IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S297/2013

BETWEEN:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150/2013

BETWEEN:

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

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

DEFENDANTS' ANNOTATED WRITTEN SUBMISSIONS

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PART I: CERTIFICATION

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

PART II: ISSUES

2. In respect of matter number S297/2013, the defendants agree with the statement of issues in paragraph 2 of the written submissions of plaintiff S297/2013 (**plaintiff S297**) dated 3 February 2014 (**plaintiff S297's submissions**).

3. In respect of matter number M150/2013, the defendants agree with the statement of issues in paragraph 2 of the written submissions of plaintiff M150/2013 (**plaintiff M150**) dated 3 February 2014 (**plaintiff M150's submissions**).

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The defendants consider that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED FACTS

5. As the defendants have demurred in both of these proceedings, there are no contested facts. The relevant facts are those alleged in the amended statements of claim.[1] Importantly, however, any legal assertions in those pleadings must be disregarded.[2]

6. While various affidavits and other documents have been included in the demurrer books, those affidavits and other documents should be disregarded having regard to the procedure by which the matters are now before the Full Court.

PART V: LEGISLATION

7. In addition to the provisions identified in plaintiff S297's submissions at [69] and plaintiff M150's submissions at [82], the legislative provisions set out in the annexure are relevant.

PART VI: ARGUMENT

8. In summary, the defendants submit that:

   (a) the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**the UMA Regulation**) does not infringe s 48 of the *Legislative Instruments Act 2003* (Cth) (**the Legislative Instruments Act**);

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[1] In matter number S297/2013, the relevant pleading is the amended statement of claim dated 24 December 2013 (**DB353ff**). In matter number M150/2013, the relevant pleading is the amended statement of claim dated 19 February 2014.

[2] See, eg, the amended statement of claim in matter number S297/2013 at [31] (**DB358**), which asserts a matter of legal conclusion that must be disregarded: *South Australia v The Commonwealth* (1961) 108 CLR 130 at 142 per Dixon CJ; *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 per Gibbs J, 144 per Stephen J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [119] per Gummow and Hayne JJ.

(b) the UMA Regulation is not *ultra vires* the regulation-making power in the *Migration Act 1958* (Cth) (**the Migration Act**) on any of the grounds relied upon by the plaintiffs, namely:

(i) it is not inconsistent with s 36(2) of the Migration Act, or any other part of that Act, by reason of its being inconsistent with the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, as applied by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (together, **the Refugees Convention**);

(ii) it is not inconsistent with s 36(2) of the Migration Act by reason of its providing, as a matter of substance, that a protection visa can be granted only to a person who entered Australia as a lawful non-citizen;

(iii) it is not inconsistent with s 46A of the Migration Act by reason of its rendering that provision substantially defunct;

(iv) it is not void for unreasonableness or lack of proportionality to the enabling power; and

(v) it is not invalid so far as it requires a protection visa application to be determined by reference to criteria not existing at the time the application was required to be determined by s 65A of the Migration Act.

(a) LEGISLATIVE INSTRUMENTS ACT

9. The plaintiffs submit that the UMA Regulation infringes s 48(1) of the Legislative Instruments Act because it is "the same in substance" as the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (**TPV Regulation**) and that, by reason of s 48(2) of the Legislative Instruments Act, it is therefore of no effect.[3]

10. The defendants accept that if the UMA Regulation is the same in substance as the TPV Regulation, the other elements of s 48(1) of the Legislative Instruments Act are satisfied and none of the exceptions apply. However, the UMA Regulation is not the same in substance as the TPV Regulation. That is because, though the effect of both legislative instruments is that a certain class of person cannot obtain a permanent protection visa, the effect of the TPV Regulation was that a person who was refused a permanent protection visa as a result of the new cl 866.222 would be granted a temporary protection visa. By contrast, the effect of the UMA Regulation is that such persons cannot obtain a protection visa at all.

(i) Principles

11. Section 48 of the Legislative Instruments Act has not been considered by this Court. However, the predecessor provision, s 49 of the *Acts Interpretation Act 1901* (Cth) (**the Acts Interpretation Act**), was examined in *Victorian Chamber of Manufacturers v The Commonwealth (Women's Employment Regulations Case)*.[4]

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[3] Plaintiff S297's submissions at [18]–[30]; plaintiff M150's submissions at [61]–[81].

[4] (1943) 67 CLR 347.

12. At the time of that case, s 49(1) of the Acts Interpretation Act provided:

> Where, in pursuance of the last preceding section, either House of the Parliament disallows any regulation, or any regulation is deemed to have been disallowed, no regulation, being the same in substance as the regulation so disallowed, or deemed to have been disallowed, shall be made within six months after the date of the disallowance, unless ...

13. It might at first be thought that there is a difference between this provision and s 48 of the Legislative Instruments Act, because the current provision contemplates that a provision of a legislative instrument may be the same in substance as a provision that has been previously disallowed. However, when s 49(1) of the Acts Interpretation Act is read in the context of "the last preceding section", namely s 48, it becomes clear that s 49 of the Acts Interpretation Act also contemplated that prospect. Section 48(1) provided that "regulations ... shall be laid before each house of Parliament within fifteen sitting days of that House after the making of the regulations". Section 48(4) then provided:[5]

> If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect.

Subsection (4) thus drew a distinction between the "regulations" laid before the House, ie the set of such regulations, and the disallowance of any one "regulation" within that set. It was to the disallowance of a regulation that s 49(1) was directed but, by reason of s 23 of the Acts Interpretation Act,[6] it extended also to the disallowance of a set of regulations. So much was expressly recognised in the *Women's Employment Regulations Case* by Latham CJ[7] and McTiernan J.[8]

14. Accordingly, like s 48 of the Legislative Instruments Act, s 49 of the Acts Interpretation Act dealt both with wholesale disallowance of a set of regulations as well as disallowance of a single regulation within the set. Section 48 of the Legislation Instruments Act was thus aptly described in the relevant explanatory memorandum as a re-enactment of s 49 of the Acts Interpretation Act.[9] The approach to the predecessor provision adopted by this Court in the *Women's Employment Regulations Case* should be applied to the current provision.[10]

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5 Emphasis added.

6 "In any Act, unless the contrary intention appears ... [w]ords in the singular shall include plural, and words in the plural shall include the singular."

7 (1943) 67 CLR 347 at 360.

8 (1943) 67 CLR 347 at 388–389. Plaintiff S297's submissions at [21] accept this point.

9 Explanatory Memorandum to the Legislative Instruments Bill 2003 (Cth), p 24. The Explanatory Memorandum contained a typographical error, referring incorrectly to s 48 of the Acts Interpretation Act in place of s 49.

10 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Mfg & Engineering Employees (Cth)* (1994) 181 CLR 96 at 106–107 per curiam; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 323–325 [7]–[8] per Gleeson CJ, 346-347 [81] per McHugh J, 370–371 [161]–[162] per Gummow, Hayne and Heydon JJ; *Spriggs v Federal Commr of Taxation* (2009) 239 CLR 1 at 17 [53] per curiam.

