IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No M47 of 2012

PLAINTIFF M47/2012
Plaintiff

DIRECTOR-GENERAL OF SECURITY
First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION
Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Third Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Fourth Defendant

COMMONWEALTH OF AUSTRALIA
Fifth Defendant

SUBMISSIONS OF THE DEFENDANTS ON THE VALIDITY OF CL 866.225 OF SCHEDULE 2 TO THE MIGRATION REGULATIONS 1994

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INTRODUCTION

1. The Plaintiff seeks a declaration that clause 866.225(a) of Schedule 2 of the *Migration Regulations 1994* (**the Regulations**) is ultra vires to the extent that it requires an applicant for a protection visa to satisfy public interest criterion 4002 (**PIC 4002**). PIC 4002 requires that the applicant is not assessed by the Australian Security Intelligence Organisation (**ASIO**) to be directly or indirectly a risk to security, within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (**the ASIO Act**).

2. The issue is whether clause 866.225 and PIC 4002 are "inconsistent" with the *Migration Act 1958* (**the Act**). Resolving this issue involves consideration of the "true nature and purpose of the [regulation-making] power".[1]

3. The Defendants submit that the relevant provisions of the Act do not give rise to any implication that the regulation-making power in ss 31(3) and 504 of the Act may not be exercised so as to prescribe PIC 4002 as a criterion for a protection visa. That is so for four reasons:

   3.1. First, to the extent that there is any conflict between s 31(3) and s 500(1) of the Act, that conflict should be resolved in terms that recognise that s 31(3) is the "leading" provision.[2]

   3.2. Second, the Act does not provide for a protection visa to be refused "relying on" Articles 32 or 33(2). While s 500(1)(c) assumes that a decision can be made on this basis, that subsection was enacted on the basis of a misapprehension as to the operation of s 36(2) of the Act. There is therefore no criterion with which clause 866.225(a) and PIC 4002 may be inconsistent.

   3.3. Third, even if a protection visa can be refused "relying on" Articles 32 or 33(2), s 31(3) nevertheless supports clause 866.225(a) to the extent that it applies PIC 4002, because these provisions create a criterion that is separate and distinct from Articles 32 and 33(2) of the Convention.

   3.4. Fourth, even if a protection visa can be refused "relying on" Articles 32 or 33(2) by reason of the character test in s 501 of the Act, clause 866.225(a) and PIC 4002 are valid.

ARGUMENT

4. Clause 866.225(a) and PIC 4002 are not directly inconsistent with any provision in the Act. The question whether there is indirect inconsistency turns on whether any

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1 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161 at 164 (Wilson, Dawson, Toohey and Gaudron JJ).

2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382.

provisions of the Act give rise to an "implicit negative proposition"[3] that conflicts with cl 866.225(a) and PIC 4002.

5. The Defendants are not aware of the precise basis upon which the Plaintiff asserts that clause 866.225(a) and PIC 4002 are invalid. The submissions that follow may therefore address some matters that ultimately are not in issue.

Project Blue Sky

6. Section 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class, expressly including the class of protection visas created by s 36 of the Act. Section 504(1) of the Act relevantly confers power on the Governor-General to make regulations not inconsistent with the Act prescribing matters that are permitted to be prescribed by the Act.

7. PIC 4002 has been a criterion for a protection visa ever since that class of visa was created.[4] It was first prescribed by the Regulations which commenced at the same time as the amendments contained in the *Migration Reform Act 1992*.[5] The Act and Regulations are to be construed so as to produce harmonious and consistent provisions.[6] Moreover, given that the Reform Act "provide[d] a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former".[7] This weighs against any implication that might be drawn from the terms of the Act, including, in particular, from ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and/or 503(1)(c), that the Act precludes the prescription of a criterion for a protection visa in the terms of PIC 4002.

8. Consistently with the principles articulated by the Court in *Project Blue Sky Inc v Australian Broadcasting Authority*:[8]

   8.1. The Act must be construed on the prima facie basis that its provisions, including ss 31(3) and 500(1)(c) "are intended to give effect to harmonious goals".

   8.2. If any conflict arises from the language of ss 31(3) and 500(1)(c), that conflict "must be alleviated, so far as possible, by adjusting the meaning of the competing provisions so as to achieve the result which will best give effect to the purpose and language of those provisions" while maintaining the unity of the Act.

   8.3. Such a process of reconciliation may require the Court to determine which of ss 31(3) or 500(1)(c) is the "leading provision", and which the "subordinate provision".

