HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

KAZI FAZLY ALAHI BODRUDDAZA PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS DEFENDANT

Bodruddaza v Minister for Immigration and Multicultural Affairs
[2007] HCA 14
18 April 2007
S241/2006

ORDER

Questions asked in the special case be answered as follows:

(1) *Q.* *Does s 486A(1) of the* Migration Act *1958 apply to the plaintiff's application to the High Court for remedies to be granted in exercise of the Court's original jurisdiction?*

A. *Yes.*

(2) *Q.* *If the answer to Question 1 is yes for any or all of the remedies applied for, is s 486A of the* Migration Act *1958 invalid in respect of the plaintiff's application?*

A. *Yes.*

(3) *Q.* *If appropriate to answer having regard to the answers to questions 1 and 2, did the delegate of the Minister make a jurisdictional error in the course of assessing the plaintiff's visa application?*

A. *No.*

(4) Q. By whom should the costs of the proceeding in this Honourable Court be borne?

A. The defendant should bear the costs of the plaintiff reasonably necessary for the determination of questions 1 and 2. The plaintiff should bear the costs associated with preparing and presenting the case in relation to question 3.

Representation

S B Lloyd with L J Karp for the plaintiff (instructed by Parish Patience Immigration Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with G R Kennett for the defendant and intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

S F Stretton with L K Byers intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office South Australia)

CATCHWORDS

Bodruddaza v Minister for Immigration and Multicultural Affairs

Constitutional law – High Court – Constitutional writs – Availability of constitutional relief in the High Court's original jurisdiction – A delegate of the respondent cancelled the plaintiff's visa – s 486A of the *Migration Act* 1958 (Cth) purported to place a time limit on applications to the High Court exercising its original jurisdiction – The plaintiff applied for relief outside this time limit – Whether s 486A applies to the plaintiff's application – s 51(xxxix) of the Constitution conferred on Parliament power to regulate procedures for seeking relief under s 75(v) of the Constitution – To what extent this power is limited by the constitutional purposes of s 75(v) – Significance of s 75(v) in the federal scheme – Whether s 486A of the *Migration Act* 1958 (Cth) is valid.

Certiorari – Interrelationship with s 75(v) of the Constitution – Whether s 486A of the *Migration Act* 1958 (Cth) validly regulated the authority of the High Court to grant certiorari to the plaintiff.

Immigration – Cancellation of visa – The plaintiff's visa was cancelled because of a failure to meet language skills qualifications in the Migration Regulations 1994 (Cth) – Whether the decision to cancel the plaintiff's visa amounted to jurisdictional error.

Statutes – Statutory Construction – Presumption that words in the singular include the plural – Item 6A31 of the Migration Regulations 1994 (Cth) fixed on what transpired "in a test" – Whether presumption vitiated by the text of Item 6A31 of the Migration Regulations.

Words and phrases – "purported privative clause decision", "migration decision", "in a test".

Constitution, ss 51(xxxix), 73, 75(v).
High Court Rules, rr 4.02, 25.06.1.
Judiciary Act 1903 (Cth), ss 33, 32.
Migration Act 1958 (Cth), s 486A.
Migration Litigation Reform Act 2005 (Cth).
Migration Regulations 1994 (Cth), reg 2.26A(2)(a)(iv), Sched 2, Item 880.222, Sched 6A, Pt 2, Sched 6A, Pt 3, Item 6A31.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ. The plaintiff was born in 1976 in Bangladesh and is not and never has been an Australian citizen. He entered Australia on 18 July 2003 as the holder of a visa and his then current visa was due to expire on 13 February 2006. The litigation arises from the plaintiff's unsuccessful attempt to obtain a further visa.

2 In the original jurisdiction of this Court, the plaintiff seeks various orders against the respondent ("the Minister") respecting a decision made by a delegate of the Minister on 5 January 2006. The delegate was exercising power conferred upon the Minister by s 65 of the *Migration Act* 1958 (Cth) ("the Act") to decide to grant or refuse visas.

3 The delegate refused an application lodged by the plaintiff on 26 July 2005 for a Skilled – Independent Overseas Student (Residence) (Class DD) Subclass 880 visa. The criteria to be met for the grant of such a visa were set out in Pt 880 of the Migration Regulations 1994 ("the Regulations"). It will be necessary later in these reasons to refer to the text of Pt 880.

4 The plaintiff was notified of the decision of the delegate by notice sent by prepaid post on 5 January 2006 and addressed to his migration agent. The plaintiff instructed the migration agent to apply for review of the delegate's decision. By application lodged with the Migration Review Tribunal ("the Tribunal") on 7 February 2006, the plaintiff sought review by the Tribunal of that decision. Section 347 of the Act and reg 4.10 of the Regulations required the application for review to be made to the Tribunal within a period ending not later than 21 days after the receipt of notification of the decision. Further, it followed from a combination of ss 494B, 494C and 494D of the Act that it was on 16 January 2006 that the plaintiff was taken to have received the notification sent on 5 January 2006.