15. In this light, the following propositions may be drawn from the *Women's Employment Regulations Case*:

(a) *First*, the question to which s 48 of the Legislative Instruments Act is directed is whether a new legislative instrument or provision is sufficiently similar to a disallowed legislative instrument or provision.[11]

(b) *Secondly*, in considering the degree of similarity between the new and disallowed legislative instruments or provisions, the comparison focusses on substance, ie operation and effect, not form.[12]

(c) *Thirdly*, where a new legislative instrument is made after the disallowance of a previous legislative instrument, it is necessary to consider the effect of each as a whole.[13]

16. The third proposition is important in this case. As Williams J noted, while comparison between each disallowed provision and each new provision is required, "the meaning of a regulation must be ascertained in the context of the whole set of regulations of which it forms a part just as a section must be construed in the context of the whole Act".[14] Thus, though a particular provision within a new legislative instrument is the same or very similar in form as a provision within a disallowed legislative instrument, s 48 is not engaged if the new provision, read in the context of the new legislative instrument taken as a whole, does not "produce substantially, that is, in large measure ... the same effect" as the disallowed law,[15] or if the new provision cannot "fairly said to be the same law as the disallowed regulation".[16]

17. It may be accepted, as Latham CJ said,[17] that s 48 may apply where a new legislative instrument deals with cases covered by a disallowed legislative instrument in the same way as they were dealt with by the disallowed legislative instrument, though the new legislative instrument also deals with other cases to which the disallowed legislative instrument did not apply. To the extent of the cases covered by both, the legislative instruments are identical in effect and thus may be the same in substance.[18] But that is quite different to the circumstance of a new legislative instrument which deals with the cases covered by a disallowed legislative instrument in a different way to the way they were dealt with by the disallowed legislative instrument. The fact that two legislative instruments operate upon the same cases does not mean that they are the same in substance: consistently with the second proposition in paragraph 15 above, the critical question is the way in which they operate on those cases as a matter of substance.

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[11] (1943) 67 CLR 347 at 363–364 per Latham CJ, 388–389 per McTiernan J.

[12] (1943) 67 CLR 347 at 360–361, 364 per Latham CJ, 377 per Rich J, 388–389 per McTiernan J, 405–406 per Williams J.

[13] (1943) 67 CLR 347 at 360–361 per Latham CJ, 406 per Williams J; cf plaintiff M150's submissions at [67]–[70].

[14] (1943) 67 CLR 347 at 406.

[15] (1943) 67 CLR 347 at 364.

[16] (1943) 67 CLR 347 at 389; cf plaintiff M150's submissions at [72].

[17] (1943) 67 CLR 347 at 361.

[18] Whether they are in fact the same in substance will depend on the circumstances, including the degree of overlap between the legislative instruments.

(ii) Application to the UMA Regulation

18. In light of the above, for the following reasons, the UMA Regulation is not the same in substance as the TPV Regulation.

(A) Legislative provisions

19. Section 30 of the Migration Act provides that a visa may be either a permanent visa (allowing the holder to remain in Australia indefinitely) or a temporary visa (allowing the holder to remain in Australia during a specified period, until a specified event happens or while the holder has a specified status). Relevantly to the latter, s 82(7) provides that a visa to remain in Australia during a particular period ceases to be in effect at the end of that period.

20. Section 31(1) of the Migration Act provides that there are to be prescribed classes of visas. Section 31(2) provides that, in addition to the prescribed classes of visas, there are to be classes of visas as provided by certain sections of the Act. One of those classes is created by s 36, which provides that there is to be a class of visas to be known as protection visas (s 36(1)).

21. Schedule 1 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**) prescribes classes of visas pursuant to s 31 of the Migration Act (reg 2.01). It relevantly includes item 1401, the Protection (Class XA) visa. Schedule 2 prescribes various subclasses of visas (reg 2.02(1)). A subclass is "relevant to" a particular class if that is provided by sched 1 (reg 2.02(2)).

22. Section 31(3) of the Migration Act provides that the regulations may prescribe criteria for visas of a specified class (specifically including the class provided for by s 36). Pursuant to this provision (read with s 504), sched 2 to the Migration Regulations prescribes criteria for various classes of visas (reg 2.03)).

23. The visa subclasses relevant to the Protection (Class XA) visa are specified in item 1401(4) of sched 1 to the Migration Regulations. Prior to the TPV Regulation, only one subclass of the Protection (Class XA) visa was specified, namely "Subclass 866 (Protection)". The criteria for that subclass were specified in cll 866.2ff of sched 2. If granted, the visa was a permanent visa (cl 866.511).

(B) The TPV Regulation

24. The TPV Regulation relevantly had the following effect:

    (a) It introduced[19] a new subclass of Protection (Class XA) visa specified in item 1401(4) of sched 1 to the Migration Regulations, namely "Subclass 785 (Temporary Protection)".

    (b) It introduced[20] cll 785.1ff into sched 2 to the Migration Regulations specifying the criteria for that subclass. The Subclass 785 (Temporary Protection) visa was a temporary visa permitting the holder to remain in Australia for a limited period of time (cl 785.511).

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[19] TPV Regulation, sched 1 item 5.

[20] TPV Regulation, sched 1 item 6.

(c) It introduced[21] a new criterion for the grant of a Subclass 866 (Protection) visa in cl 866.222 of sched 2 to the Migration Regulations, namely:

> The applicant:
>
> (a) does not hold a Subclass 785 (Temporary Protection) visa; and
>
> (b) has not held a Subclass 785 (Temporary Protection) visa since last entering Australia; and
>
> (c) held a visa that was in effect on the applicant's last entry into Australia; and
>
> (d) is not an unauthorised maritime arrival; and
>
> (e) was immigration cleared on the applicant's last entry into Australia.

(d) It provided,[22] through a new reg 2.08H, that a valid application for a Protection (Class XA) visa made, but not finally determined, before 18 October 2013 was taken to be a valid application for a Subclass 785 (Temporary Protection) visa if the applicant was a person who would fail one or more of the criteria in cl 866.222.

(e) It inserted[23] new sub-items (d) and (e) into item 1401 of sched 1 to the Migration Regulations. Sub-item (e) provided that an application for a Subclass 866 (Protection) visa was valid only if the applicant satisfied the same five criteria set out in cl 866.222. Sub-item (d) provided that an application for a Subclass 785 (Temporary Protection) visa was valid only if the applicant failed one of those criteria.

25. The effect of the TPV Regulation was to separate persons claiming to be persons in respect of whom Australia has protection obligations under the Refugees Convention into two classes. Those who satisfied cl 866.222 (and therefore sub-item 1401(3)(e) of sched 1) were eligible for a Subclass 866 (Protection) visa. Those who did <u>not</u> satisfy cl 866.222 could not obtain a Subclass 866 (Protection) visa. But they could obtain a Subclass 785 (Temporary Protection) visa, and such a visa would be granted to any person who satisfied all the criteria for a Subclass 866 (Protection) visa <u>other than</u> cl 866.222.

26. In other words, the TPV Regulation did not prevent any person from obtaining a Protection (Class XA) visa. It merely separated persons obtaining Protection (Class XA) visas into those who obtained a Subclass 866 (Permanent) visa and those who obtained a Subclass 785 (Temporary Protection) visa.

(C) The UMA Regulation

27. The TPV Regulation being disallowed, the Subclass 785 (Temporary Protection) visa ceased to exist. The UMA Regulation did not reintroduce it.

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[21] TPV Regulation, sched 1 item 9.

[22] TPV Regulation, sched 1 item 2.

[23] TPV Regulation, sched 1 item 4. Regulations prescribing criteria and requirements for a valid visa application are contemplated by s 46(1)(b) of the Migration Act.

28. Like the TPV Regulation, the UMA Regulation introduced a new criterion for the grant of a Subclass 866 (Protection) visa.[24] That criterion, again found in cl 866.222 of sched 2 to the Migration Regulations, is as follows:

> The applicant:
>
> (a) held a visa that was in effect on the applicant's last entry into Australia; and
>
> (b) is not an unauthorised maritime arrival; and
>
> (c) was immigration cleared on the applicant's last entry into Australia.

