IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M77 of 2012

BETWEEN

JAVED HUSSAIN TAHIRI

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

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PLAINTIFF'S SUBMISSIONS

Part I: Internet publication

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

Part II: Issues

2. The issues are:

   (a) the proper construction of public interest criterion (or **PIC**) 4015;

   (b) whether the Plaintiff's mother should have been found, by the delegate of the Defendant who made the decision to refuse her visa application (**the Delegate**), to be the sole person who could lawfully determine where each of her 4 minor children, included as secondary applicants in the application, should live;

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   (c) whether the Plaintiff's father, an Afghan citizen of Hazara ethnicity who had been missing since last seen in Afghanistan in early 2003, should have been presumed to be dead;

   (d) whether there was a breach of the rules of natural justice.

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Filed on behalf of: The Plaintiff

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Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

3. The Plaintiff considers that notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) is not required.

Part IV: Citations

4. There are no decisions below. The matter is in the original jurisdiction of this Court.

Part V: Facts

5. The family of the Plaintiff was living in Anguri, Jaghori, in the Ghazni province of Afghanistan.[1] All members of the family are citizens of Afghanistan and of Hazara ethnicity.[2] The father went missing in early 2003 when he travelled to Kandahar, a different province of Afghanistan, and did not return. The mother was pregnant at that time; a baby girl, Batool, was born sometime in 2003.[3]

6. After the father's disappearance, the mother left Afghanistan and travelled to Pakistan with all her children:[4] Rukhsana,[5] Javed (the Plaintiff), Masuma, Abbas Ali, Nasreen and Batool (the children are listed in decreasing order of age).

7. As at the date of these submissions, Masuma, Abbas Ali, Nasreen and Batool are all under the age of 18 years (with their ages calculated on the basis of "deemed" dates of birth).[6]

8. Between 2003 and March 2009, the mother, the Plaintiff, Masuma, Abbas Ali, Nasreen and Batool all lived as illegal residents in Quetta, Pakistan.[7]

9. The Plaintiff left Pakistan sometime in March 2009 to travel to Australia.[8] The mother, Masuma, Abbas Ali, Nasreen ad Batool all continue to live in Quetta.

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1 **SC : [26]; Att A, pp 2, 9; Att B, p 8; Att K, p 1; Att O, p 2.**

2 **SC : [1]; Att A, pp 1, 2, 9; Att B, pp 1, 2, 3, 8; Att O, p 2.**

3 **SC : [15], [26]; Att A, pp 2, 9; Att B, pp 2, 8; Att K, p 1; Att O, p 2.**

4 **SC : [16]; Att A, pp 2, 6, 9; Att B, pp 1, 16; Att K, p 1; Att O, pp 6, 14, 22.**

5 Rukhsana and her baby daughter, Nida Betool, were included in the mother's application for a subclass 202 visa as secondary applicants. However, their application for a visa was administratively separated and later refused. **[SC at [21]]** In the remainder of these submissions, when reference is made to the "children" included as secondary applicants, Rukhsana is not included in that reference.

6 **SC : Att B, pp 2, 3.**

7 **SC : [16]; Att A, pp 2, 6, 9; Att B, pp 1, 16; Att K, p 1; Att O, pp 6, 14, 22.**

8 **SC : Att A, pp 2, 6.**

10. On or about 18 May 2009, the Plaintiff arrived at Christmas Island without a valid visa.[9] By reason of the statutory bar in s 46A of the *Migration Act* 1958 (Cth) (**the Act**), the Plaintiff was unable to make a valid application for a protection visa and was offered a "Refugee Status Assessment". An officer of the Department of Immigration and Citizenship (**the Department**) found he was a person to whom Australia owed protection obligations. The Defendant subsequently decided to exercise the power under s 46(2) of the Act.[10]

11. On 7 September 2009, the Plaintiff made a valid application for a protection visa.[11]

12. As part of his application for the protection visa, the Plaintiff gave evidence that his father had been missing since he travelled to Kandahar in early 2003, and that the Plaintiff's family has not heard of him since.[12]

13. On 9 September 2009, a delegate of the Defendant decided to grant a protection visa to the Plaintiff.[13] In reasons for that decision, the delegate is recorded as accepting that the father had been missing as claimed.[14]

14. On 11 November 2009, the mother of the Plaintiff applied for a Refugee and Humanitarian (Class XB) visa; the Plaintiff proposed his mother's entry to Australia.[15] The relevant subclass is subclass 202; the criteria to be satisfied for the grant of a subclass 202 visa are set out in Schedule 2 of the Migration Regulations 1994 (Cth) (**the Regulations**).

