IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P49 of 2016

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

YOGESH KUMAR AND ORS
Respondents

RESPONDENTS' SUBMISSIONS

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Part I: Certification

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

Part II: Statement of issues

2. The Respondents contend that the appeal presents the following issue:

   Where the First Respondent could make an application for a visa (a Subclass 572 visa) by virtue of the combination of ss.45 and 46 of the *Migration Act 1958* (Cth) and subclauses 572.211(1) and (2) of the *Migration Regulations 1994* until midnight Sunday, 12 January 2014, did those provisions "allow a thing to be done" within the meaning of s.36(2)(a) of the *Acts Interpretation Act 1901* (Cth).

Part III: Notices pursuant to s 78B of the Judiciary Act 1903 (Cth)

3. After consideration, the Respondents have concluded that no notice is required to be given by s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of contested material facts

4. Subject to the following matters, the Respondents accept the facts put by the Appellant in Part V of his submissions.
5. The Appellant's delegate's decision was affirmed by the Migration Review Tribunal rather than the Administrative Appeals Tribunal (*cf* [11] of the Appellant's submissions).
6. In [9] and [11] of his submissions, the Appellant seeks to draw conclusions as to the legislative effect of certain facts. Those conclusions are not accepted.

Part V: Statement in relation to applicable provisions

7. Subject to the inclusion of s.2 of the *Acts Interpretation Act*, the Respondents accept the applicable statutes and regulations as per Part VII of the Appellant's submissions.

Part VI: Argument

8. It is trite that:

8.1 a statute is to be construed so as to give the words used the meaning which the legislature objectively intended them to have[1]; and

8.2 the primary focus, and best guide, in determining the legislature's intention should be on the words actually used[2].

9. Consequently, the task is not to be approached with any preconceived ideas as to what the provisions are doing or providing. For example, statements that s.36(2) of the *Acts Interpretation Act* or similar provisions do not affect "status" rather distract attention from the words actually used.

10. It is submitted that reading the words used by the Parliament in s.36(2) of the *Acts Interpretation Act* in an ordinary way supports the Respondents' contentions.

11. It is common ground that the First Respondent held a Subclass 485 (Temporary Graduate) visa.

12. Because he held that 485 visa, by the combination of ss.45 and 46(3) of the *Migration Act* and subclauses 572.211(1) and (2)(d)(iia) of the *Migration Regulations* he could, or was allowed to, make a valid application for a Subclass 572 visa.

13. The Appellant accepts that making a visa application is "a thing to be done" within the meaning of s.36(2)(a) of the *Acts Interpretation Act*[3].

14. The last day the First Respondent could do that thing – i.e. make a valid application as a holder of a 485 visa – was Sunday, 12 January 2014.

15. As the last day the First Respondent could do the thing was a Sunday, the thing (the making of the application) could be done on the next day, a non-holiday Monday.

16. The Parliament has, in the text of the *Acts Interpretation Act*, provided an Example of how s.36(2) is to operate. Adapting the language of the Example to this case: the First Respondent had until 12 January 2014 to make a valid application and 12 January 2014 was a Sunday, so the application could be made on Monday, 13 January 2014.

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[1] *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ.

[2] *Alcan (NT) Alumina v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

[3] [16] of the Appellant's submissions.

17. Contrary to the Appellant's submissions, with respect, it is not to the point that clause 572.211(3) of the *Migration Regulations* provided differently if the applicant was not the holder of a substantive visa: see subclause 572.211(3)(a). That is because:
    17.1 that was not the application which the First Respondent *could* make up until Sunday, 12 January 2014; and
    17.2 the First Respondent did not, factually, meet the requirements of subclause 572.211(3) and so could not, or was not allowed to, make a valid visa application by reference to any of those provisions[4].
18. The Respondents submit that s.36(2) of the *Acts Interpretation Act* applies where the *effect* of the provisions is to create a last day on which a thing may be done. Here, legislative provisions effectively provided for the last day for the making of a valid visa application by the First Respondent.
19. Section 36(2) of the *Acts Interpretation Act* did not change or affect the First Respondent's status or his 485 visa. Rather, it allowed him an "extension" from a Sunday to a working day to do a thing.
20. The point of difference between the parties' two constructions advanced is that the Appellant appears to require that the provisions, on their face, speak of a time period, or "prescribe" a last day, for an application to be made before s.36(2) has operation[5].
21. It may be accepted that the provisions referred to above did not, on their face, set down a last day for the making of an application. But the legislation did have that effect.