29. The language of that provision is identical to the language of three of the five paragraphs in the equivalent provision introduced by the TPV Regulation. However, consistently with the principles set out in paragraphs 15–16 above, it is insufficient to focus merely on that similarity.[25] Rather, the operation and effect of each of the legislative instruments as a whole must be compared. In that comparison, it is necessary to identify the substantive effect of cl 866.222 as inserted by the TPV Regulation within the context of the integrated scheme of which it formed part.[26]

30. Like the TPV Regulation, the effect of the UMA Regulation is to separate persons claiming to be persons in respect of whom Australia has protection obligations under the Refugees Convention into two classes. As before, those who satisfy cl 866.222 are eligible for a Subclass 866 (Protection) visa. But now, those who do not satisfy cl 866.222 are not entitled to an alternative subclass of Protection (Class XA) visa: rather, their application for such a visa must be refused.

31. Accordingly, while the TPV Regulation and the UMA Regulation use essentially the same language in their respective versions of cl 866.222 to identify essentially the same classes of person, their effects on the persons within those classes are radically different. Under the TPV Regulation, the effect of cl 866.222 was to distinguish between those entitled to permanent protection visas and those entitled to temporary protection visas. Under the UMA Regulation, the effect of cl 866.222 is to distinguish between those entitled to permanent protection visas and those not entitled to protection visas at all. From the perspective of the people who do not satisfy cl 866.222, the difference could not be starker.

32. This is not a case in which the UMA Regulation deals with the same cases as the TPV Regulation in the same way as the TPV Regulation as well as other cases. Each legislative instrument deals with the substantially the same cases — people who do not satisfy cl 866.222 — but does so in an entirely different way.

33. In light of the above, the UMA Regulations are not the "same in substance" as the TPV Regulations. That is so irrespective of the precise test that is applied in determining that question. It is not the case that the two manifestations of cl 866.222, or the two legislative instruments as a whole, "produce substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation".[27] Nor can it be said that the UMA Regulations are "so much like the disallowed regulation in

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[24] UMA Regulation, sched 1 item 1.

[25] cf plaintiff S297's submissions at [27].

[26] cf plaintiff S297's submissions at [29]; plaintiff M150's submissions at [67]–[68], [78].

[27] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 364 per Latham CJ; cf plaintiff S297's submissions at [22].

its general legal operation that it could be fairly said to be the same law as the disallowed regulation",[28] or to "have in substance the same 'real purpose and effect'".[29]

34. Accordingly, s 48(2) of the Legislative Instruments Act does not render the UMA Regulations of "no effect".

(b) ULTRA VIRES

(i) Summary

35. The plaintiff in each matter contends that the UMA Regulation is, in whole or in part, *ultra vires* the regulation-making power in the Migration Act. The submissions advanced in favour of this contention may be summarised as follows:

(a) *Inconsistency with the Refugees Convention.* Plaintiff S297 submits that the UMA Regulation is inconsistent with s 36(2) of the Migration Act because s 36(2) prohibits regulations which would diminish its use as the mechanism for Australia complying with its international obligations under the Refugees Convention.[30] Similarly, plaintiff M150 submits that the Migration Act does not authorise the imposition by regulations of exclusionary criteria for protection visas other than those found in arts 1F, 32 and 33 of the Refugees Convention, such as that inserted by the UMA Regulation.[31]

(b) *Exclusion of unlawful non-citizens.* Both plaintiffs submit that the UMA Regulation is inconsistent with s 36(2) of the Migration Act because the requirement that an applicant for a protection visa be "in Australia" prescribed by s 36(2) is inconsistent with a criterion excluding those who enter Australia as unlawful non-citizens.[32]

(c) *Inconsistency with s 46A of the Migration Act.* Plaintiff S297 submits that the UMA Regulation is inconsistent with s 46A of the Migration Act because the UMA Regulation renders the power in s 46A substantially defunct.[33]

(d) *Unreasonableness.* Plaintiff M150 submits that the UMA Regulation is void for unreasonableness or lack of proportionality to the enabling power.[34]

(e) *Inconsistency with ss 196 and 65A of the Migration Act.* Plaintiff S297 submits that the UMA Regulation is invalid so far as it requires the protection visa application made by him to be determined by reference to criteria not existing at the time that his application was required to be determined by s 65A of the Migration Act.[35]

For the following reasons, none of these submissions should be accepted.

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[28] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 389 per McTiernan J; cf plaintiff M150's submissions at [72].

[29] *Women's Employment Regulation Case* (1943) 67 CLR 347 at 406 per Williams J.

[30] Plaintiff S297's submissions at [35]–[45].

[31] Plaintiff M150's submissions at [41]–[54].

[32] Plaintiff M150's submissions at [17]–[40]; Plaintiff S297's submissions at [45].

[33] Plaintiff S297's submissions at [46]–[51].

[34] Plaintiff M150's submissions at [55]–[60].

[35] Plaintiff S297's submissions at [52]–[68].

(ii) The plaintiffs' reliance on implication

36. The power in the Migration Act to make regulations is given by s 504(1). It relevantly provides:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, without limiting the generality of the foregoing, may make regulations [etc.]

Pursuant to s 31(3), one of the matters permitted to be prescribed is "criteria for a visa or visas of a specified class".

37. Section 31(3) expressly provides that the power to prescribe such criteria extends to the class of visa created by s 36. Consistently with this, s 36(2) is expressed to state only "[a] criterion" for a protection visa. From the time that protection visas were first created in 1994 there have always been numerous criteria for those visas in addition to that provided for by s 36(2).[36]

38. The UMA Regulation inserts into sched 2 of the Migration Regulations a further criterion for a protection visa, namely that stated in cl 866.222. On its face, it falls within the regulation-making power given by s 504(1) of the Migration Act read with s 31(3). Further, so far as it provides that a protection visa may be granted to an applicant only if the applicant was immigration cleared on the applicant's last entry into Australia (cl 866.222(c)), it imposes a criterion of a kind expressly contemplated by s 40(2)(d) of the Migration Act.[37]

39. In order to overcome this *prima facie* position, the plaintiffs must persuade the Court that cl 866.222 is "inconsistent with" the Migration Act.

40. The plaintiffs do not suggest that cl 866.222 is inconsistent with any express provision of the Migration Act, for example because it precludes a person from obtaining a protection visa in circumstances where a provision of the Act expressly mandates that that person is to be granted a protection visa. They do not contend that the express provisions of the Migration Act and cl 866.222 create "conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations".[38]

41. Rather, the plaintiffs seek to draw various implications which cut down the otherwise unqualified words of ss 31(3) and 504. That is of course possible.[39] However, the drawing of an implication requires more than an assertion that the Migration Act has been drafted on the basis of certain assumptions or underlying premises, or that the implication is consistent with a "scheme" discerned in the express provisions of the Act. To rest an implication on such foundations would be a "naked usurpation of the legislative function under the thin guise of interpretation".[40]

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[36] See further paragraph 46 below.

[37] See paragraph 64 below.

[38] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571–572 [2] per Gleeson CJ.

[39] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 is an example of a case where this occurred, as is discussed below.

[40] *Magor and St Mellons Rural DC v Newport Corp* [1952] AC 189 at 191 per Lord Simonds, approved in *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J (Menzies J agreeing); *Parramatta CC v Brickwords Ltd* (1972) 128 CLR 1 at 12 per Gibbs J (Barwick CJ, Menzies, Owen and Walsh JJ agreeing).