15. Each of Masuma, Abbas Ali, Nasreen and Batool, included in the mother's application, is a "*member of the family unit*" of the mother[16] by reason of being a dependent child of the mother. Relevantly, a child who has not turned 18, and is not married or engaged, is a "*dependent child*" of his/her parents (see definition in reg 1.03). The term "*child*" is given an extended meaning in s 5CA of the Act,[17] but in this case, each of Masuma, Abbas Ali, Nasreen and Batool is a child of the mother in the normal sense of the word.

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9 **SC : [2].**

10 **SC : [3], [4].**

11 **SC : [5].**

12 **SC : Att A, p 2.**

13 **SC : [5].**

14 **SC : Att A, p 9.**

15 **SC : [6], [14]; Att B; Att I.**

16 **SC : [18].**

17 Note also s 5G of the Act, extending the relationships and the set of persons who are members of one person's family, including by reference to the extended definition of "*child*" in s 5CA. The policy documents of the Department, considered later in these

16. Soon after 11 November 2009, consideration commenced of the mother's application for a subclass 202 visa.[18] Relevant events occurring in the course of consideration of the mother's application were recorded in a computerised records system of the Department (**the Department's Records System**).[19] Each entry indicates when it was made (even where it refers to an earlier event, the date is of entry in the System), and by whom.

17. On 6 May 2010, the mother, Masuma and Abbas Ali are interviewed by an officer of the Department, "Gaye Lalor", who considers that there should be DNA testing done to establish the relationship between the Plaintiff, the mother and the two children.[20]

18. On 7 March 2011, after having received the results from the DNA testing confirming the relationship between the Plaintiff, the mother and the two children, the Delegate reviews the mother's application.[21]

19. On 6 September 2011, after the Delegate has further considered the mother's application, a letter is sent to the mother, with the subject line: "*Invitation to comment on information for Class XB (Refugee and Humanitarian) visa application*" (**the 6 September letter**).[22]

20. Between 6 September and 28 October 2011, in response to the 6 September letter and with various intervening communications on behalf of the Delegate to her, the mother provides to the Department two documents, a first one entitled "*Aram High Court, Kabul, Afghanistan*", written in English and bearing a heading "*True Translation from Persian*", and a second one being a translation in Persian of the first document.[23]

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submissions, are ones that have, as the head topic, the defined terms in s 5C of the Act. Apart from the link they provide to the policy documents, ss 5CA and 5G may be disregarded for the purposes of this special case.

18 **SC : [19]**.

19 The printout of all entries is at **[SC Att J]**. After some early processing of the mother's application in Australia, the file was sent to Dubai, which is where the Delegate was based. The entries relevant to consideration of the mother's application while the matter was in Dubai commence at **[SC Att J, p 10]**, after the words, at approximately point 6, "Notes from DUBAI". Note, however, that the entries appear in reverse chronological order, that is, the first entry at **[SC Att J, p 10]**, being entry number "69", records the decision refusal letter being sent on 9 January 2012.

20 **SC : [23]-[24]**; **Att K**. Analysis of the reasoning is at paragraphs [28] and [29] below.

21 **SC : [26]**.

22 **SC : [28]-[29]**; **Att L**.

23 **SC : [30]-[31], [33], [36]-[37]**; **Att M**; **Att N**; **Att Q**; **Att R**.

21. On 23 November 2011, the Delegate further reviews the mother's application.[24]

22. On 24 November 2011, an officer of the Department conducts a further interview with the mother (**the 24 November interview**).[25]

23. On 2 January 2012, the Delegate further reviews the mother's application and makes the decision to refuse the grant of the visa.[26]

24. On 9 January 2012, the Delegate writes to the mother, notifying her of his decision to refuse the grant of the visa.[27]

Part VI: Argument

Overview

10 25. These submissions first consider what were the reasons for the decision. Next, there is consideration of the background to the relevant parts of the Regulations, in particular to cl 202.288 and to PIC 4015. The submissions then address the issues of the proper construction of PIC 4015 and correct application of paragraphs (a) and (b) of PIC 4015 to the facts of the case, demonstrating that the Delegate committed jurisdictional error in respect of each of the two paragraphs. Finally, the submissions address why the presumption of death should have been applied by the Delegate, and why the failure to do so, coupled with failure to inform the mother of the critical issues, means that the decision was made in breach of the rules of natural justice.

