ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

BETWEEN

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

PLAINTIFF'S SUBMISSIONS

Dated: 3 February 2014
Farid Varess
Fragomen
Level 19, 201 Elizabeth Street
SYDNEY NSW 2000

Tel: (02) 8224 8585
Fax: (02) 8224 8500
Ref: 757261
Email: fvaress@fragomen.com

Part I CERTIFICATION

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

Part II ISSUES

2. The plaintiff's challenge to the validity of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (**UMA Regulation**) presents three issues:

   a) whether the *UMA Regulation*, or any provision within it, is "the same in substance" as the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (***TPV Regulation***) within the meaning of s 48 of the *Legislative Instruments Act 2003* (Cth) insofar as the effect of provisions of both regulations is to deny permanent protection visas to unauthorised maritime arrivals;

   b) whether cl 866.222 introduced by the *UMA Regulation* alters, impairs or detracts from the object or purpose of:

      i) s 36(2) of the *Migration Act 1958* (Cth) (***Migration Act***) insofar as cl 866.222 diminishes the class of persons defined by s 36(2);

      ii) s 46A of the *Migration Act* insofar as cl 866.222 renders futile in every case the exercise of the Minister's power to lift the bar under s 46A(2) to permit a person to make an application for a protection visa; and

   c) whether s 196 of the *Migration Act*, together with ss 47, 65 and 65A, require the Minister to consider and decide the plaintiff's application for a protection visa by reference to criteria excluding clause 866.222, and preclude the exercise of power under ss 31(3) and 504 of the *Migration Act* in a manner to the contrary.

3. The demurrer should be overruled and the declaratory and injunctive relief sought in the amended writ of summons should be granted.

Part III JUDICIARY ACT 1903

4. The plaintiff considers that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV CITATIONS

5. The matter has been brought in the original jurisdiction of the Court.

Part V FACTS AND BACKGROUND

6. Given that a demurrer is a procedure that assumes the truth of a particular set of facts,[1] the plaintiff's amended statement of claim (excluding paragraphs 15 to 20 and 43(b)) provides the relevant factual material.

7. The plaintiff is a national of Pakistan (**DB 353** [2]) who arrived in Australia on 19 May 2012 (**DB 353** [5]). He has been in detention since his arrival (**DB 353** [6]).

8. On or about 23 September 2012, the Minister decided to lift the bar under s 46A(2) of the *Migration Act* to permit the plaintiff to apply for a protection visa (**DB 353** [7]). On the same day, the plaintiff made a valid application for a protection visa (**DB 353** [8]).

9. The plaintiff's refugee status was assessed by a delegate of the Minister and by the Refugee Review Tribunal, the latter determining that he is a person in respect of whom Australia has protection obligations under the Refugees Convention (**DB 354** [9]-[12]).

10. On 1 June 2013, following the commencement of amendments to the *Migration Act*, the plaintiff fell within the expression "unauthorised maritime arrival" as defined in s 5AA(1) of the *Migration Act* (**DB 354** [14]).

11. On 17 October 2013, the Administrator of the Government of the Commonwealth made the *TPV Regulation*, which commenced on 18 October 2013 (**DB 357** [24]).

12. One aspect of the legal operation of the *TPV Regulation* was that unauthorised maritime arrivals became ineligible for the grant of a Subclass 866 permanent protection visa (**DB 253-254**, cl 866.222(c)-(e)).

13. On 2 December 2013, pursuant to s 42 of the *Legislative Instruments Act 2003* (Cth), the Senate disallowed the *TPV Regulation* (**DB 358** [27]). The Senate has not rescinded its resolution to disallow the *TPV Regulation* (**DB 358** [29]).

14. On 12 December 2013, the Governor-General made the *UMA Regulation* (**DB 357** [21]), which purports to amend Sch 2 of the *Migration Regulations* by inserting a clause 866.222 into the time of decision criteria for protection visas (**DB 317**). That clause, materially the same as that which appeared in the *TPV Regulation*, made unauthorised maritime arrivals ineligible for the grant of a Subclass 866 permanent protection visa. The plaintiff does not satisfy any of the criteria in clause 866.222 and cannot satisfy those criteria while he is in Australia (**DB 357** [23]). The plaintiff cannot ever satisfy subclause (b).

---

1 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *South Australia v Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ).

15. On 14 December 2013, the *UMA Regulation* purportedly commenced. If valid, the *UMA Regulation* denies the grant of a Subclass 866 permanent protection visa to unauthorised maritime arrivals, as well as to others who might more broadly be described as unauthorised arrivals.

16. The *UMA Regulation* is directed to the same class of persons as the *TPV Regulation* (**DB 358** [31]).

17. The purpose of the plaintiff's detention when it began did not include consideration of criteria pertaining to his status as an unauthorised arrival (**DB 359** [41]).

Part VI ARGUMENT

UMA Regulation made in contravention of *Legislative Instruments Act*

18. Section 48(2) of the *Legislative Instruments Act 2003* (Cth) provides that any legislative instrument or provision made in contravention of s 48(1) "has no effect".

19. The *UMA Regulation* was made in contravention of s 48(1) because it is "the same in substance" as the *TPV Regulation,* or one or more disallowed provisions within it, and was made within six months after the day on which the *TPV Regulation* was disallowed by the Senate (**DB 358** [30]).

Legal principles

20. Legislation in the form of s 48 was originally enacted because the disallowance provisions were "ineffective to prevent the immediate or early re-introduction of a new regulation which produced the same legal effect as the disallowed regulation".[2] Thus, a regulation, though disallowed, "might be kept in perpetual operation, notwithstanding even repeated disallowance".[3] Section 48 and its predecessors were directed to that mischief.

21. Section 48 applies equally to a legislative instrument or a provision of a legislative instrument. This was the same for its predecessor.[4] The assessment required by s 48 is whether a later regulation (or provision) is "the same in substance" as a disallowed regulation (or provision).[5]

---

2 *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 347 (***Victorian Chamber***) at 359 (Latham CJ).

3 *Victorian Chamber* at 359-360 (Latham CJ), citing *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188 at 202 (Starke J).

4 *Victorian Chamber* at 360 (Latham CJ), 388 (McTiernan J).

