IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M47 OF 2012

B E T W E E N

PLAINTIFF M47/2012

Plaintiff

and

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 PLAINTIFF IN REPLY

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1. These submissions are in a form suitable for publication on the internet. They reply to the submissions of the defendants filed 13 June 2012.

The power of removal under s 198 is not here engaged

2. The defendants' submissions proceed on the basis of two entirely contradictory propositions: that the Act ascribes no significance to the fact that a person is owed protection obligations outside of the grant of a visa; but that s 198 is, in respect of the person, constrained by the obligations under the Convention. Acceptance of the second of the defendants' propositions falsifies the first.

10 3. The defendants (DS [60] seek to hide from the conflict inherent to their position by contending[1] that the Convention rather than the Act provides the operative constraint to s 198. The dichotomy is a false one because the Act gives effect (in part) to the Convention: the protection obligations in s 36 are the obligations that the Convention imposes, not limited to Art 33. Moreover, as Keifel J observed in *M70*, the Act (in various ways) reflects acceptance of the obligation identified in *Minister for Immigration and Ethnic Affairs v Mayer*[2] – that is, an obligation (arising under the Convention) to determine whether an asylum-seeker is a refugee. For example, as her Honour went on to explain, the application of sub-divisions AI and AK to a particular person can be considered to be *a* rejection of the person's claim that Australia's protection obligations apply to them and a finding that the criterion under
20 s36(*2*) could not be met.[3] Those matters underpinned her Honour's conclusion that removal under s198(2) was not permissible unless each of the *M70* plaintiff's status as a refugee had been considered and rejected. The reasoning of French CJ was to similar effect.[4] Importantly, their honours were referring to consideration of those matters under the Act – not by reference to Australia's international obligations under the Convention at large.

4. Those matters point to the primacy of the content of the criterion in s 36(2*)*. It is incorrect to regard the Act as treating the substantive obligations to which that provision refers as no more than a criterion for a visa.

5. The defendants' argument also gives rise to the following difficulties at the level of the construction of s198: ***Firstly***, s 198 is (to adopt a term used by Toohey J in *Lim*) a provision
30 "of a machinery nature".[5] By its terms, it confers a limited function upon officers[6], which is not conditioned upon any particular state of satisfaction on the part of the repository of power[7] and rather imposes a duty by reference to that which is "reasonably practicable". That term means nothing more than that which is able to be put into practice or which can be effected or accomplished.[8]

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[1] Defendants' Submission (**DS**) [60].

[2](1985) 157 CLR 290 at 299-300 per Mason, Deane and Dawson JJ, 305-6 per Brennan J.

[3]See at 227 [223] and at 231 [238].

[4]At 176 [48] and 178 [54].

[5] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 43, referring to the then s88(6) of the Migration Act, which required that a person detained on a vessel be "expeditiously removed from Australia" in certain circumstances.

[6] Officer is broadly defined see eg paragraph (f) of the definition in s5 of the Act. Nowhere was it suggested in *M70* that the complex range of matters concerning those obligations (and the other matters identified in the Plaintiff's submissions in chief (**PS**) [35]-[41]) were to be determined by discharge of the functions and duties of the "officer"

[7] Cf ss 36(2)(a) and 65.

[8] Being a matter which was common ground between the majority and minority in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al Kateb*) see at [121] per Gummow J and at [226]-[227] per Hayne J.

6. *Secondly*, the suggestion that "there is no difficulty accommodating such consideration" within the duty imposed by s 198 (DS [60]) ignores the complexity of the matters to which attention is required when considering Australia's obligations under the Convention, which are not limited to art 33. They include the conditions on which the Convention permits protection to be provided outside of the State in which the refugee resides,[9] the conditions that pertain in the third country and the realities of processing refugee claims[10]. The defendants offer no suggestion as to how such matters are to be considered and determined by the officer. The suggestion (DS [79]) that there are many decisions that a contracting state may remove a refugee to a safe third country do not address the circumstance here where there is a finding that Australia owes protection obligations to the plaintiff.

7. *Thirdly*, the defendants' proposed construction is at odds with the scheme of the Act. The Act gives effect to the Convention by providing the means by which status is to be assessed[11] and the consequences that are to attach. The status is accorded to a person to whom the Minister is satisfied that Australia owes protection obligations. In order to give effect to the Convention, the scheme should be read as integrated whole. It is not possible at any point, especially at the point of removal, to have regard to the Act without an eye to the Convention nor is it correct, as the defendants contend to have regard only to the "Convention itself" (DS [60]) as the source of obligation or constraint.