20 ***Reasons for the decision***

26. By reason of s 66(2)(c) and (3) of the Act, there was no obligation to give written reasons to the mother in respect of the decision. No reasons for the decision were given to the mother by the Delegate.[28] The only obligation, imposed by s 66(2)(a) of the Act, was to notify the mother of the criterion for the visa which she did not satisfy.[29]

27. The fact that the governing statute does not oblige the decision-maker to give reasons to the person affected by the decision does not mean that he/she

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24 **SC : [38]**. Analysis of the reasoning is at paragraphs [28] and [29] below.

25 **SC : [39]**; **Att S**.

26 **SC : [40]**. Analysis of the reasoning is at paragraphs [28] and [29] below.

27 **SC : [41]**; **Att T**.

28 To the extent that the Delegate gave an indication of reasons in the first page of the letter to the mother **[SC Att T, p 1]**, that indication was erroneous. **[SC at [42]]**

29 The Delegate correctly notified the mother that cl 202.228 and PIC 4015 were not satisfied, in the second page of the letter to her. **[SC Att T, p 2]**

may not have recorded the reasons for that decision. Whether something amounts to the expression of reasons[30] is a question of fact.[31]

28. In the present case, the "*mental process*" of the Delegate was as follows:

7 March 2011[32]

(a) He reviews documents in the application, the notes from the interview conducted with the mother and the two older children by "Gaye Lalor", and the results of the DNA testing.

(b) He decides, wrongly,[33] that, as the Plaintiff was by then over the age of 18, the application was no longer a "split family" one, and he would proceed to assess it by reference to whether cl 202.211(1)(a) ["*the applicant is subject to substantial discrimination ...*"][34] was satisfied.[35]

(c) He accepts the father has been missing as claimed by the mother. That made the mother a "*single female*".

(d) He accepts that the mother's motivations for leaving Afghanistan, after the father went missing, were the general and economic situation in that country.

(e) However, the mother had "*multiple available relatives*" in Quetta and Afghanistan, including male relatives, "*who could provide protection and support*". One such male relative was her son, Abbas Ali. As "Gaye Lalor" had indicated concerns as to his age, an interview should be conducted to establish his age.

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30 Reasons must "*record why the decision-maker made the decision, that is to say the mental process by which he or she actually reached the decision in question*": *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [17] (Heerey, Stone and Edmonds JJ). Reasons must "*emanate from the person making the decision*": *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 66-67 [126].

31 *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152 at 164 [56] (Allsop J), citing *Minister for Immigration and Multicultural Affairs v W157/00A* (2002)125 FCR 433 (Branson, Goldberg and Allsop JJ); *Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [17].

32 The relevant entry in the Department's Records System is at **[SC Att J, pp 26-27]**; it is extracted at **[SC at [26]]**.

33 In light of the later decision of this Court in *Shahi v Minister for Immigration and Citizenship* (2011) 283 ALR 448.

34 Or the criterion in corresponding clauses in subclasses 200, 201, 203 and 204.

35 At time of decision, satisfaction of cl 202.211(1)(a) is required by cl 202.221.

6 September 2011[36]

(f) On the basis that the father is missing, and that an interview is not to be conducted to establish the age of Abbas Ali,[37] he considers that the mother's application might fail because of failure to satisfy cl 202.228 and PIC 4015. He decides the mother should be given an opportunity to "*comment on information*" that might be the reason for the decision, by having a letter sent to her.[38]

(g) The "*information*" is:

> *There is no evidence to hand that you are able to satisfy the public interest criterion with regard to child custody in relation to the included minor children. There is no evidence that*
> - *The law of Afghanistan permits the removal of the children*
> - *Each person who can determine where the children will live has given their consent or*
> - *There is an Australian child order in place with regard to the children.*

(h) The letter sent to the mother discloses he has already determined that the "*home country*" of each child is Afghanistan.