The present s.36(2) versus the previous

22. The words used in the present s.36(2) of the *Acts Interpretation Act* are different from the words used in the previous version.
23. Strictly, the question of whether there has been a change to the meaning of s.36(2) via the amendments made is not before this Court. It is submitted the question of what the present provision means should be answered without considering what the previous version meant.

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[4] *cf* [18] of the Appellant's submissions.
[5] See, for example, the first issue framed by the Appellant and then at [18] and [38] of the Appellant's submissions.

24. That said, the subsection now applies if an Act "requires or allows" a thing to be done. It is submitted that there is a noticeable difference in both the language, and focus, of the present s.36(2) of the *Acts Interpretation Act* compared with the previous version. It no longer refers to the last day of a "period prescribed or allowed by an Act".
25. It is submitted that the present provision operates where the *effect* of the Act allows a thing to be done by a last day (in addition to where the same is expressly provided). That is the important thing to focus on. As there is now no reference to "any period" in an Act, the express provisions of the Act are not now the focus of s.36(2) (if they were before).
26. The Appellant contends that there is no change in meaning resulting from the change in the words used.[6]
27. On this basis the Appellant contends that the Full Federal Court decision in *Zangzinchai v Millanta*[7] was both correct and of assistance in construing the present s.36(2).
28. If the Respondents' submission as to the meaning of the present s.36(2) of the *Acts Interpretation Act* is accepted, then there is no need for this Court to consider the correctness of the Full Federal Court's decision in *Zangzinchai*[8].
29. If, however, the Court accepts that the change in words did not affect the meaning of s.36(2), then the Respondents submit that *Zangzinchai* was not correctly decided.
30. It is submitted that there were two distinct "operations" of the previous s.36(2) of the *Acts Interpretation Act*:
    30.1 where the last day of any period was *prescribed* on the face of the provision; *or*
    30.2 there was a period of time effectively allowed by an Act (but not necessarily on its face) for the doing of anything.
31. It may be accepted that the present s.36(2) is clearer in its terms in this respect than was the second operation of the previous provision.

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[6] Appellant's submissions at [31].
[7] (1994) 53 FCR 35.
[8] (1994) 53 FCR 35.

32. It may be noted that the first operation of the previous version may have caused the provision to be read with a focus on what expressly was provided for on the face of an Act.

33. That approach appears to have been influential in the construction reached by the majority (Neaves and Beazley JJ) in *Zangzinchai*[9].

34. The majority adopted an interpretation of the provision by which the "period" and the thing allowed to be done both had to appear on the face of the legislative provision. The majority said:

> "[The Regulations] did not prescribe or allow a time for the doing of anything.[10] …
>
> Similarly, reg 21(3)(a) of the … *Regulations* did not provide for the doing of anything.[11] …
>
> The regulations did not prescribe or allow a time in which an application for an extended eligibility (economic) entry permit might be made"[12].

35. It is apparent that the Appellant, as did the majority, reads the second operation of the previous s.36(2) ("or allowed by an Act") as being conditioned or restricted by the words in the first operation such that what was allowed and the time period both had to be apparent on the fact of the Act.

36. It is submitted, with respect, that approach is not correct.

37. With respect, the reasoning of Burchett J is to be preferred to that of the majority. His Honour stated that the previous s.36(2) of the *Acts Interpretation Act* applied:

> "… where the *effect* of an Act is to prescribe or allow "anything" to be done on a Sunday etc, whether or not that effect arises out of a direct and precise prescription.[13]

38. The approach taken by Burchett J reflected, it is submitted, more fully the words actually employed by the previous s.36(2), whether or not one accepts that the provision was intended to be remedial. So, contrary to the Appellant's

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[9] (1994) 53 FCR 35.
[10] (1994) 53 FCR 35 at 39B.
[11] (1994) 53 FCR 35 at 39C.
[12] (1994) 53 FCR 35 at 39D.
[13] (1994) 53 FCR 35 at 48B-C – emphasis in the original. See also Burchett J at 44C-F.

submissions, this Court's decision in *Khoury v GIO (NSW)*[14] is not against the Respondents' submissions.

39. The Respondents submit that the correct interpretation of the previous s.36(2) of the *Acts Interpretation Act* was that Mr Zangzinchai was "allowed" to make an application while he was lawfully present in Australia, which was up until Sunday, 1 March 1992. As that last day was a Sunday, the application, being the thing which was allowed to be done, could be done on the first day following that Sunday, i.e. the Monday, 2 March 1992.

