IN THE HIGH COURT OF AUSTRALIA **No M64 of 2015**
MELBOURNE REGISTRY

BETWEEN

PLAINTIFF M64/2015

Plaintiff

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

ANNOTATED PLAINTIFF'S SUBMISSIONS

Part I: Internet publication

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

Part II: Issues

2. On 5 December 2011, the Plaintiff's mother and brothers (the **Visa Applicants**) applied for Refugee and Humanitarian (Class XB) visas (the **Visa Application**). The applications were proposed by the Plaintiff, who had arrived in Australia on 29 May 2010 and is the holder of a protection visa, as a "split family" application. In March 2014, while the visa application was still pending, the Government introduced an administrative policy dealing with "processing priorities" for Global Special Humanitarian (subclass 202) visas, under which the applications proposed by the Plaintiff were to be given the lowest priority. On 16 September 2014, a delegate of the Minister (the **Delegate**) refused to grant visas to the Visa Applicants, purporting to rely on the "priorities" set by the Government within the Special Humanitarian Programme (**SHP**).

3. In broad terms, the questions stated in the Special Case are directed to whether the Delegate made a jurisdictional error in connection with the application of the Government's administrative policy in relation to priorities within the SHP. In particular, the questions raise the following issues:

Filed on behalf of: The Plaintiff
Prepared by: Emma Dunlevie
Law firm: Russell Kennedy Lawyers
Tel: + 61 3 9609 1601 Fax: + 61 3 9609 6760
Email: edunlevie@rk.com.au
Address for service: Level 12, 469 La Trobe Street, Melbourne, VIC 3000
DX 494 Melbourne

(a) whether the Delegate misconstrued clause 202.222(2)(d) of Schedule 2 to the *Migration Regulations 1994* (the **Regulations**);

(b) whether the Delegate took into account irrelevant considerations (the number of "places" available in the SHP, or the "priorities" set by the Government within the SHP);

(c) whether the Government's policy in relation to "processing priorities" is inconsistent with the *Migration Act 1958* (the **Act**) and the Regulations; and

(d) whether the Government's policy in relation to "processing priorities" was rigidly or inflexibly applied by the Delegate.

4. The Special Case does not put in issue whether the Government can make decisions about the size or composition of its refugee and humanitarian program. Rather, the case concerns the manner in which such decisions are implemented or given effect consistently with the Act and the Regulations, and in the context of a particular visa application for Class XB visas.

Part III: Section 78B notices

5. The Plaintiff considers that notice is not required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part V: Facts

6. The material facts and documents are contained in the Special Case dated 28 August 2015.

7. The Plaintiff was born on around 20 April 1994 in Jaghori, Afghanistan. He and his family, who are of Hazara ethnicity and Shia religion, fled to Iran in 2003 following the disappearance of the Plaintiff's father. In 2010, the Plaintiff was arrested in Iran as an undocumented immigrant and was deported to Afghanistan. The Plaintiff subsequently fled Afghanistan and arrived in Australia on 29 May 2010. He was granted a protection visa on 18 August 2011. His family remained in Iran.

8. On 5 December 2011, the Visa Applicants lodged an application for Class XB visas as members of the immediate family of the Plaintiff, who proposed their entry in accordance with clause 202.211(2) of Schedule 2 of the Regulations. As a "split family" application, the Visa Applicants were not required to establish that they were subject to substantial discrimination amounting to a gross violation of human rights

in their home country (*cf.* clause 202.211(1)(a)).[1] Further, the application attracted a "concession" under which it would have been treated as meeting the "compelling reasons" criterion in clause 202.222 on the basis of the strength of the Visa Applicants' family connection with Australia.[2]

9. On 12 December 2013, when the Visa Application had been pending for more than two years,[3] the Minister made a decision to remove the prevailing "concession" for visa applications proposed by unaccompanied minors who held protection visas, and to adjust the policy in relation to "processing priorities" for visa applications in the SHP. These changes came into effect on 22 March 2014.

10. On 16 September 2014, the Delegate refused the Visa Application. The Delegate was not satisfied that there were compelling reasons for giving special consideration to granting Class XB visas to the Visa Applicants, so that the application did not satisfy (relevantly) sub-clause 202.222(2).

(a) The Delegate accepted that the Visa Applicants were subject to a significant degree of discrimination in their home country, that they had strong links to Australia, and that there was no other suitable country available for resettlement: see paragraphs 202.222(2)(a), (b) and (c).[4]

(b) However, the Delegate also relevantly found that:[5]

- *"Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time."*
- *"... the limited number of visas available and the high demand for them mean that only a small proportion of applicants can be successful."*
- *"As we can accept only a small number of applicants, the government has set priorities within the Special Humanitarian Programme. Only the highest priority applications will be successful because there are*

---

1 See generally *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 170 [12]-[13].

2 This concession was initially implemented through policy in relation to all split family applications. From 28 September 2012, the concession was embodied in the visa criteria, but was limited to split family applications proposed by holders of Subclass 202 visas or by minors who held protection visas or resolution of status visas. From 22 March 2014, the Regulations were amended to remove the concession in relation to split family applications proposed by minors who held protection visas or resolution of status visas.

3 *Cf. Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 174 [28]-[30].

4 [SCB 261].

5 [SCB 261, 262].

not enough visas available. Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time."

Part VI: Argument

The Regulations

11. Item 1402 of Schedule 1 of the Regulations prescribes Refugee and Humanitarian (Class XB) visas as a class of visa for the purposes of reg 2.01 of the Regulations and s 31 of the Act. It is a requirement for the grant of a Class XB visa that the visa applicant must be outside Australia: item 1402(3)(b).

12. There are five prescribed subclasses of Class XB visa, including subclass 202 (Global Special Humanitarian) which comprises the SHP category of the offshore component of the Humanitarian Programme.[6] Since 1997, the SHP has incorporated "split family" provisions to enable permanent refugee and humanitarian visa holders to propose members of their immediate family for settlement in Australia.[7] This reflects one of the principal aims of the Humanitarian Programme, namely "to reunite refugees and people who are in refugee-like situations with their family in Australia".[8] As at the time of the visa application on 5 December 2011, the "split family" provisions were contained in sub-clause 202.211(2) of Schedule 2 of the Regulations.

13. As in force at the time of the visa application, clause 202.222 relevantly required that, at the time of decision:

> *202.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:*
>
> *(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and*
>
> *(b) the extent of the applicant's connection with Australia; and*

---

6 Special Case, para [8].

7 Department of Immigration and Citizenship, *Refugee and Humanitarian Issues: Australia's Response* (June 2011), p 23 [SCB 90]; see *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 176 [34].

8 Special Case, para [7(b)]; Department of Immigration and Border Protection, Information Paper (December 2013), p 2 [SCB 26]; see also Submission to the Minister as to proposed changes to the SHP under the Humanitarian Programme (the **Ministerial Submission**), Attachment B ("Extent of connection to Australia") [SCB 129]: "policy has always placed a high emphasis on family, particularly as family reunion is of fundamental importance to UNHCR and has been a principle of the SHP Programme."

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

14. For "split family" applications decided prior to 28 September 2012, there was a policy "concession" under which immediate family members were taken to meet the criterion in clause 202.222 based on their family connection alone.[9]

15. On 28 September 2012, clause 202.222 was amended by the *Migration Amendment Regulation 2012 (No.5)*,[10] so as to introduce an alternative "single-factor" compelling reasons criterion for split family applicants who were proposed either by the holder of a Subclass 202 visa, or by the holder of a Subclass 866 (Protection) visa or a Resolution of Status (Class CD) visa who was less than 18 years old at the time of the visa application.[11] In respect of such applications, the Minister was required to be satisfied that there were compelling reasons for giving special consideration to granting the applicant a permanent visa having regard *only* to the extent of the applicant's connection with Australia.[12] This amendment gave effect to recommendation 11 of the Expert Panel, which considered that the policy concession should be removed for those applicants currently in the "backlog" whose proposers had arrived in Australia through illegal maritime voyages *unless* the proposer was under the age of 18 at the time the SHP application was lodged.[13] The amendments to clause 202.222 applied to visa applications that had not been finally determined

---

9 See *Report of the Expert Panel on Asylum Seekers* (August 2012), para [3.15] [SCB 58-59]; Department of Immigration and Citizenship, *Refugee and Humanitarian Issues: Australia's Response* (June 2011), p 41 [SCB 108]; Ministerial Submission, Attachment B [SCB 128].

10 SLI 2012 No 230, Schedule 1, item [12]. The amended form of clause 202.222(2)(a) inadvertently referred to "persecution" as opposed to "discrimination", but this mistake was subsequently corrected by *Migration Amendments Regulations 2013 (No.1)* (SLI 2013 No 33).