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36 The relevant entry in the Department's Records System is at **[SC Att J, p 22]**; it is extracted at **[SC at [28]]**.

37 On 17 April 2011, an officer of the Department had overruled the Delegate's request for an interview to establish the age of Abbas Ali. The relevant entry in the Department's Records System is at **[SC Att J, p 26]**; it is extracted at **[SC at [27]]**.

38 The 6 September letter is at **[SC Att L]**.

The 6 September letter is structured as if one given pursuant to the obligation in s 57 of the Act. However, subs (3) provides that s 57 does not apply to the mother's application for a visa. It might be argued the letter was given under s 56 of the Act, however it strains the language of that section to view, as information that the delegate decided to obtain, the absence of evidence that the mother could satisfy cl 202.228 and that, in respect of each of the children, PIC 4015 could be satisfied.

The better view is that the 6 September letter was given pursuant to what the Delegate perceived, correctly, to be the obligation to afford natural justice at common law, in particular the entitlement of the person affected to have his/her mind directed to the critical issues on which the decision might turn: *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-592; see also, generally, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152. Common law natural justice applies in respect of offshore decisions such as the present one: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. Whether the letter does properly identify the critical issues, such that the mother was put in a position to effectively address them, is a question considered below.

23 November 2011[39]

(i) He reviews the "*Aram High Court*" documents provided by the mother in response to the 6 September letter.

(j) He suspects the documents are not genuine, and considers that the mother should be afforded natural justice in that respect.

(k) As a later entry in the Department's Records System demonstrates,[40] he considers that a person having been missing for over 8 ½ years is consistent with "*several possible scenarios with regard to his current location*" (based on information he possesses about "*movement and migration for work and asylum seeking purposes*" about, one infers, Hazaras from Afghanistan).

(l) He concludes that, subject to what the mother might say in response to the natural justice opportunity she is to be afforded as to whether the "*Aram High Court*" documents are or are not genuine, there is "*no compelling evidence*" as to whether the father might be living somewhere, consistently with the "*several possible scenarios*", or he might be deceased.

2 January 2012[41]

(m) He reviews the contents of the Department's file relating to the mother's application for the visa.

(n) He does not depart from earlier acceptance of the fact that the father has been missing since 2003 as claimed.

(o) He finds, wrongly in light of the accepted evidence that he has been missing since 2003, that the mother has not presented "*any evidence to suggest that the husband is deceased*".

(p) He relies on information in his possession, not disclosed to the mother, "*about the movement and migration for work and asylum seeking purposes*", being information which indicates (it appears) that "*there are several possible scenarios with regard to his current location*".

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39 The relevant entry in the Department's Records System is at **[SC Att J, pp 13-14]**; it is extracted at **[SC at [38]]**.

40 This entry is considered at sub-paragraphs (m)-(t) below.

41 The relevant entry in the Department's Records System is at **[SC Att J, pp 10-11]**; it is extracted at **[SC at [40]]**.

(q) He views the 6 September letter as having afforded the opportunity to the mother to "*present documents or evidence with regard to her ability under the law of Afghanistan to remove the minor children*". This passage must be read as a reference to paragraph (a) of PIC 4015.

(r) (Other than in a rolled-up manner, as part of his conclusion) he does not address the question, relevant to paragraph (b) of PIC 4015, of who might be the individuals who can lawfully determine where the children are to live, and whether each of those individuals consents to the children being granted a visa enabling them to come to Australia. (Implicit in the rolled-up conclusion, he determines that the mother is not a person who, either solely or jointly with others, could lawfully determine where the children are to live.)

(s) He finds that the documents provided by the mother in answer to the opportunity afforded to her are not genuine, but he does not discount them entirely; rather, because documents are not important in "*Afghan custom*", he gives them little weight either favourably or adversely to the mother.

(t) He concludes:

> "*On balance I am not satisfied that the law of Afghanistan would permit the removal of the children in the circumstances claimed and we do not have any evidence as to the consent of persons who have the right to determine where the child will live, nor an Australian child order. In both Afghan law and custom, the custody of the minor children would fall to the father's side if there were credible and substantial evidence of the death of the father. ...*"

29. The reasons for decision consist of the findings that:

- the father has been missing since 2003, as claimed;[42]
- the "*Aram High Court*" documents are not genuine;
- the "*home country*" of each of the children is Afghanistan,

and the entry in the Department's Records System made by the Delegate on 2 January 2012.