40. If the Court is of the view that there was no material change to the effect of s.36(2) of the *Acts Interpretation Act* made by the change in words, the Respondents submit that both formulations of words allow for the provision to apply where the effect of the legislation determines that there is a "last day for doing the thing", whether or not that is express.

Other decisions

41. It may be accepted, as the Appellant submits, that this Court's decision in *Associated Dominions Assurance Society v Balmford*[15] only touched obliquely on the construction of s.36(2) of the *Acts Interpretation Act*.

42. It may also be accepted that this Court held in that case that the previous s.36(2) of the *Acts Interpretation Act* could not make an invalid notice valid. That holding does not assist with this case.

43. This Court did not consider, and did not need to consider, whether the correct interpretation of the previous s.36(2) included it applying where the *effect* of the Act was to create such a time period.

44. However, to the extent that some of the judgments touched on the correct interpretation, they are not against the Respondents' submissions in this case. To determine when the company had to respond to a (valid) notice, an enquiry would have to be made of the factual position; what was the effect (on the facts) of the provision. That is, what was the last day specified by the notice for the company to show cause. That last date would not be apparent from the face of the legislation.

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[14] (1984) 165 CLR 622; and see [46] of the Appellant's submissions.
[15] (1950) 81 CLR 161

45. It may be seen that *Roskell v Snelgrove*[16] and *Mathai v Kwee*[17] are similarly not against the construction advanced. Neither case needed to, nor did, consider the correctness of the construction submitted by the Respondents here. Also, in both cases there was a factual enquiry to be made as to what was the last day on which the thing could be done. One had to look at what was the date of the presentation or the time specified in the bankruptcy notice. That is, one had to look at the facts with the relevant provisions to determine what the relevant last day was.

46. The Appellant places significant reliance on the decision in *Re Tavella*[18]. It is not, with respect, clear that the decision was based on the proposition as cited by the Appellant[19]. It may equally be that Clyne J held that s.55(1)(c) of the *Bankruptcy Act 1924-1950* manifested an intention that it should apply, irrespective of the previous s.36(2) of the *Acts Interpretation Act*[20].

47. In any event, at least three subsequent decisions have reached a different conclusion on provisions which were analogous to those considered in *Re Tavella*[21]. They are: *Thomson v Les Harrison Contracting*[22]; *Price v J F Thompson (Qld)*[23]; and *DPP v Papworth*[24]. The first two were cited by Burchett J in *Zangzinchai*. Each supports a construction which considers the effect of the legislation and not just its express terms.

48. That different results have been reached (including by two intermediate appeal courts) suggests, at least, that *Re Tavella*[25] is not undoubtedly correct.

49. The provisions under consideration by the Full Federal Court in *Shephard v Chiquita Brands*[26] were ss.33(1)(c) and 44(1)(c) of the *Bankruptcy Act 1966*

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[16] (2008) 246 ALR 175.
[17] (2005) FCA 932.
[18] (1953) 16 ABC 166.
[19] [36] of the Appellant's submissions.
[20] It may be to that matter that Burchett J in *Zangzinchai* was referring when he said there may be "special considerations applicable to this provision …" (1994) 53 FCR 35 at 44F.
[21] (1953) 16 ABC 166.
[22] [1976] VR 238 at 242 *l*.11-*l*.21; and at 242 *l*.50-243 *l*.5 per Harris J.
[23] [1990] 1 Qd R 278 at 283 *l*.50-284 *l*.15; at 284 *l*.35 per Moynihan J; at 285 *l*.37-286 *l*.4 per de Jersey J.
[24] [2005] VSCA 88 at [6]-[7] per Buchanan JA for the Court.
[25] (1953) 16 ABC 166.
[26] [2004] FCAFC 76.

(Cth)[27]; but not s.36(2) of the *Acts Interpretation Act*. Section 44(1)(c) was in the same terms as s.55(1)(c) of the *Bankruptcy Act 1924-1950* (considered by Clyne J in *Re Tavella*[28]). So, the Full Federal Court's decision is not one on s.36(2) and it does not endorse expressly Clyne J's treatment of s.36(2) in *Re Tavella*.

Part VII: Statement of the Respondent's argument on the Respondent's notice of contention or notice of cross-appeal.

50. Not applicable.

Part VIII: Oral Argument

51. The Respondents estimates they will require no more than one hour for their oral argument.

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[27] quoted at [2004] FCAFC 76 at [8], [9].
[28] (1953) 16 ABC 166.