IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

B E T W E E N:

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

PLAINTIFF'S SUBMISSIONS

Filed: 22 April 2014

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I. CERTIFICATION

1. The plaintiff certifies that these submissions are suitable for publication on the internet.

II. ISSUES PRESENTED

2. The plaintiff is a national of Pakistan and a Hazara adherent to Shia Islam who in May 2013 was found to face a real chance of being seriously harmed or killed by extremist groups should he be returned to Pakistan. The plaintiff is an unauthorised maritime arrival.

3. The first defendant (**Minister**) has publicly adopted a policy of denying protection visas to persons such as the plaintiff. In October and December 2013, the Minister caused the *Migration Regulations 1994* (Cth) (**Migration Regulations**) to be amended in an attempt to ensure that persons such as the plaintiff could not be granted the permanent protection visas for which the Minister had allowed them to apply.

4. The Senate disallowed the amendments in December 2013 and March 2014. Also in December 2013, and again in March 2014, the Minister purported to exercise power under the *Migration Act 1958* (Cth) (**Migration Act**) to limit the number of permanent protection visas that may be granted in the present financial year for the purpose of denying that visa to persons such as the plaintiff.

5. Since his arrival in Australia, the plaintiff has been, and remains, in immigration detention.

6. The issue at the heart of this proceeding is whether the Minister may achieve by administrative fiat the outcome presently denied to the Minister through the Parliament. The Minister seeks to use mechanisms under the Migration Act to attain an unlawful end.

7. The special case states three questions of law for the opinion of the Full Court, which should be answered as follows:

   a. Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid? **Yes.**

   b. What, if any, relief should be granted to the plaintiff? **The plaintiff is entitled to the relief sought at [117]-[120] of the further amended statement of claim.**

   c. Who should pay the costs of the proceeding? **The defendants.**

III. SECTION 78B NOTICES

8. The plaintiff has determined that there is no need for notices to be given under s 78B of the *Judiciary Act 1903* (Cth).

IV. MATERIAL FACTS

9. The plaintiff is a national of Pakistan who arrived in Australia on 19 May 2012 as an unauthorised maritime arrival. The plaintiff was detained upon his arrival for the purpose of the Minister considering whether to exercise power under s 46A of the Migration Act to allow the plaintiff to make a valid application for a protection visa.

10. In September 2012, the Minister lifted the bar imposed by s 46A, and the plaintiff made a valid application for a protection visa on the same day.

11. In May 2013, the Refugee Review Tribunal (**Tribunal**) found that the plaintiff was a refugee, facing as he did a real chance of being seriously harmed or killed by extremist groups for reasons of his Hazara ethnicity and Shia faith.

12. In October and December 2013, the Minister caused the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (**TPV Regulation**) and the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**UMA Regulation**) to be made. The Senate disallowed those regulations in December 2013 and March 2014 respectively.

10 13. Also in December 2013, and again in March 2014, the Minister purported to exercise power under the Migration Act to limit the number of protection visas that may be granted in the present financial year.

14. The Minister has publicly adopted a policy of taking every step necessary to deny permanent protection visas to unauthorised maritime arrivals such as the plaintiff. The relationship between that policy and the Minister's purpose in making the December 2013 determination and the March 2014 determination is addressed later in these submissions.

15. The plaintiff has been held in immigration detention since his arrival in May 2012 and remains in immigration detention while the Minister pursues that policy objective.

V. ARGUMENT

20 ### A THE MINISTER'S MARCH 2014 DETERMINATION IS INVALID

16. For three reasons, s 85 does not authorise the Minister to limit the number of protection visas that may be granted in a specified financial year, with the result that the March 2014 determination is invalid. Those reasons are given below.

17. Alternatively, the March 2014 determination was not made "by notice in the Gazette", and was in any event made for an improper purpose, leading to invalidity. Those alternatives are addressed later in these submissions.

1. Section 85 does not authorise the Minister to limit protection visas

18. Three considerations require the conclusion that s 85 does not authorise the Minister to place a limit on the number of protection visas that may be granted in a financial year.

30 19. *First*, the plaintiff is detained under s 196(1)(c) solely for the purpose of the Minister considering and deciding to grant or refuse to grant a protection visa to the plaintiff. Section 85 should not be construed as authorising the Minister to prolong the plaintiff's detention from financial year to financial year at the Minister's discretion.

20. *Secondly*, the text, context and purpose of s 36 and Subdiv AH necessarily exclude the exercise of power under s 85 in relation to protection visas. Subdivision AH was intended to assist in the delivery of the annual migration programme, which has nothing to do with the statutory response to Australia's international obligations in respect of refugees.