5 The result was that the 21 day period for the making of the review application ended on 6 February 2006. This was one day before the application was made. It is from this failure of the plaintiff's migration agent by one day to ensure observance of the statutory deadline that the litigation in this Court ensued.

6 First, on 9 May 2006, the Tribunal decided that it did not have jurisdiction to determine the application for review. In its accompanying reasons, the Tribunal stated:

> "There is no provision for an extension of time and the submission [made by the plaintiff] provides no basis for accepting the review application received on 7 February 2006 outside the mandatory time limit. The review application is not a valid application and the Tribunal has no jurisdiction to review the delegate's decision."

7 Thereafter, on 11 July 2006, the plaintiff instituted the present proceeding in this Court. He seeks in respect of the decision of the delegate made on 5 January 2006 certiorari to quash that decision, accompanied by prohibition, and also mandamus requiring determination by the Minister of his visa application according to law. The plaintiff asserts jurisdictional error by the delegate in refusing his visa application lodged on 26 July 2005. On this aspect of the application, the plaintiff's arguments turn upon the construction of Pt 880 of the Regulations.

8 However, in this Court, the plaintiff encounters a threshold difficulty. This also turns upon a time constraint. The constraint is presented by s 486A of the Act in the form taken after amendment by the *Migration Litigation Reform Act* 2005 (Cth) ("the 2005 Act").

9 The application to this Court was made outside the maximum 84 day period now identified in s 486A of the Act. If valid, s 486A(2) denies to this Court any competency to make an order allowing the making of the plaintiff's application out of time.

The special case

10 In reliance upon s 486A, the Minister, by summons, sought dismissal of the application as incompetent. The sequel was an order by a Justice of this Court on 21 September 2006. A special case which had been agreed on by the parties pursuant to r 27.08.1 of the High Court Rules 2004 ("the Rules") was referred to the Full Court. Section 18 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") provides that a Justice may direct that any case or question be argued before a Full Court and the Full Court thereupon has power to hear and determine that case or question.

11 Questions 1 and 2 in the special case ask respectively whether s 486A applies to the plaintiff's application and, if so, whether s 486A is invalid in respect of that application. Question 3 is contingent upon answers to questions 1 and 2 which favour the plaintiff. Question 3 proceeds to the determination by the

Court of the legal merits of the application, asking whether the decision of the delegate of the Minister displayed jurisdictional error.

12 The Solicitor-General of the Commonwealth appeared for the Minister and on behalf of the Attorney-General as intervener. His submissions with respect to question 2 were supported by counsel who appeared on behalf of the Attorney-General for South Australia as intervener.

13 For the reasons which follow, s 486A applies to the application but does not validly deny the competence of this Court to entertain the application, and questions 1 and 2 should be answered accordingly. However, the plaintiff makes out no case of jurisdictional error by the delegate of the Minister and, accordingly, question 3 should be answered adversely to the plaintiff.

Section 486A of the Act

14 Section 486A as it previously stood received some attention in *Plaintiff S157/2002 v Commonwealth*[1]. Section 486A then provided that an application to this Court for a writ of mandamus, prohibition or certiorari or an injunction or declaration in respect of "a privative clause decision" had to be made to this Court within 35 days of the actual, as opposed to the deemed, notification of the decision; further, this Court was enjoined by s 486A(2) not to make an order allowing, or having the effect of allowing, an applicant to make an application outside that 35 day period.

15 In *Plaintiff S157/2002*, Callinan J accepted that the Parliament may in exercise of power conferred by s 51(xxxix) of the Constitution regulate the procedure by which proceedings for relief under s 75(v) of the Constitution may be sought and obtained[2]. However, his Honour held s 486A invalid. He accepted the submission that s 486A so substantially interfered with or limited access to the constitutional remedies for which s 75(v) provides that it went beyond regulation and rendered those remedies either nugatory or of virtually no utility; the power of regulation did not permit what in substance was a prohibition[3]. In the circumstances discussed later in the present reasons, the

---

1 (2003) 211 CLR 476.

2 (2003) 211 CLR 476 at 537 [172]-[173].

3 (2003) 211 CLR 476 at 535-536 [165], 537 [173].

other members of the Court in *Plaintiff S157/2002* did not rule upon the validity of s 486A as it then stood.

16 Section 486A was recast after the decision in *Plaintiff S157/2002* but, whilst longer time periods are now provided, s 486A(2) still enjoins this Court from making orders relieving against failure to comply with the time scale established by the section. The maximum permitted period for the institution of an application is now 28 days with a possible extension by this Court of up to 56 days, upon application made within that 84 day period.

17 After amendment by the 2005 Act, s 486A states:

> "(1) An application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction *in relation to* a migration decision must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.
>
> (1A) The High Court may, by order, extend that 28 day period by up to 56 days if:
>
> (a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and
>
> (b) the High Court is satisfied that it is in the interests of the administration of justice to do so.
>
> (2) Except as provided by subsection (1A), *the High Court must not make an order* allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period.
>
> (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section." (emphasis added)

18 As a result of further amendments made by the 2005 Act, the term "migration decision" is now defined in s 5(1) as meaning:

> "(a) a privative clause decision; or
>
> (b) a purported privative clause decision; or

(c) a non-privative clause decision".