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42 As noted at paragraph [13] above, another delegate of the Defendant had earlier made the exact same finding in the course of deciding the Plaintiff's application for a protection visa. See **[SC Att A, pp 2, 9]**. An inconsistent finding by another delegate, in circumstances where there was no different evidence from that upon which the first delegate had made that finding, would have given rise to the issue of whether it is possible for the Defendant, by two of his delegates, to make inconsistent findings, either at all or without giving notice that this might occur.

Background to relevant regulations

30. As first made, the Regulations did not contain a separately defined criterion corresponding to PIC 4015. Rather, clause 202.228 provided:

> 202.228 If the family unit of the applicant includes a dependent child whose application was combined with the applicant's, the Minister is satisfied that the grant of the visa to the child would not prejudice the rights and interests of any other person who has custody or guardianship of, or access to, the child.

31. The definitions of "*custody*" and "*guardian*", in reg 1.03, were in the same terms as today:[43]

> ***custody***, in relation to a child, means:
> (a) the right to have the daily care and control of the child; and
> (b) the right and responsibility to make decisions concerning the daily care and control of the child.
>
> ***guardian***, in relation to a child, means a person who:
> (a) has responsibility for the long-term welfare of the child; and
> (b) has, in relation to the child, all the powers, rights and duties that are vested by law or custom in the guardian of a child, other than:
> (i) the right to have the daily care and control of the child; and
> (ii) the right and responsibility to make decisions concerning the daily care and control of the child

32. PIC 4015 and the related PIC 4017, which is made applicable in respect of various subclasses of visas when the child is the primary applicant,[44] were inserted into the Regulations with effect from 1 July 2000. The explanatory statement that accompanied the amending regulations[45] simply stated that the new criteria would provide "*a more objective test for decision-makers*". Clause 202.228 was also amended to provide as it currently does.

33. PIC 4015 provides:[46]

> 4015 The Minister is satisfied of 1 of the following:
> (a) the law of the additional applicant's home country permits the removal of the additional applicant;

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43 There was, and is, no definition of "*access*", in relation to a child, in the Regulations.

44 Note, however, that cl 202.322 makes PIC 4017 applicable in respect of each secondary applicant who is a child, even though consideration of exactly the same issue, in respect of the same secondary applicant, is required by clause 202.228 and PIC 4015.

45 Migration Amendment Regulations 2000 (No.2), SR No. 62 of 2000.

46 Approximately 50 subclasses of visas currently include PIC 4015 as part of a criterion to be satisfied by the primary applicant, when the application for a visa includes a child as a secondary applicant.

(b) each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;
(c) the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.

34. The expression "*home country*" is defined in reg 1.03 of the Regulations, in terms unchanged from when the Regulations were first made, as follows:

> ***home country***, in relation to a person, means:
> (a) the country of which the person is a citizen; or
> (b) if the person is not usually resident in that country, the country of which the person is usually a resident.

35. The expression "*can lawfully determine where [a child] is to live*" is not defined in either the Regulations or the Act. The expression "*Australian child order*" is defined in reg 1.03 by reference to s 70L(1) of the *Family Law Act* 1975 (Cth). Section 70L(1) provides for two kinds of purely domestic orders with respect to children.

36. Policy documents of the Department indicate that PICs 4015 and 4017[47] are viewed by the Department as a mechanism by which effect may be given, in migration decisions, to the "*objectives*" of the Convention on Civil Aspects of International Child Abduction, signed at The Hague on 25 October 1980 (**the Hague Convention**).[48]

37. The Hague Convention applies to a "*child who was habitually resident*[49] *in a Contracting State immediately before any breach of custody or access rights*".[50] Removal of a child from, or retention in, the territory of a Contracting State is wrongful if *"(a) it is in breach of rights of custody attributed to a person … either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at*

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47 The Department refers to PICs 4015 and 4017 as the "*custody criteria*", in contradistinction to PICs 4016 and 4018, referred as the "*best interests of the child*" criteria. The policy documents relevant to these PICs are:

- *PAM3: s5G – Relationship and family members – Custody (parental responsibility for minor children* (deals with PICs 4015 and 4017);
- *PAM3: s5G – Relationship and family members – Best interests of minor children* (deals with PICs 4016 and 4018).