21. *Thirdly*, in the alternative to the above, the March 2014 determination is inconsistent with the Minister's statutory duty under s 65A to grant or refuse to grant a protection visa to the

plaintiff within 90 days of remittal of the plaintiff's application from the Tribunal. The enactment of s 65A effected an implied partial repeal of ss 85 and 86.

(a) The Minister does not have a discretion to prolong the plaintiff's detention

22. To construe s 85 as authorising the Minister to determine the maximum number of protection visas from time to time is to permit the plaintiff's detention to be continued at the unconstrained discretion of the Executive. That construction should not be adopted.[1]

23. The Minister's determination principally affects applicants who have been determined to be refugees and to whom the Minister is satisfied protection visas must be granted. Visa grant decisions for those persons are deferred to the next financial year (s 86). The Minister may nevertheless "consider or, subject to section 86, dispose of" other outstanding applications in such order as the Minister considers appropriate (ss 88, 91). The applications of those who are not refugees or who do not satisfy the criteria will be considered and refused.

24. So far as is disclosed by the evidence, the plaintiff is within the first category. The plaintiff must be detained until he is "granted a visa" (s 196(1)(c)) or "removed from Australia under section 198" (s 196(1)(a)), and there is no power to remove the plaintiff until his application for a protection visa "has been finally determined" (s 198(2)(c)(ii)). In delaying the grant of protection visas to persons otherwise entitled to them, the Minister has prolonged the detention of persons who must ultimately be released into the community.

25. Nothing in the text or structure of Subdiv AH requires the conclusion that the Parliament authorised the Minister to prolong the detention of persons in the plaintiff's position from financial year to financial year according to the Minister's administrative priorities.[2]

26. The administrative priorities announced by the Minister do not include the plaintiff. Shortly after making the December 2013 determination, the Minister announced that persons such as the plaintiff "will either remain in detention or on bridging visas ... until temporary protection visas are restored".[3] Should the Minister be unable to secure the legislative amendments required by his policy, as has been the case to date, the plaintiff and others like him may be detained indefinitely by successive determinations under s 85.

27. Although the Migration Act has amongst its objects the abrogation of the freedom of unlawful non-citizens generally, there is present in the Migration Act no "clear purpose" or "clearly identified legislative object",[4] nor "necessary"[5] intention expressed with "irresistible clearness",[6] that applicants to whom the Minister is satisfied he must grant protection visas should be able to be detained at his unconstrained discretion. The principle of legality requires that a construction of s 85 having that effect on liberty should not be adopted.

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1 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Offshore Processing Case***) at [64]-[65]. See also *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALJR 324 at [93] (Hayne J).

2 The question whether such a law would be consistent with Ch III of the Constitution need not be decided: *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 at [140]-[141] (Crennan, Bell and Gageler JJ), citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33.

3 SC [41] at 339.6.

4 *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at [30] (French CJ), [126] (Crennan J), [313] (Gageler and Keane JJ).

5 *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at [173] (Kiefel J with whom Hayne and Bell JJ agreed at [58] and [255]).

6 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86] (Hayne and Bell JJ), [158] (Kiefel J).

28. The effect on liberty is more pronounced for detainees who have applied for protection visas than for detainees who have applied for other visas. That effect on liberty provides a basis for distinguishing between protection visas and other classes of visa in the operation of s 85. The plaintiff will be used as an example.

29. *First*, the plaintiff has no right to enter any State other than Pakistan,[7] and there is nowhere in Pakistan to which the plaintiff can safely relocate.[8] Accordingly, the plaintiff is not a person to whom Subdiv AI ("Safe third countries") or Subdiv AK ("Non-citizens with access to protection from third countries") applies.

30. *Secondly*, all detainees can ask the Minister under s 198(1) to be removed from Australia, and detainees who do not engage Australia's protection obligations will be removed. But the Minister has no power to remove the plaintiff to any State where he faces persecution,[9] and the plaintiff has no right to enter any other State. The plaintiff will remain in detention.

31. *Thirdly*, as a consequence of the first and second points, should the Minister determine a maximum number for protection visas, the detention of protection visa applicants is necessarily prolonged at the Minister's discretion. On the other hand, should the Minister determine a maximum number for other classes of visa, detained applicants may leave.

32. *Finally*, s 195(2) provides a clear textual basis for recognising the special position of detainees who have applied or may wish to apply for protection visas or bridging visas.