The expression "purported privative clause decision" receives its content from s 5E, sub-s (1) of which states:

> "In this Act, *purported privative clause decision* means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:
>
> (a) a failure to exercise jurisdiction; or
>
> (b) an excess of jurisdiction;
>
> in the making of the decision."

19 In *Plaintiff S157/2002*, the Court held, as the Act then stood and before the special provision for a "purported privative clause decision", that "privative clause decisions" in respect of which there was to be no judicial review did not include decisions involving jurisdictional error; they were not decisions made "under" the Act. The members of the Court, other than Callinan J, did not enter upon the validity of s 486A. This was because, as the section was then expressed, it restricted applications to this Court only "in respect of a privative clause decision", being one made "under" the statute and where, as in *Plaintiff S157/2002* itself, jurisdictional error was established, there was no such decision.

The construction of s 486A after the 2005 Act

20 Before embarking upon the questions of alleged invalidity of s 486A as it now stands, it is necessary to consider various points of construction which were disputed in submissions before the Court. Once s 486A is construed, it will be appropriate to turn to consider its validity.

21 The Solicitor-General of the Commonwealth submitted that the phrase in s 486A(1) "a remedy ... in relation to a migration decision" was sufficiently broad to encompass more than applications for judicial review. He submitted that, for example, unless the plaintiff complied with s 486A, an action in tort would not lie in the original jurisdiction of this Court against the Commonwealth for false imprisonment where an officer had detained the plaintiff as an unlawful

non-citizen without the knowledge or reasonable suspicion stipulated by s 189 of the Act[4].

22 Counsel for the plaintiff advanced cogent reasons why the phrase "a remedy ... in relation to a migration decision" should not be given a reading which would take s 486A beyond public law remedies and into the area of what might be called collateral attack upon migration decisions.

23 First, the plaintiff emphasised the extensive scope of the definition of "migration decision" in s 5(1), and in particular the inclusion of proposed decisions in the definition of "purported privative clause decision" found in s 5E. The tortious conduct completing a cause of action might well take place after the end of the 84 day period stipulated in s 486A by reference to actual notification of a migration decision. Such a draconian, if not irrational, legislative scheme should not be attributed to the Parliament in the absence of clear words.

24 Secondly, the perceived mischief to which the 2005 Act was directed concerned the challenge by judicial review processes to migration decisions. The application to this Court identified in s 486A(1) is "for a remedy" by way of judicial review, specifically in a s 75(v) matter. The Explanatory Memorandum on the Bill for the 2005 Act circulated by the authority of the Attorney-General to the House of Representatives is instructive in this respect. Section 486A was one of several provisions[5] included in the 2005 Act amendments with the avowed objective "to impose uniform time limits for applications for judicial review of migration decisions in the [Federal Magistrates Court], the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court".

25 Accordingly, the submission now made by the Solicitor-General which would give broader reach to s 486A should not be accepted.

26 It is convenient here to deal, on the other hand, with a submission by the plaintiff which should be rejected. The plaintiff submits that s 486A applies to

---

4 cf *Ruddock v Taylor* (2005) 222 CLR 612.

5 Sections 476 and 477A applied respectively to the Federal Magistrates Court and the Federal Court. The special case raises no question of the validity of either of these provisions.

his present application to this Court only to the extent that he seeks certiorari and that s 486A does not reach the s 75(v) remedies he seeks, namely mandamus and prohibition. However, the application for prohibition to the Minister requiring the Minister not to take action upon the delegate's decision of 5 January 2006 and for mandamus to consider according to law the plaintiff's visa application refused by that decision are applications "for a remedy ... in relation to a migration decision". This is nonetheless so where the plaintiff seeks to achieve by mandamus a future, and favourable, migration decision to displace the previously unfavourable decision.

27 There are further submissions by the Solicitor-General on the construction of s 486A which also should not be accepted. The effect of s 486A was said to be, at the end of the 84 day period, to "validate" the migration decision in respect of which judicial review was sought as a s 75(v) "matter", and to make the decision "effective for all purposes". This consequence of the lapse of the 84 day period was said by the Solicitor-General to follow even if the migration decision was infected by some error, including fraud, which otherwise would attract prohibition under s 75(v) of the Constitution.

28 It would be a bold exercise of legislative choice for the Parliament to enact that Ministers and their delegates were authorised to exercise fraudulently any of the powers of decision conferred upon them by statute. A legislative purpose of that kind would not be imputed in the absence of "unmistakable and unambiguous language"[6]. Further, in such an unlikely eventuality, questions of validity might well arise of the nature outlined in *Plaintiff S157/2002*[7]. But there is no occasion here further to pursue such questions. That is because, as the plaintiff correctly submits, there is no statement or indication in the text of s 486A that it operates by reference to the 84 day period so as to give migration decisions an effect or validity they otherwise did not have.

