HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND GORDON JJ

PLAINTIFF M64/2015 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION DEFENDANT

Plaintiff M64/2015 v Minister for Immigration and Border Protection
[2015] HCA 50
17 December 2015
M64/2015

ORDER

The questions asked by the parties in the special case dated 28 August 2015 and referred for consideration by the Full Court be answered as follows:

Question 1

Did the Delegate:

(a) *construe clause 202.222(2)(d) of Schedule 2 to the* Migration Regulations 1994 *(Cth) as requiring or permitting him to consider the capacity of Australia to resettle all applicants who apply for a humanitarian visa;*

(b) *fail to construe clause 202.222(2)(d) as requiring him to consider the capacity of the Australian community to provide for the permanent settlement in Australia of each of the Visa Applicants, or persons such as each of the Visa Applicants, having regard to their individual circumstances; or*

(c) *fail to construe clause 202.222(2) as requiring him to assess whether or not there were compelling reasons for giving special consideration to granting permanent visas to the Visa Applicants in*

the circumstances of the particular case, having regard to all of the matters in 202.222(2)(a) to (d) both individually and cumulatively?

Answer

(a) Yes.

(b) No.

(c) No.

Question 2

If so, did the Delegate thereby make a jurisdictional error?

Answer

No.

Question 3

In deciding whether he was satisfied that the Visa Applicants satisfied clause 202.222(2) of Schedule 2 to the Regulations, was the Delegate bound not to consider:

(a) the number of 'places' available in the SHP; or

(b) the 'priorities' set by the government within the SHP?

Answer

(a) No.

(b) No.

Question 4

If so, did the Delegate consider either or both of those matters, and thereby make a jurisdictional error?

Answer

Unnecessary to answer.

Question 5

In deciding whether he was satisfied that the Visa Applicants satisfied the criterion in clause 202.222(2) of Schedule 2 to the Regulations, did the Delegate apply the policy stated in the relevant parts of the Department's Procedures Advice Manual (being Attachment G, sections 71.2, 71.4 and 71.6 and Attachment H, section 7.2) (the ***Policy****)?*

Answer

Yes.

Question 6

If so:

*(a) was the Policy inconsistent with the [*Migration Act *1958 (Cth)] and Regulations; or*

(b) did the Delegate apply the Policy inflexibly without regard to the merits or circumstances of the case;

and did the Delegate thereby make a jurisdictional error?

Answer

(a) No.

(b) No.

It is unnecessary to answer the rest of Question 6.

Question 7

What, if any, relief should be granted?

Answer

None. The proceedings should be dismissed.

Question 8

Who should pay the costs of the special case?

Answer

The plaintiff.

Representation

C J Horan with K E Grinberg for the plaintiff (instructed by Russell Kennedy Pty Ltd)

S P Donaghue QC with N M Wood for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff M64/2015 v Minister for Immigration and Border Protection

Migration – Visa application – Clause 202.222(2) of Sched 2 to Migration Regulations 1994 (Cth) provides for grant of Refugee and Humanitarian (Class XB) (Subclass 202) visa if Minister satisfied there are compelling reasons for giving special consideration to granting visa – Where applications for Subclass 202 visas refused by delegate of Minister – Where delegate considered capacity of Australian community to permanently settle visa applicants – Where delegate considered departmental policy that established priorities to be accorded to visa applications – Construction of cl 202.222(2) – Whether decision affected by jurisdictional error.

Words and phrases – "capacity", "compelling reasons", "irrelevant considerations", "jurisdictional error", "priorities policy", "special consideration".

Migration Regulations 1994 (Cth), Sched 2, cl 202.222(2).

1 FRENCH CJ, BELL, KEANE AND GORDON JJ. The plaintiff is a citizen of Afghanistan born on 20 April 1994. In 2003, the plaintiff and his family, who are of Hazara ethnicity, fled from Afghanistan to Iran. In early 2010, the plaintiff was arrested in Iran as an undocumented immigrant and was deported to Afghanistan. The plaintiff's family remained in Iran.

2 On 29 May 2010, the plaintiff entered Australia as an unaccompanied minor at an "excised offshore place" within the meaning of the *Migration Act* 1958 (Cth) ("the Act"). Upon his arrival in Australia, he became an "unlawful non-citizen" and an "offshore entry person" within the meaning of the Act as it then stood.

3 On 18 August 2011, the plaintiff was granted a Protection (Class XA) (Subclass 866) visa by the defendant ("the Minister"). Subsequently, the plaintiff's mother and three younger brothers ("the Visa Applicants") applied for Refugee and Humanitarian (Class XB) (Subclass 202) visas under the Australian Government's Special Humanitarian Programme. The plaintiff proposed the Visa Applicants for entry into Australia in accordance with the Migration Regulations 1994 (Cth) ("the Regulations"). The application was refused by a delegate of the Minister ("the Delegate").

4 The plaintiff then commenced proceedings in the original jurisdiction of this Court pursuant to s 75(v) of the Constitution, seeking certiorari to quash the Delegate's decision to refuse to grant the visas, and mandamus to require the Minister to determine the application according to law. The plaintiff contends that the decision of the Delegate was affected by one or more jurisdictional errors.

5 The plaintiff argued that the Delegate misconstrued and misapplied the regulation pursuant to which the application was determined, and that the Delegate unlawfully applied a departmental policy which was inconsistent with the requirements of the Act and the Regulations, or applied that policy inflexibly and without regard to the merits of the particular application. The policy required that the lowest priority be accorded to the application on the basis of the type of visa that the plaintiff had been granted, and the circumstance that he arrived in Australia as an "irregular maritime arrival".