8. That is particularly so when one considers the fact that the Act, in terms, addresses the circumstances in which a person to whom Australia owes protection obligations may be removed. That may be seen in ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and 503(1)(c) (to which the Court has drawn attention in its letter). In so far as those provisions refer to articles 32 or 33(2), they indicate that there is a particular sequence of decision making required in respect of an application for a protection visa. For the terms of those articles necessarily contemplate that a person has first been found to be a refugee within the meaning of article 1 (as implemented in the Act).[12] PIC 4002 should not be available as a means to avoid the grounds of expulsion and the protections that the Act and Convention confer. To the extent that they had that effect, they would be repugnant to the scheme.

9. Once that finding is made, removal under s 198 can only take place if there has been "a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on" Arts 32 or 33(2). There is no other provision in the Convention dealing with the expulsion of a person found to be a refugee. There is similarly no other provision in the Act which specifically addresses that situation. Further, as submitted at PS [21], ss 500(1) and (4) provide for a particular procedure in respect of such decisions, which appears to manifest a concern that they involve high quality decision making. As regard the passages from *M70* upon which the defendants seek to rely at DS [58], it is by that route alone that there can be

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[9] Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', 28 *Michigan Journal of International Law* 223 (2007); Hathaway et al, 'The Michigan Guidelines on Protecion Elsewhere' 28 Mich J Int Law 207 (2006 - 2007), adopted 3 January 2007.

[10] *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 206 CLR 57 at [62] per Gaudron J; *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at 658 [150] per Gummow J; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 283 per Gummow J. Further, by reason of the nature of the matters that are required to be considered and the interests involved, the obligations of procedural fairness would arguably require advance notice of the decision and an opportunity to be heard: *Kioa v West* (1985) 159 CLR 550 at 586-7 per Mason J.

[11] *NAGV and NAGW Of 2002 v The Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 170 [17]

[12] As suggested in chief at PS [20], footnote 20 the effect of those articles is not to annul that status, but to authorise Australia to divest itself of certain of its particularised responsibilities (see also Professor Hathaway *The Rights of Refugees Under International Law* CUB (2005) at 344).

removal [under s 198] which "accord[s] with Australia's non-refoulement obligations"[13]. It is similarly by that route alone that there can be removal under s 198 which accords with Art 32. That (rather than the strained a-textual construction proposed by the defendants) is the way in which Australia's obligations under the Convention are properly accommodated within the scheme of the Act. There being no attempt to engage that procedure in this case, the power of removal cannot be engaged and the defendant's detention (purportedly for the purposes of such removal) is not lawful.

10. *R (on the application of ST (Eritrea)) (FC) (Appellant) v Secretary of State for the Home Department* (**ST**), on which the defendants seek to rely (DS [69]-[77]), is of little if any assistance.[14] To the extent that Australian law permits "protection elsewhere" it is specifically addressed and heavily constrained. That authority is said to support the proposition that the plaintiff can nevertheless be removed because he was not 'lawfully in [their] territory' within the meaning of Art 32, that being a matter to be determined (so the defendants say, drawing upon *ST*) solely by reference to domestic law.[15] Moreover, its outcome was dictated by the statutory context, which "deemed" the appellant to have not lawfully entered the UK.[16]

11. In contrast, as Gummow J observed in *Al-Kateb* at 601 [97], the Act does not draw such a distinction. Moreover, the fact that the Act refers to a decision to refuse to grant a protection visa "relying on" Art 32 suggests that, where expulsion is permissible under Art 32, a protection visa may be refused. Yet, if the defendants are correct and that matter is foreclosed by the fact that the plaintiff became an "unlawful non-citizen" within the meaning of s 14 on expiry of his visa, it would mean that every such person could be refused a protection visa by dint alone of that status. That anomalous outcome suggests that, for the purposes of the "decision" referred to in ss 500(1)(c), 500(4)(c), 502(1)(a)(iii) and 503(1)(c), the term "lawfully in territory" in article 32 is rather to be understood as being satisfied during the period where (as here) the plaintiff seeks to invoke Australia's protection obligations[17] and certainly by such time as a decision is reached on the admissibility of the protection claim.[18]

12. None of that detracts from Australia's "sovereign rights" to determine who will be permitted to enter and to stay (cf DS 52). The Parliament can (and has) enacted other statutory mechanisms which avoid engaging Art 32 (see again Kiefel J's explanation of the operation of sub-divisions AI and AK in *M70*). Nor does the plaintiff's argument overlook the power conferred by s 31(3) to prescribe criteria. That power is, of course, necessarily constrained by the subject matter, scope and object of the Act. A question would therefore arise as to whether the criterion specified in cl 866.225(a) is ultra vires in so far as it refers to public interest criteria 4002.[19] But, even if it is not, the fact that a person in the position of the plaintiff may not be required to satisfy such criteria where others are does not undermine the

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[13] *M70* per French CJ at 178, [54].