29 Indeed, there are indications in the text of s 486A which point against any such construction. For example, given that there will be instances where more than one party has an interest sufficient to challenge a migration decision, and given that there might be different dates of actual notification received by such persons, there may be differently expiring 84 day periods; the upshot would be

---

6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

7 (2003) 211 CLR 476 at 512-513 [101]-[103].

the conferral of validity as respects different parties at different times rather than a generally effective conferral of validity at the one date.

30 The text of s 486A indicates, as the above example illustrates, that it is directed not to the conferral of validity but to deny the competency of applications to this Court not commenced within the stipulated period. It is in this setting that the alleged invalidity of s 486A falls for decision on the special case. Before turning to consider the submissions respecting validity, something more should be said respecting what otherwise is provided by the Rules of this Court.

The Rules

31 The Rules make special provision concerning mandamus as follows, in r 25.07.2:

> "An application for an order to show cause why a writ of mandamus should not issue to a judicial tribunal to hear and determine a matter shall be made within 2 months of the date of the refusal to hear or within such further time as is, under special circumstances, allowed by the Court or a Justice."

It will be apparent that this provision has no application to the present case, neither the delegate nor the Minister being a "judicial tribunal". The Rules contain no time stipulation respecting applications for prohibition.

32 Certiorari is not a remedy identified independently in s 75(v) of the Constitution, a point to which it will be necessary to return. However, the Rules make special provision respecting certiorari in r 25.06.1:

> "An order to show cause why a writ of certiorari should not issue to remove a judgment, order, conviction or other proceeding, for the purpose of its being quashed shall not be granted unless the application for the order is made not later than six months after the date of the judgment, order, conviction or other proceeding, or within such shorter period as may be prescribed by any law."

It may be accepted for present purposes that the decision of the delegate answers the description of "other proceeding". The delegate's decision was dated 5 January 2006 and the application to this Court was made on 11 July 2006, thus

outside the six month period stipulated by r 25.06.1. However, account must be taken of r 4.02. This states:

> "Any period of time fixed by or under these Rules may be enlarged or abridged by order of the Court or a Justice whether made before or after the expiration of the time fixed."

33 As already remarked, if valid, s 486A(2) would deny authority under r 4.02 or otherwise for this Court to make an order allowing, or with the effect of allowing, an application for a judicial review remedy outside the stipulated statutory period.

34 Provisions to the effect of those now made respecting certiorari and mandamus[8] have been found in Rules of this Court since 1903. So also have general provisions for the enlargement of time. The Rules of Court included as a Schedule to the *High Court Procedure Act* 1903 (Cth) made provision for a six month period in respect of certiorari[9] and a two month period in respect of mandamus[10], with a provision for enlargement of time[11]. The same pattern was followed with the Rules made in 1910[12] and in the 1952 Rules which immediately preceded those made in 2004[13].

The English antecedents

35 In considering the time constraints upon the judicial review remedies sought in this case, some assistance is to be derived from the state of the law on that subject in England at the time of the commencement of the Constitution.

---

8 r 25.06.1, r 25.07.2 respectively.

9 O XLI r 7.

10 O XLI r 25.

11 O XLV r 6.

12 SR No 130/1910, O XLVII rr 7, 25; O LIII r 6.

13 O 55 rr 17, 30; O 60 r 6.

36 First, as to prohibition. Prohibition had been seen as intimately connected with the rights of the Crown and as ensuring the prerogative was protected against encroachment by disobedience to the prescribed structure for the administration of justice. In *Farquharson v Morgan*, Davey LJ remarked[14]:

> "[I]t has always been the policy of our law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction".

His Lordship added that for the inferior courts to stray beyond that sphere would involve "an usurpation of the prerogative of the Crown"[15].

37 However, by the end of the nineteenth century, prohibition was seen as protective of the rights of the subject rather than as a safeguard of the prerogative[16]. It was in this contemporary setting that the remedy was carried over to the federal structure provided by the Constitution. There, what was to be protected in the Australian constitutional context was not only the rights of all natural and corporate persons affected[17], but the position of the States as parties to the federal compact, and jurisdictional error might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred. It is out of its recognition of these features of the remedies provided by s 75(v), and their high constitutional purposes, that in more recent years this Court has described the remedies there provided as

---

14 [1894] 1 QB 552 at 560.

15 [1894] 1 QB 552 at 560.

16 Shortt wrote in 1887 that "the original groundwork of the jurisdiction in prohibition has undergone modification by the decisions of recent times" and that it was only from the standpoint of the right of the subject to protection from jurisdictional error by inferior courts "that laches, acquiescence, or misconduct can be said to disentitle him to the aid of the superior Court": *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, (1887) at 445-446.

17 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 514 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

"constitutional writs" rather than (as earlier and historically in England) as "prerogative writs"[18].