5 Ibid.

22. Whether two regulations are "the same in substance" within the meaning of s 48(1) depends upon whether the new regulation (or provision) as compared with the disallowed regulation (or provisions): produce "in large measure, though not in all details, the same effect";[6] "deal in the same way with cases";[7] have the same "general legal operation";[8] or have in substance the same "real purpose and effect".[9] Section 48 does more than preclude mere changes of form, requiring the court to consider the "degree" to which the new regulation (or provision) operates differently to a disallowed one.[10] In this way, "a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation" will not save the new regulation.[11]

23. A later regulation (or provision) that deals in the same way with cases as an earlier disallowed provision will not lose its character as one that is "in substance the same" merely because other parts of the later or earlier regulations dealt, in addition, with other cases or matters.[12]

24. Section 48 should be given "the fullest operation and effect".[13] If the disallowing House does not wish its disallowance to preclude the later regulation, the House can easily rescind or amend the resolution of disallowance. No decision of the Court that one regulation is the same in substance as another regulation can prevent the disallowing House from giving effect to a contrary opinion if it wishes to do so.[14]

Application of these principles

25. One object of the (disallowed) *TPV Regulation* was that it would prevent people who were unauthorised maritime arrivals or had arrived without a visa or had not been immigration cleared from "being granted ... a protection visa that allows the holder to remain in Australia indefinitely" (**DB 257** (33-35)). This object was sought to be achieved by the insertion of new visa criterion cl 866.222 (see **DB 254**), which made persons in any of the overlapping categories mentioned above ineligible for the grant of a Subclass 866 permanent protection visa (see cl 866.222(c)-(e)). As a result of the disallowance, such persons were again eligible for the grant of Subclass 866 permanent protection visas (**DB 319** (21-22)).

---

6 *Victorian Chamber* at 364 (Latham CJ).

7 *Victorian Chamber* at 361 (Latham CJ).

8 *Victorian Chamber* at 389 (McTiernan J).

9 *Victorian Chamber* at 406 (Williams J).

10 *Victorian Chamber* at 363-364 (Latham CJ), 389 (McTiernan J), 406 (Williams J).

11 *Victorian Chamber* at 361, 364 (Latham CJ).

12 *Victorian Chamber* at 361, 369 (Latham CJ).

13 *Victorian Chamber* at 363 (Latham CJ).

14 Ibid.

26. The *TPV Regulation* also made provision for the creation of a new subclass of visa that would give persons found to be refugees temporary residence in Australia.

27. The *UMA Regulation* was a repeat attempt to "implement the Government's policy intention", namely "to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa" (**DB 319** (18-20)). This was sought to be achieved by the insertion of new visa criterion 866.222 (see **DB 317**), which has the same effect of excluding the same categories of visa applicants as the earlier form of cl 866.222 contained in the *TPV Regulation*. Indeed, the new paragraphs 866.222(a)-(c) are in identical terms to the earlier paragraphs 866.222(c)-(e).

28. These provisions are "in substance the same". They are both visa criteria. They both operate to exclude the exact same categories of persons from being eligible for the grant of permanent protection visas. That is, they have the same "general legal operation", the same "effect" and the same "real purpose".

29. The fact that the disallowed *TPV Regulation* also established a subclass of visa to provide temporary residence for refugees does not affect the comparison of the new and disallowed provisions designed to exclude persons from permanent protection visas.

30. The Court should conclude that the *UMA Regulation* is in substance the same as the disallowed *TPV Regulation* (or provisions in it) and declare the *UMA Regulation* invalid.

UMA Regulation inconsistent with the *Migration Act*

Overview

31. Section 36 of the *Migration Act* establishes a class of visas that was intended to be, and has acted as, the principal mechanism by which Australia meets its international non-refoulement obligations in respect of refugees. Section 504 does not authorise the making of regulations that are inconsistent with this or other provisions of the *Migration Act*.

32. An important consideration in judging inconsistency is "the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned".[15] In that regard:

> *Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions*

---

15 *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 (**Plaintiff M47**) at [54] (French CJ), [133] (Gummow J), citing *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

made by the Act or regulations which go outside the field of operation which the Act marks out for itself.[16]

33. The *UMA Regulation* is inconsistent with, and varies or departs from, ss 36 and 46A as addressed below.

The scheme of the Act when protection visas introduced

34. The essential elements of the *Migration Act* following the commencement of the *Migration Reform Act 1992*, in September 1994, were as follows:

a) The Act empowered the prescription of classes of visa (s 31(1)).

b) The Act also made express provision for a limited number of classes of visa (see ss 32-38), one of which was the establishment of a class of visas to be known as protection visas (s 36(1)).

c) The explanatory memorandum stated that a protection visa was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]".[17] This was done by the adoption of a formula in s 36(2) that served to identify persons who were "refugees" within the Refugees Convention as amended by the Refugees Protocol.[18]

d) That mechanism is a reflection of "the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia's compliance with the obligations undertaken in the Refugees Convention and the Refugees Protocol".[19]

e) The Act conferred a general power to prescribe criteria for grant pertaining to classes of visa (except for certain immaterial exceptions) (ss 31(3) and 65(1)(a)(ii)).

f) The Act created a general power to make regulations providing that visas or visas of a specified class may only be granted in specified circumstances (s 40(1)). The Act identified non-exhaustively four circumstances by reference to location of the visa applicant, namely outside Australia (s 40(2)(a)), at a port prior to immigration clearance having been completed (s 40(2)(b)), in detention (s 40(2)(c)) and in the

---

16 *Plaintiff M47* at [174] (Hayne J), [382] (Crennan J), citing *Morton v Union Steamship Co of New Zealand* Ltd (1951) 83 CLR 402 at 410.

17 *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 (***NAGV***) at [40] (joint judgment). See also the discussion of the history of s 36 more generally at [34]-[41].

18 *NAGV* at [32]-[33].

19 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (***Plaintiff M70***) at [98] (Gummow, Hayne, Crennan and Bell JJ), [212] (Kiefel J).

migration zone (the general community) (s 40(2)(d)). This general power is clearly subject to s 36(2): it would be inconsistent for the regulations to specify that a protection visa could be granted only when the applicant is "outside Australia" when s 36(2) identifies as part of the criterion that the applicant is "in Australia".

g) The Act also conferred a similar general power to make regulations prescribing where the applicant must be when an application is made, picking up the same categories of location as mentioned above (s 45(3)).[20] Failure to meet these requirements would result in the application being invalid (s 46(1)(b)). Again, this power must be subject to s 36(2) for the same reason.