48 *PAM3: s5G – Relationship and family members – Custody (parental responsibility for minor children*, at [3.3] (read with [3.1] and [3.2]).

49 This Court has considered the expression "*habitual residence*", as adopted in the Hague Convention, in *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 591-594 [21]-[27].

50 Article 4.

the time of removal or retention those rights were actually exercised ...".[51] The expression "*rights of custody*" is defined to "*include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence*".[52]

38. Clearly, PIC 4015 is not a mechanism by which Australia's obligations under the Hague Convention are incorporated into domestic law. PIC 4015 provides for something quite different from treaty obligations.[53]

39. Further, there is no limitation, in either PIC 4015 or cl 202.228, reflecting that the Hague Convention applies only to a child who is habitually resident in a signatory state. The text of PIC 4015 permits it to be satisfied in relation to a child, included as a secondary applicant in an application for a Refugee and Humanitarian (Class XB) visa, subclass 202,[54] where: the primary applicant is a parent (a common scenario); the parent lives in a country that is not a signatory to the Convention; and the child lives with that parent. Notably, neither Afghanistan (the country which the Delegate, wrongly, considered was the "*home country*" of the children), nor Pakistan (the children's country of "*habitual residence*") is a signatory to the Hague Convention.

Construction of PIC 4015

40. PIC 4015 is satisfied if any one of the three possibilities is satisfied. Each paragraph of PIC 4015 provides for a different test.

Paragraph (a) of PIC 4015

41. Paragraph (a) requires consideration of the expression "*home country*". That expression provides for mutually exclusive alternatives. If a person is a citizen of country X, but not usually resident in that country, then country X cannot be the person's home country.

42. The words "usually resident" are normal English words, to be given their natural meaning (unless the statute requires otherwise, either expressly or by implication).[55] The notion conveyed by the expression "usually resident" (and by cognate ones such as "usual place of residence", or "ordinarily resident") is

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51 Article 3.

52 Article 5.

53 Cf the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

54 Or any one of subclasses 200, 201, 203 and 204.

55 *Re Taylor; Ex parte Natwest Australia Bank Limited* (1992) 37 FCR 194 (Lockhart J); *Gauthiez v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 512 at 519-521 (Gummow J); *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at 264-267 [17]-[26] (French, von Doussa and Marshall JJ).

of a place where, in the ordinary course of a person's life, he/she regularly or customarily lives. Whether a person is usually resident in a given country is a question of fact and degree. A person may have usual residence in more than one place.[56]

43. In effect, the expression "*home country*" gives preference to the country of citizenship (say country A) if a person has usual residence in that country and also in country B. Otherwise, it selects country B.

Paragraph (b) of PIC 4015

44. While paragraph (a), in express terms, requires a choice of law determination, paragraphs (b) and (c) do not. Moreover, paragraph (c) is clearly and solely directed to matters of Australian law.

45. The structure of PIC 4015 in its entirety, and in particular the fact that, when possible application of a foreign law is made a requirement for the decision-maker's consideration it is made so expressly, leads to the conclusion that the test in paragraph (b) is to be assessed according to Australian law.

46. Given that the expression "*can lawfully determine*" is not defined, giving it its natural meaning in the relevant context (i.e., migration decisions as they may affect a child), the conclusion is that it refers to the guardian (or guardians) of the child (and, possibly, to one or more other persons with custody rights, unless those rights reside with the guardian(s)[57]). The term "*guardian*" is defined in reg 1.03 of the Regulations consistently with its meaning at common law.

Application of paragraphs (a) and (b) of PIC 4015 to the facts of the case

The law of the additional applicant's home country

47. Each of the children was not usually resident in Afghanistan, and was usually resident in Pakistan.

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56 There is probably little difference between the expressions "*usual residence*" (commonly used in Australian legislation), and "*habitual residence*" (adopted in the Hague Convention, and in numerous other conventions associated with the work of the Hague Conference on Private International Law). Both are chosen as "*a rejection of other possible connecting factors such as domicile or nationality*" and in particular as a rejection of the English law concept of domicile: *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 593 [24]. Both are to be determined as matters of fact and degree, permitting consideration of a wide variety of circumstances that bear upon where the person has the centre of his/her personal and family life. But see doubt expressed by this Court as to whether "*habitual residence*" permits of more than one place: *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 593-594 [25].