[14] [2012] 2 WLR 735.

[15] DS [75]. The comments made by Stephen J, sitting as a single judge, in *Simsek v Macphee* (1982) 148 CLR 636 at 644-5 were plainly obiter; the passage from *QAAH* at [49] was concerned with the consequences of cessation under article 1C and had nothing to do with the question of lawful presence under article 32; the reference to the views of Professor Shearer in *NAGV* are obviously directed (by way of comparison) to the controversial views of the United States Supreme Court in *Sale v Hatian Centres Council* (1993) 509 US 155 at 182.

[16] See s11(1) of the *Immigration Act 1971* (UK) and Lord Dyson at [56] (stating that, absent s11, it was "not self evident that [the appellant] was not lawfully present..."; see also Lord Hope (with whom Lady Hale, Lord Brown, Lord Mance, Lord Kerr and Lord Clarke agreed) at [14], [34] and [39].

[17] Consistent with the view expressed by Professor Hathaway at 175.

[18] See Hathaway et al, 'The Michigan Guidelines on Protecion Elsewhere' 28 Mich J Int Law 207 (2006 - 2007), at [5].

[19] See eg R *v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381 at 406-407 per Fullagar J (Kitto and Taylor JJ agreeing).

scheme of the Act. The conferral of a visa (and receipt of those consequential benefits) may be seen to be consistent with the hierarchy of obligations identified by Professor Hathaway[20] upon which the defendants seek to rely (at DS [64]-[66]) – possession of a visa signifying a comparatively closer "connection or attachment" (DS [64]) but does not authorise expulsion.

Re-opening and correctness of *Al-Kateb*

13. As regards the plaintiff's application to re-open this Court's decision in *Al-Kateb*, the primary submission made by the defendants is that the occasion to do so does not arise. That is put solely upon the basis that the special case does not recite the fact that there is no real likelihood or prospect that the plaintiff will be removed in the foreseeable future (DS [89] and [112]). That submission appears to misunderstand the nature of what is authorised by clause 27.08.5 of the Rules. Unlike a case stated under s18 of the *Judiciary Act 1903* (Cth),[21] the Court's authority extends to making "any inference, whether of fact or law, that might have been drawn from the [facts stated and documents identified in the special case] if proved at trial". The relevant facts are summarised at PS [23]-[24]. It is readily inferred from those facts that there is no real likelihood or prospect that the plaintiff will be removed in the foreseeable future (see also the evidence upon which von Doussa J relied in *Al-Kateb* at first instance[22]).

14. As to the discretionary matters identified in DS [90]: ***First***, contrary to the defendant's submissions (at 90.1), the reasoning in *Al-Kateb* does not rest upon a principle worked-out in a significant succession of cases. While other first instance and intermediate appeal courts had considered like cases before *Al-Kateb* was decided, *Al-Kateb* and *Al-Khafaji*,[23] which was heard at the same time, were the first – and thus far only – opportunities for this Court to consider the questions here raised, which, it must be remembered, bear heavily on individual liberty. ***Secondly***, notwithstanding what is said by the defendants at [90.2], Gummow and Hayne JJ have more recently described *Al-Kateb* as involving a "division of opinion...as to the effect to be given to *Lim*"[24] and there are (for the reasons given in PS [76]) ongoing controversies about aspects of the reasoning in *Al-Kateb*, which are yet to be settled (including as to *Lim* – see eg PS [65], footnote 67 and PS [71]-[75]). ***Thirdly***, since *Al-Kateb* was decided, the Court has had cause to further consider the scheme of the *Migration Act*, the Convention and the Protocol (most notably in *M61* and *M70*) and there have been amendments to the Act which may bear upon aspects of the reasoning (see PS [56]). ***Fourthly***, the "principle of legality" has been further developed in more recent decisions of this Court – see the authorities referred to at PS [46]-[47] and cf DS [92].