33. Section 85 should not be construed as authorising a limit for protection visas.

(b) Subdivision AH does not apply to protection visas

i. Section 36 is the mechanism by which Australia responds to its international obligations

34. Section 36 of the Migration Act establishes a class of visas that was intended by the Parliament to be, and has acted as, "the mechanism by which Australia offers protection to persons who fall under [the Convention]".[10] 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 and the Refugees Protocol.[11]

35. 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".[12]

36. Although Australia's international obligations do not require refugees to be granted permanent residence, a consequence of those obligations is that where there is no place to which a person can be removed without a non-refoulement obligation being breached, the State "has no choice but to tolerate that individual's presence within its territory".[13] Sections 36 and 65(1) form part of a scheme for granting visas to such individuals, and are

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7 SC [12] at 123 [9].

8 SC [12] at 125 [21].

9 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [54] (French CJ), [95]-[98] (Gummow, Hayne, Crennan and Bell JJ), [212]-[239] (Kiefel J); *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at [228], [269], [272] (Lander and Gordon JJ).

10 *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [40].

11 *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [32]-[33].

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

13 *NAGV v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [23].

an example of where "the provisions of the Migration Act may, at times, have gone beyond what would be required to respond to" Australia's international obligations.[14]

37. Considerations of that kind led this Court unanimously to conclude in the *Offshore Processing Case* that the text and structure of the Migration Act proceed on the footing that the Act provides power to respond to Australia's international obligations, amongst other things, "by granting a protection visa in an appropriate case".[15]

38. There is an inherent and inescapable tension between the enactment by the Parliament of a statutory duty to grant protection visas in response to Australia's international obligations and the existence of an executive discretion to vary or suspend that duty from financial year to financial year. To construe s 85 as authorising the Minister to neuter s 36 by determining such limits—potentially very low limits—as may suit the Executive Government from time to time, would do damage to the mechanism chosen by the Parliament to respond to Australia's international obligations. Had the Parliament intended protection visas to be subject to that kind of control, the Parliament could have simply left the class of protection visas to be created by the Executive Government by regulation.[16]

39. Section 85 should not be construed as authorising the Minister to give effect to an administrative policy that is different to the legislative policy reflected in s 36.

ii. Disharmony in exemption of family members

40. Section 87 provides that a limit set under s 85 does not prevent the grant of a visa to a person who applied for it on the ground that he or she is "the spouse, de facto partner or dependent child" of certain classes of person, including the holder of a protection visa.

41. Conversely, the criterion for a protection visa in s 36(2)(b)-(c) may be satisfied by a non-citizen in Australia who is "a member of the same family unit" as a person in Australia who holds a protection visa. The concept of a family unit is given content by s 5(1) and reg 1.12 of the Migration Regulations, which extend the concept to spouses, de facto partners, children, grandchildren, step-children and cohabiting relatives.

42. To hold that s 85 authorises a limit for protection visas would require the conclusion that spouses, partners and dependent children of protection visa holders in Australia may be granted their own protection visas—even if that would be contrary to the Minister's planning levels—but not dependent grandchildren, step-children, cohabiting relatives or other "members of the same family unit".

43. The point is not that s 85 should be read in light of reg 1.12, but rather that the exemption by s 87 of only some family members from limits imposed under s 85 is incongruous with the eligibility in s 36(2)(b)-(c) of all members of the same family unit. That disharmony is best reconciled by a conclusion that s 85 does not authorise a maximum number of protection visas.

iii. The context and purpose of Subdivision AH

44. Subdivision AH was enacted "to assist in the delivery of the annual migration program"[17] by giving the Minister "the power to establish a cap on the annual migration program".[18]

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14 *Offshore Processing Case* at [27], citing *NAGV* at [54]-[59].

15 *Offshore Processing Case* at [27].

16 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 at [72] (Hayne J).

17 Explanatory Memorandum, Migration Legislation Amendment Bill 1992 (Cth) at 6 [7].

45. The *Migration Legislation Amendment Act 1992* (Cth) was passed with bipartisan support. During the second reading of the bill, the Minister for Immigration explained that the new power would allow the Minister to "target the grant of visas in accordance with the priorities of the migration program".[19] The Shadow Minister for Immigration, Mr Philip Ruddock, observed:[20]

> *It is clear that the capping powers are not to be applied to spouses, aged parents and dependent children; that is, the categories which are demand driven.*

46. Later during the debate, Mr Ruddock also stated:[21]

> *I certainly would not want to make the change in relation to refugees as I take the view that we have a very special responsibility in relation to refugees ... I have not commented on the refugee area because I know it is likely, separately, to be the subject of legislation during this session. ...*

47. The Rt Hon Ian Sinclair, member for New England, said: "We have to have compassion. We have to allow for refugees."[22] Mr Garry Nehl, member for Cowper, said: "the prime purpose of migration is to benefit Australia ... if we leave aside the humanitarian questions of refugees, that is really the only reason for having a migration program."[23]

48. In reply to those and other comments, the Minister stated:[24]

> *The shadow Minister also touched on the matter of refugees and said he would leave his arguments to another day. I think it probably preferable that most of the comments made by honourable members in this debate about refugees be left until then.*

49. There was no apparent intention that s 85 would apply in any way to protection visas. There is, however, apparent in all of the extrinsic material a distinction between "the annual migration program" and Australia's response to its international obligations. It is primarily in the context of the former that there is a need for administrative planning levels.