6 The parties agreed to state a number of questions for determination by this Court, in the form of a special case, with a view to resolving the plaintiff's challenge to the Delegate's decision. Before considering the parties' arguments, it is necessary to give a brief description of the programme under which the visas were sought, the terms of the application, and the basis for, and the detail of, the Delegate's decision to refuse it.

Australia's Humanitarian Programme

7 Australia's Humanitarian Programme is the component of Australia's Immigration Programme that provides for the immigration of refugees and people in refugee-like situations. The offshore component of the Humanitarian Programme has two categories: "Refugee" and "Special Humanitarian Programme" ("SHP"). The Refugee category comprises four visa subclasses: Refugee (Subclass 200), In-country Special Humanitarian (Subclass 201), Emergency Rescue (Subclass 203) and Woman at Risk (Subclass 204). The SHP category comprises one visa subclass: Global Special Humanitarian (Subclass 202). The Refugee and Humanitarian (Class XB) (Subclass 202) visa ("Subclass 202 visa"), sometimes referred to as a "split family visa", is directed to the immigration of people who are subject to substantial discrimination amounting to gross violation of their human rights in their home country, and who are members of the immediate family of a person in Australia who has already been granted a Subclass 202 visa, or has been granted a Protection (Class XA) (Subclass 866) visa or a Resolution of Status (Class CD) (Subclass 851) visa.

8 Each year, the Australian Government consults with State and Territory governments, peak refugee and humanitarian bodies, the United Nations High Commissioner for Refugees ("the UNHCR"), and the public, and makes a decision as to the size and composition of the Humanitarian Programme. In the 2014-2015 financial year, the Australian Government decided that the Humanitarian Programme would comprise 13,750 places, including a minimum of 11,000 places for offshore applicants. On 17 August 2014, the Minister announced that 5,000 places would be allocated to the SHP category in 2014-2015. A minimum of 4,400 places were committed for persons affected by the conflicts in Iraq and Syria, and those places were to be provided predominantly out of the SHP allowance.

The visa application

9 On 5 December 2011, the Visa Applicants applied for Subclass 202 visas as prescribed in item 1402 of Sched 1 to the Regulations ("the Visa Application"). The plaintiff proposed the Visa Applicants for entry into Australia in accordance with approved form 681 and cl 202.211(2) of Sched 2 to the Regulations.

10 The plaintiff's proposal contained information that assistance would be provided to the Visa Applicants by way of permanent housing in Australia. In December 2011, the plaintiff's carer sent a letter to the Department of Immigration and Citizenship (now the Department of Immigration and Border

Protection) ("the Department") in support of the Visa Application. On 19 April 2012, The Victorian Foundation for Survivors of Torture Inc, known as Foundation House, sent a letter to the Department in support of the Visa Application to the effect that the plaintiff's mental health would "significantly improve" if the Visa Applicants were granted protection in Australia. On 31 May 2012, the plaintiff's carer sent a further letter to the Department, requesting that the processing of the Visa Application be expedited.

11 On 2 April 2014, the Department sent a letter to the plaintiff's mother, care of the plaintiff, outlining changes affecting the assessment of the Visa Application and requesting additional information.

12 On 21 May 2014, the Flemington and Kensington Community Legal Centre, on behalf of the plaintiff's mother, sent a letter to the Department providing further information in support of the Visa Application and confirming, in particular, the ongoing support of the plaintiff's carer and her willingness "to help settle the family", and stating that the family would live in Melbourne, "where there is a lively and close Hazara community which will embrace and support the family as they settle into Australia".

The Delegate's decision

Clause 202.222(2)

13 The Visa Application was decided under cl 202.222(2) of Sched 2 to the Regulations. The terms of cl 202.222(2) have varied over time, but it is common ground that, at the relevant time, it provided for the grant of a visa if:

> "the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:
>
> (a) the degree of discrimination to which the applicant is subject in the applicant's home country; and
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> (b) the extent of the applicant's connection with Australia; and
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> (c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and
>
> (d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia."

The SHP "processing priorities"

14 On 12 December 2013, the Minister made an adjustment to what were described as the "processing priorities" for applications in the SHP. The proposed changes were outlined in a submission from the Department to the Minister annexed to the special case.

15 The changes, which took effect from 22 March 2014, did not alter the order in which applications were considered, but provided for five categories of priority for the grant of applications. The "processing priorities within the SHP", as they became, were, in descending order of priority, as follows:

> "(a) applicants proposed by an immediate or 'split' family member who holds a Refugee and Humanitarian (Class XB) (subclass 202) visa;
>
> (b) applicants proposed by a close family member (a sibling, parent, partner or child) who does *not* hold a Protection (Class XA) (Subclass 866) visa or a Resolution of Status (Class CD) (Subclass 851) visa;
>
> (c) applicants proposed by an extended family member (a grandparent, grandchild, aunt, uncle, niece, nephew or cousin) who does *not* hold a Protection (Class XA) (Subclass 866) visa or Resolution of Status (Class CD) (Subclass 851) visa;
>
> (d) applicants proposed by a friend or distant relative who does *not* hold a Protection (Class XA) (Subclass 866) visa or a Resolution of Status (Class CD) (Subclass 851) visa or by an organisation operating in Australia;
>
> (e) any application proposed by or on behalf of a person who holds a Protection (Class XA) (Subclass 866) visa or a Resolution of Status (Class CD) (Subclass 851) visa, or who arrived as an 'irregular maritime arrival' prior to 13 August 2012."

16 Because the Visa Application was proposed by the plaintiff, who is a person who holds a Protection (Class XA) (Subclass 866) visa and who arrived as an irregular maritime arrival prior to 13 August 2012, the Visa Application was accorded the lowest of these priorities.

