IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150 of 2013

B E T W E E N

PLAINTIFF M150 OF 2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR

Plaintiff

and

10 **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S ANNOTATED WRITTEN SUBMISSIONS IN REPLY

Date of document: 26 February 2014
Filed on behalf of: the plaintiff

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PART 1 – FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the Internet.

PART 2 - ARGUMENT

Legislative Instruments Act

2. At the heart of section 48 of the *Legislative Instruments Act 2003* (Cth) (**LIA**) lies the comparison required by the term 'same in substance'. As the terms of s48 make clear,[1] that may operate at more than one level: it may be at the level of particular 'provisions' in each legislative instrument; alternatively, it may be at the level of the set of provisions constituting each 'legislative instrument' as a whole.

3. The reason for that flexible approach is two-fold. First, a comparison between each instrument as a whole may reveal the circumstance identified by Latham CJ in the *Women's Employment Regulations Case* at 360-361: that is, that while 'no single one of the new regulations was the same in substance as any particular disallowed regulation', the 'effect of the new re-drafted and re-arranged regulations, taken as a whole, might be the same as that of the regulations which had been disallowed'. The fact that those two instruments would then differ in form would not be sufficient to defeat the apparent object of s49.[2]

4. Secondly, by permitting a comparison at the level of individual provisions, Parliament has sought to ensure that the consequences of disallowance cannot be evaded by adopting the device of preserving an area in which the new and disallowed instrument has the 'same operation', but adding to (or subtracting from[3]) the matters otherwise covered by the disallowed instrument: see Latham CJ's reasons at 361. As his Honour there observed, if permissible, that would reduce the provision to a 'complete futility'. Yet, it is just such a construction of s49 that the defendants invite this Court to adopt.

5. This case invites a comparison at the level of two particular provisions.[4] It is a truism that each of those provisions is to be construed in the context of the whole of the instrument of which they form a part (cf DS [16]). That is no more than an aspect of the orthodox manner in which legal meaning is attributed to a legal text (be it a statute or delegated legislation), guided by common law principles, which require attention to the text, objective purpose and the context, including the context of the legislation under which they are made.[5]

6. The text of clause 9 of schedule 1 to the TPV Regulation, and the context (including in particular the fact that it purportedly provided a criterion for the specified visa sub-class), suggests that the objective purpose is that succinctly identified in the explanatory statement:

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[1] And as was accepted to be the case in respect of the predecessor provision in the *Acts Interpretation Act 1901* (Cth): see *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 347 (**Women's Employment Regulations Case**) at 360 per Latham CJ and 388-389 per McTiernan J.

[2] But, the defendants' suggestion that a comparison is 'necessary' in every case where a legislative instrument is disallowed (see DS 15(c)) involves a misstatement of his Honour's reasons. Nor did Williams J suggest such a requirement at 405-406. It remains open to approach the comparison at the level of the particular provisions.

[3] See, in that regard, Latham CJ's reference at 361.5 to similar considerations applying where the ground of disallowance is that the 'regulations are too extensive in their operation'.

[4] Being clause 9 of schedule 1 to the *Migration Amendment (Temporary Protection Visa) Amendment Regulation 2013* (Cth) (the **TPV Regulation**) and clause 1 of schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (the **PPV Regulation**).

[5] See eg *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 110, [19] per curiam.

> The purpose of this amendment is to ensure that a Subclass 866 (Protection) visa is no longer available to a person who is an unauthorised maritime arrival, did not hold a visa on their last entry to Australia, was not immigration cleared on their last entry to Australia, or who holds or has held a Subclass 785 (Temporary Protection) visa since last entering Australia. This amendment reflects the Government's intention that such a person will not be granted a permanent protection visa.