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3 *Cf. Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [244] (Gummow J).
4 See Defendants' Bundle of Legislative Materials, Tab 8.
5 See Defendants' Bundle of Legislative Materials, Tabs 1, 2 and 3.
6 See, e.g., *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 336 at [27] (Crennan J), citing Pearce, *Delegated Legislation in Australia*, Ch 19; *Webster v McIntosh* (1980) 32 ALR 603 at 605; *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70].
7 *Hanlon v The Law Society* [1981] AC 124 at 194 (Lord Lowry); see *e.g. Migration Agents Registration Authority v Barrie Goldsmith* (2001) 113 FCR 18 at [54]; *Australian Steel Company (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33 at [41].
8 (1998) 194 CLR 355 at 381-382 [70].

9. Sections 31(3) and 504 of the Act contemplate the making of a system of visa classes and criteria in the Regulations. As the Full Federal Court observed in *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs*, "[t]he structure of the *Migration Act* is such as to give a central role to the prescription by the Executive of criteria necessary to be satisfied for the grant of a visa. Sections 31 and 65 reflect that."[9] And, in fact, in reliance on ss 31(3) and 504 of the Act, an elaborate and interconnected scheme of visa classes and criteria has been established.

10. If s 500(1)(c) of the Act – which is a grant of jurisdiction to undertake merits review of a decision refusing the grant of a protection visa "relying on" Arts 32 or 33(2) of the Convention, but which does not itself purport to confer power to refuse a visa on that basis - conflicts with s 31(3), then s 500(1)(c) is clearly the subordinate provision. Unlike ss 31(3) and 504, it is not a provision pivotal to the operation of the scheme to which the Act gives effect. To the extent that any conflict arises from the language of ss 31(3) and 500(1)(c), the latter provision ought not be interpreted as impliedly limiting the range of visa criteria capable of being prescribed that the clear and broad language of s 31(3) would otherwise allow.

11. Consistently with the above, the argument that PIC 4002 is invalid because it is repugnant to s 500(1)(c) of the Act was rejected by the Federal Court in *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 989 FCR 597 at 601 (Tamberlin J).

A protection visa cannot be refused "relying on" Articles 32 and 33

12. The Explanatory Memorandum to the Act that introduced s 500(1)(c) demonstrates that Parliament enacted that provision on the basis that each of Articles 1F, 32 and 33 "removed the obligation to provide protection as a refugee".[10] That suggests that Parliament considered that, if those Articles of the Convention applied, the criterion in s 36(2) of the Act would not be satisfied, and that in this way a decision to refuse a protection visa could be made "relying on" Articles 32 or 33.

13. In *NAGV and NAMW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[11] this Court unanimously rejected a submission made on behalf of the Minister for Immigration that, having regard to ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and/or 503(1)(c), a protection visa could be refused relying on Articles 32 and 33 of the Convention. The Court held that an applicant for a protection visa could be owed "protection obligations" for the purposes of s 36(2) of the Act even if the person could be removed from Australia consistently with Article 33, because the criterion in s 36(2) was satisfied provided that the applicant for a protection visa was a "refugee" within the meaning of Article 1 of the Convention. The Court stated that the reference to Articles 32 and 33(2) in s 500(1)(c) of the Act was included out of "abundant caution" or was "epexegetical" of Article 1F.

14. If the reference to Articles 32 and 33(2) in s 500(1)(c) was included out of "abundant caution", that reference does not provide an adequate foundation for any implication

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9 (2005) 147 FCR 135 at 141 [20].
10 Explanatory Memorandum, *Migration (Offences and Undesirable Persons) Amendment Bill 1992* at [10].
11 (2005) 222 CLR 161.

that regulations cannot validly be made to deny a protection visa to persons who ASIO assesses to pose a direct or indirect risk to "security" as defined in s 4 of the ASIO Act.

15. Further, "[t]he mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different. That has been stated in a number of cases".[12] That must be particularly true in cases where a judicial decision subsequent to the enactment of a provision has revealed that Parliament legislated on a misapprehension as to the law. Accordingly, the fact that in some of its potential operations s 500(1)(c) assumes the law to be something it is not does not alter the law.

PIC 4002 validly applies even if a protection visa can be refused "relying on" Article 32 and 33(2)

16. Alternatively, even if the Minister can decide to refuse a protection visa relying on Articles 32 and/or 33 of the Convention, PIC 4002 is not repugnant to any implied criterion that incorporates those Articles.

17. On that hypothesis, the effect of s 500(1)(c) is that it would be possible to appeal to the Administrative Appeals Tribunal (**AAT**) if a decision was made to refuse a protection visa based on Articles 32 or 33(2), but not if the decision to refuse a protection visa was made on the basis of the separate and distinct criteria in PIC 4002. That was held to be the position by Sundberg J in *Director-General of Security v Sultan* (1998) 90 FCR 334 at 339 (prior to *NAGV*, when it was thought that a protection visa could be refused on the basis of Article 33(2)).