42. What precisely is required has been differently expressed at different times: the phrases "clear necessity",[41] "clear reason"[42] and "irresistible conviction"[43] have all been used in formulating the test. In *Carr v Western Australia*,[44] Gleeson CJ referred to the following statement of Barton J (for the Court) as reflecting a correct approach to statutory implication in general (though expressed by reference to retrospectivity in particular):[45]

> If, doing this, we find that though no express words are found, yet the necessary intendment of the language is retrospectivity, the task is at an end. Necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable.

The stringency of these expressions reflects the separation of the legislative and judicial functions mandated by the Constitution.[46]

43. An implication may be recognised where the express provisions of the Migration Act are such that it can be said that the Act deals completely and thus exhaustively with the subject matter of the regulation in question.[47] It was this kind of inconsistency with the scheme established by the Act for ministerial decisions to refuse or cancel protection visas on national security grounds, and for merits review of such decisions, which spelled invalidity for the regulation at issue in *Plaintiff M47/2012 v Director-General of Security.*[48] But to limit, by implication, the regulation-making power in the Migration Act by reference to a scheme discerned in its express provisions requires more than that the asserted limit is consistent with the scheme: it requires that the absence of the limit is inconsistent with the scheme.

44. It is with this background in mind that the plaintiffs' submissions must be approached.

(iii) Inconsistency with the Refugees Convention

45. Plaintiff S297 submits that the Migration Act impliedly prohibits the prescription of a criterion that would "diminish the use of the s 36 class as the mechanism for Australia complying with its international obligations under the Refugees Convention and Protocol".[49] Similarly, plaintiff M150 submits that the Migration Act "does not permit the imposition of exclusionary criteria for protection visas in addition to those founded upon Articles 1, 32 or 33 of the Convention".[50] Both of these formulations in substance seek to limit the regulation-making power in the Migration Act such that it does not authorise the imposition of criteria that would deny protection visas to persons in respect of whom Australia has protection obligations under the Refugees

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41 *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Western Australia v The Commonwealth (Territory Senators Case (No 1))* (1975) 134 CLR 201 at 251 per Stephen J.

42 *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445 per Lord Loreburn.

43 *Weedon v Davidson* (1907) 4 CLR 895 at 905 per Barton J.

44 (2007) 232 CLR 138 at 146–147 [17].

45 *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 32.

46 *Taylor v Centennial Newstan Pty Ltd* (2009) 76 NSWLR 379 (CA) at 400–401 [90] per Basten JA.

47 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [133]–[134] per Gummow J.

48 (2012) 86 ALJR 1372 at 1395–1397 [65]–[72] per French CJ, 1418–1421 [203]–[221] per Hayne J, 1452–1456 [381]–[401] per Crennan J, 1460–1465 [429]–[459] per Kiefel J.

49 Plaintiff S297's submissions at [38].

50 Plaintiff M150's submissions at [41].

Convention. A similar argument was advanced in *Plaintiff M47*, although it was not accepted by any member of the Court.[51] It should not be accepted now.

46. From the inception of the scheme for the grant of protection visas enacted by the *Migration Reform Act 1992* (Cth) (**the Reform Act**), it required an applicant to satisfy criteria in addition to the statutory criterion of being a person to whom Australia had protection obligations.[52] Section 36(2) provides that "'A criterion — not, it should be emphasised, 'the criterion'"[53] for the grant of a protection visa is that the applicant is "a non-citizen in Australia" in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention. It follows, as Gummow J said in *Plaintiff M47*, that "an applicant to whom the Minister is satisfied Australia has protection obligations under the Convention yet may fail to qualify for a protection visa".[54]

47. Section 31(3) "explicitly provides"[55] that criteria for a protection visa additional to those found in s 36 may be prescribed. That power was, from inception of the scheme, expressly stated to apply in respect of protection visas. The further power in s 40 to specify by regulations that visas of a specified class may only be granted in specified circumstances, and the express inclusion within such circumstances as being that the applicant is in the migration zone and on last entering Australia was immigration cleared, likewise is naturally read as extending to protection visas.[56]

48. Criteria applicable to protection visas additional to that stated in s 36(2) of the Migration Act were contained in sched 2 to the Migration Regulations, made contemporaneously with the coming into force of the Reform Act. Those criteria included that the applicant had undergone a medical examination and in some case a chest x-ray (cll 866.223, 866.224), that the applicant satisfied specified public interest criteria (cl 866.225) and that the Minister was satisfied that the grant of the visa is in the national interest (cl 866.226). These contemporaneously made regulations assist to understand the nature of the scheme established by the Migration Act so as to better interpret the Act in light of its purpose.[57]

49. Thus, far from the Act establishing s 36(2) as the exclusive or exhaustive criterion for the grant of a protection visa, the prescription of criteria by regulations has always been an integral part of the scheme.[58] That scheme contemplates and has always contained criteria that may require a protection visa to be refused despite the fact that

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[51] See esp *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1411 [164], 1414 [181] per Hayne J.

[52] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1428 [265] per Heydon J, 1467–1468 [472] per Bell J.

[53] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1399 [90] per Gummow J. See also at 1434 [283] per Heydon J.

[54] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1414 [181] per Hayne J (accepting that the Act allows the creation of additional criteria, or "hurdles", beyond those found in s 36(2)), 1429 [271], 1434 [283] per Heydon J, 1470–1471 [485]–[490] per Bell J.

[55] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1439 [316] per Heydon J.

[56] See paragraph 64 below.

[57] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109–110 [19] per curiam. See further *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1441 [324] per Heydon J; Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at 307–308 [25.1.2760].

[58] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J.

the applicant for that visa is a refugee[59] and therefore satisfied the criteria in s 36(2).[60] Further, these criteria are not limited to criteria founded upon any of arts 1, 32 or 33 of the Refugees Convention. For example, they have always required the refusal of a protection visa to a person determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.[61]

50. Statements in this Court that the Migration Act "focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system"[62] must be read in context.[63] Those statements were made to emphasise that the Migration Act does not enact into Australian municipal law protection obligations of Contracting States found in Chs II, III and IV of the Refugees Convention. They do not suggest that the criterion stated in s 36(2) is the sole criterion for the grant of a protection visa.

51. Further, in the nearly 20 years since the commencement of the Reform Act, Parliament has made numerous amendments to the Migration Act that emphasise that s 36(2) is not intended to result in the grant of a protection visa to every person in respect of whom Australia has protection obligations under the Refugees Convention. Having regard to these provisions, there is simply no basis in the Migration Act for the proposition that "Parliament had, by s 36(2), indicated that the visa should presumptively be available to all 'refugees'".[64]

52. In particular, s 46A(1) expressly renders invalid an application for a visa by an unauthorised maritime arrival in Australia who is an unlawful non-citizen. The validity of that section has been upheld by this Court.[65] Its effect, subject only to the personal and non-compellable power of the Minister, is to deny unauthorised maritime arrivals — being one class of persons the subject of the UMA Regulation — the ability to apply for any class of visa, including a protection visa. Allied with s 46A, Subdivision B of Division 8 of Part 2 provides for the taking of unauthorised maritime arrivals to regional processing countries, whether or not they are persons to whom Australia has protection obligations (see s 198AA(b)).

53. In light of those provisions, s 36(2) cannot be regarded as the only — or even the principal — mechanism by which the Migration Act responds to Australia's international obligations under the Refugees Convention. Compliance with those obligations does not require Australia to grant protection visas (or any other visas) to refugees, because refugees have no right to asylum.[66] Australia can comply with its

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[59] A "person to whom Australia has protection obligations under" the Refugees Convention describes no more than a person who is a refugee within the meaning of art 1: *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

[60] This has long been accepted: see eg *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 (FC) at 347–349 [23]–[32] per Branson J (Beaumont and Lehane JJ agreeing).