38 In the authorities in the Court of King's Bench, a distinction was drawn between the grant of prohibition where the want of jurisdiction appeared on the record and so was patent, and those cases where the want of jurisdiction was latent. The Court of King's Bench was not bound to grant prohibition to a party who had acquiesced in the proceeding in the subordinate tribunal where the defect of jurisdiction did not appear on the face of the record; acquiescence precluded the party from showing *aliunde* the want of jurisdiction. But acquiescence did not disentitle a party to relief where the defect of jurisdiction was patent[19].

39 The distinction was further explained by Lopes LJ in *Farquharson v Morgan*[20], with particular reference to what had been said by Willes J in *Mayor, &c, of London v Cox*[21]. Lopes LJ said[22]:

> "In the elaborate opinion of the judges delivered by Willes, J, to the House of Lords in *Mayor of London v Cox*[23], it is said that 'upon an application being made in proper time, upon sufficient materials, by a party, who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the Court;' and at 283 of the same case it is said: 'Where, however, the defect is not apparent, and depends on some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought

---

18 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-94 [18]-[25] per Gaudron and Gummow JJ, 133-134 [138] per Kirby J, 140-141 [161]-[162] per Hayne J.

19 Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, (1887) at 446-447.

20 [1894] 1 QB 552 at 558.

21 (1867) LR 2 E & I App 239 at 279.

22 [1894] 1 QB 552 at 558.

23 (1867) LR 2 E & I App 239 at 279.

> proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction[24]; yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and on excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant.'
>
> It was held in that case that the writ was not of course, inasmuch as there might be circumstances which would justify the Court in refusing it, such as undue delay, insufficient materials, or misconduct or laches by the party applying for it. But there is nothing in the case contravening the rule, which I have mentioned, where the absence of jurisdiction is apparent on the face of the proceedings; in fact, there is an express exception of such cases."

40 The position in England respecting mandamus was less complicated. As a general proposition, save in cases where delay was duly accounted for, mandamus would not be granted unless applied for within a reasonable time. In *R v Churchwardens of All Saints, Wigan*, Lord Chelmsford remarked[25]:

> "A writ of mandamus is a prerogative writ and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned."

41 In the same case, Lord Hatherley[26] spoke of "matters connected with delay, or possibly with the conduct of the parties" as "matters of discretion".

---

24 *Knowles v Holden* (1855) 24 LJ (Ex) 223.

25 (1876) 1 App Cas 611 at 620.

26 (1876) 1 App Cas 611 at 622.

42 In an appeal from New South Wales, *Broughton v Commissioner of Stamp Duties*[27], the Privy Council considered a situation where executors had paid probate duty partly under a mistake of law and partly with the expressed reservation of the right to have the excess refunded without regard to delay. Subsequently it was decided in another case that no duty at all was payable, but the Privy Council held that an application made nine years later for a mandamus to require the Commissioner to state a case for the New South Wales Full Court was not brought within a reasonable time and must be refused.

43 With respect to certiorari, in the eighteenth century a period of six months had been fixed by statute[28], but thereafter the Court of Queen's Bench held that the statute applied only to certiorari in respect of orders of magistrates and that there was no general rule of practice which required an application for certiorari to be made within six months[29]. Where the period of six months was fixed by statute, there had been no power of extension in the Court. Thereafter, the Crown Office Rules which applied on what was then "the Crown side" of the Queen's Bench Division made provision with respect to certiorari[30]. No writ of certiorari might be granted unless applied for within six calendar months of the making of the order or determination of which complaint was made; however, the Court had a power of extension of time in all civil proceedings on the Crown side[31].

The place of s 75(v) in the Constitution

44 In *R v Federal Court of Australia; Ex parte WA National Football League*[32], Barwick CJ treated as applicable to "prohibition" as identified in s 75(v) of the Constitution the law pertaining to that writ when issued by the

---

27 [1899] AC 251.

28 13 Geo II c 18, s 5.

29 *R v Mayor of Sheffield* (1871) LR 6 QB 652.

30 The Crown Office Rules 1886, r 33; The Crown Office Rules 1906, r 21.

31 The Crown Office Rules 1886, r 293; The Crown Office Rules 1906, r 259; Halsbury, *The Laws of England*, 1st ed (1909), vol 10, par 403.

32 (1979) 143 CLR 190 at 201.

Court of King's Bench in England. As already remarked in these reasons, more was involved in the translation of prohibition to a remedy in a federal constitution. As a result, and as explained by Hayne J in *Re Refugee Review Tribunal; Ex parte Aala*[33], the anterior situation in England has not generally been accepted as a comprehensive guide to the operation of s 75(v) of the Constitution. For example, while there had been much judicial discussion in England as to whether prohibition issued as a matter of right, under s 75(v) it is a discretionary remedy[34]. However, the absence in England of legislatively fixed time bars of an absolute character is a matter of present significance to which further reference will be made.

