HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ENT19
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

DEFENDANTS' OUTLINE OF ORAL ARGUMENT

PART I: Certification

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

PART II: Propositions to be advanced in oral argument

The national interest criterion is valid

2. Clause 790.227 was not inserted into the *Migration **Regulations** 1994* (Cth) by an exercise of delegated legislative power under s 504 of the *Migration **Act** 1958* (Cth). Rather, it was inserted by an exercise of primary legislative power by the Parliament. Accordingly, cl 790.227 cannot be invalid on the basis that it is inconsistent with the Act (**DS [6]-[7]**).

3. If the Amending Act which enacted cl 790.227 were inconsistent with pre-existing provisions of the Act, the question would be whether the Amending Act impliedly repealed inconsistent provisions of the Act. The plaintiff does not undertake this analysis. Section 5(3) of the *Legislative Instruments Act 2003* (Cth) does not alter the position.

4. The Act does not exhaustively regulate the subject of the national interest, invalidating any regulation utilising the concept. The Regulations have contained a "national interest" criterion for the grant of protection visas since they were created in 1994 (**DS [12]**). A "national interest" criterion was included in the schemes that addressed persons covered by protection obligations prior to 1994 (**DS [13]**).

5. There is nothing that prevents ss 36(1B), 36(1C) and 501, and cl 790.227, operating cumulatively (**DS [18]**). The provisions are capable of serving different purposes. Sections 36 and 501 are not intended to be exhaustive of the matters they address: see ss 35A(6), 501H. Criteria like cl 790.227 existed at the time ss 501 and 501H were enacted.

6. Under s 35A(6)(b), it is open to prescribe "other" criteria that are capable of having an overlapping operation with criteria in the Act: *VWOK* (2005) 147 FCR 135 (**SJBA, Vol 8, Tab 63**).

7. Section 501(3) is not a general power to refuse visas in the national interest. It is a power to refuse a visa to a person who fails the character test, which can be done without natural justice if the refusal is in the national interest: see also ss 501(5), 501C(4).

The Minister's consideration was not *ultra vires* cl 790.227

8. The Decision was not based on the fact that the plaintiff has been convicted of a people smuggling offence. The plaintiff's conviction was a factum giving rise to the national interest considerations which were the reason for the Decision (**DS [32];** cf **Reply [18]**).

9. In any event, it is not possible to construe ss 233A to 234A as constituting an exhaustive prescription of the visa consequences which follow from the criminal conduct they proscribe. Indeed, those provisions do not address visa consequences. As such, there is no analogy to the decision in *Plaintiff S297* (2015) 255 CLR 231 (**JBA 3, Tab 16**) (**DS [34]**).

The Decision was not penal or punitive

10. There is no challenge to the validity of either s 65 of the Act or cl 790.227 of the Regulations on the basis that they are contrary to Ch III (**DS [36]**). The question is whether the Decision was authorised by the statute: *AJL20* (2021) 95 ALJR 567 at [43] (**JBA 5, Tab 25**).

11. Contrary to the Plaintiff's major premise, an intention to deter conduct perceived as being harmful to Australia or its national interest is not inherently punitive: *Djalic* (2004) 139 FCR 292 at [74]-[75] (**JBA 5, Tab 26**). Deterrence is usually (if not always) not an end in itself. It serves the purpose of the law the contravention of which is being deterred. It is not something innately linked to criminal punishment.

12. Cases involving deportation or cancellation of a visa, which are cases involving the taking away of granted rights, are distinguishable from a case of not granting a visa, given such a person never had the right to enter Australia: cf *Re Sergi* (1979) 2 ALD 224; *Tuncok* [2004] FCAFC 172 (**JBA 6, Tabs 35 and 38**); *ENT19* (2021) 289 FCR 100 at [153] (**JBA 5, Tab 27**) (**DS [43]**).

13. Contrary to the Plaintiff's minor premise, even if the refusal to grant a visa for the purpose of general deterrence is punitive (which is denied), that was not the sole or substantial purpose of the Decision, which is analogous to the decision considered in *ENT19* (2021) 289 FCR 100 at [154] (**DS [46]-[48]**). The Decision was not made to punish the Plaintiff but to achieve expressly stated national interest objectives.

14. The refusal of a benefit is not a punishment. It is the avoidance of signalling what might be an incentive to others.

15. There is no textual foothold in the Minister's reasons for the contention that she was punishing the plaintiff for his conduct as a people smuggler. His conviction was merely a factum that gave rise to the identified matters of public interest (**DS [50])**.

16. The Plaintiff was liable to be held in detention until he is removed both before and after the refusal decision. That is, the Decision did not cause the detention. The Minister is under a duty to remove him as soon as reasonably practicable, notwithstanding s 197C of the Act,

including to a third country: *Al-Kateb* (2004) 219 CLR 562 at [227] (**JBA 2, Tab 4**). Further, there are other outcomes envisaged by the Act (**DS [54]**).

17. The Plaintiff conflates the purpose of the Decision with his concept of the effect of the Decision upon him (**DS [51]**). The Plaintiff's detention was a consequence of other provisions in the Act and his continuing status as an unlawful non-citizen: *Falzon* (2018) 262 CLR 333 at [63], [69], [84]-[85], [96] (**JBA 2, Tab 7**).

Minister did not act on a misunderstanding of the law

18. The proposition that the Minister did not understand that the Act conferred upon her power to grant a visa application is farfetched and should be rejected (**DS [56]**).

19. The fact that the Ministerial Submission contemplated that a grant decision would not be made personally by the Minister is not a basis to infer that the Minister did not understand that she had power to grant a visa. Regardless, that misunderstanding would be immaterial.

Minister did not fail to take into account relevant considerations

20. The Minister has considerable latitude in what she considers as relevant to the "national interest. The Minister was entitled to, but not bound to, consider the matters agitated by the plaintiff: *Huynh* (2004) 139 FCR 505 at [71], [74], [80] (**JBA 5, Tab 30**) (**DS [61]**).

21. It should not be inferred that the Minister was unaware of any of the issues agitated: see RAB 91-94 [4]-[5], [7], [19], 101ff (**DS [62];** cf **PS [63]**).

Relief

22. If the Decision is invalid, the appropriate relief is an order quashing the Decision and an order requiring the Minister to make a new decision (**DS [63]**).

23. If cl 790.227 is read down so as not to support the making of the Decision, that would not foreclose the Minister from lawfully refusing the visa: cf *Plaintiff S297/2013* (2015) 255 CLR 231 at [41] (**JBA 3, Tab 16**) (**DS [66]**). Accordingly, the Court should not order peremptory mandamus to compel the grant of a visa.

24. In addition, in any scenario in which the Plaintiff is successful, the detention of the plaintiff would not be unlawful. Accordingly, there should be no order for habeas corpus (**DS [67]**).

Dated: 15 March 2023

Stephen Lloyd Alison Hammond Jackson Wherrett