11 The amendments also precluded "irregular maritime arrivals" on or after 13 August 2012 from proposing members of their immediate family for entry under the SHP: see Schedule 1, items [9] and [11].

12 Accordingly, as was the case in relation to the policy concession prior to 28 September 2012, such applications proposed by minors (often referred to as "unaccompanied humanitarian minors" or "UHMs") would still be taken to meet the "compelling reasons" criterion based on their family connection alone: see the Explanatory Statement, SLI 2014 No 32, Attachment B, pp 6-7.

13 Explanatory Statement to SLI 2012 No 230; *Report of the Expert Panel on Asylum Seekers* (August 2012), p 16, 40-41 [SCB 55, 58-59].

before 28 September 2012.[14] Accordingly, the amended form of clause 202.222 was applicable to the Visa Application, which would at that time have been governed by clause 202.222(1) rather than clause 202.222(2).

16. On 22 March 2014, clause 202.222 was further amended by the *Migration Amendments (2014 Measures No.1) Regulation 2014*.[15] These amendments narrowed the alternative "single-factor" compelling reasons criterion in sub-clause 202.222(1) so as to exclude immediate family members proposed by minors who hold protection visas or Resolution of Status visas.[16] As a consequence, from 22 March 2014, the "concession" in relation to the compelling reasons criterion was applicable only to applicants proposed by the holder of a Subclass 202 (Global Special Humanitarian) visa. Other applications were required to be assessed against the four factors of the compelling reasons criterion in sub-clause 202.222(2).[17] These amendments to clause 202.222 were applicable to visa applications that had not been finally determined before 22 March 2014,[18] and were therefore applicable to the Visa Application.

The "processing priorities" policy

17. There is no dispute that, as a result of these legislative changes, the Visa Application was no longer entitled to the concessional treatment previously available under former sub-clause 202.222(1), and became required to satisfy the "compelling reasons" criterion under sub-clause 202.222(2). However, the changes introduced by the Minister with effect from 22 March 2014 sought to go much further, by introducing an administrative policy as to "processing priorities" under which a category of applications that included the Visa Application would be treated as "lowest priority" and would invariably, or almost invariably, be refused for failure to meet the "compelling reasons" criterion.[19]

---

14 Schedule 1, item [22]; see Schedule 13, item 501 of the Regulations.

15 SLI 2014 No 32, Schedule 2.

16 See generally the Ministerial Submission, pp 4-5 [SCB 123-124].

17 See Explanatory Statement, SLI 2014 No 32, Attachment B, p 7: "The main difference will be that family of minors will need to show that they have humanitarian claims in their own right, which will make it more difficult to be eligible for an SHP visa."

18 SLI 2014 No 32, Schedule 6; see Schedule 13, item 2701 of the Regulations.

19 Although the changes purported to take effect only from 22 March 2014 (see *e.g.* [SCB 131]), it seems to have been contemplated that no applications were to be granted in the period between the Minister's decision on 12 December 2013 and the commencement of the changes on 22 March 2014, even if they otherwise met the visa criteria. Thus, the Ministerial Submission stated at para 18 that "[i]n the meantime, the introduction of the new processing priorities, which make applications proposed by Protection visa holders the

18. In contrast to the removal of the concession for applications proposed by unaccompanied humanitarian minors, the changes to "processing priorities" were not brought about by amendments to the Regulations, but were purportedly given effect by the Minister by administrative decree.[20] The term "processing priorities" was itself somewhat of a misnomer – despite some of the language used in the Departmental guidelines,[21] it is clear that the policy was designed to address more than just the order in which visa applications were to proceed or be dealt with.[22] Thus, the policy clearly contemplated that applications in the highest priority category would be granted and that most if not all applications in the lowest priority category would be refused.[23] The policy was intended to operate in a substantive manner, with the effect that split family applications which had been awaiting decision for many years (and which may well have been granted if processed prior to 22 March 2014) were to be determined, but with a strong presumption against the grant of a visa for certain categories of applicants, in particular those proposed by a person who held a protection visa or Resolution of Status visa.

19. The Plaintiff submits that the Delegate's attempt to apply the policy as to "priorities" has led to a number of significant legal errors in the decision to refuse the Visa Application.

Misconstruction of clause 202.222(2)(d)

20. On the findings made by the Delegate, the factors set out in paragraphs 202.222(2)(a), (b) and (c) did not present any difficulties for the Visa Application. The Delegate made positive findings in relation to each of those factors, namely:

    (a) the Visa Applicants were subject to "a significant degree" of discrimination in their home country;

---

lowest priority, would effectively stop processing of all UHM-proposed applications", and that "[u]ntil the regulation change becomes effective, *UHM-proposed applications effectively meet the 'compelling reasons' criterion based on their family connection and are unlikely to be refused, but will not be granted*" [SCB 124] (emphasis added).

20 See Ministerial Submission, p 2 [SCB 121]: "Processing priorities are set in policy and can be amended by means of your directive and by amending the Procedures Advice Manual (PAM)."

21 For example, see *Changes to the Refugee and Humanitarian Programme: Frequently Asked Questions*, "What are the new processing priorities?" [SCB 132]; Extract from PAM3 titled "the Offshore Humanitarian Program – Planning and Prioritising", section 7.2 (SHP priorities) [SCB 150].

22 *Cf.* s 51 of the Act, which provides that "[t]he Minister may consider and dispose of applications for visas in such order as he or she considers appropriate".

23 Ministerial Submission, paras 4 to 15 [SCB 122-123].

(b) the Visa Applicants had "strong links" to Australia; and

(c) there was no other suitable country available for resettlement.[24]

21. The critical issue for the Delegate was therefore the factor in paragraph 202.222(2)(d) – "*the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia*". It was the Delegate's findings on this factor which led him to conclude that he was "not satisfied that there were compelling reasons for giving special consideration to granting you and your family a Class XB visa". In particular, the Delegate considered that "Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time",[25] that "only a small proportion of applicants can be successful", and that it was necessary to give priority to certain categories of applicants as decided by the government. While the Delegate referred to "[w]eighing" all of the factors in clause 202.222(2), what this effectively meant was that the factor in paragraph 202.222(2)(d) was taken to outweigh the other factors in paragraphs 202.222(2)(a) to (c) on which the Delegate had made findings in favour of the Visa Applicants.

22. In adopting this approach, the Delegate misconstrued or misapplied paragraph 202.222(2)(d) of the Regulations.

23. First, the Delegate erroneously treated paragraph 202.222(2)(d) as referring to the capacity of *Australia* to resettle *all* applicants for Class XB visas, as opposed to the capacity of *the Australian community* to resettle persons such as *the particular visa applicant* in Australia. To assert that Australia is unable to resettle all applicants for humanitarian visas says nothing about the capacity of the community to provide for the permanent settlement of a particular applicant, or persons such as the particular applicant. It is self-evident that "persons such as the applicant" in paragraph 202.222(2)(d) does not mean all or every applicant for a Class XB visa. While the reference to "persons such as the applicant" might allow some level of generalisation, this is nevertheless focused by reference to the characteristics and the situation of the particular applicant. This demands consideration of the individual circumstances of the visa applicant, including the nature and level of community support that would be available in the particular case.

---

24 [SCB 261]; see also case notes in IRIS at [SCB 254-256].

25 See also the subsequent assertion: "Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time" [SCB 262].

24. Second, the Delegate failed to give proper consideration to the individual circumstances of the Visa Applicants, and the material relevant to community support for their permanent settlement in Australia. To a significant extent, this was a consequence of the Delegate's inflexible application of the government's policy on "priorities" within the SHP (which is addressed below). Even the Departmental guidelines recognise that decision-makers "must consider the level of support available to the applicant from the proposer or other friends, relatives or organisations in Australia" when addressing paragraph 202.222(2)(d).[26] However, the reasons set out in the notification letter did not contain any reference to the support that would be available to the Visa Applicants in Australia.[27]

25. This deficiency is not remedied by reference to the IRIS case notes recorded by the Delegate, which stated that "[t]he proposer has indicated that they [sic] are prepared to provide short-term accommodation, airfares and settlement services for the applicants".[28] There does not appear to have been any material before the Delegate indicating that the Plaintiff had offered only "short-term" accommodation to the Visa Applicants.[29] Further, the following relevant material was before the Delegate:

(a) a letter from the Plaintiff's carer stating that the Plaintiff had been doing his best to provide financial support to his family;[30]

(b) a letter from the Plaintiff's representatives stating that the family would live with the Plaintiff in Melbourne "where there is a lively and close Hazara community which will embrace and support the family as they settle into Australia", that the Plaintiff was "well placed to assist his family as they settle into Australia" and had "the ongoing support of his appointed carer Ms Pam Rowley who has expressed a willingness to help settle the family";[31]

(c) a statement of support from the Montmorency Community Group, an active volunteer organisation with close links to other support groups, who would

---

26 Extract from PAM3 titled "Class XB-specific criteria", section 71.6 [SCB 140].

27 [SCB 260-262].