7. That is the 'real purpose and effect' of that clause which, as Williams J observed in the *Women's Employment Regulations Case*, equates to its 'substance'.[6] It is, of course, true that other provisions of the TPV Regulation provided for an alternative visa class, for which the plaintiff would have been eligible. But every criterion in the Migration Regulations takes its place in a milieu of visa classes, sub-classes and associated criteria.[7] Considered at the level of the particular provisions, the substance here is materially identical: the persons there specified cannot be granted a Subclass 866 (Protection) visa. The defendants' submissions enter upon the issue at an inappropriate level of generality and conflate the 'effect' of the instrument as a whole with the notion that it is necessary to construe each provision in its context (see particularly DS [29]).

8. It is also necessary to bear in mind that there are a number of possible avenues available to the Government in the event that it wishes to re-cast a disallowed legislative instrument in narrower form. That includes, in particular, by way of the Senate rescinding the disallowance motion pursuant to s48(1), thereby removing any obstacle to the later, narrower, instrument being passed. The Act envisages that that is the course that will be followed, rather than seeking to invite the Court to seek to decipher from an inscrutable disallowance motion whether one part, or another or the whole of a disallowed legislative instrument was considered obnoxious by the Senate.[8]

Ultra vires

9. The defendants' submissions regarding 'implication' (DS [36]-[43]) miss the mark. As was made clear in the plaintiff's submissions, the plaintiff's arguments concerning ultra vires are addressed to the legal meaning to be attributed to ss31(3) and 504 of the *Migration Act 1958* (Cth) (**Migration Act**) in light of the scheme of the Act as a whole (PS [10]-[16]). That involves what Gleeson CJ characterised (in *Carr v Western Australia*[9] – upon which the defendant seeks to rely) as a 'commonplace exercise' whereby the general words in a statute are read in light of other provisions in the legislative scheme. His Honour went on to draw a sharp contrast between that commonplace exercise and the argument sought to be advanced by the appellant in *Carr*, which he characterized as an 'attempt to add, by implication, a ground of mandatory exclusion of evidence' (without seeking to show any 'process of construction by which that can occur'). It is to that endeavour that his Honour's reasons at [17] were directed. The question that arises here concerns the proper construction of the statutory text. That question is apt to be obscured by the *a priori* approach seemingly suggested by the defendants at [36]-[44]. Nor, for the reasons given below, do any of the matters

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[6] At 406 and 408.
[7] Indeed, the application of clause 866.222 to the plaintiff, and the resulting refusal of his application for a protection visa, has led to him being granted other temporary visas: see para 17B of the ASOC.
[8] See Latham CJ in the *Women's Employment Regulations Case* at 362-363.
[9] (2007) 232 CLR 138 at 146 [15]. See also Herzfeld et al '*Interpretation and use of legal sources*' Thomson Reuters (2013) at 197-198.

upon which the defendants seek to rely provide a persuasive reason for adopting their proposed construction of ss31(3) and 504.

10. ***Section 46A:*** The defendants effectively argue that s46A dilutes the primacy of the criterion specified in s36(2) (see eg DS [53]). As the plaintiff submitted in chief, that criterion, together with the criteria derived from articles 1F, 32 and 33(2) of the Convention (which are also picked up in the text of the Act), can be seen as an exhaustive statutory traverse of the circumstances in which Australia owes protection obligations, and the exceptions and qualifications to those obligations. Properly construed, that exhaustive statement of the law on that subject matter carries with it an implicit negative:[10] that is, that there are to be no additional exclusionary criteria unrelated to those matters.[11]

11. And, far from detracting from that submission, s46A reinforces it. As this Court has said and then reiterated,[12] the changes to the *Migration Act* effected by the enactment of s46A (and the consequential addition of s198A) reflected 'a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act'. It did so in two ways, identified in *M61* by reference to a Departmental document (see at 341 [34]): first, by providing a 'framework to enable the [Minister] to decide whether to allow an application for a visa to be made by ['offshore entry persons'] (while in Australia), following consideration of protection obligations under the relevant United Nations Conventions'. And secondly, by providing (as an alternative procedure) for people in that class to be taken to another country, where their claims for refugee status will be assessed (see now Part 2, Division 8, Subdivision B).