Inconsistency

35. The *UMA Regulation* transforms the operation of the statutory scheme considered in *Plaintiff M61* to one where offshore entry persons (now unauthorised maritime arrivals) held in immigration detention are no longer eligible for any form of protection visa, even where those persons have made valid applications for protection visas and been determined to be refugees in satisfaction of the criterion stated in s 36(2)(a) of the Act.

36. The plaintiff contends that there are negative implications arising from s 36(2) that limit the general regulation-making powers because the relevant matter is traversed by s 36(2). For example, s 36(2) indicates that the class is principally directed to persons who are "non-citizen[s] in Australia". A "non-citizen" is a person who is not an Australian citizen. The visa is available whether the person is a lawful non-citizen (one who holds a visa: s 13) or an unlawful non-citizen (one who does not hold a visa: s 14). It would have been inconsistent with the Act for a criterion to be prescribed by regulation that limited protection visas only to "lawful non-citizens". This would alter and detract not only from an important element defined by the Parliament, but from Australia's protection obligations under the Refugees Convention and Protocol. As six members of this Court accepted in *NAGV*, the non-refoulement obligation in art 33(1) of the Refugees Convention "applies to refugees whether lawfully or unlawfully within the host territory".[21] That view is consistent with the obligation imposed on Australia by art 31(1) of the Refugees Convention.

37. Likewise, s 36(2) clearly indicates that the class of visas is to be available to refugee applicants who are "in Australia". If a regulation under ss 31(3), 40 or 45 had attempted to limit the visa to persons who are "outside Australia", the

---

20 Repealed by *Migration Legislation Amendment Act (No. 1) 2000* (Cth).

21 *NAGV* at [21] (joint judgment).

regulation would have resulted in no person being eligible and would have thus completely undermined the statutory scheme and intention.

38. The plaintiff contends that a further negative implication is that no criterion can be prescribed that would diminish the use of the s 36 class as the mechanism for Australia complying with its international obligations under the Refugees Convention and Protocol. The Parliament had, by s 36(2), indicated that the visa should presumptively be available to all "refugees".

39. It would have been (and would be) inconsistent with the Act to prescribe by regulation a criterion according to which persons from a specified country were ineligible for the grant of a protection visa. At a later point in time, the Parliament made provision itself for the Minister to have the capacity to identify safe third countries, the Act then operating presumptively to exclude persons from such countries. (See ss 91A-91G of the current version of the Act.)

40. Similarly, it would have been inconsistent with the Act to prescribe a criterion that precluded the making of a valid application by reason only of the circumstance that the applicant was a citizen of two or more countries. Again, this was later effected by the Parliament expressly amending the Act. (See ss 91M-91Q of the current form of the Act.)

41. It was implicit in the creation of the class in s 36(1) with the criterion in s 36(2), replacing as it did a system where an assessment of refugee status was undertaken outside the Act, that the class of visas would be available for persons who claimed to be refugees; so that those claims could be assessed.

42. Where specific exception from this underlying premise was seen by the Parliament to be required, it amended the statute (see ss 36(3)-(7)). These amendments were, however, specific and confined. None of them suggest that it was open (still less make it open) to conclude that these reforms could all have been achieved simply by amending the regulations.

43. The plaintiff contends that the regulation-making powers conferred by the Act in 1994 (and subsequently) do not authorise the making of further criteria that would undermine (alter, impair or detract from) the clear function of the protection visa class established in s 36. The regulations could not prescribe that a protection visa applicant must be a citizen of the United Kingdom (with the result that all applicants from other countries would be ineligible for the grant of a protection visa). Likewise, new criteria cannot be added that detract from the defining characteristics of who are, or are commonly, refugees: namely persons fleeing persecution, often without visas and thus both being incapable of getting immigration clearance and being unauthorised maritime arrivals.

44. This does not mean that no criteria at all can be added in respect of that class of visas. The touchstone is s 36(2). Any criteria that are not inconsistent with

the notion of "refugee" in the Refugees Convention and Protocol, or that do not obstruct compliance with Australia's "protection obligations", could validly be made. This would include, for example, a criterion requiring applicants to provide information honestly and in a timely manner, as well as the claims criterion in cl 866.211 and the health criteria in cll 866.223-224B. It is unnecessary to identify precisely the limits of this negative implication. The plaintiff contends that it is clear that the criteria imposed in new cl 866.222 all detract from the original and current form of s 36(2).

45. The effect of cl 866.222 is to exclude from eligibility for the visa anyone who was not a "lawful non-citizen" and immigration cleared upon the person's last entry into Australia. The effect of this is to exclude a very large category of "refugees" from being eligible for the class of visa established by the Parliament for the benefit of such persons (and to meet Australia's international obligations). The visa class would be available *only* to persons who have arrived in Australia lawfully on some other kind of visa; thus who have left their country with a measure of planning and financial resources (and, in some cases, lying about why they want to come to Australia). This can be seen to be a very substantial reduction in the availability of protection visas and thus an impairment of the mechanism by which the Parliament intended to offer protection to refugees. It is inconsistent with the Act.

Clause 866.222 and s 46A of the Migration Act

46. While this is sufficient to support the relief sought by the plaintiff, it is appropriate to say something further about why s 46A of the *Migration Act* in its original and current forms is consistent with and, indeed, reinforces this conclusion.