28 [SCB 256], lines 38-39.

29 *Cf.* Questions 36-40 of the Plaintiff's "Refugee and special humanitarian proposal" (Form 681) [SCB 182], in which the Plaintiff stated that he would provide or arrange accommodation for the Visa Applicants. The Plaintiff also indicated that he was able to assist the Visa Applicants to access various services, and that he would meet their travel costs.

30 [SCB 193, 201].

31 [SCB 219].

"use our wide networks to facilitate assistance such as social support, English tutoring, donation of household items, sharing transport, etc";[32] and

(d) a statement of support from the Year 9 co-ordinator at Doncaster Secondary College stating that the Plaintiff was "a fantastic young man who would have no trouble at all in supporting and assisting his family were they to be granted asylum in Australia".[33]

26. Of the above material, only the first letter from the Plaintiff's carer was even mentioned in the IRIS case note,[34] and none of the other material was dealt with by the Delegate in assessing the capacity of the Australian community to provide for the permanent settlement of the Visa Applicants, or persons such as the Visa Applicants, in Australia. The Delegate was required to give real and genuine consideration to the relevant facts and material in relation to the capacity of the Australian community to resettle the Visa Applicants.[35] The material was directly relevant, and was not so "insignificant that failure to take it into account could not have materially affected the decision".[36] The Delegate failed to have regard to relevant material in assessing the capacity of the Australian community for the purposes of paragraph 202.222(2)(d), which was a mandatory relevant consideration in the application of clause 202.222(2). It is accepted that "jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power".[37]

27. A proper assessment of whether there are "compelling reasons for giving special consideration" within the meaning of clause 202.222(2) must necessarily be directed to the facts of the individual case, having regard to all four matters identified in

---

32 [SCB 250].

33 [SCB 251].

34 [SCB 254], lines 14-17.

35 See *e.g. Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 181-182 [106]-[107]; *Bruce v Cole* (1998) 45 NSWLR 163 at 185-186; *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 12-13. See also *Weal v Bathurst City Council* [2000] NSWCA 88 at [80] (Giles JA): "Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration."

36 *Minister for Aboriginal Affairs v Peko- Wallsend Ltd* (1986) 162 CLR 24 at 40.

37 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 175 [27]; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351-352 [82]-[84]; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179. See also *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 127-128 [98], 130 [111]; *Minister for Immigration and Border Protection v MZYTS* (2013) 136 ALD 547 at [64].

paragraphs (a) to (d) both individually and cumulatively. Higher level factors going to the public interest are addressed by other prescribed visa criteria – such as regional or global priorities between different categories of applicants (clause 202.223) or questions of overall capacity or quotas (clause 202.226).

28. Third, the Delegate misconstrued or misapplied clause 202.222(2) by effectively treating paragraph (d) as a "stand-alone" criterion. It is clear from the Delegate's reasons that the factor of "capacity" under paragraph (d) was treated as determinative of the outcome of the Visa Application, rather than as one factor to be weighed in determining whether there were "compelling reasons" for giving special consideration to the grant of visas to the Visa Applicants. The Delegate's reference to "[w]eighing all these factors" does not rebut the inference that "capacity" was regarded as the overriding consideration, given that all of the other factors set out in clause 202.222(2) weighed in favour of the Visa Applicants. As the Delegate went on to state: "Only the highest priority applications will be successful because there are not enough visas available".[38] As addressed further below, the question of capacity as applied by the Delegate left no room for the operation of any other factors, nor for the consideration of the individual circumstances of the particular case which should have been the focus of the assessment of whether there were *compelling reasons* for giving *special consideration* to the grant of visas to the particular Visa Applicants.[39]

Irrelevant considerations

29. When addressing the question of capacity for the purposes of paragraph 202.222(2)(d), the Delegate took into account that there were "only around 5,000 places available in the Special Humanitarian Programme for 2014-15", that "the limited number of visas available and the high demand for them mean that only a small proportion of applicants can be successful", and that "[o]nly the highest priority applications will be successful because there are not enough visas available".[40]

---

38 [SCB 262].

39 Compare the extract from PAM3, which acknowledges that "[t]he words 'compelling reasons' and 'special consideration', should be given their ordinary dictionary meaning" [SCB 138]; and see generally *Paduano v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 204 at 211-213 [31]-[37] (Crennan J).

40 [SCB 261-262].

30. The reference to the number of "places" and "visas" available in the SHP was treated by the delegate as an informal cap or quota on the grant of Class XB subclass 202 visas. However, the Minister has not utilised either of the formal statutory mechanisms available to impose such a limit on the number of visas of this type.

(a) Section 85 of the Act enables the Minister to limit the maximum number of visas of a specified class that may be granted in a financial year. The Minister has not made any legislative instrument under s 85 of the Act in respect of Class XB visas.[41]

(b) Section 39 of the Act and clause 202.226 of Schedule 2 of the Regulations enable the Minister to fix by legislative instrument the maximum number of Subclass 202 visas, or the maximum number of visas of particular classes including Subclass 202 visas, that may be granted in a financial year. Once any such limit is reached, outstanding applications for the grant of that class of visas would be taken not to have been made. The Minister has not made any legislative instrument for the purposes of s 39 or clause 202.226.[42]

31. It may be assumed that the Delegate's reference to "places" available in the SHP in 2014-15 was referring to the Government's annual decision as to the size and composition of the Humanitarian Programme, and in particular to the Minister's announcement that 5,000 "places" would be allocated in the SHP in 2014-2015 (from a total of 13,750 "places" in the Humanitarian Program).[43] Such a decision does not involve the exercise of any power conferred by the Act or the Regulations, and does not have any direct operation on the visa criteria prescribed by Part 202 of Schedule 2 of the Regulations. The decision as to the size and composition of the Humanitarian Program is not directed at the circumstances of particular visa applicants, and does not have a bearing on the capacity of the Australian community to provide for the permanent settlement of any particular visa applicant in Australia. There was in fact no strict limit on the number of Subclass 202 visas that could be

---

41 Special Case, para 15.

42 Special Case, para 16. It may be noted that s 85 of the Act confers the only power to make such a legislative instrument, which may be given additional consequences by a prescribed visa criterion for the purposes of s 39: see *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 732 [56]-[57]; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735 at 742-743 [28]-[29], 748 [60]-[61], 749 [70].

43 Special Case, paras 13-14. It appears that the majority (up to 4,400) of these "places" in the SHP were committed to persons affected by the conflicts in Iraq and Syria.

granted in 2014-15 (nor in any other relevant financial year). For the delegate to determine "capacity" by reference to an administratively determined finite cap or quota was to take into account a consideration that was irrelevant to the application of clause 202.222(2)(d).[44]

32. Moreover, the Delegate erred by having regard to the "priorities" set by the Government within the SHP under which only the highest priority applications would result in the grant of a visa.

(a) There is a threshold question as to whether the Delegate was referring to the "processing priorities" policy as evidenced in the relevant extracts from the Departmental guidelines set out in the Procedures Advice Manual (**PAM**),[45] or whether the Delegate instead had regard to some idiosyncratic notion of government "priorities" within the SHP. The Delegate's reasons did not expressly refer to the Procedures Advice Manual, and described a government decision to give priority to certain applicants in terms that differed from the categories set out in the PAM.[46] Further, it seems clear that the "priorities" to which the Delegate referred were to be strictly applied, in that "[o]nly the highest priority applications will be successful".[47]

(b) If the Delegate did not take into account the "processing priorities" policy as set out in the PAM, but instead had regard to a differently formulated policy, the latter policy must have been an irrelevant consideration which the

---

44 To the extent that the Departmental guidelines suggest the contrary, those guidelines involve error: see Extract from PAM3 titled "Class XB-specific criteria", section 71.6 [SCB 139] ("Officers should consider the stated Government priorities and the size of the program when assessing this factor").

45 Special Case, paras 18-19; Extract from PAM3 titled "Class XB-specific criteria", sections 71.2, 71.6 [SCB 138-140]; Extract from PAM3 titled "The Offshore Humanitarian Program – Planning and Prioritising", section 7.2 [SCB 150].

46 [SCB 261]. The Delegate's reasons refer to a decision by government to give priority to applicants who were either assessed as refugees by UNHCR, or were "proposed by very close family members under the [SHP]". What is puzzling about this description (or misdescription) is that it would seem that the Visa Application should have been accepted as falling within the identified priorities as an application proposed by a close family member.