45 Section 75(v) has the special significance identified by Dixon J in *Bank of NSW v The Commonwealth*[35]. His Honour said that the purpose of the inclusion of s 75(v) was[36]:

> "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".

46 The reference to restraint of officers of the Commonwealth from exceeding federal power should not be read as limited to the observance of the constitutional limitations upon the executive and legislative power of the Commonwealth. An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers[37]. Section 75(v) furthers that end by controlling jurisdictional error as asserted in the present application by the plaintiff. In this way, s 75(v) introduced "into the Constitution of the Commonwealth an entrenched minimum provision of judicial review"[38]. The

---

33 (2000) 204 CLR 82 at 140-141 [162].

34 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

35 (1948) 76 CLR 1.

36 (1948) 76 CLR 1 at 363.

37 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43].

38 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103].

significance of s 75(v) in the structure of the federal system of government established by the Constitution was further explained in the joint judgment of five members of the Court in *Plaintiff S157/2002*[39]:

> "The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review."

The validity of s 486A

47 The Minister (and the interveners) did not dispute that, if s 486A had the character of a law which purported to direct the manner in which the judicial power of the Commonwealth should be exercised, it would be invalid.

48 The treatment given in *Chu Kheng Lim v Minister for Immigration*[40] to what was then s 54R of the Act demonstrates the point. Section 54R provided:

> "A court is not to order the release from custody of a designated person."

---

39 (2003) 211 CLR 476 at 513-514 [104]. See also the reasons of Gleeson CJ at 482-483 [5].

40 (1992) 176 CLR 1.

The majority of this Court construed s 54R as purporting to apply to persons detained unlawfully, and held it invalid. Brennan, Deane and Dawson JJ (who, with Gaudron J, formed the majority[41]) said[42]:

> "Ours is a Constitution 'which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires'[43]. All the powers conferred upon the Parliament by s 51 of the Constitution are, as has been said, subject to Ch III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party[44] or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court."

49 Further, the Minister and the interveners accepted that a law which sought to prevent any application being made to this Court for remedies in respect to a particular class of decision by an officer of the Commonwealth would be invalid as inconsistent with the entrenched provision for judicial review made by s 75(v) of the Constitution. However, they characterise s 486A as regulating the right to institute proceedings, rather than as an attempted deprivation of the entrenched jurisdiction of the Court; the section was said to be analogous to a limitation statute barring the remedy but not extinguishing the right of action.

---

41 Mason CJ, Toohey J and McHugh J construed s 54R as a direction not to release persons *lawfully* detained in custody and held it valid.

42 (1992) 176 CLR 1 at 36.

43 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 165 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

44 Constitution, s 75(iii).

50 In addition, the Minister and the interveners (a) pointed to the statement in the passage from the joint reasons in *Plaintiff S157/2002*[45], set out earlier in these reasons, that the powers of the Parliament to avoid or confine judicial review are limited, given the centrality of s 75(v) in the structure of the Constitution; and (b) emphasised that their Honours in that passage did not deny the competence of legislative regulation of judicial review under s 75(v) of a class of decisions made by officers of the Commonwealth; (c) referred by analogy to the appearance in s 73 of the Constitution of the phrase "with such exceptions and subject to such regulations as the Parliament prescribes" for the appellate jurisdiction of this Court and to the long established acceptance of time limits within which proceedings under s 73 must be instituted[46] and (d) concluded that, whilst an "unreasonably short" limitation period might be seen, as Callinan J put it in *Plaintiff S157/2002*[47], to be "in substance a prohibition", and so inconsistent with s 75(v), the present s 486A "reasonably regulates" the right to proceed in a s 75(v) jurisdiction in a particular class of case.

51 The plaintiff countered that the references to regulation are not useful and direct attention away from the task at hand. This requires consideration of the degree to which applicants for s 75(v) relief may be denied access to this Court by the Parliament but without contravening the entrenchment of judicial review by that provision. The plaintiff emphasised the significance in the English provenance of mandamus and prohibition of the discretion of the Court to grant relief without fixed time limits and the apparent influence of the English system in the rules of this Court since 1903.

52 The plaintiff submitted that references to statutes of limitation devised to control litigation of private rights, in particular causes of action in contract and

---

45 (2003) 211 CLR 476 at 514 [104].

46 *Hannah v Dalgarno* (1903) 1 CLR 1 at 9-10. But, in *Cockle v Isaksen* (1957) 99 CLR 155 at 166, Dixon CJ, McTiernan and Kitto JJ warned that a legislative exception made in reliance upon s 73 must not:

> "eat up or destroy the general rule laid down by the Constitution that appeals shall lie to this Court from judgments decrees orders and sentences of courts of a State exercising federal jurisdiction".

47 (2003) 211 CLR 476 at 537 [173].

tort, are of no assistance where what is at stake is the operation of s 75(v) in enforcing the due administration of the laws of the Commonwealth.