17 Departmental information about the "priorities" in relation to Subclass 202 visas was set out in the Department's Procedures Advice Manual 3 ("the PAM 3"), which was also annexed to the special case. The PAM 3, referring to the "compelling reasons" criterion in cl 202.222(2), stated that:

> "It is a reality of the global situation that every year many more persons apply for a [Subclass 202] visa than Australia has the capacity to accept. From a pool of many applicants, officers must ensure that the limited resettlement places available each year are offered to those applicants for whom there are compelling reasons for resettlement. This is, by necessity, a subjective process.
>
> ...
>
> The 4 factors [in cl 202.222(2)] should be considered both individually and cumulatively. ...
>
> ...
>
> When assessing the 'compelling reasons' criterion, officers should be aware of the following background:
>
> - the Government's current priorities for resettlement of persons under the humanitarian program, as announced each year, including the number of visa places available under the refugee and special humanitarian program categories".

18 The PAM 3 noted that in exceptional circumstances individual applications may be given a higher priority.

The decision letter

19 By letter to the plaintiff's mother dated 16 September 2014, the Delegate informed the Visa Applicants that the Visa Application had been refused ("the Delegate's letter"). The Delegate said that he was not satisfied that there were compelling reasons for giving special consideration to granting Subclass 202 visas to the Visa Applicants. The parties' arguments made extensive reference to this letter; it is therefore convenient to set out the passages that were said to be relevant. The Delegate referred to cl 202.222(2) and said:

> "The assessment of the four (4) factors included in the compelling reasons criteria is made in the context of the Government's annual decision on the size of the Humanitarian Programme, and the reality of a very large number of applicants who are subject to persecution or substantial discrimination. On 1 July 2014 there were over 45,000 applicants awaiting a decision in the Special Humanitarian Programme with only 5,000 places available in the 2014-15 programme year. Most applicants have close family in Australia and have suffered some form of discrimination or persecution.

I have considered all the information provided for the purposes of this visa application.

I acknowledge you and your family have strong links to Australia and that there is no other suitable country available for resettlement. I accept that you are subject to a significant degree of discrimination in your home country.

I have also considered that Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time.

Every year many more people apply to be resettled in Australia than we can accept. In 2013-14, more than 63,000 people applied and 11,000 were accepted. On 1 July 2014 there were over 45,000 applicants, including close family members of Australian proposers, awaiting a visa decision, with only around 5,000 places available in the Special Humanitarian Programme for 2014-15.

While most applicants have suffered some form of discrimination or persecution, the limited number of visas available and the high demand for them mean that only a small proportion of applicants can be successful.

The government has decided that the fairest way to deal with applications is to give priority to applicants who are outside their home country and are either assessed as refugees by the [UNHCR] and formally referred to Australia for resettlement, or proposed by very close family members under the [SHP].

Weighing all these factors I am not satisfied that there are compelling reasons for giving special consideration to granting you and your family a Class XB visa.

As we can accept only a small number of applicants, the government has set priorities within the [SHP]. Only the highest priority applications will be successful because there are not enough visas available. Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time.

I appreciate that you wish to resettle in Australia, and I understand you will be disappointed with this decision. I assure you that I considered all the information included in your application."

20 In addition, on 16 September 2014, the Delegate made an entry into the case notes field of the Department's "Immigration Records Information System" to which the parties referred in the course of their arguments.

21 The Minister accepted that it may be inferred that, as the plaintiff contended, the Delegate assessed the Visa Application as one that ought to receive the lowest "priority".

Questions for determination

22 Pursuant to r 27.08 of the High Court Rules 2004 (Cth), the parties agreed upon questions for determination by this Court in a special case and the facts relevant to those questions. The questions posed for the opinion of this Court are:

1. Did the Delegate:

   (a) construe cl 202.222(2)(d) as requiring or permitting him to consider the capacity of Australia to resettle all applicants who apply for a humanitarian visa;

   (b) fail to construe cl 202.222(2)(d) as requiring him to consider the capacity of the Australian community to provide for the permanent settlement in Australia of each of the Visa Applicants, or persons such as each of the Visa Applicants, having regard to their individual circumstances; or

   (c) fail to construe cl 202.222(2) as requiring him to assess whether or not there were compelling reasons for giving special consideration to granting permanent visas to the Visa Applicants in the circumstances of the particular case, having regard to all of the matters in cl 202.222(2)(a) to (d) both individually and cumulatively?

2. If so, did the Delegate thereby make a jurisdictional error?

3. In deciding whether he was satisfied that the Visa Applicants satisfied cl 202.222(2), was the Delegate bound not to consider:

   (a) the number of "places" available in the SHP; or

   (b) the "priorities" set by the Government within the SHP?

4. If so, did the Delegate consider either or both of those matters, and thereby make a jurisdictional error?

5. In deciding whether he was satisfied that the Visa Applicants satisfied the criterion in cl 202.222(2), did the Delegate apply the policy stated in the relevant parts of the PAM 3?

6. If so:

   (a) was the PAM 3 inconsistent with the Act and the Regulations; or

   (b) did the Delegate apply the PAM 3 inflexibly without regard to the merits or circumstances of the case;

   and did the Delegate thereby make a jurisdictional error?

7. What, if any, relief should be granted?

8. Who should pay the costs of the special case?

The limited scope of the judicial review

23 It is necessary to make some preliminary observations in relation to the constraints within which the plaintiff's challenge to the validity of the Delegate's decision falls to be determined. These constraints are aspects of the scope of judicial review of administrative action, which is confined to the legality of the Delegate's decision. In particular, judicial review is concerned with whether the Delegate's decision was one which he was authorised to make; it is not[1]:

> "an appellate procedure enabling either a general review of the … decision … or a substitution of the … decision which the … court thinks should have been made."