18. PIC 4002 creates a criterion that is separate and distinct from Articles 32 and 33(2) because:

18.1. Articles 32 and 33(2) are concerned with the expulsion or removal of refugees. They limit the circumstances in which expulsion can occur (with respect to refugees who are lawfully in the territory - Art 32), and the places to which expulsion can occur (Art 33). But they are not concerned with the criteria that a Contracting State may choose to apply in deciding whether to grant asylum to a refugee. A sovereign state is entitled to set any criteria it wishes to govern the circumstances in which it will grant non-citizens admission to its territory.

18.2. The risk that is required to attract the operation of the exception in Art 33(2) is greater than that required to attract the operation of PIC 4002, because Article 33(2) of the Convention is addressed to the circumstances in which Australia may send a refugee to a place where they reasonably fear persecution. By reason of the seriousness of the potential consequences, the power in Art 33(2) is available only where there is an objectively reasonable basis for concluding

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12 *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 at 898 (Lord Reid), quoted with approval in *CSR Ltd v Eddy* (2005) 226 CLR 1 at 25 (Gleeson CJ, Gummow and Heydon JJ). See also *R v P* (2010) 209 A Crim R 334 at [37] (Doyle CJ).

that the refugee is a serious danger to the security of the country.[13] By contrast, PIC 4002 does not direct attention to the severity of the threat that a person poses to security.

18.3. PIC 4002 directs attention to the security of both Australia and other countries (by reason of the definition in s 4 of the ASIO Act), while Articles 32 and 33 are concerned only with the security of the country in which a refugee is located.

19. Further, it is noteworthy that if a protection visa can be refused on the basis of Articles 32 or 33(2), any such decision would necessarily be made by a DIAC officer who has no special expertise in assessing security matters. The capacity to make regulations in the form of clause 866.225 and PIC 4002 ensures that assessments concerning national security are undertaken by ASIO, being Australia's specialist security organization, on such grounds as Australia considers appropriate to its circumstances (rather than only by reference to criteria set in an international instrument), and that merits review of such assessments takes place only in the circumstances delimited by Parliament in s 36(b) of the ASIO Act.

20. Even if a protection visa can be refused on the basis that Articles 32 and 33 would permit Australia to expel or remove a non-citizen from Australia, it does not follow that the Act should be construed as providing that a protection visa can be refused only in those circumstances.[14] There is no repugnancy between a criterion that reflects the operation of Articles 32 and 33(2) of the Convention, and a criterion that imposes different limits based on a risk to security of a different kind. It would be a large step to imply a restriction on the capacity of the Executive to decide to exclude non-citizens from Australia on security grounds. That is particularly so in circumstances where it is accepted that the Act will operate to prevent the removal of the non-citizen from Australia unless that removal occurs consistently with Australia's obligations under Articles 32 and 33 of the Convention.[15]

21. The power to prescribe criteria in ss 31(3) and 504 of the Act is wide enough to entitle the Executive to delimit the class of refugees to whom Australia will grant asylum, consistent with its sovereign right that is untrammelled by the Convention. No inconsistency arises between the prescription of PIC 4002 as a criterion for a protection visa by cl 866.225(a) of Sch 2 to the Regulations and the scheme applicable to decisions of the kind referred to in ss 500(1)(c) and (4)(c), 502(1)(a)(iii) and 503(1)(c) of the Act.

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13 See, e.g., *Zaoui v Attorney-General (No 2)* (2006) 1 NZLR 289 at [43], [45] and [52]; *Suresh v Canada* [2002] 1 SCR 3 at [90].

14 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571 [2]. See also at 586 [53] (Gummow and Hayne JJ) and 612 [150] (Heydon and Crennan JJ).

15 As the Defendants have addressed in oral submissions, based on the judgment in *Plaintiff M70 v Commonwealth*.

Character grounds

22. A question arises whether a decision to refuse a protection visa "relying on" Article 32 or Article 33(2) may be made in reliance upon s 501 of the Act (perhaps in conjunction with s 65(1)(a)(ii) or (iii) and/or PIC 4001).

22.1. Section 501 relevantly confers power on the Minister to refuse to grant a protection visa if he or she is not satisfied that the person passes the character test including by reason that the person "represent[s] a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way" (s 501(6)(d)(v)).

22.2. The power to refuse a protection visa on that ground overlap with the subject matter of Article 32 or Article 33(2), in the sense that, if a refugee could properly be expelled from Australia in reliance upon those Articles, that refugee would fail the character test (either under s 501(6)(d)(v), or more broadly).

22.3. It does not follow, however, that a decision to refuse to grant a protection visa on the basis of s 501(6)(d)(v) is a decision "relying on" Articles 32 or 33 of the Convention, for the scope of the provisions is not co-extensive.

22.4. The Explanatory Memorandum that accompanied the enactment of s 500(1)(c) provides no support for the proposition that the contemplated decisions "relying on" Articles 32 or 33(2) were decisions to be made on character grounds. The clear inference is that such decisions were thought to relate to s 36(2), not to s 501.