53 It is unnecessary to decide this case at the highest level at which the plaintiff put his submissions. This appeared to be that constitutionally permissible legislative regulation of the s 75(v) jurisdiction could never support a fixed time limit upon the making of an application to this Court. It is sufficient to accept a less absolute proposition as follows. This is that a law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure, as explained in *Plaintiff S157/2002*[48].

54 The determination of the validity of a provision such as s 486A requires consideration of the substance or practical effect of the provision, not merely of its form[49]. Accordingly, distinctions drawn in private law (but not without question[50]) respecting the barring of remedies but not rights are of little assistance. To say that because s 486A only denies entitlement to applicants to institute proceedings it therefore cannot trench upon the content of s 75(v) and upon the authority of this Court to determine applications thereunder is to look to form at the expense of substance.

55 Section 486A is cast in a form that fixes upon the time of the actual notification of the decision in question. This has the consequence that the section does not allow for the range of vitiating circumstances which may affect administrative decision-making. It is from the deficiency that there flows the invalidity of the section.

56 In *Plaintiff S157/2002*[51], Gleeson CJ emphasised in relation to the former s 486A that the time of the notification of a decision "may be very different from

---

48 (2003) 211 CLR 476 at 482-483 [5], 513-514 [104].

49 See *Ha v New South Wales* (1997) 189 CLR 465 at 498.

50 See Jackson, "The Legal Effects of the Passing of Time", (1970) 7 *Melbourne University Law Review* 407 at 423-424.

51 (2003) 211 CLR 476 at 494 [39].

the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision". His Honour went on to instance the discovery, after the expiry of a time limit fixed by reference to the time of notification, that the decision had been procured by a corrupt inducement. What was there said is applicable to the present operation of s 486A. Likewise the plight of an applicant where the circumstances giving rise to actual or apprehended bias are unknown and unknowable whilst the s 486A timescale is in operation but later become known to the applicant.

57 The fixing upon the time of the notification of the decision as the basis of the limitation structure provided by s 486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit. The present case where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser, is an example.

58 It is no answer to say that some unfairness is to be expected and must be tolerated. The above examples are instances where the time limit subverts the constitutional purpose of the remedy provided by s 75(v). Further examples may be suggested from practical experience.

59 Considerations of this kind may be dealt with at the level of discretion to grant or withhold the remedy under s 75(v). That is the path taken by the Rules and the case law in this Court. The path taken by the Parliament with s 486A is to deal with these considerations by the application of a rule precluding what is considered by the legislature to be an untimely application for what by hypothesis is a discretionary remedy. As the above discussion of the operation of s 486A illustrates, any attempt to follow that path is bound to encounter constitutional difficulties.

60 Section 486A is invalid. It is so drawn as not to permit its reading down so as to sever and preserve any valid operation, and no case for severance was presented.

Certiorari

61 As has been remarked, s 75(v) of the Constitution does not include certiorari as one of the enumerated remedies. Section 33 of the Judiciary Act provides that the High Court may make orders or direct the issue of certain writs, among which certiorari is not enumerated; however, the section also provides

that it is not to be taken to limit by implication the power of this Court to make any order or to direct the issue of any writ. Section 32 enjoins the Court in the exercise of its original jurisdiction to grant complete relief so that all matters in controversy may be completely and finally determined.

62 It is unnecessary to determine whether it would be open to the Parliament to legislate to withdraw from this Court any power to grant certiorari as the principal relief in the original jurisdiction of the Court[52]. That is because here certiorari is ancillary to the principal relief of prohibition and mandamus and the Court is seized of jurisdiction with respect to that s 75(v) "matter".

63 In *Re Refugee Review Tribunal; Ex parte Aala*, Gaudron and Gummow JJ said[53]:

> "The power of this Court to issue certiorari is not stated in Ch III of the Constitution. Rather, in a matter such as the present, the conferral of jurisdiction to issue writs of prohibition and mandamus implies ancillary or incidental authority to the effective exercise of that jurisdiction. In the circumstances of this matter, that includes authority to grant certiorari against the officer of the Commonwealth constituting the Tribunal[54]."

64 The upshot is that s 486A cannot validly diminish the authority of the Court in the present case to afford the remedy of certiorari as an ancillary remedy so as effectively to determine the "matter" in respect of which jurisdiction is conferred by s 75(v).

Was there jurisdictional error?

65 The plaintiff thus crosses the threshold into adjudication of his application under s 75(v). We therefore turn to address the substance of the plaintiff's complaint, unimpeded by the invalid attempt of s 486A of the Act to prevent this Court from doing so. However, the plaintiff fails to show jurisdictional error by the delegate in the course of assessing the plaintiff's visa application.

---

52 cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 [81].

53 (2000) 204 CLR 82 at 90-91 [14].

54 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 33. See also *Glover v Walters* (1950) 80 CLR 172 at 174-175.

66 One of the criteria to be satisfied at the time of the decision on the application for the visa for which the plaintiff applied was that set out in Item 880.222 of Sched 2 to the Regulations. This stated:

> "The applicant has the qualifying score when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act."