15. As to the substantive point, in contending that *Al-Kateb* was decided correctly, the defendants essentially reiterate the reasoning of the majority. For the reasons given at PS [45]-[59], the reasoning of the minority is to be preferred. It is also notable that the defendants give no answer to the additional matters upon which the plaintiff relies. For example, for the reasons given at PS [56] it is no longer the case that the Act contemplates a closed system limited to "one of the three specified events" in s196 (contra DS [94]). Nor do the defendants seek to grapple with the arguments in PS [57] and [59] (see DS [99.1] and [99.2]) or those put on the basis of *M61* in PS [55] (see DS [96]-[97]). As to what is said in DS [99.3], the plaintiff has not sought to rely upon decisions of foreign courts to construe the provisions of the Act.

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[20] At 154-60

[21] See eg *R v Rigby* (1956) 100 CLR 146 at 150.

[22] *SHFB v Goodwin & Ors* [2003] FCA 294 at [17]-[19].

[23] (2004) 219 CLR 664.

[24] *Vasilkjovic v Commonwealth* (2006) 227 CLR 614 at 648, footnote 103.

Relevant constitutional limitations

16. The following short points may be made in response to the defendants' submissions concerning Chapter III: *First*, whatever may be the case as regards civil penalty provisions, there is little room for "indeterminacy" where what is involved is the loss of liberty of the individual – ordinarily one of the hallmarks reserved to criminal proceedings conducted in a Court.[25] *Secondly*, while differing opinions have been expressed about what was held in *Lim*[26] the proposition identified in PS [63] is consistent with the constitutional object identified in PS [62] and therefore to be preferred to the views upon which the defendants seek to rely at DS [103]. *Thirdly*, the proposition concerning segregation advanced in DS [106] is controversial and for the reasons given at PS [71]-[75] should not be accepted as the doctrine of this Court. The defendants do not seek to answer those submissions.[27] *Fourthly*, for the reasons given in PS [65]-[67] (with which the defendants similarly do not engage), there is no difficulty with an inquiry involving consideration of the relationship between the end or purpose served by detention and the means by which it does so - whether that be described as a "proportionality test" or by reference to the formula adopted in *Lim* of "reasonably capable of being seen as necessary" for a constitutionally legitimate purpose. It is accepted that that question is not to be answered at the level of the effect upon a particular individual, and rather requires consideration of the purpose for which Parliament has authorised the detention (using purpose in the sense identified at PS [63]).[28] But it is only by substituting the indeterminate notion of "segregation" for the more limited set of constitutionally legitimate purposes for which aliens may be detained[29] (which has the effect of the exception swallowing the rule as far as the detention of aliens is concerned) that the defendants can assert that invalidity is avoided, notwithstanding the fact that the legislature authorises detention in circumstances where there exists no real likelihood or prospect that the plaintiff will be removed in the foreseeable future (see DS [108]).

Procedural fairness

17. The defendants' submissions in respect of the alleged denial of procedural fairness properly focus their attention on the terms of the *ASIO Act* and the task undertaken by ASIO in performing adverse security assessments. In a given case, national security may require that certain information not be provided to the subject of a security assessment, although there may be other means by which procedural fairness might be accorded.[30] However, no such claim is made in the affidavit of the Director General of Security in this proceeding. It is well accepted that the requirements of procedural fairness will depend on the *particular* facts engaged.[31] On the facts of this case, no reason emerges as to why the information held by ASIO – or the substance of that information – could not be squarely put to the plaintiff. Simply put, national security was not here available as a trump to the ordinary requirements of procedural fairness but the process proceeded on the flawed assumption (deliberate or otherwise) that it was.

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[25] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [79] per Gummow J, cf DS at [104].

[26] As was acknowledged by the plaintiff at PS [63], footnote 54. As submitted above, that difference of opinion is a reason for rejecting the defendants' submissions concerning re-opening.

[27] Nor does Gleeson CJ's discussion of a "power of exclusion" in *Re Woolley; Ex Parte Applicants M276/2003* (2004) 225 CLR 1 assist the defendants –see footnote 80 to the plaintiff's submissions in chief.

[28] *Woolley* at [163], [167] per Gummow J.

[29] Identified at PS [64]

[30] See, for example, *Tariq v Home Office* [2011] 3 WLR 322 and *Secretary of State for the Home Department v AV (No 3)* [2009] 3 WLR 74.

[31] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-161 [26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

DATED: 15 June 2012

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