47. Section 46A was inserted into the *Migration Act* with effect from 27 September 2001 by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). It provided that an application for a visa is not valid if it is made by an "offshore entry person" who is in Australia and is an unlawful non-citizen. The Minister, however, was given a power to lift this bar. An "offshore entry person" was a person who entered Australia at an "excised offshore place" after a specified time and thereby became an unlawful non-citizen. "Excised offshore place" was limited to certain external territories or small islands or sea installations. The amendments led this Court in *Plaintiff M61* unanimously to hold:

> *... the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case ...*[22]

---

22 *Plaintiff M61/2011E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

48. It may be seen that, once again, where the ambit of eligibility validly to apply for the s 36 class visa was to be reduced, it was done by the Parliament and not by regulations. Moreover, the scheme that was established provided an important balancing power: while offshore entry persons were excluded from making visa applications (including, most relevantly, protection visa applications), the Minister was given a power to lift this bar in the public interest. When the bar was lifted, the person would have her or his claims assessed against the statutory criterion in the normal manner, with access to a visa. The introduction of this scheme did not throw asunder what had gone before: it did not empower the making of a regulation that imposed a visa criterion that the visa applicant not be an offshore entry person. The imposition of such a criterion would not only be inconsistent with s 36(2) (in the manner discussed above) but would be inconsistent with the conferral by s 46A upon the Minister of a special power in the public interest to allow offshore entry persons to apply for protection visas.

49. The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) amended s 46A to refer to "unauthorised maritime arrivals" in place of "offshore entry person". The new expression is now defined in s 5AA in broad terms that include not only offshore entry persons but all persons who enter Australia by sea at any place after the commencement of the section and become unlawful non-citizens by doing so (subject to immaterial exceptions). While these reforms meant that a much broader range of fleeing refugees (and others) would be caught by the bar created by s 46A, it does not otherwise change the analysis outlined above.

50. At the time of the making of the *UMA Regulation* (and still), the *Migration Act* established a regime according to which unauthorised maritime arrivals were ineligible to make a valid application for *inter alia* protection visas. This bar could be lifted by the Minister in the public interest, at which time the person concerned could validly apply for a protection visa even though he or she may be an unauthorised maritime arrival. A regulation that requires the Minister to refuse all such applications (as does the new cl 866.222) detracts from the scheme created by the Act: it makes the public interest power in s 46A substantially defunct in relation to protection visas. In this way, in addition to the inconsistency with s 36(2) discussed above, the *UMA Regulation* is inconsistent with the scheme established by s 46A, which envisages that the Minister should have a power to allow protection visa applications to be made that are not futile.

51. The plaintiff contends that the *UMA Regulation* is inconsistent with the *Migration Act* for the reasons set out above and should be declared invalid.

UMA Regulation inconsistent with sections 196 and 65A of the *Migration Act*

The operation of ss 189, 196 and 198 of the Migration Act during the s 46A process

52. Upon the plaintiff's arrival at the Territory of Christmas Island on 19 May 2012, he was detained in the exercise of the discretionary power then conferred by s 189(3). The plaintiff was detained as an offshore entry person, the legal consequences of which were considered in *Plaintiff M61*.

53. The duration of the plaintiff's detention was fixed by s 196(1), which provided that the plaintiff must be kept in detention until one of three terminating events: removal from Australia (ss 198-199), deportation (s 200), or grant of a visa (ss 65, 195A). Section 198(2) imposed a duty to remove the plaintiff from Australia as soon as reasonably practicable. Section 200 had no application to the plaintiff, and the bar imposed by s 46A(1) denied the plaintiff access to s 65 unless lifted under s 46A(2).

54. Between 19 May 2012 and 23 September 2012, rather than being immediately removed from Australia, the plaintiff was detained for the purpose of the Minister considering whether to exercise power under ss 46A or 195A.[23] The *Migration Act* authorised that prolongation of detention, confined as it was to detention for a defined purpose and a defined duration under and for the purposes of the Act.

55. As to purpose, the Minister's decision to prolong the plaintiff's detention for the purpose of considering the exercise of power under ss 46A or 195A by reference to particular criteria drew authority from ss 196(1) and 198(2). Those sections authorised the prolongation of detention, but only while the purpose for which the Minister had prolonged detention was being fulfilled. The Minister's purpose in prolonging detention could be fulfilled only by the Minister taking steps towards considering and deciding whether to exercise power by reference to the criteria identified by the Minister at the outset.[24]

56. As to duration, ss 196(1) and 198(2) authorised the prolongation of the plaintiff's detention for so long as steps to fulfil the purpose of the prolongation were being undertaken reasonably promptly,[25] so that the Minister's decision would be made within a reasonable time.[26]

---

23 *Plaintiff M61* at [9] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

24 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 (***Plaintiff M79***) at [96]-[107] (Hayne J).

25 *Plaintiff M61* at [35] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

26 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53 (***Plaintiff M76***) at [93] (Hayne J).

The operation of ss 196 and 65A during the visa application process

57. On 23 September 2012, the Minister decided to lift the bar to permit the plaintiff to make a valid application for a protection visa, and the plaintiff made the application. The plaintiff having made that application, there ceased to be either duty or power to remove the plaintiff. The plaintiff was thereafter detained until "granted a visa", being the only remaining terminating event prescribed by s 196(1), following which the plaintiff would be released or removed. The relevant visa was the protection visa for which the Minister had permitted the plaintiff to apply.

58. The operative duty at that time was imposed by s 47 of the *Migration Act*, which required the Minister to consider the plaintiff's application until the Minister granted or refused to grant a protection visa. Section 65A of the *Migration Act*, which applies only to applications for protection visas, prescribed a further timeframe in which that consideration was to occur, being 90 days from 23 September 2012. Sections 47, 65 and 65A together required the Minister to consider and decide the plaintiff's application within that timeframe. The Minister did not complete his consideration of the plaintiff's application within that timeframe (**DB354** [9]) and the plaintiff's detention was prolonged while the Minister's consideration continued (until a decision was eventually made on 11 February 2013, from which the plaintiff sought review).

59. On 17 May 2013, when the Refugee Review Tribunal remitted the plaintiff's matter to the Minister for reconsideration, the timeframe imposed by s 65A was renewed. Section 65A required the Minister to complete his reconsideration within 90 days of 17 May 2013. That also did not occur (**DB354** [13]) and the plaintiff's detention was again prolonged while the Minister's consideration continued.

The consequences of prolonging the plaintiff's detention

60. Section 196(1)(c) required the plaintiff to be detained "until he ... is granted a visa". The only available heads of power for the grant of a visa were ss 65 and 195A.

61. For the Minister to grant a visa under s 65, the combined operation of ss 47, 65 and 65A required that the Minister consider the plaintiff's application and decide whether to grant a protection visa within a fixed timeframe of 90 days. During that timeframe, the plaintiff's detention was authorised by s 196(1)(c), and the duration of his detention was fixed by s 65A. Upon the expiration of that timeframe, further detention was authorised only if the detention were under and for the purposes of the Act.

