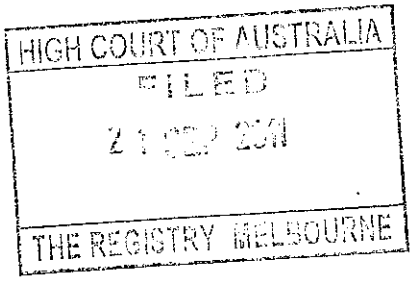
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M10 of 2011

BETWEEN



SAYED ABDUL RAHMAN SHAHI

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

10 **PLAINTIFF'S SUBMISSIONS IN REPLY**

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

2. In *Berenguel v Minister for Immigration and Citizenship,*[1] this Court rejected an approach to construction of the Regulations founded upon "*some direct operation of the undefined heading 'Criteria to be satisfied at time of application'*."[2] (The heading "Criteria to be satisfied at time of decision" is no more defined.)

3. The Defendant contends that the case of *Berenguel* was exceptional, and its reasoning should be limited to the situation of a clause set out under the heading "Criteria to be satisfied at time of application", and then only where
20 the language of the clause is more suggestive of satisfaction at the time of decision better meeting its purpose.[3] Save for the exceptional case, the very structure of every Part of Schedule 2 dictates, according to the Defendant, that the headings "Criteria to be satisfied at time of application" and "Criteria to be satisfied at time of decision" are determinative of the construction of the clauses set out under each of them. On the Defendant's argument,[4] what the

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1 (2010) 264 ALR 417.

2 (2010) 264 ALR 417 at 422 [25].

3 Defendant's submissions on special case dated 14 September 2011 (**Defendant's submissions**) at [20].

4 Defendant's submissions at [18].

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Court in *Berenguel* found was an "*undefined heading*"[5] that did "*not connect grammatically*"[6] with the terms of the clauses set out it, should be read as if it provided, with great specificity: "Criteria to be satisfied at the time of decision by reference to the circumstances as they existed at the time of application, evaluated on the evidence as at the time of decision".

4. The Defendant's contentions should not be accepted.

5. The reasoning of this Court is *Berenguel* is not as limited as the Defendant would read it. Nor did *Berenguel* hold that the criterion there at issue "*needed to be assessed as at the time when the delegate made the decision whether or not to grant the visa*".[7] This Court said nothing about the precise moment in time when that criterion should be assessed, only that it was capable of being satisfied at a later point in time than when the applicant made his application by evidence provided pursuant to section 55 of the Act.

6. The fact that other regulations, such as reg. 2.08, either allow for "deeming" matters to have occurred at the time of application for the visa, or specifically identify the time when matters must be satisfied, shows that, in each case and consistently with this Court's reasons in *Berenguel*, it will be a question of the proper construction of all applicable regulations, including criteria contained in a Part of Schedule 2, to determine how any issue of timing of a particular matter or circumstance, required to be satisfied by reason of it having been prescribed as part of a criterion for the grant of the visa, is to be resolved.

7. Clause 202.221, by its reference to "the criterion in clause 202.211", provides no more than, whenever evaluated, an applicant continues at that time either to be subject to substantial discrimination amounting to gross violation of human rights, or to meet the requirements of subclause (2) of clause 202.211. Nothing in the language of clause 202.221, certainly not the word '*continues*', dictates the construction of subclause (2) of clause 202.211. Where, in Part 202 of the Regulations, the drafter intended that a relationship should exist as a time of application and as a continuing time of decision circumstance, the drafted provided expressly to that effect: see clauses 202.311 and 202.321.[8]

8. Results apparently contrary to an apparent policy of the definition of "member of the immediate family",[9] such as the result that might occur in the case of a

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5 (2010) 264 ALR 417 at 422 [25].

6 (2010) 264 ALR 417 at 422-423 [26].

7 Defendant's submissions at [20].

8 Modified by the Migration Regulations (Amendment) 1997, SR 1997 No.137.

9 See Defendant's submissions at [34]-[35]. The Plaintiff does not concede there is an apparent policy of that definition, distinct from the policy of the Regulations as a whole insofar as they provide for the "split family" stream in the five subclasses of Class XB.

spouse who divorces the proposer before a delegate of the Defendant makes a decision, are capable of being addressed under any one of clauses 202.222, 202.223 and 202.224.

9. As the Defendant acknowledges, no limit in respect of subclass 202 visas has been gazetted under section 85 of the Act.[10] Where no determination has been made under section 85, a delegate of the Defendant does not have authority not to consider, or delay consideration of, an application for a visa.

10. In the present case, the delegate took 9 months to make a decision in respect of the Plaintiff's mother application for a subclass 202 visa, then took another 3 months before notifying her. **[SCB 10 at [4], 12 at [14]]** If the delegate had been delaying making the decision by reason of some quota informally set by the Department of Immigration and Citizenship, or by reason of a "go slow" policy in respect of proposers granted subclass 866 visas after arriving in Australia as unaccompanied minors, mandamus would have gone to compel the discharge of the duty in section 65 of the Act.[11]

11. The very existence of a legislative scheme intended to permit "capping" of the number of visas and, possibly,[12] authorise "delay" in the processing of an application, supports the Plaintiff's argument on unfairness. The criteria in clauses 202.211 and 202.221 are to be construed against the background that if "delay" in processing had been authorised, by reason of the Defendant having made a determination under section 85 of the Act, clause 202.226 would have become relevant.

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10 Defendant's submissions at [36]. To the best of the Plaintiff's knowledge, no limit has ever been gazetted in respect of any of the five subclasses of Class XB.

11 See *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 483 [38] (Gummow J).

12 Section 88 of the Act suggests that delay in processing a visa application is not authorised.