47 [SCB 262]. *Cf.* Extract from PAM3 titled "the Offshore Humanitarian Program – Planning and Prioritising", section 7.2 [SCB 150], which states that "in exceptional circumstances, after consultation with Humanitarian Branch, individual applications may be given a higher priority than indicated above"; *Changes to the Refugee and Humanitarian Programme: Frequently Asked Questions*, "What do the changes mean?" [SCB 132], stating that "[t]o be successful, protection visa proposed applicants will need to have compelling humanitarian claims given the strong demand for these places."

Delegate was bound not to take into account, and which caused the Delegate to ask the wrong question leading to jurisdictional error.

(c) Alternatively, if an inference is drawn that the Delegate had regard to and sought to apply the policy as set out in the PAM, then for the reasons set out below:

(i) the "processing priorities" policy is inconsistent with the Act and the Regulations, and led the Delegate into error in the application of clause 202.222(2); or

(ii) in any event, the Delegate inflexibly applied the "processing priorities" policy without regard to the merits of the particular case.

The Policy is inconsistent with the Act and Regulations

33. The so-called "processing priorities" introduced by the Minister involve dividing the pool of visa applications into five categories, largely by reference to the identity of the person who proposes the visa applicants' entry into Australia. Applications proposed by a member of the immediate family who holds a Subclass 202 visa are placed at the head of the queue as "Priority 1" applications,[48] while any applications proposed by a person who holds a protection visa or a Resolution of Status visa are grouped together as "Priority 5" or "lowest priority" applications. In between the highest and lowest priority categories are Priorities 2, 3 and 4 – which respectively deal with applications proposed by a close family member, an extended family member, or a friend or distant relative who does not hold a protection visa or a Resolution of Status visa. It will be apparent that the policy gives priority to a visa application by a friend or distant relative of a proposer who does not hold a protection visa (Priority 4) over an application made by a member of the immediate family of a person who holds a protection visa (Priority 5).

34. On its face, the specification of the "processing priorities" [SCB 132] or "SHP priorities" [SCB 150] does not disclose any relationship to the prescribed criteria for a Subclass 202 visa. However, it is apparent from the PAM guidelines that officers are expected to consider the "stated Government priorities" when assessing the capacity of the Australian community under paragraph 202.222(2)(d).[49] Such a link

---

48 It may be noted that such applications generally remain entitled to concessional treatment under the "single factor" compelling reasons criterion in sub-clause 202.222(1), as opposed to the "four factor" compelling reasons criterion in sub-clause 202.222(2).

49 Extract from PAM3 titled "Class XB-specific criteria", section 71.6 [SCB 139].

was also drawn in the Ministerial Submission, where it was envisaged that lowest priority applications were not expected to proceed to grant "unless they were exceptionally compelling".[50] The Department advised the Minister that it was expected that all Priority 1 applications would progress to grant, that there would be "sufficient SHP places available to grant visas to a reasonable proportion" of Priority 2 applications, and that some Priority 3 applicants who had "strong humanitarian claims and verified family relationships" may be approved subject to the availability of places.[51] In contrast, it was not expected that any Priority 5 applications would be successful unless they could meet a higher bar of "exceptionally compelling" or "extraordinary and highly compelling reasons".[52]

35. Such an attempt to divide up the pool of applications into broad categories, and to impose a different test in relation to one such category of applicants, is directly inconsistent with the criteria prescribed by Part 202 of Schedule 2, and in particular clause 202.222(2). As already noted, it seeks to impose a gloss on the prescribed criterion of "compelling reasons for giving special consideration" to granting a permanent visa to the applicant, requiring some categories of applicant to meet a different and higher test of "exceptionally" or "highly" compelling reasons. But more significantly, the manner in which the categories are framed (and in particular the "Priority 5" or "lowest priority" category) has no relevance to the capacity of the Australian community to provide for the permanent settlement of the visa applicants.

36. The "Priority 5" category does not turn upon any characteristic of the visa applicant, and certainly not upon any characteristic which has a bearing on the capacity of the Australian community to resettle persons such as the visa applicant. Rather, the category is defined by reference to characteristics of *the proposer* (in the present case, the Plaintiff), that is, the kind of visa held by the proposer and the manner in which he or she arrived in Australia. The fact that visa applicants are proposed by a person who holds a protection visa or who arrived in Australia by boat cannot have any relevance or significance to the capacity of the Australian community to provide for the settlement of such applicants. The policy appears to be designed to visit a punitive consequence on certain irregular maritime arrivals (or IMAs) by retrospectively removing the family reunion avenue available under the split family

---

50 Ministerial Submission, para 14 [SCB 123].
51 Ministerial Submission, paras 6, 9 and 11 [SCB 122-123].
52 Ministerial Submission, paras 14, 15 [SCB 123].

provisions of the SHP.[53] However, such an objective has nothing to do with the question of capacity for the purposes of clause 202.222(2)(d).

37. Further, the "compelling reasons" criterion in clause 202.222(2) does not permit the Minister or his delegates "to attach an additional consequence to being an unauthorised maritime arrival beyond those fixed by the Act", and does not authorise the application of a "general rule" that a split family application proposed by a person who holds a protection visa must be given lowest priority and invariably be refused.[54]

38. Accordingly, the treatment of "lowest priority" applications under the policy is inconsistent with the visa criterion prescribed by clause 202.222(2), by impermissibly quarantining a category of applicants and sending them to the bottom of the pile or the back of the line, irrespective of the individual circumstances of the application relevant to whether there are "compelling reasons for giving special consideration" within the meaning of clause 202.222(2). Nor is it permissible for such cases to be weighed differently in some unidentified or unarticulated manner. If the Government wishes to create a category of applicants who are to be given different treatment in this way, it is required to do so by amendment to the Regulations and not by an administrative direction.

39. In such circumstances, the SHP "processing priorities" policy is inconsistent with clause 202.222 of the Schedule 2 of the Regulations, and it was impermissible for the Delegate to take into account or apply the policy so as to refuse the Visa Application.[55]

40. Further or alternatively, ss 39 and 85 of the Act create specific statutory mechanisms for limiting the maximum number of visas of a particular class that may be granted in

---

53 The policy cannot be regarded as having been directed to an objective of deterrence of irregular maritime voyages, because the Regulations had already been amended to remove the ability of IMAs who arrived after 13 August 2012 to propose split family applications under the SHP: see *Migration Amendment Regulations 2012 (No 5)*, Schedule 1, item [11], which inserted new clause 202.211(2)(e) with prospective effect to visa applications made on or after 28 September 2012.

54 Compare *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 89 ALJR 292 at 294-295 [5], 296-297 [20]-[21].

55 An administrative policy must be consistent with the governing statute, must allow the decision-maker to take into account relevant circumstances, and must not require the decision-maker to take into account irrelevant circumstances: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641.

a financial year.[56] In so far as the SHP "processing priorities" policy amounts to an attempt to implement an informal administrative cap or quota on the number of Class XB Subclass 202 visas that may be granted in any program year, the policy is inconsistent with the statutory scheme embodied in ss 39 and 85 of the Act (together with clause 202.226 of the Regulations), which constitutes "one statutory scheme ... for controlling the volume of grants of particular classes of visa made in a given financial year".[57]

Inflexible application of policy

41. Alternatively, assuming that the "processing priorities" policy was otherwise consistent with the Act and Regulations, the Delegate impermissibly treated the policy as a fetter on the exercise of his discretion to decide whether there were "compelling reasons for giving special consideration" to the grant of visas to the Visa Applicants within the meaning of clause 202.222(2).

42. In order not to be an invalid fetter on the exercise of a discretionary power, an administrative policy "must admit of the possibility of exception depending on the circumstances of a particular case".[58] Any such policy –

> "must not be such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful."[59]

The discretion conferred by the relevant statute "cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases"; rather, the

---

56 See generally *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735.

57 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735 at 743 [28] (French CJ).

58 *Sieffert v Prisoners Review Board* [2011] WASCA 148 at [124] (Martin CJ).