62. As the only terminating event for the plaintiff's detention was the grant of a visa, and ss 47, 65 and 65A required the Minister to consider and decide whether to grant a visa within 90 days, further detention could only have been

under and for the purposes of the Act if the prolongation of detention facilitated the Minister considering and deciding whether to grant a visa on the basis required by those provisions. In other words, s 196(1)(c) authorised the Minister to prolong the plaintiff's detention only for such further period of time as was reasonably necessary for the Minister to consider and decide the plaintiff's application on the same legal basis as the application would have been considered and decided had the Minister complied with ss 47, 65 and 65A.

63. Had the Minister complied with ss 47, 65 and 65A, the Minister could only have considered and decided the plaintiff's application by reference to such lawful criteria for a protection visa as were then in force. The criteria then in force did not include the criteria now found in cl 866.222. For protection visa applicants detained under s 189(3), ss 47, 65 and 65A thus represent a specific statutory constraint on the general power under ss 504 and 31(3) to prescribe and amend the criteria for protection visas. The regulation-making power cannot be exercised to require the Minister to consider and determine an application for a protection visa contrary to ss 47, 65 and 65A.

64. The alternative construction would give s 65A no work to do. The timeframe prescribed by s 65A was fixed by the Parliament. If the lawfulness of detention beyond the timeframe fixed by s 65A is not limited by ss 65A and 196(1)(c), the Minister could lawfully prolong a person's detention for so long as it might take the Executive Government to amend the visa criteria to disqualify the person so detained. The provisions of the Act are not to be construed as authorising detention for whatever period of time or for whatever purpose the Executive may choose.[27]

65. Just as the system of assessment and review considered in *Plaintiff M61* was "knitted by ministerial announcement into the statutory power conferred by s 46A(2)",[28] so were the former criteria for a protection visa knitted by ministerial decision into the statutory outcome required by ss 47, 65 and 65A.

Invalidity of the UMA Regulation

66. Item 2601(a) in cl 2 of Sch 1 to the *UMA Regulation* (**DB 317**) provides that the amendments made by the *UMA Regulation* apply in relation to applications for visas made, but not finally determined, before 14 December 2013. The prolongation of the plaintiff's detention beyond the timeframe fixed by s 65A being lawful, the *UMA Regulation* cannot now validly require the Minister to consider and decide the plaintiff's application for a protection visa on a legal

27 *Plaintiff M76* at [98] (Hayne J).

28 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [49] (French CJ and Kiefel J).

basis other than that permitted and required by s 196(1)(c) as a result of ss 47, 65 and 65A.

67. Accordingly, item 2601(a) is invalid. Whether the *UMA Regulation* is valid insofar as item 2601(b) causes it to apply to valid applications for protection visas made after its commencement need not be decided.

Conclusion

68. Clause 866.222 of the *UMA Regulation* is invalid or has no application to the plaintiff. The plaintiff adopts the submissions of Plaintiff M150 of 2013 to the extent those submissions are consistent with these submissions.

Part VII LEGISLATION

69. The applicable statutory and regulatory provisions as they existed at the relevant times are set out in the annexure to these submissions. The provisions have been amended from time to time as indicated.

Part VIII ORDERS SOUGHT

70. The plaintiff seeks the following orders:

a) The demurrer be overruled.

b) Declare that the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) is invalid.

c) An injunction issue retraining the Minister, whether by himself, his officers or otherwise, from acting upon or giving effect to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth).

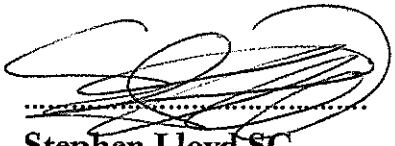
d) The defendants pay the plaintiff's costs of the proceeding to date.

e) The matter be listed for directions on a date to be advised by the registrar.

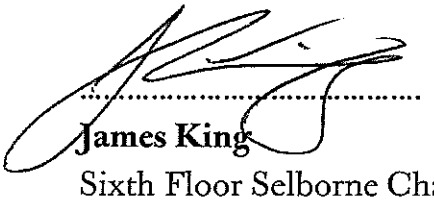
Part IX ORAL ARGUMENT

71. The plaintiff estimates that about one hour is required for the plaintiff's oral argument.

Dated: 3 February 2014



Stephen Lloyd SC
Sixth Floor Selborne Chambers
T (02) 9235 3753
stephen.lloyd@sixthfloor.com.au



James King
Sixth Floor Selborne Chambers
T (02) 8067 6913
jking@sixthfloor.com.au

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

LEGISLATIVE INSTRUMENTS ACT 2003 (CTH)

Section 42(1)—Disallowance of legislative instruments

42 Disallowance of legislative instruments

(1) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

...

Section 48—Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

48 Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

(1) If, under section 42, a legislative instrument or a provision of a legislative instrument is disallowed, or is taken to have been disallowed, a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision, must not be made within 6 months after the day on which the first-mentioned instrument or provision was disallowed or was taken to have been disallowed, unless:

(a) if the first-mentioned instrument or provision was disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or

(b) if the first-mentioned instrument or provision was taken to have been disallowed—the House of the Parliament in which notice of the motion to disallow the instrument or provision was given by resolution approves the making of a legislative instrument or provision the same in substance as the first-mentioned instrument or provision.

(2) Any legislative instrument or provision made in contravention of this section has no effect.

MIGRATION ACT 1958 (CTH)

Section 31—Classes of visas

31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

Section 36–Protection visas

ad. No. 184/1992

26B Protection visas

(1) There is a class of temporary visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

am. No. 60/1994

9 Protection visas

Section 26B of the Principal Act is amended by omitting from subsection (1) "temporary".

am. No. 160/1999

65 At the end of section 36

Add:

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

am. No. 131/2001

2 Subsection 36(2)

Repeal the subsection, substitute:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

am. No. 134/2001

5 Subsection 36(2)

After "whom", insert "the Minister is satisfied".

am. No. 144/2008

22 Paragraph 36(2)(b)

Omit "the spouse or a dependant of", substitute "a member of the same family unit as".

am. No. 121/2011

12 After paragraph 36(2)(a)

Insert:

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

13 At the end of subsection 36(2)

Add:

; or (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

14 After subsection 36(2)

Insert:

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

15 Subsections 36(4) and (5)

Repeal the subsections, substitute:

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

am. No. 113/2012

7 Paragraphs 36(2)(a) and (aa)

Omit "to whom", substitute "in respect of whom".