24 First, the burden is upon the plaintiff to demonstrate that the Delegate's decision was affected by jurisdictional error. The plaintiff must show that the approach adopted by the Delegate "manifest[ed] a legally erroneous view as to

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1 *Craig v South Australia* (1995) 184 CLR 163 at 175; [1995] HCA 58. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42; [1986] HCA 40; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; [1990] HCA 21.

what it was about which [he] needed to be satisfied"[2], so that the Delegate lacked legal authority to make the decision that was made[3].

25 It is well settled that in the context of administrative decision-making, the court is not astute to discern error in a statement by an administrative officer which was not, and was not intended to be, a statement of reasons for a decision that is a broad administrative evaluation rather than a judicial decision[4]. It is possible that error of law on the part of the Delegate might be demonstrated by inference from what the Delegate said by way of explanation of his decision; but it must be borne in mind that the Delegate was not duty-bound to give reasons for his decision[5], and so it is difficult to draw an inference that the decision has been attended by an error of law from what has *not* been said by the Delegate[6]. Further, "jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power"[7]; but here the plaintiff does not show that relevant material was ignored simply by pointing out that it was not mentioned by the Delegate, who was not obliged to give comprehensive reasons for his decision. Further, the Delegate's letter is "not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed"[8].

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2 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 629 [55]; [1999] HCA 21.

3 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30.

4 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 278, 282; [1996] HCA 6.

5 *Migration Act* 1958 (Cth), s 66(2)(c) and (3).

6 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605-606 [31]-[33], 615-618 [66]-[73]; [2011] HCA 1.

7 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 175 [27]; [2010] HCA 48; see also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351-352 [82]-[84].

8 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

26 Secondly, the formation by the Delegate of the state of satisfaction required by cl 202.222(2) establishes whether a visa is to be granted. That state of mind is not readily seen as a jurisdictional fact upon which the Delegate's authority to enter upon the determination of the application depends[9]. A complaint about the result of the exercise by the Delegate of his authority is not a complaint about the non-existence of that authority[10]. Accordingly, there may be a question as to whether any demonstrated error on the part of the Delegate in deciding the application was such as to vitiate his authority to decide whether or not to grant the visas. As will appear, however, the plaintiff's challenge fails at the point of demonstrating any error of law on the part of the Delegate so that it is unnecessary to delve further into the subtleties encompassed in the concept of jurisdictional error[11].

27 In addition to the limited scope of judicial review, it is also to be noted that the arguments advanced by the plaintiff asserted error of law in relation to the Delegate's understanding of cl 202.222(2) and his application of that provision by reference to the priorities policy adopted by the Minister. No case was advanced that the Delegate's decision was vitiated by a failure to accord the plaintiff or the Visa Applicants procedural fairness.

28 For the sake of coherence in addressing the issues raised by the agreed questions, it is convenient to marshal the arguments addressed by the parties under three broad headings. While there is some overlap of the arguments relating to the various questions, the groupings will aid focus and, to some extent, reduce repetition. Under the heading "Clause 202.222(2): its proper construction and application" will be grouped the arguments which bear upon Questions 1 and 2. Under the heading "Irrelevant considerations" will be grouped the arguments relevant to Questions 3 and 4. Under the heading "The priorities" will be grouped the arguments relevant to Questions 5 and 6.

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9 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 629 [55].

10 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391; [1938] HCA 7.

11 cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163]; [2000] HCA 57; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 350-351 [81]-[82]. Frankfurter J famously described the concept of jurisdictional error as a "verbal coat of too many colors": *United States v L A Tucker Truck Lines Inc* 344 US 33 at 39 (1952).

Clause 202.222(2): its proper construction and application

Four criteria or one criterion

29 The plaintiff argued that the Delegate's letter contains positive findings made by the Delegate in respect of each of the factors enumerated in cl 202.222(2)(a), (b) and (c). It was said that the Delegate found that the Visa Applicants were subject to a "significant degree" of discrimination in their home country, that they had "strong links to Australia" and that there was "no other suitable country available for resettlement". Accordingly, in the plaintiff's submission, the issue on which the Delegate's determination turned was cl 202.222(2)(d): "the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia". The plaintiff submitted that the Delegate's view that "Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time" and "only a small proportion of applicants can be successful" erroneously treated par (d) as determinative of the outcome of the Visa Application, rather than as one factor to be weighed in applying cl 202.222(2).

30 The plaintiff's submission misunderstands the operation of cl 202.222(2). Clause 202.222(2) does not state several criteria by reference to which the decision is to be made: it raises only one criterion for the grant of the relevant visa. That criterion is that the Minister (or a delegate) is "satisfied" that "there are compelling reasons for giving special consideration to granting the applicant a permanent visa". As was the case in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[12], the nature of the decision entrusted to the Delegate was not a "determination" but, rather, "satisfaction". That state of satisfaction must be informed by the factors mentioned in pars (a) to (d), to which the Minister must have regard in making the single evaluation required in order to grant a Subclass 202 visa. It is, therefore, wrong to speak of findings that the Visa Application "satisfied" pars (a), (b) and (c). And, in truth, the terms of the Delegate's letter do not suggest that the Delegate approached his task as a matter of making findings about separate criteria rather than taking the factors into account in reaching his decision.

31 In addition, the state of mind required of the Minister (or a delegate) must be reached by reference to "reasons" that are "compelling"; that is, those reasons

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12 (1996) 185 CLR 259 at 271.

must "force or drive the decision-maker"[13] "irresistibly"[14] to be satisfied that "special consideration" should be given to granting the particular application. Paragraphs (a), (b) and (c) of cl 202.222(2) may be met by an applicant in a general way, but the reasons why that is so may not be sufficiently compelling to satisfy the Minister that "special consideration" should be given to granting the application.