59 *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 at 496-497, quoted with approval by Gleeson CJ in *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 286-287 [17]; see also at 320 [138] (Kirby J). Compare *C v Director of Immigration* [2013] HKCFA 19; (2013) 16 HKCFAR 280; [2013] 4 HKC 563 at [74] (Sir Anthony Mason NPJ): "It is, however, important that the policy adopted, whether general in character or confined to a class of persons, is not so rigid as to exclude the exercise of discretion by the decision-maker to consider the merits of the particular case and a willingness to depart from the policy, if need be, in a particular case, at least in the general run of cases."

policy must be one which "guides but does not control the making of decisions".[60] Accordingly, an applicant must be "able to put forward reasons why the policy should be changed, or should not be applied in the circumstances of the particular case".[61] The decision-maker must not "abdicate" its function to one of simply applying the relevant policy.[62]

43. In the present case, there is nothing in the Delegate's reasons for decision which reveals any consideration of whether the Government's policy as to "priorities" within the SHP should not be applied to the particular circumstances of this case, nor whether there were exceptional circumstances sufficient to justify the grant of visas to the Visa Applicants notwithstanding the general priorities set by the Government. On the contrary, the Delegate emphasised in his reasons that "[o]nly the highest priority applications will be successful".[63] The Delegate's reasons reveal, if not "a refusal to entertain the possibility that a particular case might fall outside the policy, or require its re-consideration",[64] at the very least a complete failure to address such a possibility.

44. The inflexible application of the policy is further manifested by the Delegate's finding that the Visa Applicants did not satisfy the "compelling reasons" criterion in *any* of the five visa subclasses (*i.e.* clauses 200.222, 201.222, 202.222(2), 203.222 and 204.224), but without addressing "compelling reasons" in the context of the differing criteria that were applicable to each subclass other than Subclass 202. This supports the inference that the Delegate determined "compelling reasons" solely by reference to "capacity" considerations, and treated capacity as being concerned only with the limited number of places and the priorities set by the government.[65]

---

60 *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641. See also *Jackson v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 643 at 648-649 [20] (Lee, Carr and Moore JJ); *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 503-507; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 192, 202.

61 *Elias v Commissioner of Taxation* (2002) 123 FCR 499 at 506-507 [34] (Hely J); see also *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 624-625.

62 Compare *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115 at 120-121 [42].

63 [SCB 262].

64 *Cf. Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 289-290 [26]; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 624-625.

65 There is a further disconnect in the Delegate's reasons for finding that the Visa Applicants did not satisfy the compelling reasons criterion in the context of subclasses 200, 201, 203 and 204, in that the Delegate's findings on capacity were directed only at Subclass 202

45. Further, the finding made by the Delegate that "most applicants have close family in Australia and have suffered some form of discrimination or persecution" betrays an exclusive reliance on the limits and priorities set by the government. By implying that all split family applicants are equal, the Delegate sought to dismiss or avoid consideration of the individual circumstances of the extent of the connection with Australia and the degree of discrimination suffered by the applicants.

46. Accordingly, the policy was rigidly or inflexibly applied by the Delegate without regard to the circumstances or merits of the individual case. The Delegate applied the policy so as to confine the question of capacity to one that was concerned exclusively with high demand for limited available "places", requiring the strict application of priorities set by government in order to confine the grant of visas to "highest priority" cases. On this approach, the refusal of the Visa Application was inevitable. However, even assuming that the policy itself was consistent with the Act and the Regulations and admitted of exceptional cases, it remained incumbent on the Delegate to address whether the individual circumstances amounted to such an exceptional case – that is, whether there were circumstances that gave rise to compelling reasons for giving special consideration to the grant of visas to the Visa Applicants, *outside* the priorities set by the Government within the SHP. The Delegate failed to do so, and thereby fell into jurisdictional error.

Part VII: Applicable legislation

47. The relevant legislative provisions are:

    (a) *Migration Act 1958* (Cth), ss 31, 39, 65 and 85-91;

    (b) *Migration Regulations 1994* (Cth), regs 1.12AA, 2.01, 2.02 and 2.03; Schedule 1, item 1402; and Schedule 2, Part 202.

48. The relevant provisions of the Regulations were amended on four occasions between the date of the visa application and the date of the Delegate's decision: *Migration Amendment Regulation 2012 (No.5)* (SLI 2012 No 230); *Migration Legislation Amendment Regulation 2013 (No.1)* (SLI 2013 No 33); *Migration Amendment Regulation 2013 (No.2)* (SLI 2013 No 75); and *Migration Amendment (2014 Measures No 1) Regulation 2014* (SLI 2014 No 32).

---

visas (*i.e.* the number of places available *in the SHP* and the priorities set by the government *within the SHP*).

49. The Annexure sets out item 1402 of Schedule 1 and Part 202 of Schedule 2 as in force on 5 December 2011 (the date of the visa application), together with the relevant amendments and transitional provisions from each of the above amending regulations.

Part VIII: Orders sought

50. The questions stated for the opinion of the Full Court should be answered as follows:

1. (a) Yes.
   (b) Yes.
   (c) Yes.
2. Yes.
3. (a) Yes.
   (b) Yes.
4. Yes.
5. If the Delegate did not apply the Policy, he had regard to an irrelevant consideration and asked the wrong question. If the Delegate applied the Policy, see the answers to questions 6(a) and (b) below.
6. (a) Yes.
   (b) Yes.
7. The Court should grant the relief claimed in the Application for an Order to Show Cause, namely a writ of certiorari or an order setting aside the Refusal Decision and a writ of mandamus or an order requiring the Defendant to determine the Visa Application according to law.
8. The Defendant.

Part IX: Estimate of time

51. It is estimated that the Plaintiff will require 1.5 hours for the presentation of his oral argument.

Dated: 29 September 2015

Chris Horan
Tel: (03) 9225 8430
Fax: (03) 9225 8668
Email: chris.horan@vicbar.com.au

Krystyna Grinberg
Tel: (03) 9225 7222
Fax: (03) 9225 8485
Email: kgrinberg@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA **No M64 of 2015**
MELBOURNE REGISTRY

BETWEEN

PLAINTIFF M64/2015

Plaintiff

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

Filed on behalf of: The Plaintiff
Prepared by: Emma Dunlevie
Law firm: Russell Kennedy Lawyers
Tel: + 61 3 9609 1601 Fax: + 61 3 9609 6760
Email: edunlevie@rk.com.au
Address for service: Level 12, 469 La Trobe Street, Melbourne, VIC 3000
DX 494 Melbourne

Item 1402, Schedule 1 and Part 202 of Schedule 2 of the *Migration Regulations 1994* (Cth) as in force on 5 December 2011 (the date of application)

Migration Regulations 1994

Statutory Rules 1994 No. 268 as amended

made under the

Migration Act 1958

This compilation was prepared on 5 November 2011
taking into account amendments up to SLI 2011 No. 199

[Note: Regulation 2.12A ceases to be in force at the end of 14 August 2013 — *see* subsection 91D (4) of the Act]

This document has been split into seven volumes
Volume 1 contains Parts 1–3 (Rr. 1.01–3.31),
Volume 2 contains Parts 4 and 5 (Rr. 4.01–5.44) and Schedule 1,
Volume 3 contains Schedule 2 (Subclasses 010–415),
Volume 4 contains Schedule 2 (Subclasses 416–801),
Volume 5 contains Schedule 2 (Subclasses 802–995),
Volume 6 contains Schedules 3–12, and
Volume 7 contains Notes and Tables A and B
Each volume has its own Table of Contents

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Rectified 22/11/2012 Federal Register of Legislative Instruments F2011C00876

(3) Subclasses:

070 (Bridging (Removal Pending))

Part 4 Protection, Refugee and Humanitarian visas

1401. Protection (Class XA)

(1) Form: 866.

(2) Visa application charge:

(a) First instalment (payable at the time application is made):

(i) In the case of each applicant who is in immigration detention and has not been immigration cleared: Nil

(ii) In any other case: $30

(b) Second instalment (payable before grant of visa): Nil.

(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)

1402. Refugee and Humanitarian (Class XB)

(1) Form: 842.

(2) Visa application charge: Nil.

(3) Other:

(a) Application by a person included in a class of persons specified in a Gazette Notice for this paragraph must be made by:

Rectified 22/11/2012 Federal Register of Legislative Instruments F2011C00876

(i) posting the application (with the correct pre-paid postage) to the post office box address specified by the Minister; or

(ii) having the application delivered by a courier service to the address specified by the Minister.

Note An application made under paragraph (a) is taken to have been made outside Australia — see regulation 2.07AM.

(aa) Application by a person not included in a class of persons specified for paragraph (a) must be made outside Australia.

(b) Applicant must be outside Australia.

(c) Application by a person claiming to be a member of the family unit of a person who is an applicant for a Refugee and Humanitarian (Class XB) visa may be made at the same time and place as, and combined with, the application by that person.

(4) Subclasses:

200 (Refugee)

201 (In-country Special Humanitarian)

202 (Global Special Humanitarian)

203 (Emergency Rescue)

204 (Woman at Risk)

Rectified 22/11/2012 Federal Register of Legislative Instruments F2011C00876

Subclass 202 Global Special Humanitarian

202.1 Interpretation

Note ***eligible New Zealand citizen***, ***member of the family unit*** and ***member of the immediate family*** are defined in regulation 1.03.

