Act, such that the Regulations cannot impose a further and additional liability to that provided for by the enabling Act, consistently with the authorities discussed; not that another legislature could not impose further consequences. For the same reason, *Huynh* is not apposite, as it involved consideration of s 501(2) and not whether delegated legislation purported to impose a distinct and independent liability to that imposed by the legislature. To the extent the defendants' answer to this submission depends on its position that cl 790.227 has the force of a provision of the Act itself (**DS [31]**), this has already been addressed.

B. The purported exercise of power was unconstitutional and punitive

20. The analogy with civil penalties and disciplinary sanctions at **DS [41]** is inapposite. Each of the cases referred to at **fn 45** are concerned with a Ch III court having conferred upon it the power to impose a civil penalty. The decisions at **fn 46** do not address whether Ch III may be infringed by the Executive purportedly making a decision pursuant to a statutory power directed solely to the grant, or the withholding, of the benefit of residing lawfully in the Australian community. By analogy, as the plurality stated in *Alexander*, "[s]uch a

consequence cannot be equated with the cancellation of a licence or other privilege conferred by a statute which regulates business or other activities".[11] Where the consequence of the exercise of a statutory power is refusal of a protection visa to a person in respect of whom Australia owes non-refoulement obligations, when that power is exercised by reason of a person's criminal conduct and unconnected with any protective purpose it "is punishment of a different order from the loss of a statutory privilege or a licence under a regulatory regime".[12] For the reasons already stated in the plaintiff's submissions in chief, which bear repeating, the consequences for the plaintiff of the purported exercise of power are no less than catastrophic.

10 21. Relatedly, as to **DS [43]**, the distinction the defendants seek to draw between cancellation and refusal of a protection visa raises no higher than an assertion. The defendants advance no principled basis for drawing this distinction. It is not supported by Wheelahan J's judgment in *ENT19* in the Full Federal Court (cf **DS fn 49**).[13] To the extent that that distinction is significant, the remarks of Allsop CJ and Katzmann J in *NBMZ* (a refusal decision, not a cancellation decision) might be thought to suggest a decision made to refuse a protection visa by reason of the person's criminal offending is more likely, not less likely, to be punitive than a cancellation decision[14] – particularly where, as here, the basis for the refusal is not ss 36(1C) or 501, and thus does not import any requirement that regard be had to the protection of the Australian community.

20 22. The submission at **DS [46]-[47]** that the Decision was not made for the purpose of deterrence is unconvincing. The defendants submit that "the concept of 'deterrence' appears nowhere in the Decision" (**DS [47]**). At [20], the Minister commences her consideration of the national interest by stating "I have had regard to the effect of granting a protection visa to a person who has been convicted of a people smuggling offence".[15] The Minister continued (at [22]-[24]):[16]

> In my view, granting a protection visa to a person who has been convicted of people smuggling would send the wrong signal to people who may be contemplating engaging in

---

[11] *Alexander* (2022) 96 ALJR 560 at 579 [77] (Kiefel CJ, Keane and Gleeson JJ).
[12] *Alexander* (2022) 96 ALJR 560 at 579 [77] (Kiefel CJ, Keane and Gleeson JJ).
[13] Wheelahan J at [154] of *ENT19* (2021) 289 FCR 100 did not refer to any distinction between visa cancellation and refusal, and did not say that refusal of a visa for the sole purpose of deterrence could not be characterised as punitive; rather, his Honour characterised the Minister's decision as having been primarily for national interest objectives rather than deterrent objectives.
[14] *NBMZ* (2014) 220 FCR 1 at 8 [28] (Allsop CJ and Katzmann J); see also *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 at 46-47 [5]-[6] (Allsop CJ and Katzmann J), see also at 80 [142] (Buchanan J).
[15] **AB Vol 2 94**.
[16] **AB Vol 2 94**.

> similar conduct in the future, thereby potentially weakening Australia's border protection regime. It is not in the national interest for a person convicted of people smuggling to be seen to get the benefit of a protection visa.
>
> …
>
> With regard to matters specific to [the plaintiff], even if he were to undertake not to disclose publicly that he has been granted a protection visa, in my opinion, there are so many ways by which the grant of the visa may became known (including, for example, through the Australian media or the Senate estimates process) that it is unrealistic to think that it could not become publicly known. In this respect, I note the considerable media coverage of [the plaintiff's] conviction for people smuggling.

23. The concept of general deterrence in sentencing and at common law, which has long been recognised as one of the primary purposes of punishment, involves "making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment" and recognises that "the fear of severe punishment does, and will, prevent the commission of many offences that would have been commnitted if it was thought that the offender could escape … with only a light punishment".[17] On any reasonable interpretation, it is plain the Decision was made for the sole or substantial purpose of general deterrence. Indeed, the Decision falls squarely within that concept as it has been understood and applied in sentencing: it was directed primarily at sending a signal to would-be people smugglers that any such offending would not be met with only a light punishment.

C. Relief

24. As to peremptory mandamus, the defendants do not explain why it "should not be countenanced" that this Court issue a writ of peremptory mandamus commanding the Minister to grant the plaintiff a SHEV (**DS [65]**). As stated at **PS [65] fn 99**, such order can be made by this Court "in the first instance", pursuant to rule 25.13.7 of the *High Court Rules 2004* (Cth), and further, as this Court observed in *Plaintiff S297*, the practice to be adopted in this Court must accord with s 32 of the *Judiciary Act 1903* (Cth), and the Court "shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled … so that as far as possible all matters in controversy between the parties regarding the cause of action … may be completely and finally determined".[18]

---

[17] *R v Radich* [1954] NZLR 86 at 87, cited in, eg, *R v Rushby* (1977) 1 NSWLR 594 at 597-598 (Street CJ), *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 98 [38] (Kiefel CJ, Bell, Keane and Steward JJ), *Environment Protection Authority v Grafil Pty Ltd* [2022] NSWCCA 268 at [106] (Bellew J); see also *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

[18] *Plaintiff S297* (2015) 255 CLR 231 at 249 [44] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

25. This case is, in any event, extraordinary (cf **DS [64]**). If it is found that the Minister's one reason given for refusing the SHEV was legally infirm, there is no basis for granting mandamus permitting the Minister *yet another* opportunity to attempt to lawfully exercise the power to determine the SHEV (in what would be the fourth attempt by successive ministers to do so).[19] Given the parties' agreement that apart from cl 790.227 of the Regulations, the other criteria prescribed for the visa by the Act and the Regulations are satisfied, there is only one lawful path open to the Minister (cf **DS [66]**). In those circumstances, the duty that remains unperformed is the duty *to grant the SHEV*, not merely to lawfully determine the plaintiff's application. The order sought by the plaintiff is not only appropriate, but necessary to quell the controversy between the parties.

10

Dated: 22 February 2023

Bret Walker
T (02) 8257 2500
E caroline.davoren@stjames.net.au

Lisa De Ferrari
T (03) 9225 8444
E lisa.deferrari@vicbar.com.au

Jason Donnelly
T (02) 9221 1755
E donnelly@lathamchambers.com.au

Elizabeth Brumby
T 0431 594 036
E e lizabeth.brumby@vicbar.com.au

[19] Cf *EPU v Minister for Home Affairs* [2020] FCA 541 at [4] (Steward J).