57 *Hewer v Bryant* [1970] 1 QB 357 at 372-373 (Sachs LJ).

48. Accordingly, the Delegate should have found that the applicable law, for the purposes of considering whether removal of the children was permitted, was the law of Pakistan.

49. While there is no evidence before this Court as to the law of Pakistan, and accepting that the issue of application of the relevant law to the facts is for the Defendant and not this Court, it might be doubted that the law of Pakistan – or, for that matter, of any other country – would prohibit departure of displaced children, together with the sole remaining parent, to a safe country where they will be granted permanent resident status and join an immediate family member who has already made his permanent home there.

50. Certainly, if the issue were to be considered in terms of whether a decision to grant the visa would conflict with the objectives of the Hague Convention, the clear answer would be: "There is no conflict".

Each person who can lawfully determine where the additional applicant is to live

51. The mother had, since she moved her family to Quetta in early 2003 after the disappearance of the father, been the sole guardian of the children, and the sole person with custody rights that were being actually exercised.[58]

52. Moreover, the common law no longer views "rights of custody" through the prism of regarding children as a form of property, but rather as parental responsibilities coupled with the necessary authority to discharge them.[59]

53. In the present case, the father who had been missing since 2003 (assuming he was not deceased) had, in January 2012, no responsibility for the children. The father had no rights of custody. No patriarchal system of law, assuming it were applicable (which it was not), could pass rights to relatives on the father's side of the family.

54. Additionally, the father should have been presumed to be deceased, for the reasons given below.

Each person who can lawfully determine ... consents to the grant of the visa

55. The mother was the only person who could lawfully determine where each of the children should live. The clear inference to be drawn from her application for the visa is that she consented to the grant of visas to the children.

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58 Cf Art 3 of the Hague Convention.

59 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218. See also discussion of *Hewer v Bryant* [1970] 1 QB 357 and *Marion's case*, in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 57-59 [157]-[159] (Gummow J).

56. Accordingly, the Delegate should have found that paragraph (b) of PIC 4015 was satisfied. Moreover, it is policy that paragraph (b) is the preferred way of applicants being able to meet PIC 4015.[60]

Presumption of death and denial of natural justice

57. The evidence of the mother, and of the Plaintiff, who is older than the children, is that the father has been missing since early 2003 when, while all of the family was living in the Ghazni province of Afghanistan, he travelled to Kandahar, another province of Afghanistan, and failed to return. The evidence of the mother and the Plaintiff is that they have not heard of him since he went missing in 2003.

58. There is nothing contradicting this evidence. Nor, significantly, was it ever put to the mother that there was something contradicting this evidence, or that she might not be believed. To the contrary, the Delegate accepted that the father has been missing since 2003.

59. Nothing suggests that the relationship between the father and the mother (and between the father and his children) was one, prior to 2003, such that it might have led the father not to attempt to contact his family if he was alive.

60. Further, the city of Quetta, the provincial capital of the Balochistan province in Pakistan, located near the Durand Line border with Afghanistan (and near the province of Kandahar), is a main centre for Hazaras from Afghanistan who have fled that country since the rise of the Taliban. If the father were alive, on learning that his family was no longer living in Anguri, Jaghori, in the Ghazni province of Afghanistan, and that they had left Afghanistan, then Quetta would be the logical place for him to consider searching for his family.

61. Quite apart from a period of more than 7 years having passed from the time of the father's disappearance (a period sufficient to give rise to the presumption of death as one of law), the circumstances in Afghanistan in 2003 for Hazara men were of danger to life and tending to support the improbability of living.

62. The Delegate considered there had to be evidence ("*compelling evidence*") that the father was deceased. He considered the status of the father (simply missing or deceased) to be a critical issue for determination. On the basis of the matters set out at paragraphs [57]-[61] above, the Delegate should have found that the father was to be presumed dead.[61]

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60 *PAM3: s5G – Relationship and family members – Custody (parental responsibility for minor children*, at [16].