32 The rationale of the criterion of "compelling reasons for giving special consideration" is that there are, indeed, more applicants in the general category of persons described in pars (a), (b) and (c) than can, in the Government's judgment, be settled permanently within the Australian community. To accept that this is so does not mean, as the plaintiff argued, that the Delegate effectively treated the limits on Australia's capacity as leaving no room for the operation of the factors specified in cl 202.222(2)(a) to (c) in the circumstances of this particular case. The plaintiff's argument that the Delegate failed to construe cl 202.222(2) as requiring him to have regard to all of the matters in cl 202.222(2)(a) to (d) individually and cumulatively must be rejected.

The meaning of cl 202.222(2)(d)

33 The plaintiff also argued that a misunderstanding of cl 202.222(2)(d) is demonstrated by the circumstance that the Delegate, in his letter of 16 September 2014, spoke of having:

> "considered that Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time. … Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time."

34 In particular, the plaintiff argued that the Delegate misconstrued par (d) as referring to "Australia's" capacity to resettle *all* applicants for Subclass 202 visas, rather than the "Australian community's" capacity to resettle persons such as the *particular* Visa Applicants in Australia. The plaintiff argued that par (d) should be understood as referring to the "settlement of the applicant" not to "all applicants who apply for a humanitarian visa". On this basis, it was said that the Delegate failed to give proper consideration to the individual circumstances of

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13 *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 285 at 289 [21].

14 *Paduano v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 204 at 211 [32], 213 [37].

the Visa Applicants. And in this regard, the plaintiff emphasised that the Delegate's letter contains no reference to the support available to the Visa Applicants which was apparent in the material before the Delegate, including in the letters from the plaintiff's carer, from Foundation House and from the Flemington and Kensington Community Legal Centre. In the plaintiff's submission, that material was directly relevant and not so "insignificant that the failure to take it into account could not have materially affected the decision"[15].

35 The Minister submitted that the plaintiff identified no basis upon which this Court might conclude that the Delegate did not consider all of the evidence provided in support of the Visa Application, especially given the Delegate's express assurances in his letter that he had done so. It was said that the onus of establishing that fact is upon the plaintiff, and in circumstances where the Delegate's letter cannot be taken as comprehensive reasons for decision, a finding to that effect is not open to the Court.

36 The plaintiff's scrutiny of the Delegate's letter as if it were a comprehensive statement of his reasons concerned to make findings as to the various matters referred to in cl 202.222(2)(a) to (d) does not expose error by the Delegate. As noted above, by reason of s 66(2)(c) and (3) of the Act, the Delegate was not required to give a statement of reasons in relation to his decision to refuse the Visa Application. It is apparent from the Delegate's letter that the Delegate considered the Visa Application taking account of each of the four matters specified in pars (a) to (d) of cl 202.222(2). The plaintiff cannot invite the inference that an erroneous view has been taken of some material aspect of the matter simply because that aspect has not been expressly addressed and made the subject of findings.

37 As to the plaintiff's attempt to seize upon the reference to "Australia" in the letter, as opposed to the "Australian community" in par (d), on any fair reading of the letter, there is no reason to think that the Delegate used the word "Australia" in contradistinction to the "Australian community". In addition, the Delegate did not err in construing par (d) of cl 202.222(2) as referring to the capacity of Australia to settle permanently persons who, like the Visa Applicants, might fall within pars (a), (b) and (c). The Delegate's approach conformed to both the letter and the substance of the provision.

38 The plaintiff's argument fails to acknowledge that the occasion for having regard to cl 202.222(2)(d) is the making of a determination as to whether there

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15 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

are "compelling reasons for giving special consideration to granting the applicant a permanent visa". To give "special consideration" is to distinguish the application for the grant of a visa from the general run of candidates who, individually, might have merit under cl 202.222(2)(a) to (c). The Australian community's "capacity" to provide for the permanent resettlement of such persons who apply for Subclass 202 visas is a factor in the assessment of whether there are "compelling reasons for giving special consideration" to granting permanent visas to the Visa Applicants. This is because cl 202.222(2)(d), in referring to "persons such as the applicant", is naturally apt to include all persons who may qualify for the same visa.

39 An evaluation of "the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia" involves an evaluation that is so open-textured that it may be doubted whether a challenge to its correctness is viable at all unless a misunderstanding of this factor on the part of the decision-maker can be demonstrated by reference to what the decision-maker has actually said on that subject. In this case, the plaintiff asserted that an error of this kind may be inferred from the circumstance that material was placed before the Delegate about the support that would be available to the Visa Applicants should they be permitted to come to Australia, and so only if the Delegate had misunderstood par (d) could he have concluded that the Australian community does not have the capacity to provide for the permanent settlement of the Visa Applicants in Australia. But this argument itself depends upon the premise that par (d) is concerned only with the availability in Australia of sources of support for, and accommodation of, the Visa Applicants. That premise is not supported by the language of the paragraph.

40 The issue is not whether arrangements can be made to feed, clothe and house the Visa Applicants by relying upon the support of the plaintiff's carer and the local Hazara community. The issue is as to the capacity of the Australian community to provide for their permanent settlement in Australia. Clause 202.222(2) authorises the decision-maker to consider a wide range of matters which bear upon their successful absorption into the Australian community, including, but not limited to, their likely ability to support themselves, and the effect that the exercise of that ability is likely to have upon others in the community. Concerns such as these are comprehended in the notion of "provid[ing] for ... permanent settlement … in Australia", that is, as members of the Australian community. These concerns are not apt to be resolved by arrangements for the provision of accommodation and support to the Visa Applicants.

Irrelevant considerations

41 The plaintiff submitted that, in considering cl 202.222(2)(d), the Delegate took into account irrelevant considerations. These considerations were said to be the "5,000 places available in the Special Humanitarian Programme for 2014-15", "the limited number of visas available and the high demand for them", the assertion that "only a small proportion of applicants can be successful", and that "[o]nly the highest priority applications will be successful because there are not enough visas available".