22.5. If a decision is made to refuse a protection visa by reference to s 501(6)(d)(v), an appeal would be available to the AAT on the basis of s 500(1)(b) (except in the case of a decision made by the Minister personally). The conferral of jurisdiction with respect to decisions "relying on" Articles 32 or 33(2) would there have little or no work to do. If the operation of s 500(1)(c) is so minimal, that further suggests that the section does not provide any proper foundation for the drawing of a negative implication that would prevent the exercise of the power conferred by s 31(3) to make clause 866.225.

22.6. Further, if a decision "relying on" Articles 32 or 33(2) is properly characterized under the Act as a decision made under s 501 on character grounds, that reduces the basis for any implication that other criteria cannot validly be prescribed, for it is plain that the Act contemplates that character grounds will be supplementary to other criteria upon which a visa may properly be refused. As Crennan J noted in *VWOK v Minister for Immigration and Multicultural Affairs*,[16] "[t]here is nothing clearly inconsistent or clearly lacking in harmony in the coexistence of a power to refuse a particular class of visa for failure to satisfy certain criteria set out in subordinate legislation and a power to refuse to grant a visa on character grounds under the Act". This conclusion was endorsed on

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16 [2005] FCA 336 at [33].

appeal to the Full Court of the Federal Court,[17] which noted that "[t]he structure of the *Migration Act* is such as to give a central role to the prescription by the Executive of criteria necessary to be satisfied for the grant of a visa".

23. There is no reason to conclude that Parliament intended s 501(6)(d)(v) of the Act to be both its interpretation and implementation of Australia's obligations under Arts 32 and 33 of the Convention.

23.1. Section 501(6)(d)(v) of the Act is a provision that applies to all visa classes - its operation is not confined to the refusal or cancellation of protection visas.

23.2. As explained above, Arts 32 and 33 of the Convention do not speak to the question whether a person is to be admitted by a country. They are concerned to circumscribe the power to expel refugees.

23.3. Section 501 neither accommodates the conditions to, nor reflects the serious consequences of, the exercise of the expulsion powers in Arts 32 or 33 of the Convention. Thus, for instance, the fact that the Minister may be satisfied that if a person were allowed to remain in Australia, there is a significant risk that he or she would represent a danger to a segment of the Australian community within the meaning of s 501(6)(d)(v) does not entail that there exist objectively reasonable grounds for concluding that the person is a danger to the security of the country. To hold that s 501(6)(d)(v) embodies Australia's interpretation and implementation of Australia's obligations under Arts 32 and 33 of the Convention would be inconsistent with the proposition that the Convention should be given a generous and purposive interpretation bearing in mind its humanitarian objects.

23.4. If Parliament had intended, by s 500(1)(c), to ensure that decisions about the application of the character test in s 501(6)(d)(v) be reviewable in the AAT, it could easily have made its intention clear simply by extending the application of s 500(1)(b) (which identifies decisions of a delegate of the Minister under s 501), rather than by referring to decisions "relying on" Arts 32 or 33 of the Convention.

Deportation

24. Sections 200 and 202 of the Act make provision for the deportation of certain non-citizens whose conduct appears to the Minister to constitute a threat to security, where the Minister has been furnished with an adverse security assessment for the purposes of s 202.

24.1. Subject to one exception, a non-citizen without a permanent visa is not entitled to apply for review of an adverse security assessment furnished for the purposes of the exercise of a power under the Act (s 36(b) of the ASIO Act).

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17 (2005) 147 FCR 135 at [19]-[20].

24.2. That exception is where an adverse security assessment is furnished for the purposes of s 202 of the Act. In such a case, the non-citizen may seek review of the assessment in accordance with Part IV of the ASIO Act.

24.3. In this exceptional case, the review is conducted in the Security Appeals Division of the AAT: s 19(6) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**). The provisions that govern the procedure of the Security Appeals Division have been carefully designed to manage the risk of disclosure of security-sensitive information in the conduct of such a review: see ss 39A and 39B of the AAT Act.

10 24.4. As statutes which emanate from the same legislature, the provisions of the ASIO Act and the Migration Act should so far as possible be read together.[18] Section 36(b) reflects a deliberate decision by the Parliament to limit the rights of review in respect of security assessments created under that Act, with the associated special procedures applicable to the Security Appeals Division of the AAT. This weighs against any interpretation of s 500(1)(c) of the Act that would enable a review of a security assessment or any other decision "relying on" Art 32 or 33(2) of the Convention to take place without the protection of any such procedures.

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18 Compare *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276 (Fullagar J), referring to the "very strong presumption that the ... legislature did not intend to contradict itself, but intended that both Acts should operate".