8 Subsection 36(3)

Omit "obligations to", substitute "obligations in respect of".

Section 40(1)-(2)—Circumstances for granting visas

40 Circumstances for granting visas

(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

(2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:

(a) is outside Australia; or

(b) is in immigration clearance; or

(c) has been refused immigration clearance and has not subsequently been immigration cleared; or

(d) is in the migration zone and, on last entering Australia:

(i) was immigration cleared; or

(ii) bypassed immigration clearance and had not subsequently been immigration cleared.

...

Section 46A—Visa applications by offshore entry persons

ad. No. 127/2001

46A Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(3) The power under subsection (2) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:
   (a) sets out the determination; and
   (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:
   (a) the name of the offshore entry person; or
   (b) any information that may identify the offshore entry person; or
   (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:
   (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
   (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

am. No. 35/2013

11 Subsections 46A(1) and (2)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

12 Subsection 46A(2)

Omit "the person", substitute "the unauthorised maritime arrival".

13 Paragraphs 46A(5)(a) and (b)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

14 Subsection 46A(7)

Omit "offshore entry person" (wherever occurring), substitute "unauthorised maritime arrival".

Section 47—Consideration of valid visa application

47 Consideration of valid visa application

(1) The Minister is to consider a valid application for a visa.

(2) The requirement to consider an application for a visa continues until:
   (a) the application is withdrawn; or
   (b) the Minister grants or refuses to grant the visa; or
   (c) the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration).

(3) To avoid doubt, the Minister is not to consider an application that is not a valid application.

(4) To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa.

Section 65(1)–Decision to grant or refuse to grant a visa

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

...

Section 65A–Period within which Minister must make decision on protection visas

65A Period within which Minister must make decision on protection visas

(1) If an application for a protection visa:

(a) was validly made under section 46; or

(b) was remitted by any court or tribunal to the Minister for reconsideration;

then the Minister must make a decision under section 65 within 90 days starting on:

(c) the day on which the application for the protection visa was made or remitted; or

(d) in the circumstances prescribed by the regulations—the day prescribed by the regulations.

(2) Failure to comply with this section does not affect the validity of a decision made under section 65 on an application for a protection visa.

Subdivision AI–Safe third countries

91A Reason for Subdivision

This Subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

91B Interpretation

(1) In this Subdivision:

agreement includes a written arrangement or understanding, whether or not binding.

CPA means the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989.

(2) For the purposes of this Subdivision, if, apart from this section:

(a) a colony, overseas territory or protectorate of a foreign country; or

(b) an overseas territory for the international relations of which a foreign country is responsible;

is not a country in its own right, the colony, territory or protectorate is taken to be a country in its own right.

91C Non-citizens covered by Subdivision

(1) This Subdivision applies to a non-citizen at a particular time if:

(a) the non-citizen is in Australia at that time; and

(b) at that time, the non-citizen is covered by:

(i) the CPA; or

(ii) an agreement, relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen (see section 91D); and

(c) the non-citizen is not excluded by the regulations from the application of this Subdivision.

(2) To avoid doubt, a country does not need to be prescribed as a safe third country at the time that the agreement referred to in subparagraph (1)(b)(ii) is made.

91D Safe third countries

(1) A country is a ***safe third country*** in relation to a non-citizen if:

(a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and

(b) the non-citizen has a prescribed connection with the country.

(2) Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:

(a) the person is or was present in the country at a particular time or at any time during a particular period; or

(b) the person has a right to enter and reside in the country (however that right arose or is expressed).

(3) The Minister must, within 2 sitting days after a regulation under paragraph (1)(a) is laid before a House of the Parliament, cause to be laid before that House a statement, covering the country, or each of the countries, prescribed as a safe third country by the regulation, about:

(a) the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and

(b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and

(c) the willingness of the country, or each of the countries, to allow any person in relation to whom the country is prescribed as a safe third country:

(i) to go to the country; and

(ii) to remain in the country during the period in which any claim by the person for asylum is determined; and

(iii) if the person is determined to be a refugee while in the country—to remain in the country until a durable solution relating to the permanent settlement of the person is found.

(4) A regulation made for the purposes of paragraph (1)(a) ceases to be in force at the end of 2 years after the regulation commences.

91E Non-citizens to which this Subdivision applies unable to make valid applications for certain visas

Despite any other provision of this Act, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a protection visa then, subject to section 91F:

(a) if the non-citizen has not been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a visa is a valid application; or

(b) if the non-citizen has been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a protection visa is a valid application.

91F Minister may determine that section 91E does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine:

(a) that section 91E does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given; or

(b) that section 91G does not apply to an application for a visa made by the non-citizen during the transitional period referred to in that section.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

91G Applications made before regulations take effect

(1) Subject to section 91F and subsection (3), if:

(a) this Subdivision applies to a non-citizen immediately after a regulation prescribing a country as a safe third country takes effect and did not apply to the non-citizen immediately before that time; and

(b) the regulation prescribes a day as the cut off day; and

(c) during the period (the ***transitional period***) from the beginning of the cut off day until immediately before that regulation takes effect, the non-citizen made an application for a protection visa;

then:

(d) if the non-citizen had not been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(e) if the non-citizen had been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a protection visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(f) on and after the regulation takes effect, this Act applies as if the non-citizen had applied for a protection visa immediately after the regulation takes effect.

(2) To avoid doubt:

(a) paragraphs (1)(d) and (e) apply even if an application referred to in the paragraph concerned, or a decision in relation to such an application, is the subject of a review by, or an appeal or application to, the Migration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, a Federal Court or any other body or court; and

(b) no visa may be granted to the non-citizen as a direct, or indirect, result of such an application.

(3) Subsection (1) does not apply in relation to a non-citizen who, before the regulation referred to in that subsection takes effect, has:

(a) been granted a substantive visa as a result of an application referred to in that subsection; or

(b) been determined under this Act to be a non-citizen who satisfies the criterion mentioned in subsection 36(2).