42 The plaintiff argued that the Delegate treated the number of places and visas available as an informal cap or quota on the grant of Subclass 202 visas. This was said to be an irrelevant consideration because the Minister had not utilised the statutory mechanisms[16] in the Act and the Regulations to impose a limit on the number of such visas that may be granted. The plaintiff also argued that, insofar as the priorities policy is an attempt to implement an informal administrative cap or quota on the number of Subclass 202 visas, it is inconsistent with the statutory mechanism for implementing a formal cap or quota.

43 These arguments cannot be accepted. The plaintiff's characterisation of the Government's decision to allocate 5,000 "places" in the SHP as an informal cap or quota is misconceived. It is true that the Minister did not exercise the statutory power to determine the maximum number of Subclass 202 visas that could be granted in a specified year, but the effect of the priorities policy on the Delegate's consideration of cl 202.222(2)(d) was not equivalent to a "cap" or "quota" fixed under s 85 of the Act. If a cap is fixed under s 85, then once that cap is reached in any given year, all outstanding applications are deemed not to have been made and affected applicants would be required to recommence the application process[17].

44 Clause 202.222(2)(d) requires consideration of whether there are "compelling reasons for giving special consideration" to granting a visa, taking

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16 Section 85 of the Act empowers the Minister to limit the number of visas of a specified class that may be granted in a financial year. Section 39 of the Act and cl 202.226 of Sched 2 to the Regulations empower the Minister to fix the number of Subclass 202 visas that may be granted in a financial year by legislative instrument.

17 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 729-730 [38]-[45]; 309 ALR 209 at 218-219; [2014] HCA 24.

into account the decisions and guidance of the Australian Government. Choices must necessarily be made in deciding which applicants should be given special consideration. Whether there are compelling reasons for making a particular choice may be affected by the number of available places. The number of available places in the SHP affects how compelling a case must be to distinguish an application requiring special consideration from the others which are generally worthy of consideration under pars (a), (b) and (c) of cl 202.222(2).

The priorities

45 The plaintiff submitted that the priorities policy is inconsistent with the Act and the Regulations. Further, it was said that the Delegate inflexibly applied the priorities policy without regard to the merits of the Visa Application.

46 As to the first of these arguments, the plaintiff said that the instruction to officers given in the PAM 3 to consider the "stated Government priorities" when assessing the capacity of the Australian community in cl 202.222(2)(d) is inconsistent with the factors prescribed for consideration by cl 202.222(2). In particular, it was said that the priority category to which the plaintiff belongs is unrelated to any characteristic of a visa applicant (as opposed to the person who proposed the application); that it is irrelevant to the Australian community's capacity to resettle persons such as the visa applicant; and that it is, in effect, a punishment of the plaintiff imposed by reason of the circumstances of his arrival in Australia.

47 As to the second argument, it was said that cl 202.222(2) does not contemplate that the Minister may "quarantine" a category of applicants without regard to the circumstances of a particular application.

Inconsistency and irrationality

48 The priorities policy is not inconsistent with cl 202.222(2). Rather, it is apt to inform the evaluation required to be satisfied that there are "compelling reasons for giving special consideration" to an application which can be seen to attract general consideration under pars (a) to (c). And the plaintiff's submissions that the "priorities" are irrelevant to the issues which arise under cl 202.222(2) or are in some way designed to "visit a punitive consequence" on irregular maritime arrivals cannot be sustained.

49 The evident rationale of the priorities policy is that no-one should receive a migration advantage as a result of arriving in Australia as an irregular maritime arrival. Whether or not one agrees with that rationale as a matter of policy, it is not inconsistent with cl 202.222(2). As already noted, the subclause

contemplates a process of differentiation to separate the special from the general run of applicants who are candidates under pars (a), (b) and (c). Further, there is no suggestion that the application of the priorities policy means that any visa places allocated to the SHP are not filled. The policy means only that, in conducting the evaluation of whether there are compelling reasons for giving special consideration to the grant of a visa, an advantage will be conferred on an applicant whose application was proposed by a person who arrived in Australia in a "regular", rather than "irregular", fashion.

50 The breadth of the evaluative judgment authorised by cl 202.222(2) can accommodate a consideration of the manner in which the proposer of a visa came to Australia. Consideration of that factor as an aspect of government policy is not inconsistent with either the text or purpose of cl 202.222(2). If numerous applications are otherwise compelling in terms of the criteria in cl 202.222(2), it is not irrational, or unreasonable, or punitive to prefer an application from the family of a proposer who came to Australia by regular means over an application from the family of a proposer who came to Australia as an irregular maritime arrival. It is not irrational that the former application might be regarded as of a kind which should be encouraged in preference to others. There is nothing irrational or unreasonable about preferring the former application over the latter where it is impossible, or simply invidious, to attempt to distinguish between them on other, more subjective grounds.

51 It must also be said that to separate those with a compelling claim to special consideration from all those who generally have merit under pars (a), (b) and (c) by reference to the circumstances of the arrival in Australia of the proposer is not to punish those whose proposer arrived in circumstances not favoured by Australian law[18]: it is simply to recognise that not every applicant for a visa can obtain that advantage, and that the choice to be made may reflect a view that some applications are more compelling than others because of the circumstances of the proposer.

Inflexibility

52 In relation to the plaintiff's submission that the Delegate impermissibly treated the priorities policy as a fetter on the exercise of his discretion, it was said that any application of an administrative policy "must admit of the possibility of

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18 *Migration Act* 1958 (Cth), s 42(1), which provides relevantly that "a non-citizen must not travel to Australia without a visa that is in effect."

exception depending upon the circumstances of a particular case"[19] and must not be such as to[20]:

> "preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful".