12. The effect of the Minister's proposed construction is to empower the executive to erase the first route from the Act, in a manner that would deviate from the legislative intention discerned by this Court. For the dispensing power conferred by s46A(2) is not a power to grant a visa and the relevant criteria would remain to be satisfied.[13] So understood, at least in the case of protection visas,[14] the addition of s46A in fact suggests that the regulation making power does not extend to the prescription of exclusionary criteria dealing with the subject matter of s46A(1) (lawful presence in, and entry into, Australia). It is not to the point that there are <u>other</u> powers, subject to <u>different</u> conditions (including, in the case of s195A, that an unlawful non-citizen is detained), by which the Minister may achieve a similar end result (cf DS [57]). The task of construction is to be approached on the basis that none of the elements of a statute shall prove superfluous, void, or insignificant, if by '*any* other construction they may all be made useful and pertinent'.[15]

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[10] See by way of analogy *Momcilovic v R* (2011) 245 CLR 1 at 116 [261] and 122 [276] per Gummow J.
[11] That does not mean that the power to prescribe criteria for protection visas is rendered nugatory: see the examples given at PS [53], [54].
[12] *Plaintiff M61/2010E v The Commonwealth* (**M61**) (2010) 243 CLR 319 at 341 [34]; *Plaintiff M70 v The Commonwealth and Another* (2011) 244 CLR 144 (**M70**) at 160 [10], 176 [49], 192 [96], 223, [212] and 228 [226] and in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 (**M76**) at 151, [59].
[13] *M76* at 155, [84] per Hayne J.
[14] It is, of course, true that s46A is also applicable to applications for visas more generally. However, as is clear from the legislative history identified in the reasons in *M61* at [29]-[34]), the amending enactments that inserted that provision and s198A contemplated a particular process directed to the assessment of claims of protection (see also *M70* at 191-192 [96], per French CJ).
[15] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ (emphasis added); *Plaintiff M47-2012 v Director General of Security* (2012) 86 ALJR 1372 (**M47**) at [41] per French CJ, [171] and [193] per Hayne J.

13. ***'non-citizen in Australia'*** A similar error is made by the defendants in dealing with the various provisions in the Act (including in s36(2)(a)) which expressly contemplate that 'non-citizens' (be they 'lawful' non-citizens within the meaning of s13 or 'unlawful non-citizens' within the meaning of s14) may be granted protection visas. The words 'in Australia' in s36(2)(a) are equally ambulatory, and are applicable to all persons physically present in Australia, regardless of whether they did or did not come to be 'in Australia' with lawful authority. It is the plaintiff's case that having dealt with that subject matter in those terms (encompassing, as a criterion for protection visas, both presence in Australia and the circumstances attendant upon that presence), Parliament has laid down the sole rule regulating that subject matter (PS [17]-[35]).

14. It is said by the defendants that the plaintiff's argument cannot stand with s46A,[16] insofar as it prevents certain non-citizens (albeit, not persons in the position of the plaintiff) from applying for a protection visa by reference to the circumstances by which they come to be in Australia (DS [63]). But that submission depends, critically, upon an elision between the capacity to apply for a visa and the question of what criteria may lawfully be prescribed as a condition of its grant. In pursuit of the legislative objective identified in *M61*, s46A is addressed only to the first matter, such that it remains the case (even where s46A(1) is engaged) that the Act provides 'power to respond' to Australia's international obligations by 'granting a protection visa in an appropriate case': *M61* at [34] read with [27] and *M70* at [226]. Again, the defendants' submission invites acceptance of an impermissible form of self-abnegation via the exercise of the regulation making power that would depart from the legislative scheme and the intention discerned in *M61*.