(4) The cut off day specified in the regulation must not be:

(a) before a day on which the Minister, by notice in the *Gazette*, announces that he or she intends that such a regulation will be made; or

(b) more than 6 months before the regulation takes effect.

Subdivision AK–Non-citizens with access to protection from third countries

91M Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

91N Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

Determining nationality

(6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

91P Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

(1) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a visa; and

(c) the non-citizen is in the migration zone and has not been immigration cleared at that time;

neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

91Q Minister may determine that section 91P does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

Sections 189, 196 and 198

as at 19 May 2012

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of ***immigration detention*** in subsection 5(1).

196 Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

(4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.

(4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.

(5) To avoid doubt, subsection (4) or (4A) applies:

(a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and

(b) whether or not a visa decision relating to the person detained is, or may be, unlawful.

(5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.

(6) This section has effect despite any other law.

(7) In this section:

visa decision means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and
(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and
(c) either:
(i) the non-citizen has not been immigration cleared; or
(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
(d) either:
(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or
(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

am. No. 113/2012 (commenced 18 August 2012)

11 Subsection 189(3)

After "a person", insert "(other than a person referred to in subsection (3A))".

12 Subsection 189(3)

Omit "may detain", substitute "must detain".

13 After subsection 189(3)

Insert:

(3A) If an officer knows or reasonably suspects that a person in a protected area:
(a) is an allowed inhabitant of the Protected Zone; and
(b) is an unlawful non-citizen;
the officer may detain the person.

14 Subsection 189(5)

After "subsections (3)", insert ", (3A)".

16 Subsection 196(1)

Omit "he or she is".

17 Paragraph 196(1)(a)

Before "removed", insert "he or she is".

18 After paragraph 196(1)(a)

Insert:

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

19 Paragraph 196(1)(b)

Before "deported", insert "he or she is".

20 Paragraph 196(1)(c)

Before "granted", insert "he or she is".

21 Subsection 196(3)

Omit "for removal or deportation", substitute "as referred to in paragraph (1)(a), (aa) or (b)".

24 At the end of section 198

Add:

(11) This section does not apply to an offshore entry person to whom section 198AD applies.

Section 504–Regulations

504 Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, without limiting the generality of the foregoing, may make regulations ...

Stephen Lloyd SC
Sixth Floor Selborne Chambers
T (02) 9235 3753
stephen.lloyd@sixthfloor.com.au

James King
Sixth Floor Selborne Chambers
T (02) 8067 6913
jking@sixthfloor.com.au

Migration Amendment (Temporary Protection Visas) Regulation 2013

Select Legislative Instrument No. 234, 2013

I, Professor Marie Bashir AC CVO, Administrator of the Government of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 17 October 2013

Marie Bashir
Administrator

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60271 - B

Contents

1 Name of regulation

This regulation is the *Migration Amendment (Temporary Protection Visas) Regulation 2013*.

2 Commencement

This regulation commences on 18 October 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 Subregulation 2.07AQ(3) (table item 1, column headed "Criterion 2", at the end of paragraph (d))

Add "granted before 18 October 2013".

2 After regulation 2.08G

Insert:

2.08H Certain persons taken to have applied for Subclass 785 (Temporary Protection) visas

(1) For subsection 46(2) of the Act, a Protection (Class XA) visa is a prescribed class of visa.

(2) A valid application for a Protection (Class XA) visa made, but not finally determined, before 18 October 2013 is taken to also be a valid application for a Subclass 785 (Temporary Protection) visa if the applicant:

(a) holds a Subclass 785 (Temporary Protection) visa; or

(b) has held a Subclass 785 (Temporary Protection) visa since last entering Australia; or

(c) did not hold a visa that was in effect on the applicant's last entry into Australia; or

(d) is an unauthorised maritime arrival; or

(e) was not immigration cleared on the applicant's last entry into Australia.

3 Subitem 1127AA(3) of Schedule 1 (table item 1, column headed "Criterion 1", at the end of paragraph (d))

Add "granted before 18 October 2013".

4 At the end of subitem 1401(3) of Schedule 1

Add:

(d) An application by a person for a Protection (Class XA) visa is a valid application for a Subclass 785 (Temporary Protection) visa only if the person:
  (i) holds a Subclass 785 (Temporary Protection) visa; or
  (ii) has held a Subclass 785 (Temporary Protection) visa since last entering Australia; or
  (iii) did not hold a visa that was in effect on the person's last entry into Australia; or
  (iv) is an unauthorised maritime arrival; or
  (v) was not immigration cleared on the person's last entry into Australia.

(e) An application by a person for a Protection (Class XA) visa is a valid application for a Subclass 866 (Protection) visa only if the person:
  (i) does not hold a Subclass 785 (Temporary Protection) visa; and
  (ii) has not held a Subclass 785 (Temporary Protection) visa since last entering Australia; and
  (iii) held a visa that was in effect on the person's last entry into Australia; and
  (iv) is not an unauthorised maritime arrival; and
  (v) was immigration cleared on the person's last entry into Australia.

5 Subitem 1401(4) of Schedule 1

Repeal the subitem, substitute:

(4) Subclasses:
  (a) Subclass 785 (Temporary Protection)
  (b) Subclass 866 (Protection).

6 After Subclass 773 of Schedule 2

Insert:

Subclass 785—Temporary Protection

785.1—Interpretation

785.111

In this Part:

Refugees Convention means the Refugees Convention as amended by the Refugees Protocol.

Note: ***Refugees Convention***, ***Refugees Protocol*** and ***member of the same family unit*** are defined in section 5 of the Act.

785.2—Primary criteria

Note: All applicants must satisfy the primary criteria.

785.21—Criteria to be satisfied at time of application

785.211

(1) One of subclauses (2) to (5) is satisfied.

(2) The applicant:
  (a) claims to be a person in respect of whom Australia has protection obligations under the Refugees Convention; and
  (b) makes specific claims under the Refugees Convention.

(3) The applicant claims to be a member of the same family unit as a person who is:
  (a) mentioned in subclause (2); and
  (b) an applicant who has made a valid application for a Subclass 785 (Temporary Protection) visa.