53 The plaintiff argued that the Delegate's letter revealed that the priorities policy was inflexibly applied without proper regard to the circumstances or merits of the individual case. Once again, the plaintiff's argument fails to appreciate that the application of cl 202.222(2) involves an evaluative judgment as to whether the Minister is satisfied that there are "compelling reasons for giving special consideration". The priorities policy assists in informing that evaluative judgment but, as the PAM 3 noted, exceptions might apply.

54 Policy guidelines like the priorities policy promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike[21]. In particular, policies or guidelines may help to promote consistency in "high volume decision-making"[22], such as the determination of applications for Subclass 202 visas. Thus in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[23], Brennan J, as President of the Administrative Appeals Tribunal, said that "[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable" because the adoption of a guiding policy serves, among other things, to assure the integrity of administrative decision-making by "diminishing the importance of

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19 *Seiffert v Prisoners Review Board* [2011] WASCA 148 at [124].

20 *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 at 497, cited by Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 287 [17]; [2003] HCA 35.

21 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 201-202, 204-205; [1965] HCA 27; *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 646-647.

22 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 206.

23 (1979) 2 ALD 634 at 642.

individual predilection" and "the inconsistencies which might otherwise appear in a series of decisions"[24]. The subjectivity of the evaluation by a decision-maker in a case such as the present highlights the importance of guidelines. The importance of avoiding individual predilection and inconsistency in making choices between a large number of generally qualified candidates by the application of the open-textured criterion of "compelling reasons for giving special consideration" is readily apparent.

55 The plaintiff observed that there was nothing in the Delegate's letter that revealed any consideration of whether the particular circumstances of this case should give rise to an exception to the application of the "priorities". But to say this is not to demonstrate that consideration was not given to that possibility. It cannot be inferred that the Delegate ignored evidence that the Visa Applicants were exposed to a degree of discrimination in their home country which was so serious relative to the generality of applicants for a visa, or that the extent of their connection with Australia was so strong relative to the generality of applicants, that a reasonable decision-maker would disregard the priorities policy. Understandably, the plaintiff did not attempt the difficult task of demonstrating that the circumstances of the Visa Applicants were so compelling in terms of their connection with Australia, and so grave in terms of their situation in Iran, that, on any reasonable assessment, their claim to a grant of visas overwhelmed that of all other applicants who are worthy candidates under pars (a), (b) and (c) and who stand higher than them under the priorities policy.

56 It may be said that the difficulty of demonstrating that the decision of the Delegate lacked an "evident and intelligible justification"[25] is a virtually insuperable hurdle for the plaintiff, but to say that is to acknowledge the broad and subjective evaluation required in the application of cl 202.222(2) and the difficulty of distinguishing between all the applications which have merit in terms of pars (a), (b) and (c).

57 The plaintiff also fixed on the statement in the penultimate paragraph of the excerpt from the Delegate's letter set out above – "[o]nly the highest priority applications will be successful" – and asserted that it demonstrates that the

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24 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640.

25 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76]; [2013] HCA 18.

priorities policy was applied inflexibly. This statement does not establish the plaintiff's contention.

58 It may be accepted that the priorities policy could not lawfully be applied rigidly so as to preclude the consideration by the Delegate of the circumstances of each applicant. But the departmental policy referred to in the PAM 3 contemplated that the circumstances of a particular application might be such as to raise compelling reasons for giving special consideration to the grant of a visa notwithstanding the priorities policy. The policy thus contemplated the possibility of relaxation of the priorities having regard to the circumstances of a particular case. And the paragraph on which the plaintiff has fixed does not demonstrate that the priorities policy was applied rigidly without regard to the particular circumstances of this case.

59 In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[26], Brennan CJ, Toohey, McHugh and Gummow JJ approved the statement of the Full Court of the Federal Court (Neaves, French and Cooper JJ) in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[27] that "[t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error." The statement of the Delegate on which the plaintiff relied follows the statement in the previous paragraph of the basis of the Delegate's decision: "Weighing all these factors I am not satisfied that there are compelling reasons for giving special consideration to granting you and your family a [Subclass 202] visa." That statement does not reveal error[28].

60 The Delegate's letter must be read fairly as a whole. It is apparent that the Delegate expressed his conclusion in respect of the application in the paragraph before that on which the plaintiff has fixed. That paragraph might have been an attempt on the part of the Delegate to emphasise that many applicants have strong claims to the scarce places available, in an attempt to assuage the disappointment which the Visa Applicants could be expected to feel at the decision stated in the preceding paragraph. However that may be, it can fairly be seen as a postscript to his conclusion.

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26 (1996) 185 CLR 259 at 272.

27 (1993) 43 FCR 280 at 287.

28 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 615-618 [66]-[73].

Conclusion

61 The questions posed for determination by the Court should be answered:

1. (a) Yes.

   (b) No.

   (c) No.

2. No.

3. (a) No.

   (b) No.

4. Unnecessary to answer.

5. Yes.

6. (a) No.

   (b) No.

   It is unnecessary to answer the rest of Question 6.

7. None. The proceedings should be dismissed.

8. The plaintiff.

62 GAGELER J. In my opinion, the questions reserved should be answered in the manner proposed by French CJ, Bell, Keane and Gordon JJ substantially for the reasons their Honours give.

63 The criterion prescribed by cl 202.222(2) of Sched 2 to the Migration Regulations 1994 (Cth), which must be met at the time of the grant of a Refugee and Humanitarian (Class XB) (Subclass 202) visa, is a single criterion that "the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa".