202.111 In this Part:

special assistance visa means any of the following:

(a) Burmese in Burma (Special Assistance) (Class AB) visa;

(b) Burmese in Thailand (Special Assistance) (Class AC) visa;

(c) Cambodian (Special Assistance) (Class AE) visa;

(d) Citizens of the Former Yugoslavia (Special Assistance) (Class AI) visa;

(e) East Timorese in Portugal, Macau or Mozambique (Special Assistance) (Class AM) visa;

(f) Minorities of the Former USSR (Special Assistance) (Class AV) visa;

(g) Sudanese (Special Assistance) (Class BD) visa;

(h) Sri Lankan (Special Assistance) (Class BG) visa;

(i) Ahmadi (Special Assistance) (Class BJ) visa;

(j) Vietnamese (Special Assistance) (Class BK) visa.

Subclass 202 visa means:

(a) a Subclass 202 (Global Special Humanitarian) visa; or

(b) a Class 202 (global special humanitarian program) visa within the meaning of the Migration (1993) Regulations; or

(c) a global special humanitarian visa (code number 202) within the meaning of the Migration (1989) Regulations; or

(d) a transitional (permanent) visa granted on the basis of an application for a visa of a kind referred to in paragraph (b) or (c).

Subclass 866 visa means:

(a) a Subclass 866 (Protection) visa; or

(b) a Class 817 (protection (permanent)) entry permit within the meaning of the Migration (1993) Regulations; or

(c) a transitional (permanent) visa granted on the basis of an application for a visa of a kind referred to in paragraph (b).

202.2 Primary criteria

Note The primary criteria must be satisfied by all applicants except certain applicants who are members of the family unit, or members of the immediate family, of certain applicants who satisfy the primary criteria. Those other applicants need satisfy only the secondary criteria.

202.21 Criteria to be satisfied at time of application

202.211 (1) The applicant:

(a) is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; or

(b) meets the requirements of subclause (2).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called ***the proposer***); and

(b) either:

(i) the proposer is, or has been, the holder of a Subclass 202 visa, and the applicant was a member of the immediate family of the proposer on the date of grant of that visa; or

(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(iia) the proposer is, or has been, the holder of a Resolution of Status (Class CD) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(iii) the proposer is, or has been, the holder of a special assistance visa, and the applicant was a member of the immediate family of the proposer on the date of the application for that visa; and

(ba) the application is made within 5 years of the grant of that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to Immigration.

202.22 Criteria to be satisfied at time of decision

202.221 The applicant continues to satisfy the criterion in clause 202.211.

202.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

202.223 The permanent settlement of the applicant in Australia would be consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds.

202.224 The Minister is satisfied that permanent settlement in Australia:

(a) is the appropriate course for the applicant; and

(b) would not be contrary to the interests of Australia.

202.225 The applicant is proposed for entry to Australia, in accordance with approved form 681, by:

(a) a person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; or

(b) a body operating in Australia.

202.226 Grant of the visa would not result in either:

(a) the number of Subclass 202 visas granted in a financial year exceeding the maximum number of Subclass 202 visas, as determined by Gazette Notice, that may be granted in that financial year; or

(b) the number of visas of particular classes, including Subclass 202, granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.

202.227 (1) The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010; and

(b) if the applicant had turned 18 at the time of application — satisfies public interest criterion 4019.

(2) If the applicant has previously been in Australia, the applicant satisfies special return criterion 5001.

202.228 If a person (in this clause called the ***additional applicant***):

(a) is a member of the family unit of the applicant; and

(b) has not turned 18; and

(c) made a combined application with the applicant —

public interest criteria 4015 and 4016 are satisfied in relation to the additional applicant.

202.229 (1) Each member of the family unit of the applicant who is an applicant for a Subclass 202 visa is a person who:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010; and

(aa) if the person had turned 18 at the time of application, satisfies public interest criterion 4019; and

(b) if the person has previously been in Australia, satisfies special return criterion 5001.

(2) Each member of the family unit of the applicant who is not an applicant for a Subclass 202 visa is a person who:

(a) satisfies public interest criteria 4001, 4002, 4003 and 4004; and

(b) satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

202.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit, or members of the immediate family, of certain persons who satisfy the primary criteria.

202.31 Criteria to be satisfied at time of application

202.311 The applicant:

(a) is a member of the family unit of, and made a combined application with, a person who meets, or has met, the requirements of paragraph 202.211 (1) (a); or

(b) is a member of the immediate family of, and made a combined application with, a person who meets, or has met, the requirements of paragraph 202.211 (1) (b).

202.312 The proposal made under clause 202.225 in respect of the relevant person who satisfies the primary criteria includes the applicant.

202.32 Criteria to be satisfied at time of decision

202.321 The applicant:

(a) continues to be a member of the family unit of a person who, having satisfied the primary criteria (and, in particular, having met the requirements of paragraph 202.211 (1) (a)), is the holder of a Subclass 202 visa; or

(b) continues to be a member of the immediate family of a person who, having satisfied the primary criteria (and, in particular, having met the requirements of paragraph 202.211 (1) (b)), is the holder of a Subclass 202 visa.

202.322 If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

202.323 The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010; and

(aa) if the applicant had turned 18 at the time of application — satisfies public interest criterion 4019; and

(b) if the applicant has previously been in Australia — satisfies special return criterion 5001.

202.4 Circumstances applicable to grant

202.411 The applicant must be outside Australia when the visa is granted.

202.5 When visa is in effect

202.511 Permanent visa permitting the holder to travel to and enter Australia within 5 years of grant.

202.6 Conditions

202.611 Entry must be made before the date specified by the Minister for the purpose.

202.612 Condition 8502 may be imposed.

202.7 Way of giving evidence

202.711 No evidence need be given.

202.712 If evidence is given, to be given by a label affixed to a valid passport or valid Convention travel document.

Subclass 203 Emergency Rescue

203.1 Interpretation

Note ***member of the family unit*** and ***member of the immediate family*** are defined in regulation 1.03.

203.111 In this Part:

Subclass 203 visa means:

(a) a Subclass 203 (Emergency Rescue) visa; or

(b) a Class 203 (emergency rescue) visa within the meaning of the Migration (1993) Regulations; or

(c) an emergency rescue visa (code number 203) within the meaning of the Migration (1989) Regulations; or

(d) a transitional (permanent) visa granted on the basis of an application for a visa of a kind referred to in paragraph (b) or (c).

203.2 Primary criteria

Note The primary criteria must be satisfied by all applicants except certain applicants who are members of the family unit, or members of the immediate family, of certain applicants who satisfy the primary criteria. Those other applicants need satisfy only the secondary criteria.

203.21 Criteria to be satisfied at time of application

203.211 (1) The applicant:

(a) is subject to persecution in the applicant's home country, whether the applicant is living in the applicant's home country or in another country; or

(b) meets the requirements of subclause (2).

Extract from *Migration Amendment Regulation 2012 (No. 5)* *(SLI 2012 No 230)*

Migration Amendment Regulation 2012 (No. 5)[1]

Select Legislative Instrument 2012 No. 230

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 27 September 2012

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

CHRIS BOWEN
Minister for Immigration and Citizenship

1 Name of regulation

This regulation is the *Migration Amendment Regulation 2012 (No. 5)*.

2 Commencement

This regulation commences on the day after it is registered.

3 Amendment of *Migration Regulations 1994*

Schedule 1 amends the *Migration Regulations 1994*.

Schedule 1 Amendments

(section 3)

[1] Regulation 2.07AM

substitute

2.07AM Applications for Refugee and Humanitarian (Class XB) visas

(1) For subsection 46 (2) of the Act, a Refugee and Humanitarian (Class XB) visa is a prescribed class of visa.

(2) An application for a Refugee and Humanitarian (XB) visa is taken to have been validly made by a person only if the requirements in subregulation (3) or item 1402 of Schedule 1 have been met.

(3) The requirements are that:

(a) the person is an irregular maritime arrival; and

(b) the Minister has invited the person to make an application for a Refugee and Humanitarian (Class XB) visa; and

(c) the person indicates to an authorised officer that he or she accepts the invitation; and

(d) the authorised officer endorses, in writing, the person's acceptance of the invitation.

(4) An application made under paragraph 1402 (3) (a) of Schedule 1 is taken to have been made outside Australia.

(5) In this regulation:

irregular maritime arrival means a person who, on or after 13 August 2012:

(a) became an offshore entry person; or

(b) was taken to a place outside Australia under paragraph 245F (9) (b) of the Act.