[61] See cl 866.225, giving effect to sched 4, public interest criterion 4003. See also PIC 4004, concerning debts to the Commonwealth.

[62] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45] per McHugh and Gummow JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14–15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

[63] Cf plaintiff M150's submissions at [42].

[64] Plaintiff S297's submissions at [38].

[65] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 345–348 [53]–[61] per curiam.

[66] See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273–274 per Gummow J; *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169–170 [16]

non-refoulement obligations under art 33 of the Refugees Convention, and any other obligations under that Convention that apply to refugees who are not lawfully in its territory, without granting protection visas under s 36. Subdivision B of Division 8 of Part 2 of the Migration Act specifically contemplates that such a course may be adopted with respect to unauthorised maritime arrivals.

54. So too, non-citizens to whom Subdivision AI of Division 3 of Part 2 applies (concerning "safe third countries") and non-citizens to whom Subdivision AK applies (concerning non-citizens with access to protection from third countries) cannot in general make valid applications for protection visas regardless of whether they satisfy s 36(2).[67]

55. These legislative provisions deny any basis for the submission that there is a "clear necessity" or "clear reason" for an implication limiting the power to prescribe criteria for protection visas. In particular, they deny any sure foundation for an implication premised on the centrality of s 36(2) in ensuring that Australia complies with its obligations under the Refugees Convention.

56. The qualifications inserted by 46A and Subdivision B of Division 8 of Part 2 are particularly important for present purposes, as the class of persons to whom they are directed — unauthorised maritime arrivals — overlaps to a significant extent with the class of persons to whom the UMA Regulation is directed. Plaintiff S297 relies upon the assertion that the effect of the UMA Regulation is to exclude a very large category of "refugees" from being eligible for protection visas, and to limit such visas to persons who have left their country with a measure of planning and financial resources.[68] In truth, that submission invites this Court to pass upon the expediency and wisdom of the regulation.[69] It goes no further than that because, in light of the legislative amendments referred to above, at least to the extent that the UMA Regulation applies to unauthorised maritime arrivals, s 46A had already excluded those persons from making valid applications for protection visas under s 36 unless the Minister made a personal decision to permit such applications to be made.

57. Further, it is not the case that as a result of the UMA Regulation there is no "balancing power" to permit an unauthorised maritime arrival to be granted a protection visa if the Minister thinks that is in the public interest.[70] The Minister could exercise his power under s 195A to grant a protection visa to any unlawful non-citizen (including an unauthorised maritime arrival) who is in detention, notwithstanding that he or she did not satisfy cl 866.222 of sched 2 to the Migration Regulations.[71]

58. None of the above denies the relevance to the construction of the Migration Act of the recognition that it is, in part, directed to the purpose of responding to international obligations which Australia has undertaken in the Refugees Convention.[72] But at

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per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1470 [487] per Bell J. See also plaintiff M150's submissions at [37].

67 See ss 91E and 91P. Whether these reforms could have been made by amendment to the regulations is not to the point. Nor does the fact that they were implemented by amendment to the Migration Act shed light on whether that was required (cf plaintiff S297's submissions at [42]). That course may have been taken for reasons unconnected with any view as to the scope of the regulation-making power.

68 Plaintiff S297's submissions at [45].

69 cf *South Australia v Tanner* (1989) 166 CLR 161 at 168 per Wilson, Dawson, Toohey and Gaudron JJ.

70 cf plaintiff S297's submissions at [48].

71 See *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682.

72 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27] per curiam.

issue here is not the construction of provisions of the Act susceptible of more than one meaning. It is the implication of limitations, not found in the express words of the Act, upon an express and wide power to make regulations, that being a power that occupies a central role in the visa regime that the Migration Act creates to regulate in the national interest the presence of non-citizens in Australia. Neither the *Offshore Processing Case*,[73] nor any of the cases that have followed it, suggest that compliance with Australia's obligations under the Refugees Convention requires refugees to be granted protection visas. Absent any such obligation, it is entirely consistent with the purpose of the Act in responding to the Refugees Convention to recognise that criteria can validly be prescribed that restrict access to the protection visa regime, leaving other limits (including implied limits on the power to remove non-citizens[74]) to ensure that Australia complies with its obligations under that Convention. There is therefore no "clear necessity" or "clear reason" to imply limits on the regulation-making power of the kind for which the plaintiffs contend.

59. Plaintiff M150 points to two "anomalies" said to demonstrate the invalidity of cl 866.222.[75] The first is that where an application for a protection visa is refused by reason of that regulation, without a determination of whether Australia owes protection obligations in respect of the applicant, such a determination would nevertheless still be required before the applicant may be removed pursuant to s 198(2)(c)(ii).[76] However, this is not anomalous. The same is true with respect to every unauthorised maritime arrival who is subject to s 46A and who claims to be a refugee. In such cases, unless the Minister decides to "lift the bar" to allow an application to be made for a protection visa, an assessment of Australia's protection obligations will be undertaken not in the context of an application for a protection visa, but either for the purpose of the Minister considering whether to exercise that power (as was occurring under the processing model in place at the time of the *Offshore Processing Case*) or for the purposes of determining whether the removal power under s 198 may be exercised to removal an unauthorised maritime arrival to a particular country.[77]

60. The second asserted anomaly is that it is said that the effect of cl 866.222(c) is to "repose the determination of a person's application for a protection visa in the hands of" the officer who decides whether to grant or refuse immigration clearance.[78] That point is without substance. By definition, at the time that the question of immigration clearance is determined, a person will not have made an application for a protection visa. Plainly, therefore, the clearance officer cannot be "determining" such an application. Rather, the clearance officer performs the particular functions specified in ss 166–172 of the Migration Act, in circumstances where the performance of those functions may have a variety of consequences under the Act (see, eg, under ss 174, 193(1)(a) and (b)). Section 40(2) specifically contemplates that one such consequence may be to limit the circumstances in which a visa may be granted.[79]

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[73] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

[74] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 178 [54] per French CJ, 190-192 [91]–[97] per Gummow, Hayne, Crennan and Bell JJ, 230 [233] per Kiefel J.

[75] Plaintiff M150's submissions at [51]–[52].

[76] Following the reasoning in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 187–189 [83]–[99] per Gummow, Hayne, Crennan and Bell JJ.

[77] See, eg, *SZQRB v Minister for Immigration and Citizenship* (2013) 210 FCR 505 (FC) at 549 [228]–[229], 554 [270]–[271] per Lander and Gordon JJ.

[78] Plaintiff M150's submissions at [52].

[79] See paragraph 64 below.

There is therefore nothing anomalous about the regulations providing that the refusal of immigration clearance has consequences for whether a visa may be granted.

(iv) Exclusion of unlawful non-citizens

61. Plaintiff M150 submits that the UMA Regulation is inconsistent with s 36(2) of the Migration Act because "the requirement in s 36(2)(a) that an applicant for a protection visa be 'in Australia' is to apply as the sole rule regulating the relevant subject matter, being presence in Australia and the circumstances associated with that presence" and cl 866.222 derogates from this "by limiting the scope to non-citizens whose presence in Australia is attended by particular circumstances in connection with their last entry".[80] This submission should be rejected.