64 A statutory requirement that a decision-maker arrive at a state of satisfaction as a precondition to an exercise of a statutory power, like a requirement that a decision-maker hold a belief as a precondition to an exercise of a statutory power, necessitates that the decision-maker "feel an actual persuasion"[29] – "an inclination of the mind towards assenting to, rather than rejecting, a proposition"[30]. A statutory requirement that a decision-maker be satisfied that there are "compelling reasons" for taking particular action is a requirement that the decision-maker be persuaded that there are reasons in favour of taking that action which, when weighed within the context of the particular statutory scheme, are irresistible[31].

65 The structure of cl 202.222(2) obliges the Minister, or his or her delegate, in deciding whether there are compelling reasons for giving special consideration to granting the applicant a permanent visa, to reach the requisite state of satisfaction by "having regard to" the individual and cumulative effect of each of the considerations identified in pars (a) to (d). The requirement of "having regard to" those considerations is a requirement to take each of those considerations into account and to give each of them weight as a "fundamental element" of the decision to be made[32].

66 There is no dispute that each of pars (a) to (d) of cl 202.222(2) refers to a consideration which requires the exercise of evaluative judgment on the part of the decision-maker. It would be nonsense to suggest that any of them refers to a "jurisdictional fact", the existence or non-existence of which is for the objective

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29 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361; [1938] HCA 34.

30 *George v Rockett* (1990) 170 CLR 104 at 116; [1990] HCA 26.

31 *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 285 at 289 [21]-[24].

32 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; [1979] HCA 32.

determination of a court[33]. The evaluative judgment of the decision-maker gives content to each of them, provided the decision-maker conducts himself or herself according to law[34].

67 Once it is accepted that par (d) of cl 202.222(2) refers to a consideration which is for the evaluative judgment of the Minister or his or her delegate, there can be no doubt that it is for the Minister or his or her delegate to determine both the category of persons who meet the description of "persons such as the applicant" and the capacity of the Australian community to provide for the permanent settlement in Australia of persons within that category. Given that the capacity of the Australian community to provide for the permanent settlement in Australia of any category of persons must always be finite, it must also be for the Minister or his or her delegate to determine how to prioritise allocation of that finite capacity amongst persons within that category for the purpose of coming to the requisite state of satisfaction as to whether there are compelling reasons for giving special consideration to granting a permanent visa to a particular applicant within that category.

68 It is open to the Minister in the exercise of non-statutory executive power to lay down a policy for the guidance of his or her delegates in making those determinations. Indeed, it is inconceivable that the Minister would not do so. In *Nevistic v Minister for Immigration and Ethnic Affairs*[35], Deane J emphasised the importance of the adoption and consistent application of policy to the avoidance of substantial injustice in administrative decision-making, which involves "competition or correlativity between rights, advantages, obligations and disadvantages". Each applicant must always be entitled to have his or her application for the exercise of a decision-making power determined on its merits. But the merits of an application cannot always adequately be considered by reference to the circumstances of the applicant alone.

69 Where, as here, the statutory question is whether the decision-maker should be persuaded that there are compelling reasons for giving special consideration to granting one of a finite number of permanent visas to a particular applicant, the correct or preferable decision in the individual case cannot be divorced from the correct or preferable decision across the range of cases in which an exercise of that decision-making power can be expected to be

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33 Contrast *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 194 [107]-[109]; [2011] HCA 32.

34 Compare *Buck v Bavone* (1976) 135 CLR 110 at 118-119; [1976] HCA 24; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 306; [1997] HCA 10.

35 (1981) 34 ALR 639 at 647.

sought. Blinkered and individualised decision-making would be a recipe for maladministration.

70 The policy in fact determined by the Minister at the time of the decision of his delegate under review in this case had two relevant components. One was the determination that, of the 13,750 persons which the Australian Government had decided it was within the capacity of the Australian community permanently to settle in Australia in 2014-2015, 5,000 places would be allocated to applicants for Refugee and Humanitarian (Class XB) (Subclass 202) visas. The other was the determination that, in the allocation of those 5,000 places amongst the very much larger number of potentially deserving applicants for Refugee and Humanitarian (Class XB) (Subclass 202) visas, processing priorities would be applied according to which the lowest priority would be given to applications proposed by or on behalf of a person who arrived in Australia as an irregular maritime arrival before 13 August 2012.

71 Neither component of that policy was inconsistent with the terms or structure of cl 202.222(2) of Sched 2 to the Migration Regulations. The policy did not disregard the four mandatory considerations set out in pars (a) to (d) of cl 202.222(2). The ordering of the priorities was consistent with the object set out in s 4(1) of the *Migration Act* 1958 (Cth) of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens, and was not inconsistent with the general scheme of the *Migration Act* or with any of its provisions. The expression of the policy was not so rigid as to exclude consideration of the merits of the particular case, including a consideration of whether the circumstances of the particular applicant were so extraordinary as to warrant departure from the priority which would be afforded to the applicant in the ordinary application of the policy.

72 The terms of the delegate's letter notifying the applicants of the delegate's decision do not justify drawing an inference that the delegate adopted such a rigid approach to the application of the policy that he failed to have regard to the circumstances of the individual case advanced in support of the application. The letter was not a formal statement of the reasons for the decision: it was not a document devoted to setting out, exclusively and exhaustively, the findings of fact made by the delegate and the process of reasoning which the delegate adopted to reach the conclusion that there were no compelling reasons for giving special consideration to granting the visas. It was somewhat informally expressed.

73 The delegate's statement that "[o]nly the highest priority applications will be successful" would be demonstrative of undue rigidity were it to be read as reflecting part of the process of reasoning by which the delegate arrived at the conclusion that there were no compelling reasons for giving special consideration to granting the visas. The statement was made, however, after the delegate had already explained that he had reached that conclusion "[w]eighing" all of the

factors to which he had referred. The statement is best read, in the context of the letter as a whole, as having been offered by way of consolation in light of the decision already made, which the delegate recognised would cause disappointment to the applicants.