[2] Schedule 1, item 1402, heading

substitute

1402. Refugee and Humanitarian (Class XB)

Note Subregulation 2.07AM (3) sets out requirements for the making of applications by persons who are irregular maritime arrivals.

[3] Schedule 1, after paragraph 1402 (3) (b)

insert

(ba) Applicant must not be an irregular maritime arrival.

[4] Schedule 1, after subitem 1402 (4)

insert

(5) In this item:

irregular maritime arrival means a person who, on or after 13 August 2012:

(a) became an offshore entry person; or

(b) was taken to a place outside Australia under paragraph 245F (9) (b) of the Act.

the applicant's settlement and protection from persecution; and

(iv) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

[9] Schedule 2, clause 202.111

insert

irregular maritime arrival means a person who, on or after 13 August 2012:

(a) became an offshore entry person; or

(b) was taken to a place outside Australia under paragraph 245F (9) (b) of the Act.

[10] Schedule 2, paragraph 202.211 (2) (d)

omit

Immigration.

insert

Immigration; and

[11] Schedule 2, after paragraph 202.211 (2) (d)

insert

(e) the proposer is not an irregular maritime arrival.

[12] Schedule 2, clause 202.222

substitute

202.222 (1) If the applicant met the requirements of subclause 202.211 (2) at the time of application and the applicant's proposer:

(a) is, or has been, the holder of a Subclass 202 visa; or

(b) was less than 18 years old at the time of application and is, or has been, the holder of:

(i) a Subclass 866 (Protection) visa; or

(ii) a Resolution of Status (Class CD) visa;

the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to the extent of the applicant's connection with Australia.

(2) If subclause (1) does not apply, the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

(a) the degree of persecution to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

[13] Schedule 2, paragraph 202.225 (a)

substitute

(a) a person who:

(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(ii) is not an irregular maritime arrival; or

[14] Schedule 2, clause 203.111

insert

irregular maritime arrival means a person who, on or after 13 August 2012:

(a) became an offshore entry person; or

(b) was taken to a place outside Australia under paragraph 245F (9) (b) of the Act.

the applicant's settlement and protection from persecution; and

(iv) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

[22] Schedule 13, after Part 4

insert

Part 5 Amendments made by *Migration Amendment Regulation 2012 (No. 5)*

501 Operation of Schedule 1

(1) The amendments of these Regulations made by items [1] to [7], [10], [11], [14] to [16] and [18] to [20] of Schedule 1 to the *Migration Amendment Regulation 2012 (No. 5)* apply in relation to an application for a visa made on or after the day that regulation commences.

(2) The amendments of these Regulations made by items [8], [9], [12], [13], [17] and [21] of Schedule 1 to the *Migration Amendment Regulation 2012 (No. 5)* apply in relation to an application for a visa:

(a) made, but not finally determined, before the day that regulation commences; and

(b) made on or after the day that regulation commences.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.comlaw.gov.au.

Extract from *Migration Legislation Amendment Regulation 2013 (No. 1)*

(SLI 2013 No 33)

Migration Legislation Amendment Regulation 2013 (No. 1)

Select Legislative Instrument No. 33, 2013

I, Quentin Bryce, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 14 March 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

Brendan O'Connor
Minister for Immigration and Citizenship

OPC50365 - 14

1 Name of regulation

This regulation is the *Migration Legislation Amendment Regulation 2013 (No. 1)*.

2 Commencement

(1) Each provision of this regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 4 and anything in this regulation not elsewhere covered by this table	23 March 2013.	23 March 2013
2. Schedules 1 and 2	23 March 2013.	23 March 2013
3. Schedule 3	13 April 2013.	13 April 2013
4. Schedule 4	1 July 2013.	1 July 2013
5. Schedules 5 and 6	23 March 2013.	23 March 2013

Note: This table relates only to the provisions of this regulation as originally made. It will not be amended to deal with any later amendments of this regulation.

(2) Any information in column 3 of the table is not part of this regulation. Information may be inserted in this column, or information in it may be edited, in any published version of this regulation.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

paragraph (a) that was granted on the basis of satisfying the primary criteria for the grant of that visa; and

(ii) must be less than 50; and

(iii) must nominate a skilled occupation for the applicant that is specified by the Minister in an instrument in writing for this subparagraph.

(7) If the applicant is seeking to satisfy the criteria for the grant of a Subclass 487 (Skilled — Regional Sponsored) visa:

(a) the applicant must hold:

(i) a Subclass 417 (Working Holiday) visa; or

(ii) a Subclass 442 (Occupational Trainee) visa that was granted on the basis of satisfying the primary criteria for that visa; and

(b) if the applicant is seeking to satisfy the primary criteria for the grant of the visa, the applicant:

(i) must be less than 50; and

(ii) must nominate a skilled occupation for the applicant that is specified by the Minister in an instrument in writing for this subparagraph.

(9) If the applicant is seeking to satisfy the criteria for the grant of a Subclass 487 (Skilled — Regional Sponsored) visa, the applicant must claim to be a member of the family unit of an applicant who holds a Skilled (Provisional) (Class VC) visa granted on the basis of satisfying the primary criteria for the grant of the visa.

(10) Subclasses:

Subclass 485 (Temporary Graduate)

Subclass 487 (Skilled — Regional Sponsored).

6 Paragraph 202.222(2)(a) of Schedule 2

Omit "persecution", substitute "discrimination".

7 Paragraph 202.222(2)(c) of Schedule 2

Omit "persecution", substitute "discrimination".

8 Paragraph 476.211(b) of Schedule 2

Schedule 6—Amendments relating to transitional arrangements

Migration Regulations 1994

1 At the end of Schedule 13

Add:

Part 13—Amendments made by the Migration Legislation Amendment Regulation 2013 (No. 1)

1301 Operation of Schedule 1

(1) The amendments of these Regulations made by items 1 and 2 of Schedule 1 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* apply in relation to an application for review to the Migration Review Tribunal made on or after 1 July 2013.

(2) The amendments of these Regulations made by items 3 and 4 of Schedule 1 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* apply in relation to an application for review to the Refugee Review Tribunal made on or after 1 July 2013.

1302 Operation of Schedule 2

(1) The amendments of these Regulations made by items 1 to 5 and 8 to 22 of Schedule 2 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* apply in relation to an application for a visa made on or after 23 March 2013.

(2) The amendments of these Regulations made by items 6 and 7 of Schedule 2 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* apply in relation to an application for a visa:

(a) made, but not finally determined, before 23 March 2013; or

(b) made on or after 23 March 2013.

1303 Operation of Schedule 3

(1) The repeal of subparagraph 2.43(2)(b)(i) by item 2 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* does not apply in relation to a person who:

(a) holds a student visa; and

(b) was sent a notice of proposed cancellation of the visa under section 119 of the Act for non-compliance with visa condition 8104 or 8105 before 13 April 2013.

(2) The repeal of subparagraph 2.43(2)(b)(ii) by item 2 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* does not apply in relation to a person who:

(a) holds a student visa; and

(b) was sent:

(i) a notice of proposed cancellation of the visa under section 119 of the Act for non-compliance with visa condition 8202 before 13 April 2013; or

(ii) a notice under section 20 of the *Education Services for Overseas Students Act 2000* for non-compliance with visa condition 8202 in relation to the visa.

1304 Operation of Schedule 4

(1) The amendments of these Regulations made by Schedule 4 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* apply in relation to an application to the Migration Review Tribunal or the Refugee Review Tribunal if the decision to which the application relates is made on or after 1 July 2013.

(2) If:

(a) an application to the Migration Review Tribunal or the Refugee Review Tribunal was made before 1 July 2013; and

(b) on or after 1 July 2013, the tribunal issues a notice to appear, or an invitation to provide comments or information, in relation to the application;

the amendments of these Regulations made by Schedule 4 to the *Migration Legislation Amendment Regulation 2013 (No. 1)* also apply in relation to the issue of the notice or invitation.

Extract from *Migration Amendment Regulation 2013 (No. 2)* *(SLI 2013 No 75)*

Migration Amendment Regulation 2013 (No. 2)

Select Legislative Instrument No. 75, 2013

I, Quentin Bryce AC CVO, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 16 May 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

Brendan O'Connor
Minister for Immigration and Citizenship

OPC50302 - C

1 Name of regulation

This regulation is the *Migration Amendment Regulation 2013 (No. 2)*.