62. The fact that s 36(2) is expressed so that it is capable of applying to persons who enter Australia as either lawful or unlawful non-citizens does not confine the regulation-making power so as to prohibit any regulation which impinges upon that capacity.[81] That is so for two reasons.

63. *First*, while s 36(2) refers to an applicant being "in Australia", it says nothing about the "circumstances associated with that presence". Section 36(2) is not the "sole rule" regulating that subject matter. Most obviously, both s 46A(1) and the definition of "unauthorised maritime arrival" in s 5AA are directly concerned with the "circumstances" (including the mode of travel) by which a non-citizen comes to be "in Australia". Where those provisions apply, those "circumstances" prevent the non-citizen from having any capacity to lodge an application for a protection visa in the absence of ministerial intervention. That is inconsistent with s 36(2) stating the "sole rule" regulating "presence in Australia and the circumstances associated with that presence".

64. *Secondly*, the submission founders on the express terms of s 40, which provides:

> (1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
>
> (2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person ... (d) is in the migration zone and, on last entering Australia ... (i) was immigration cleared ...

Clause 866.222(c) is a condition of precisely the kind mentioned in sub-s (2).

65. It may be accepted that s 40 must if possible be read harmoniously with the other provisions of the Migration Act.[82] But plaintiff M150 submits that to achieve that "harmonious" reading the Court must deny effect to the express terms of s 40 to give effect to an implication from s 36(2).[83] That is contrary to principle. Rather, the provisions should be read harmoniously by giving full effect to the express terms of both. As s 36(2) does not in its terms prohibit the imposition of additional criteria for a protection visa, it is not inconsistent with the imposition of a criterion connected with the circumstances associated with the entry of an applicant for a protection visa into

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[80] Plaintiff M150's submissions at [33]–[34]. See also at [23].

[81] cf plaintiff M150's submissions at [22]–[26]; plaintiff S297's submissions at [45].

[82] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

[83] Plaintiff M150's submissions at [40].

Australia, particularly given that a criterion of that kind is contemplated by the express terms of s 40. That submission is further supported by a comparison of ss 39(1) and 40, for the former provision suggests that where Parliament did not intend a general provision to extend to protection visas it so provided in express terms.

66. None of the other matters relied upon by plaintiff M150 cast doubt on the above conclusion. The fact that s 72(2) confers a non-compellable power on the Minister[84] to broaden the circumstances in which bridging visas can be granted to include non-citizens who entered Australia as unlawful non-citizens does not provide any proper foundation for restricting the regulation-making power so as to ensure that persons who enter Australia unlawfully are able to apply for protection visas.[85] Section 72(2) does no more than recognise that, in the absence of provision to the contrary (such as the UMA regulation or, where it applies, s 46A) persons who enter Australia as unlawful non-citizens can apply for protection visas. Section 72(2) confers a confined power to respond to that circumstance (the power being confined because it arises only where a non-citizen has been in detention for more than six months after an application for a protection visa has been made).

67. Section 91E likewise merely proceeds on an assumption that a non-citizen to whom Subdivision AI of Division 3 of Part 2 applies and who has not been immigration cleared may make an application for a protection visa. It does not deny that criteria may be prescribed which mean that such an application must be refused.[86] Indeed, far from suggesting that such criteria are impermissible, s 91E indicates that cl 866.222 is not repugnant to the Act, because s 91E adopts similar criteria to prevent the grant of protection visas to some categories of persons who may satisfy the criteria in s 36(2).

68. So far as reliance is placed on the notion of giving effect to the Refugees Convention,[87] it is answered both by the matters immediately above as well as those at paragraphs 45 to 60 above.

(v) Inconsistency with s 46A of the Migration Act

69. Plaintiff S297 submits that the UMA Regulation is inconsistent with s 46A of the Migration Act because the UMA Regulation renders the power in s 46A substantially defunct.[88] That submission should be rejected.

70. Prior to the enactment of s 46A, unlawful non-citizens who arrived in Australia by sea (including at certain external Australian territories) could validly apply for visas, including but not limited to protection visas.

71. As inserted into the Migration Act in 2001, s 46A(1) prohibited the making of valid visa applications by "offshore entry persons" (as defined) and s 46A(2) gave power to the Minister to permit such applications by way of the exercise of a personal and non-compellable power. From 2013, s 46A was amended to refer to "unauthorised maritime arrivals" in place of "offshore entry persons".

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[84] See s 72(2)(e), (3), (4), (7).

[85] cf plaintiff M150's submissions at [28]–[30].

[86] cf plaintiff M150's submissions at [31].

[87] Plaintiff M150's submissions at [36]–[39].

[88] Plaintiff S297's submissions at [50].

72. Section 46A says nothing as to the criteria by reference to which any visa, including a protection visa, may be granted or refused. It operates simply to prevent the persons to whom it applies from making a valid application for any kind of visa, unless the Minister "lifts the bar" to permit an application to be made for a specified kind of visa (which need not be a protection visa).

73. If the Minister exercises the power under s 46A(2) to permit a valid application to be made for a specified class of visa, that application is subject to whatever criteria then apply with respect to that class of visa. A regulation that prescribes a criterion is not invalid simply because it means that an unauthorised maritime arrival cannot obtain a visa of a particular class. There are many visas that have criteria that could not be satisfied by most unauthorised maritime arrivals, even if applications were permitted to be made for those visas.

74. Plaintiff S297's submission that s 46A is a "special power in the public interest to allow offshore entry persons to apply for protection visas"[89] is untenable. The submission reverses the operation of the section, which is to remove the right to apply for a protection visa. The section does not confer a contingent right to make an application for a protection visa free from criteria that might mean that, if an application is permitted to be made, it would fail.

75. The UMA Regulation does not render s 46A "substantially defunct":[90] the fact that cl 866.222 precludes the grant of a protection visa does not deny the application of s 46A(1) to other classes of visa or the need for an exercise of the power under s 46A(2) to permit an application for them. The UMA Regulation does not "detract from the scheme created by the Act",[91] because that scheme contemplates that it is for the Minister to determine in the public interest what, if any, visas may be validly applied for by unauthorised maritime arrivals.

(vi) Unreasonableness

76. Plaintiff M150 submits that the UMA Regulation is void for unreasonableness because it is not capable of being considered proportionate to the pursuit of the object of giving effect to Australia's obligations under the Refugees Convention.[92]

77. The degree of unreasonableness required to justify a challenge of this kind is very great. Expressions that have been used include:[93] "fantastic and capricious ... such as reasonable men could not make in good faith";[94] "so oppressive or capricious that no reasonable mind can justify it";[95] "such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men";[96] "such manifest arbitrariness, injustice or partiality that a court

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89 Plaintiff S297's submissions at [48].

90 Plaintiff S297's submissions at [50].

91 Plaintiff S297's submissions at [50].

92 Plaintiff M150's submissions at [57].

93 See also *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 306–310 [48]–[59] per French CJ, 319–321 [117]–[123] per Hayne J (Bell J agreeing), 334 [198]–[199] per Crennan and Kiefel JJ; Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at 380–382 [25.1.3720].

94 *Slattery v Naylor* (1888) 13 App Cas 446 (PC) at 452 per Lord Hobhouse (for the Board).

95 *Brunswick Corp v Stewart* (1941) 65 CLR 88 at 97 per Starke J.