(4) The applicant claims to be a person in respect of whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

(5) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (4); and

(b) an applicant who has made a valid application for a Subclass 785 (Temporary Protection) visa.

785.22—Criteria to be satisfied at time of decision

785.221

(1) One of subclauses (2) to (5) is satisfied.

(2) The Minister is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention.

Note: See paragraph 36(2)(a) of the Act.

(3) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and

(b) the applicant mentioned in subclause (2) has been granted a Subclass 785 (Temporary Protection) visa.

Note: See paragraph 36(2)(b) of the Act.

(4) The Minister is satisfied that the applicant:

(a) is not a person in respect of whom Australia has protection obligations under the Refugees Convention; and

(b) is a person in respect of whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note: See paragraph 36(2)(aa) of the Act.

(5) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and

(b) the applicant mentioned in subclause (4) has been granted a Subclass 785 (Temporary Protection) visa.

Note: See paragraph 36(2)(c) of the Act.

785.222

(1) Subclause (2) or (3) is satisfied.

(2) The applicant, or a member of the family unit of the applicant, has not been offered a temporary stay in Australia by the Australian Government for the purposes of regulation 2.07AC.

(3) Section 91K of the Act does not apply to the applicant's application because of a determination made by the Minister under subsection 91L(1) of the Act.

785.223

The applicant has undergone a medical examination carried out by any of the following (a ***relevant medical practitioner***):

(a) a Medical Officer of the Commonwealth;

(b) a medical practitioner approved by the Minister for the purposes of this paragraph;

(c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

785.224

(1) One of subclauses (2) to (4) is satisfied.

(2) The applicant has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia.

(3) The applicant is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested the examination mentioned in subclause (2).

(4) The applicant is a person:

(a) who is confirmed by a relevant medical practitioner to be pregnant; and

(b) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(c) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(d) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

785.225

(1) A relevant medical practitioner has considered:
  (a) the results of any tests carried out for the purposes of the medical examination required under clause 785.223; and
  (b) the radiological report (if any) required under clause 785.224 in respect of the applicant.

(2) If the relevant medical practitioner:
  (a) is not a Medical Officer of the Commonwealth; and
  (b) considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community;

he or she has referred any relevant results and reports to a Medical Officer of the Commonwealth.

785.226

If a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

785.227

The applicant:
  (a) satisfies public interest criteria 4001 and 4003A; and
  (b) if the applicant had turned 18 at the time of application—satisfies public interest criterion 4019.

785.228

(1) If the applicant is a child mentioned in paragraph 2.08(1)(b), subclause (2) or (3) is satisfied.

(2) Both of the following apply:

(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 785.211(2);
(b) the applicant mentioned in subclause 785.211(2) has been granted a Subclass 785 (Temporary Protection) visa.

(3) Both of the following apply:
(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 785.211(4);
(b) the applicant mentioned in subclause 785.211(4) has been granted a Subclass 785 (Temporary Protection) visa.

785.229

The Minister is satisfied that the grant of the visa is in the national interest.

785.3—Secondary criteria

Note: All applicants must satisfy the primary criteria.

785.4—Circumstances applicable to grant

785.411

The applicant must be in Australia when the visa is granted.

785.5—When visa is in effect

785.511

Temporary visa permitting the holder to remain in Australia until the earlier of:
(a) the end of 36 months from the date of grant of the visa; and
(b) the end of any shorter period, specified by the Minister, from the date of grant of the visa.

785.6—Conditions

785.611

Conditions 8503, 8564 and 8565.

7 Subclauses 866.211(2) and (4) of Schedule 2

Omit "to whom", substitute "in respect of whom".

8 Subclauses 866.221(2) to (5) of Schedule 2

Repeal the subclauses, substitute:

(2) The Minister is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention.

Note: See paragraph 36(2)(a) of the Act.

(3) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and

(b) the applicant mentioned in subclause (2) has been granted a Subclass 866 (Protection) visa.

Note: See paragraph 36(2)(b) of the Act.

(4) The Minister is satisfied that:

(a) the applicant is not a person in respect of whom Australia has protection obligations under the Refugees Convention; and

(b) the applicant is a person in respect of whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note: For paragraph (b), see paragraph 36(2)(aa) of the Act.

(5) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and

(b) the applicant mentioned in subclause (4) has been granted a Subclass 866 (Protection) visa.

Note: See paragraph 36(2)(c) of the Act.

9 After clause 866.221

Insert:

866.222

The applicant:

(a) does not hold a Subclass 785 (Temporary Protection) visa; and

(b) has not held a Subclass 785 (Temporary Protection) visa since last entering Australia; and

(c) held a visa that was in effect on the applicant's last entry into Australia; and

(d) is not an unauthorised maritime arrival; and

(e) was immigration cleared on the applicant's last entry into Australia.

10 Subclause 866.223

Omit "relevant medical practitioner", substitute "***relevant medical practitioner***".

11 At the end of Schedule 8

Add:

8565 The holder must notify Immigration of any change in the holder's residential address within 14 days after the change occurs.

12 At the end of Schedule 13

Add:

Part 21—Amendments made by the Migration Amendment (Temporary Protection Visas) Regulation 2013

2101 Operation of Schedule 1

(1) The amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Temporary Protection Visas) Regulation 2013* apply in relation to an application for a visa made on or after 18 October 2013.

(2) The amendment of these Regulations made by Schedule 1 to the *Migration Amendment (Temporary Protection Visas)*

Regulation 2013, other than the amendments made by items 1, 3 and 4 of that Schedule, apply in relation to an application for a visa made, but not finally determined, before 18 October 2013.

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Select Legislative Instrument No. 280, 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 12 December 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60354 - B

Contents

1 Name of regulation

This regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

2 Commencement

This regulation commences on 14 December 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 After clause 866.221 of Schedule 2

Insert:

866.222

The applicant:

(a) held a visa that was in effect on the applicant's last entry into Australia; and

(b) is not an unauthorised maritime arrival; and

(c) was immigration cleared on the applicant's last entry into Australia.

2 At the end of Schedule 13

Add:

Part 26—Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

2601 Operation of Schedule 1

The amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

(a) made, but not finally determined, before 14 December 2013; or

(b) made on or after 14 December 2013.