2 Commencement

This regulation commences on 1 June 2013.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 Subitem 1402(2) of Schedule 1

Repeal the subitem, substitute:

(2) Visa application charge:

(a) First instalment (payable at the time the application is made):

Item	Column 1 For...	Column 2 the charge is...
1	an applicant whose application includes a proposal by an approved proposing organisation described in Part 200, 201, 202, 203 or 204 of Schedule 2	$2,680
2	any other applicant	nil

(b) Second instalment (payable before grant of visa):

Item	Column 1 For...	Column 2 the charge is...
1	an applicant: (a) whose application includes a proposal by an approved proposing organisation described in Part 200, 201, 202, 203 or 204 of Schedule 2; and (b) who satisfies the primary criteria for the grant of the visa	$16,444
2	an applicant: (a) whose application includes a proposal by an approved proposing organisation described in Part 200, 201, 202, 203 or 204 of Schedule 2; and (b) who satisfies the secondary criteria for	$2,680

Item	Column 1 For...	Column 2 the charge is...
	the grant of the visa	
3	any other applicant	nil

2 Paragraph 1402(3)(a) of Schedule 1

Omit "in a Gazette Notice", substitute "by the Minister in an instrument in writing".

3 After subitem 1402(3) of Schedule 1

Insert:

(3A) In addition to subitem (3), for an application that includes a proposal by an approved proposing organisation described in Part 200, 201, 202, 203 or 204 of Schedule 2:

(a) the applicant may be a person who made a valid application for a visa, in accordance with form 842, before 1 June 2013 (whether or not the application was accompanied by form 681); and

(b) the application must include form 1417, completed by the approved proposing organisation; and

(c) an application that includes a proposal by an approved proposing organisation must not include form 681.

Note 1: This subitem commenced on 1 June 2013 as part of the Department's Community Proposal Pilot program. Applicants who made a valid application for a Refugee and Humanitarian (Class XB) visa, using form 842, before 1 June 2013 may make a new application for a Refugee and Humanitarian (Class XB) visa as part of that program, but are not required to do so.

Note 2 Applicants wishing to make a new application for a Refugee and Humanitarian (Class XB) visa as part of the Community Proposal Pilot program must not include form 681 as part of that application.

4 Clause 200.111 of Schedule 2

Insert:

approved proposing organisation means an organisation in relation to which the following requirements are met:

(a) the degree of persecution to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and

(d) the capacity of the approved proposing organisation to provide for the permanent settlement of the applicant in Australia.

19 Paragraph 201.311(a) of Schedule 2

Repeal the paragraph, substitute:

(a) is a member of the family unit of, and made a combined application with, a person who meets, or has met, the requirements of:

(i) paragraphs 201.211(1)(a) or (aa); or

(ii) paragraph 201.212(a); or

20 Paragraph 201.321(a) of Schedule 2

Repeal the paragraph, substitute:

(a) continues to be a member of the family unit of a person who, having satisfied the primary criteria and, in particular, having met the requirements of:

(i) paragraph 201.211(1)(a); or

(ii) paragraph 201.211(1)(aa); or

(iii) paragraph 201.212(a);

is the holder of a Subclass 201 visa; or

21 At the end of clause 201.411 of Schedule 2

Add:

Note: If the application includes a proposal by an approved proposing organisation, the second instalment of the visa application charge must be paid before the visa can be granted.

22 Clause 202.111 of Schedule 2

Insert:

approved proposing organisation means an organisation in relation to which the following requirements are met:

(a) the organisation has entered into a deed with the Department relating to:

(i) the proposal of applicants for a Refugee and Humanitarian (Class XB) visa; and

(ii) the provision and management of resettlement services to an applicant that it has proposed;

(b) the deed:

(i) is in effect; and

(ii) is not suspended under the terms of the deed.

Note: When this definition commenced on 1 June 2013, these requirements were part of the Department's Community Proposal Pilot program.

23 Subclause 202.211(1) of Schedule 2

Omit "The applicant:", substitute "If the application does not include a proposal by an approved proposing organisation, the applicant:".

24 After clause 202.211 of Schedule 2

Insert:

202.212

If the application includes a proposal by an approved proposing organisation:

(a) the applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; and

(b) the proposal is not made on behalf of another person who is mentioned in subregulation 2.07AM(5); and

(c) the applicant is still proposed by the approved proposing organisation.

25 Clause 202.221 of Schedule 2

Repeal the clause, substitute:

202.221

(1) If the criteria in clause 202.211 apply to the applicant, the applicant continues to satisfy the criteria.

(2) If the criteria in clause 202.212 apply to the applicant, the applicant continues to satisfy the criteria.

26 Subclause 202.222(2) of Schedule 2

Repeal the subclause, substitute:

(2) If subclause (1) does not apply, and the application does not include a proposal by an approved proposing organisation, the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of the applicant in Australia.

(3) If the application includes a proposal by an approved proposing organisation, the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from discrimination; and

(d) the capacity of the approved proposing organisation to provide for the permanent settlement of the applicant in Australia.

27 Paragraph 202.311(a) of Schedule 2

Repeal the paragraph, substitute:

(a) is a member of the family unit of, and made a combined application with, a person who meets, or has met, the requirements of paragraph 202.211(1)(a) or 202.212(a); or

28 Paragraph 202.321(a) of Schedule 2

Repeal the paragraph, substitute:

(a) continues to be a member of the family unit of a person who, having satisfied the primary criteria and, in particular, having met the requirements of paragraph 202.211(1)(a) or 202.212(a), is the holder of a Subclass 202 visa; or

29 At the end of clause 202.411 of Schedule 2

Add:

Note: If the application includes a proposal by an approved proposing organisation, the second instalment of the visa application charge must be paid before the visa can be granted.

30 Clause 203.111 of Schedule 2

Insert:

approved proposing organisation means an organisation in relation to which the following requirements are met:

(a) the organisation has entered into a deed with the Department relating to:

(i) the proposal of applicants for a Refugee and Humanitarian (Class XB) visa; and

(ii) the provision and management of resettlement services to an applicant that it has proposed;

(b) the deed:

(i) is in effect; and

(ii) is not suspended under the terms of the deed.

Note: When this definition commenced on 1 June 2013, these requirements were part of the Department's Community Proposal Pilot program.

(a) continues to be a member of the family unit of a person who, having satisfied the primary criteria and, in particular, having met the requirements of paragraph 204.211(1)(a) or 204.211A(a), is the holder of a Subclass 204 visa; or

47 At the end of clause 204.411 of Schedule 2

Add:

Note: If the application includes a proposal by an approved proposing organisation, the second instalment of the visa application charge must be paid before the visa can be granted.

48 After Part 13 of Schedule 13

Insert:

Part 14—Amendments made by Migration Amendment Regulation 2013 (No. 2)

1401 Operation of Schedule 1

The amendments of these Regulations made by Schedule 1 to the *Migration Amendment Regulation 2013 (No. 2)* apply in relation to an application for a visa made on or after 1 June 2013.

Extract from *Migration Amendment (2014 Measures No. 1) Regulation 2014* (SLI 2014 No 32)

Migration Amendment (2014 Measures No. 1) Regulation 2014

Select Legislative Instrument No. 32, 2014

I, Quentin Bryce AC CVO, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 13 March 2014

Quentin Bryce
Governor-General

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60386 - C

1 Name of regulation

This regulation is the *Migration Amendment (2014 Measures No. 1) Regulation 2014*.

2 Commencement

This regulation commences on 22 March 2014.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 2—Amendments relating to Subclass 202 (Global Special Humanitarian) visas for applicants proposed by minors

Migration Regulations 1994

1 Subclause 202.222(1) of Schedule 2

Repeal the subclause, substitute:

(1) If:

(a) the applicant met the requirements of subclause 202.211(2) at the time of application; and

(b) the applicant's proposer is, or has been, the holder of a Subclass 202 visa;

the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to the extent of the applicant's connection with Australia.

Schedule 6—Amendments relating to transitional arrangements

Migration Regulations 1994

1 At the end of Schedule 13

Add:

Part 27—Amendments made by the Migration Amendment (2014 Measures No. 1) Regulation 2014

2701 Operation of Schedules 1 to 3

The amendments of these Regulations made by Schedules 1 to 3 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* apply in relation to the following applications for a visa:

(a) an application made, but not finally determined, before 22 March 2014;

(b) an application made on or after 22 March 2014.

2702 Operation of Schedule 4

The amendment of these Regulations made by Schedule 4 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* applies in relation to a person covered by a residence determination on or after 22 March 2014.

2703 Operation of Schedule 5

The amendments of these Regulations made by Schedule 5 to the *Migration Amendment (2014 Measures No. 1) Regulation 2014* apply in relation to:

(a) the following applications for a visa:

(i) an application made, but not finally determined, before 22 March 2014;

(ii) an application made on or after 22 March 2014; and

(b) the following nominations by an approved sponsor under section 140GB of the Act:

(i) a nomination made, but not finally determined, before 22 March 2014;

(ii) a nomination made on or after 22 March 2014.