96 *Brunswick Corp v Stewart* (1941) 65 CLR 88 at 99 per Williams J.

would say: 'Parliament never intended to give authority to make such rules'";[97] and "no reasonable mind could justify it by reference to the purposes of the power".[98]

78. The fact that the UMA Regulation is required to be laid before Parliament makes a successful attack on this ground even more difficult.[99]

79. An object of the TPV Regulation was stated in the Explanatory Statement as follows:[100]

> The reintroduction of Temporary Protection visas is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

10 80. The Explanatory Statement to the UMA Regulation provided:[101]

> On 2 December 2013, the Migration Amendment (Temporary Protection Visa) Regulation 2013 was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa (Protection visa) in Australia.

It is readily apparent how the UMA Regulation gives effect to the stated objects. It is
20 also readily apparent that it falls well short of the standard required to be deemed unreasonable within the expressions above.

81. In truth, though expressed as being a challenge to the UMA Regulation on grounds of unreasonableness, plaintiff M150's submissions are directed to a lack of "proportionality" between the UMA Regulation and the empowering provisions. The amenability of a regulation to challenge on this ground has not been determined by this Court.[102] It is, however, submitted that the Court should conclude that such a challenge is available (if at all) only in cases where legislation empowers regulations directed to a particular purpose, not a particular subject matter.[103] For that reason, a proportionality analysis is not applicable to the regulation-making power at issue here.

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97 *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 QB 214 (CA) at 237 per Diplock LJ.

98 *Clements v Bull* (1953) 88 CLR 572 at 577 per Williams ACJ and Kitto J.

99 *Ferrier v Wilson* (1906) 4 CLR 785 at 802 per Isaacs J; *Bienke v Minister for Primary Industries & Energy* (1994) 125 ALR 151 (FCA) at 166 per Gummow J.

100 Explanatory Statement to Select Legislative Instrument No 234, 2013 – *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth), p 1.

101 Explanatory Statement to Select Legislative Instrument No 280, 2013 — *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), p 1

102 It was conceded that lack of proportionality was an open ground of challenge in *South Australia v Tanner* (1989) 166 CLR 161: see at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

103 See eg *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 (NSWCA) at 37–38 per Handley JA, 45–46 per Sheller JA, 81–84 per Cole JA; *De Silva v Minister for Immigration & Multicultural Affairs* (1998) 89 FCR 502 (FC) at 510 per curiam. See also *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 308–310 [55]–[61] per French CJ.

82. Even if proportionality is relevant, the degree of disproportionality required before a regulation will be invalid is akin to the degree of unreasonableness referred to above.[104] The UMA Regulation should not be held invalid on this ground.

83. The power to prescribe criteria for visa classes created by the Migration Act and the Migration Regulations does not exist only for the limited purpose of giving effect to Australia's obligations under the Refugees Convention. The submission by plaintiff M150 to the contrary[105] is, in a different guise, the same submission dealt with in paragraphs 45–60 above; it should be rejected for the same reasons. The regulation-making power is generally expressed, and it applies to all visa classes. It should be interpreted having regard to the object of the Migration Act as a whole, being to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".[106] The UMA Regulation is "capable of being reasonably considered to be appropriate and adapted" for giving effect to that purpose.[107]

(vii) Inconsistency with ss 196 and 65A of the Migration Act

84. Plaintiff S297 submits that the UMA Regulation is invalid in so far as it requires his protection visa application to be determined by reference to criteria (namely cl 866.222) not existing at the time that his application was required to be determined by s 65A of the Migration Act.[108] That submission is not applicable in relation to plaintiff M150, as the time prescribed by s 65A had not elapsed in respect of his protection visa application at the time the UMA Regulation commenced.[109]

85. Section 65A obliges the Minister to make a decision on a protection visa application within a specified time period. The duty that section imposes is susceptible to enforcement by mandamus.[110] But breach of the section does not affect the validity of a decision on a visa application (s 65A(2)). If s 65A required a decision to be made within 90 days even if investigations are ongoing as to whether or not particular criteria are met, it would follow that any application not determined within 90 days would have to be refused, because the decision-maker could not be satisfied under s 65(1)(a) that the relevant criteria were met. Accordingly, even if the time specified in s 65A has passed, decision-makers are nevertheless required by s 65 to grant or refuse protection visas by applying the applicable visa criteria. The "applicable" criteria will ordinarily be the criteria in force at the time an application for a visa is made, even if there has been a change in the criteria after the application is lodged.[111]

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[104] *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 (FC) at 577 per Gummow J, 585–586 per Cooper J; *Attorney-General (SA) v Corp of City of Adelaide* (2013) 87 ALJR 289 at 334–335 [201] per Crennan and Kiefel JJ.

[105] Plaintiff M150's submissions at [57].

[106] See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [133] per Gummow J.

[107] *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 264–265 per Deane J, applied in *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

[108] Plaintiff S297's submissions at [66].

[109] The Refugee Review Tribunal remitted plaintiff M150's protection visa application on 3 October 2013 (**DB339 [12]**). The time prescribed by s 65A elapsed 90 days later, on 1 January 2014. The UMA Regulation commenced on 14 December 2013.

[110] See *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at 231 [2]–[7] per Lindgren J.

[111] *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at 479–480 [27]–[28] per McHugh J; *Lopez v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 344 at [6] per curiam; *Jackson v Minister for Immigration and Multicultural and Indigenous Affairs* [2003]

86. However, that ordinary position may be displaced. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen*,[112] McHugh J held, by reference to s 65 of the Migration Act, that an applicant had a "right" to be granted a visa if the Minister was satisfied of the relevant criteria in force at the time of the visa application. His Honour then said that "[u]nless the contrary intention appears in [the regulation that removed the 'special need relative' criterion], it follows that the removal of the 'special need relative' criterion did not affect the right which I have just described".[113] Thus, McHugh J plainly accepted that the amending regulation could have amended the visa criteria in a way that applied to pending visa applications, although it had not in fact done so in that case.

87. In this case, the UMA Regulation provides that it applies to applications for visas made, but not finally determined, before 14 December 2013.[114] The terms of the transitional provision are clear. For that reason, cl 866.222 applies to plaintiff S297's protection visa application. That is not denied by the fact that plaintiff S297 was detained or that his detention was for the purpose of assessing whether a protection visa should be granted to him. The alteration of the criteria against which that assessment was to be made did not alter the purpose of the detention, being detention for the purpose of considering a valid application for a visa against the applicable criteria at the time of decision. The lawfulness of the detention is not dependent upon the criteria remaining fixed as they stood at the end of the period mandated by s 65A of the Migration Act.

88. If the submission made by plaintiff S297 were accepted, that would not lead to the invalidity of cl 866.222 or any other part of the UMA Regulation. Rather, the Court would declare only that item 2601(a) of sched 13 of the Migration Regulations does not make cl 866.222 applicable to any protection visa application that should, by reason of s 65A, have been determined prior to 14 December 2013. Item 2601(a) would be read down so as not to apply to such cases.[115]

(c) ORDERS

89. In each proceeding, the demurrer should be allowed with costs.

PART VII: ORAL ARGUMENT

90. The defendants estimate that presentation of their oral argument will require approximately 2 hours.

Dated 19 February 2014

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FCAFC 203 at [7] per curiam. See also *Hicks v Aboriginal Legal Service of WA (Inc)* (2001) 108 FCR 589 (FC) at 600 [57] per curiam.

[112] (2001) 177 ALR 473.

[113] (2001) 177 ALR 473 at 480 (emphasis added).

[114] UMA Regulations, sched 1 item 2 (adding item 2601(a) into sched 13 of the Migration Regulations).