61 *Axon v Axon* (1937) 59 CLR 395 at 404-405 (Dixon J); see also at 406 ("*a period of disappearance … of not less than seven years*").

63. To the extent that the Delegate's reasons could be read as the assumption of a contradictor's role,[62] and further that, as contradictor, he proposed to rely on information in his possession on "*movement and migration for work and asylum seeking purposes*" that supported existence of "*several possible scenarios with regard to his current location*", the Delegate failed to give the mother an opportunity to deal with that information.[63]

64. Further, neither the 6 September letter, nor the 24 November interview,[64] gave notice to the mother of the following matters:

(a) a critical issue was whether the father was deceased; in the absence of a death certificate, the fact he had been missing since 2003 would be insufficient to satisfy the Delegate that she was the sole guardian and the only person with custody rights, even in circumstances where the mother had had the sole care of and responsibility for the children since 2003; and

(b) the basis upon which the Delegate had concluded that, for the purpose of considering whether paragraph (a) of PIC 4015 could be met, he would apply the law of Afghanistan.

65. Natural justice required that the mother be informed of the critical issues on which the decision might turn.[65] Further, that conveying of the critical issues be done in a way that properly informed her and which was not apt to mislead her. This did not occur. The decision was made in breach of the rules of natural justice.

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62 That is, that at least implicitly the Delegate viewed the Defendant as the party against whom the presumption would operate in the circumstances where the issue was whether the Defendant (by his delegate) was satisfied of one of paragraphs (a), (b) or (c) of PIC 4015.

63 In what appears to be the only decision to have directly considered the presumption of death in a migration context (namely, the "*remaining relative*" criterion in reg 1.15 of the Regulations), McInnis FM concluded that the Migration Review Tribunal's failure to apply the common law presumption was a failure to have regard to a relevant consideration: *Kim v Minister for Immigration and Citizenship* [2007] FMCA 798 at [62]. The persons claimed to be missing in that case were citizens of Cambodia who had been living in Cambodia at the time of the Khmer Rouge Regime.

64 On the basis that relevant events are recorded in the Department's Records System **[SC at [20]]** and, further, that the Defendant has not located any other document within his or the Department's custody, power or control relevant to the issues raised in the questions stated for the opinion of the Full Court **[SC at [43]]**, the 6 September letter and the 24 November interview are the only two relevant occasions for assessing what was put by the Delegate to the mother.

Part VII: Legislation

66. Relevant parts of the Regulations are as follows:

- regulations 1.03, 1.12 and 1.12AA;
- item 1402 of Schedule 1;
- subclass 202 in Schedule 2;
- PIC 4015 in Schedule 4.

As in force at all relevant times, they are reproduced in the Special Case Book.

67. On 28 September 2012, the *Migration Amendment Regulation 2012 (No. 5)* commenced. The amending regulation introduces into the Regulations, in various places, a new definition of "*irregular maritime arrival*", being a person who on or after 13 August 2012 either became an "*offshore entry person*" (as that expression is defined in s 5(1) of the Act), or was taken to a place outside Australia under s 245F(9)(b) of the Act.

68. As a result of the amendments, a person who is an "*irregular maritime arrival*" is not eligible to propose his/her immediate family members for Class XB visas under the "split family" part of subclasses 200-204. Had the Plaintiff arrived in Australia on or after 13 August 2012, he could not have proposed the mother's entry to Australia, and the mother's application could only have been considered under the "non-split family" part of subclasses 200-204.

Part VIII: Orders sought

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

Q 1: Did the Delegate make a jurisdictional error in finding that paragraph (a) of PIC 4015 was not satisfied in relation to each additional applicant?
A 1: Yes.

Q 2: Did the Delegate make a jurisdictional error in finding that paragraph (b) of PIC 4015 was not satisfied in relation to each additional applicant?
A 2: Yes.

Q 3: Was the Decision made in breach of the rules of natural justice?
A 3: Yes.

Q 4: Who should pay the costs of this special case?
A 4: If any of questions 1, 2 or 3 is answered "Yes", the Defendant.

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65 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-592, approved in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

Part IX: Estimate of time

70. The Plaintiff estimates that the time for presentation of oral argument (including reply) will be between 1 ¾ and 2 hours.

DATED: 12 November 2012

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