The relevant subdivision related to the "points system", with respect to which s 93 of the Act states:

> "(1) The Minister shall make an assessment by giving the applicant the prescribed number of points for each prescribed qualification that is satisfied in relation to the applicant.
>
> (2) In this section:
>
> *prescribed* means prescribed by regulations in force at the time the assessment is made."

67 The prescription for the Subclass 880 visa was found in reg 2.26A(2)(a)(iv). This permitted points to be awarded for each qualification specified in column 2 of an item in certain Parts of Sched 6A. The language qualification in Pt 3 of Sched 6A was as follows:

"Part 3 Language skill qualifications

Column 1 Item	Column 2 Qualification	Column 3 Number of points
6A31	The applicant provides evidence of having achieved an [International English Language Testing System] test score of at least 6 for each of the 4 test components of speaking, reading, writing and listening in a test conducted: (a) not more than 12 months before the day on which the application was made; or	20

(b) during processing of the application

...

6A33	The applicant provides evidence of having achieved an [International English Language Testing System] test score of at least 5 on each of the 4 test components of speaking, reading, writing and listening in a test conducted: (a) not more than 12 months before the day on which the application was made; or (b) during processing of the application"	15

68 The plaintiff required 20 points in the language skills qualification to meet the points test, so that he had to satisfy Item 6A31 rather than Item 6A33.

69 The plaintiff undertook two tests, one on 17 September 2005 and the second on 17 December 2005. He only achieved a score of at least six in three of the four components in any one test, although taking the two tests together he achieved a score of at least six in each of the four test components. The delegate construed Item 6A31 as requiring that the score of at least six for each of the four test components be obtained at the one test rather than in one or more tests undertaken within the qualifying period. Accordingly, the delegate awarded the plaintiff only 15 points for language, because he satisfied Item 6A33.

70 Even if the interpretation given Item 6A31 was erroneous, it is not immediately apparent that this had the consequence of vitiating the decision for jurisdictional error, rather than representing an error within jurisdiction which would not attract prohibition and mandamus under s 75(v). The differential treatment of errors on the face of the record with respect to certiorari has often been noted[55], but here certiorari can only be ancillary to relief under s 75(v) for jurisdictional error.

---

55 See, for example, *Craig v South Australia* (1995) 184 CLR 163 at 175-176.

71 It is unnecessary further to pursue this question. This is because, in any event, there was no error by the delegate of any description.

72 The plaintiff relies upon the presumption that words in the singular number include the plural[56]. However, any such presumption must yield to the particular text involved.

73 Item 6A31 fixes upon what transpired "in a test". That test must have been conducted not more than 12 months before the day on which the application is made or during the process of the application. From that test the applicant must be able to provide evidence of having achieved a score of at least six for each of the four components of that test, namely, speaking, reading, writing and listening.

74 The Minister correctly submits that the apparent objective of requiring a particular level of overall competence in the English language would not be achieved if Item 6A31 were to be satisfied by sitting the test on several occasions, concentrating on different components, until there was accumulated a sufficient collection of scores.

Orders

75 Questions 1 and 2 in the special case each should be answered "yes". Question 3 should be answered "no".

76 There remains question 4 which asks by whom the costs of the proceeding should be borne. The plaintiff accepts that the construction of Item 6A31 does not give rise to any matter of public interest and the costs associated with preparing and presenting the case in relation to question 3 should be borne by him if he be unsuccessful. However, the great bulk of the argument and of the written submissions was concerned with s 486A and here the plaintiff has been successful, although the outcome of the litigation is that the application under s 75(v) will be dismissed by the Justice disposing of the matter.

---

56 *Acts Interpretation Act* 1901 (Cth), ss 23, 46(1).

77 There is no absolute rule with respect to the exercise of the power to award costs[57]. In *Oshlack v Richmond River Council*[58], for example, reference was made to *Liversidge v Anderson*[59], where, in response to an intimation by the Law Lords that, the case being one of "very general importance", costs should not be asked for, junior counsel[60] for the successful Home Secretary responded that, in those circumstances, he "should not dream" of asking for them.

78 The present is a case of very general importance, so far as the validity of s 486A is concerned. Not only should the Minister not have the costs of questions 1 and 2, the Minister should bear the costs of the plaintiff reasonably necessary for the determination of questions 1 and 2.

---

57 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 88 [40], 126-127 [143].

58 (1998) 193 CLR 72 at 89 [42].

59 [1942] AC 206 at 283.

60 The future Valentine Holmes KC.

79 CALLINAN J. Subject to a reservation, I agree with the reasons given and conclusions reached in the joint judgment.

80 The reservation is as to the availability of certiorari as an entrenched constitutional remedy. In this regard I need merely draw attention to, without restating, what I said on this topic in *Plaintiff S157/2002 v Commonwealth*[61].

---

61 (2003) 211 CLR 476 at 520-525 [120]-[131]; see also Aitken, "The High Court's Power to Grant Certiorari – The Unresolved Question", (1986) 16 *Federal Law Review* 370.