[115] Legislative Instruments Act, s 13(2). See *Pidoto v Victoria* (1943) 68 CLR 87; *Harrington v Lowe* (1996) 190 CLR 311 at 323 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

ANNEXURE
Additional relevant legislative provisions

The *Acts Interpretation Act 1901* (Cth), as at the date of *Victorian Chamber of Manufacturers v The Commonwealth (Women's Employment Regulations Case)*:[116]

23.—In any Act, unless the contrary intention appears—

...

(b) Words in the singular shall include the plural, and words in the plural shall include the singular.

...

48.—(1.) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(a) shall be notified in the *Gazette*;

(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and

(c) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

...

(4.) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect.

(5.) If, at the expiration of fifteen sitting days after notice of a resolution to disallow any regulation has been given in either House of the Parliament in accordance with the last preceding sub-section, the resolution has not been withdrawn or otherwise disposed of, the regulation specified in the resolution shall thereupon be deemed to have been disallowed.

(6.) Where a regulation is disallowed, or is deemed to have been disallowed, under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation.

49.—(1.) Where, in pursuance of the last preceding section, either House of the Parliament disallows any regulation, or any regulation is deemed to have been disallowed, no regulation, being the same in substance as the regulation so disallowed, or deemed to have been disallowed, shall be made within six months after the date of the disallowance, unless—

(a) in the case of a regulation disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or

(b) in the case of a regulation deemed to have been disallowed—the House of the Parliament in which notice of the resolution to disallow the

[116] (1943) 67 CLR 347.

regulation was given by resolution approves the making of a regulation the same in substance as the regulation deemed to have been disallowed.

(2.) Any regulation made in contravention of this section shall be void and of no effect.

The *Migration Act 1958* (Cth) (current):

5AA. Meaning of unauthorised maritime arrival

(1) For the purposes of this Act, a person is an unauthorised maritime arrival if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person entered Australia by sea if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an excluded maritime arrival if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

"aircraft" has the same meaning as in section 245A.

"ship" has the meaning given by section 245A.

...

46. Valid visa application

(1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:

(a) it is for a visa of a class specified in the application; and

(b) it satisfies the criteria and requirements prescribed under this section; and

...

82. When visas cease to be in effect

...

(7) A visa to remain in Australia (whether also a visa to travel to and enter Australia) during a particular period or until a particular date ceases to be in effect at the end of that period or on that date.

...

166. Persons entering to present certain evidence of identity etc.

Requirement to be immigration cleared

(1) A person, whether a citizen or a non-citizen, who enters Australia must, without unreasonable delay:

(a) present the following evidence (which might include a personal identifier referred to in subsection (5)) to a clearance authority:

(i) if the person is a citizen (whether or not the person is also the national of a country other than Australia)—the person's Australian passport or prescribed other evidence of the person's identity and Australian citizenship;

(ii) if the person is a non-citizen—evidence of the person's identity and of a visa that is in effect and is held by the person; and

(b) provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by this Act or the regulations; and

(c) if the person is a non-citizen and prescribed circumstances exist—comply with any requirement, made by a clearance authority before an event referred to in subparagraph

172(1)(a)(iii) or (b)(iii) or paragraph 172(1)(c) occurs, to provide one or more personal identifiers referred to in subsection (5) of this section to a clearance officer.

...

172. Immigration clearance

When a person is immigration cleared

(1) A person is immigration cleared if, and only if:

(a) the person:

(i) enters Australia at a port; and

(ii) complies with section 166; and

(iii) leaves the port at which the person complied and so leaves with the permission of a clearance authority and otherwise than in immigration detention; or

...

When a person is refused immigration clearance

(3) A person is refused immigration clearance if the person:

(a) is with a clearance officer for the purposes of section 166; and

(b) satisfies one or more of the following subparagraphs:

(i) the person has his or her visa cancelled;

(ii) the person refuses, or is unable, to present to a clearance officer evidence referred to in paragraph 166(1)(a);

(iii) the person refuses, or is unable, to provide to a clearance officer information referred to in paragraph 166(1)(b);

(iv) the person refuses, or is unable, to comply with any requirement referred to in paragraph 166(1)(c) to provide one or more personal identifiers to a clearance officer.

...

174. Visa ceases if holder remains without immigration clearance

If the holder of a visa:

(a) is required to comply with section 166; and

(b) does not comply;

the visa ceases to be in effect.

...

193. Application of law to certain non-citizens while they remain in immigration detention

(1) Sections 194 and 195 do not apply to a person:

(a) detained under subsection 189(1):

(i) on being refused immigration clearance; or

...

(b) detained under subsection 189(1) who:

(i) has entered Australia after 30 August 1994; and

(ii) has not been immigration cleared since last entering; or

...

Division 8—Removal of unlawful non-citizens etc

...

Subdivision B—Regional processing

198AA. Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

...

The *Migration Regulations 1994* (Cth) (current):

2.01 Classes of visas (Act, s 31)

For the purposes of section 31 of the Act, the prescribed classes of visas are:

(a) such classes (other than those created by the Act) as are set out in the respective items in Schedule 1 ...

2.02. Subclasses

(1) Schedule 2 is divided into Parts, each identified by the word "Subclass" followed by a 3-digit number (being the number of the subclass of visa to which the Part relates) and the title of the subclass.

(2) For the purposes of this Part and Schedules 1 and 2, a Part of Schedule 2 is relevant to a particular class of visa if the Part of Schedule 2 is listed under the subitem "Subclasses" in the item in Schedule 1 that refers to that class of visa.

3.03. Criteria applicable to classes of visas

(1) For the purposes of subsection 31(3) of the Act (which deals with criteria for the grant of a visa) and subject to regulation 2.03A, the prescribed criteria for the grant to a person of a visa of a particular class are:

(a) the primary criteria set out in a relevant Part of Schedule 2; or

(b) if a relevant Part of Schedule 2 sets out secondary criteria, those secondary criteria.

...

(2) If a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred to must be satisfied by an applicant as if it were set out at length in the first-mentioned criterion.

...

Schedule 1—Classes of visa

...

1401. Protection (Class XA)

(1) Form: 866.

(2) Visa application charge ...

(3) Other:

(a) Application must be made in Australia.

(b) Applicant must be in Australia.

(c) Application by a person claiming to be a member of the family unit of a person who is an applicant for a Protection (Class

XA) visa may be made at the same time and place as, and combined with, the application by that person.

(4) Subclasses:

866 (Protection)

The *Migration Regulations 1994* (Cth) (as made):

SCHEDULE 2

PROVISIONS WITH RESPECT TO THE GRANT OF SUBCLASSES OF VISAS

...

SUBCLASS 866—PROTECTION (RESIDENCE)

866.1 INTERPRETATION

866.111 In this Part:

"Refugees Convention" means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

866.2 PRIMARY CRITERIA

[NOTE: All applicants must satisfy the primary criteria.]

866.21 Criteria to be satisfied at time of application

866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; or

(b) claims to me a member of the family unit of a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class AZ) visa.

866.22 Criteria to be satisfied at time of decision

866.221 The Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):

(a) the Minister is satisfied that the applicant is a member of the family unit of a person who has made specific claims under the Refugees Convention; and

(b) the person of whose family unit the applicant is a member has been granted a Protection (Residence) visa.

866.223 The applicant has undergone a medical examination carried out by a Commonwealth medical officer.

866.224 The applicant:

(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

(b) is under 16 years of age and is not a person in respect of whom a Commonwealth medical officer has requested such an examination.

866.225 The applicant satisfies public interest criteria 4001 to 4004.

866.226 The Minister is satisfied that the grant of the visa is in the national interest.

...

10

SCHEDULE 4

PUBLIC INTEREST CRITERIA

...

4003. The applicant is not determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.

20

4004. The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

...