IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M97 of 2016

BETWEEN:

AARON JOE THOMAS GRAHAM
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P58 of 2016

BETWEEN:

MEHAKA LEE TE PUIA
Applicant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF TASMANIA (INTERVENING)

Filed on behalf of Attorney-General for the State of Tasmania
Date of document: 6 February 2016
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PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of Tasmania intervenes in each proceeding pursuant to s 78A of the *Judiciary Act 1903 (Cth).* In M97 of 2016 the Attorney-General intervenes in support of the defendant. In P58 of 2016 the Attorney-General intervenes in support of the respondent. For convenience, the parties in each case will be referred to in these submissions as plaintiff and defendant respectively.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable Constitutional and legislative provisions are set out in the separate volume provided by the plaintiffs.

PART V: ARGUMENT

Introduction

5. The *Migration Act 1958 (Cth)* reserves to the defendant Minister the power to determine whether to cancel or refuse a visa to a non-resident of Australia according to law.

6. The law applicable to the Minister's determination includes provisions which protect from disclosure to the plaintiff and the Court confidential information relevant to the character of the plaintiffs and to the national interest.

7. Tasmania submits that:

a. the provisions of s501(3) and 503A of the Act are a valid exercise of the Parliament's power under s 51(xix) of the Constitution;
b. they do not confer a function on the Court which, by reason of its nature, or historical considerations, is something with is inconsistent with the essential character of the Court; and
c. they do not conscript the court to determine a matter in a particular way.

In each proceeding, question 1 of the Special Case should be answered no.

Statutory Scheme

8. Tasmania respectfully adopts the defendant's description of the statutory scheme.[1]

9. The power to make laws with respect to Immigration is vested in the Commonwealth Parliament.[2] Sections 501(3), 501C, and 503A are expressions of that power.

10. The Parliament's decision to exclude information from the statutory process of cancelling or refusing a visa is a question for the Parliament, in the interests of National security.

Section 501(3)

11. The plaintiffs' case is essentially concerned with the constitutionality of the statutory scheme on the basis of the Court's inability to review information which is confidential information under s 503A.

12. There should be no controversy about the exclusion of natural justice from the Ministerial determination whether to cancel or refuse a visa under 501(3) or (3A).[3]

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1 Defendant's submissions in Graham [9] to [12]
2 Section 51(xix): see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 25 to 26

13. The exclusion of natural justice in relation to the "original decision"[4], is express.[5] Similarly, the diminishing effect of s 503A on the decision making process under s 501(3) is an expression of the general principle that "the precise or practical content" of the obligation to afford procedural fairness is controlled by the relevant statutory principles.[6]

14. Moreover, the statutory scheme anticipates that a non-resident subject to exclusion has a right to make representations to the Minister under s 501C of the Act. In this way, the scheme is akin to a show cause proceeding, permitting the plaintiffs an opportunity to make representations to the Minister for the purposes of convincing the Minister that they pass the character test.[7] That this process may be formidable for the plaintiffs in the face of the Minister's obedience to s 503A is not to the point.

15. Further, at least some (if not many) decisions accompanied by the non-disclosure of confidential information relating to a person's character, or the national interest, may remain unreviewed. In that way, the complaint made by the plaintiffs lies not in the validity of the executive power to cancel or refuse a visa, but in its consequences should the matter come before the court for review.[8]

16. It is submitted that there is no reason to attach invalidity as a legal consequence to the statutory process governing either the original decision, or an adverse decision under s 501C.[9] Therefore, so far in the statutory scheme, there is no constitutional point that arises, because there is no intrusion into the jurisdiction of the Court under s 75.

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3 The Act, *s 501(5)*
4 *As this phrase is used in s 501C(1)*
5 *Section 501(5)*
6 *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 at [50]
7 Section 501C(4)
8 *Bhardwaj* at [12] citing *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 413 per Finkelstein J
9 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [11] per Gleeson CJ.

17. It is submitted that, logically, the plaintiffs' complaints about the process leading to the Minister's determination do not go to the exercise of the Minister's power to make a determination under s 501(3). Rather, it goes to the exclusion of confidential material that was before the Minister at the time of the decision to cancel or refuse the visa, but is not subsequently available to the plaintiff, or to the court on judicial review.

Section 503A

18. The evident purpose of s 503A is to enhance the ability of the Minister or an authorised migration officer to maintain the confidentiality of information supplied to the Minister's department by criminal investigation organisations in Australia or overseas for the purposes of decision making.[10]

19. In the context of judicial review, it operates as an evidentiary provision, which displaces the common law as expressed in *Ridgeway v R*[11]. Its operation does not involve an impermissible interference with the exercise of judicial power. The operation of s 503A is to exclude the use of confidential information from the Court.

20. In this regard, the Court's function is no more impaired than by provisions relating to the compellability of witnesses, [12] or, for that matter a provision providing for the averment of a fact in an information, or complaint. Some evidence, no matter how relevant, may be excluded from the Court.

21. In the context of public interest immunity the exclusion of relevant material from the Court will present "a formidable hurdle" to a plaintiff.[13]

> "The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials."[14]

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10 *Evans v Minister for Immigration and Multicultural Indigenous Affairs* (2003) 135 FCR 306 at [47] to [50]; *Vella v Minister for Immigration and Border Protection* (2015) FCR 61 at [34]

11 (1995) 184 CLR 19: see *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at 260 [39]; *Nicholas v The Queen* (1998) 193 CLR 173.

12 *eg., Evidence Act 1995 (Cth), ss 15, 17 and 18*

13 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 per Mason J

14 *ibid*

22. Seen in this light, the exclusion of evidence from a Court on judicial review is not a function which, by reason of its nature, or historical considerations, is something with is inconsistent with the essential character of the Court.[15] To the contrary, it is consistent.

23. Section 503A does not prevent the plaintiffs from successfully seeking judicial review of the Minister's determination.[16] Neither does s 503A "conscript" the Court to determine an application for judicial review in a particular way.[17]

24. It is submitted that the reliance by the plaintiffs on principles relating to the constitutional position of the State Courts under the constitution is misplaced. The principles relating to s 75 are to be found in *Chu Kheng Lim v Minister for Immigration*.[18]

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

25. Tasmania estimates that it will require not more than 10 minutes for presentation of oral argument.

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15 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27
16 In the plaintiff Graham's case he has successfully done so: *Graham v the Minister for Immigration and Border Protection* [2016] FCA 682
17 In that regard it does not infringe the constitutional holding in *Lim at 35 to 36*
18 *(1992) 176 CLR 1*