15. That point applies equally to the defendants' submissions concerning ss91E and 91F (DS [66] and cf PS at [31], [32]). In each of those cases, and in the case of s72(2), the terms of the Act embody an understanding that a protection visa may be granted in the very circumstances to which the exclusionary criteria in sub-clauses 866.222(a) and (c) are addressed. Not only do the defendants invite the Court to liberate the regulation making power from the constraints that inhere in the text and context in that regard, they also seemingly embrace the procedural charade in connection with s72(2) to which the plaintiff referred at PS [30] (see DS [66]).

16. The defendants also argue that the terms of s36(2)(a) mean nothing more than that the criterion is 'capable of applying to persons who enter Australia as either lawful or unlawful non-citizens [and] does not confine the regulation making power so as to prohibit any regulation that impinges upon that capacity' (original emphasis). But if that were correct the same would be true of the balance of the text of s36(2)(a). That is, while it is 'capable' of applying to all persons in respect of whom the Minister reaches the requisite state of satisfaction, that is no barrier to a regulation purporting to 'impinge' on that 'capacity' by, say, excluding those whose protection claims are founded upon membership of a particular social group. That proposition need only be stated to be rejected.

17. ***Sections 31(2) and 40*** In preference to the 'express terms' of ss36(2)(a), 46A, 91E and 72(2), the defendants seek to emphasise those of ss31 and 40 (DS [47], [64] and [65]). But, as the plaintiff submitted in chief, it is plain from the terms of

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[16] Read with the definition of 'unauthorised maritime arrival' in s5AA.

s40(2)(a) that it does not apply in an undifferentiated and absolute fashion to the prescription of criteria for protection visas. And this Court has held, in *M47*, that the same is true of s31. In this case, those more general provisions, applicable to all visa classes, must yield to the terms of s36(2)(a) dealing with the more specific subject matter of the criteria applicable to protection visas.

18. ***The actual exercise of the regulation making power*** The defendants' reliance at DS[48] upon contemporaneously (and perhaps subsequently – see DS [49]) made regulations is similarly misplaced. Indeed, the authority relied on by the defendants makes clear that while it 'may be useful to read together regulations and the Act with which they were made, in order to identify the nature of a legislative scheme which they comprise' this does not warrant the use of regulations to construe and expand the terms of the Act.[17]

Unreasonableness

19. The defendants advance essentially three points as regards unreasonableness. **First**, it is said, that the Court is yet to determine that proportionality supplies the (or a) relevant criterion of invalidity in the context of a challenge to the validity of delegated legislation founded upon unreasonableness. While that may be so, it should now be accepted as the doctrine of this Court. It accords with the observations made by three members of this Court in *Corneloup* and the assumption made by four members of this Court in *Tanner*.[18] The defendants advance no reasons of principle for preferring a contrary view. **Secondly**, it is said that the doctrine, if it applies, should be restricted to 'purposive' powers. But, as Professor Pearce has persuasively argued, all delegated legislation making power may be seen to be 'purposive' – although the degree of specificity of that purpose will, of course, vary according to the terms of the empowering provision.[19] **Thirdly**, the defendants seek to invoke the broad statement of purpose identified by Gummow J in *M47* at 1406 [133]. But, for the reasons given by the plaintiff at PS[57], more specificity is required, particularly given that the power is conferred in terms of the prescription of criteria for 'visas of a specified class'. The relevant object is that identified in PS[57]. The defendants do not seek to argue that the impugned regulation is capable of being considered proportionate to that object and it is not.

Dated 26 February 2014

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[17] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19] 109-110. See also *M47* at 1393 [56] per French CJ (Heydon J, to whom the defendants refer in footnote 57, was in dissent).
[18] *South Australia v Tanner* (1989) 166 CLR 161 at 167-168 and *Attorney-General (SA) v Adelaide CC* (2013) 87 ALJR 289 (***Corneloup***) at 309-310 [58] per French CJ and at 334-335 [198]-[201] per Crennan and Kiefel JJ.
[19] Pearce and Argument '*Delegated Legislation in Australia*' (2012) LexisNexis Butterworths at 320-321 and at 340. French CJ's reference in *Comeloup* to 'purposive powers' at [58] is to be understood in that light.