50. Historically, s 85 has only been used to limit visas in "the annual migration program", and until now has never been used to place a limit on protection visas.[25] The Department explains that, in the past, "onshore places were not fixed, and any visas granted over and above a nominal target resulted in a commensurate reduction in offshore places (in the Special Humanitarian Programme)".[26] So although there was a nominal allocation of places for all humanitarian visas including both protection visas under s 36 and other visas prescribed by the regulations, in practice, protection visas were granted before other visas.

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18 Explanatory Memorandum, Migration Legislation Amendment Bill 1992 (Cth) at 6 [9].

19 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 185 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, 2035 (Philip Ruddock, Shadow Minister for Immigration).

21 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, 2038 (Philip Ruddock, Shadow Minister for Immigration).

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, 2044 (Ian Sinclair).

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, 2049 (Garry Nehl).

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, 2055 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).

25 SC [53] at 460 [6], being SM2014/00554 at 3 [6].

26 SC [53] at 460 [7], being SM2014/00554 at 3 [7].

All five of the "Special Humanitarian" visas prescribed by the regulations are subclasses of "Class XB" and include maximum number conditions prescribed under s 39(1).[27]

51. The utility of the relationship between protection visas granted "onshore" and refugee and humanitarian visas granted "offshore" through the "Special Humanitarian Programme" was described in a December 2011 information paper published by the Department:[28]

> *The SHP has been linked numerically to the onshore protection component of the Program since 1996–97. Successive governments have maintained this link as it enables planning and budgeting for government-funded settlement services to properly meet the needs of humanitarian entrants, as it is not possible to cap or limit the number of places onshore.*

10 52. The view held by successive governments since 1996 that "it is not possible to cap or limit the number of places onshore" is correct. Section 85 has never authorised the Minister to determine a maximum number of protection visas.

(c) Alternatively, s 65A effected an implied partial repeal of Subdiv AH

53. Even if, contrary to the above submissions, it was historically possible for power to be exercised under s 85 to limit protection visas, the enactment of s 65A effected an implied partial repeal of Subdiv AH. The submissions below proceed on the assumption (denied by the plaintiff) that s 85 was available to limit protection visas when originally enacted.

i. Text and context point to an implied partial repeal

54. Sections 65(1) and 65A(1) of the Migration Act together impose a statutory duty on the
20 Minister to complete his consideration of a valid application for a protection visa and to make a decision under s 65(1) within 90 days of the day on which the application was made or remitted.[29] The duty under s 65A is limited to protection visas.

55. Subdivision AH was enacted by the *Migration Legislation Amendment Act 1992* (Cth) and s 65A was enacted some years later by the *Migration and Ombudsman Legislation Amendment Act 2005* (Cth). This is not a case where conflicting provisions were enacted together, such as to require the court to determine "which is the leading provision and which the subordinate provision".[30] Section 65A was introduced by subsequent legislation that expressly amended the Migration Act. The mandatory timeframe for decision-making prescribed by 65A is "inconsistent and irreconcilable" with the provisions of Subdiv AH
30 and effected an implied partial repeal of those provisions in relation to protection visas.[31]

56. That inconsistency between s 65A and Subdiv AH is demonstrated by three considerations.

57. *First*, s 65A(1) requires that the Minister "make a decision under section 65 within 90 days" of a certain date. Section 65 does not use the term "decision", although the heading to the section is "Decision to grant or refuse to grant a visa".[32] Properly construed, s 65 imposes a duty on the Minister to grant (s 65(1)(a)) or refuse to grant (s 65(1)(b)) a visa according to

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27 Clauses 200.225, 201.225, 202.226, 203.225 and 204.225 of Sch 2 of the Migration Regulations.

28 SC [30(c)] at 209.9.

29 FASOC at [86] admitted in defence at [63] subject to the full terms and effect of the Migration Act.

30 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

31 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [9] (Brennan CJ and McHugh J), [67]-[69] (Gummow and Hayne JJ).

32 Pursuant to s 13(1) of the *Acts Interpretation Act 1901* (Cth), headings are material that is part of the Act.

whether the Minister is satisfied of certain matters in relation to a valid application for the visa. The only "decision" contemplated by s 65 and its heading is a decision by the Minister to "grant" or "refuse to grant" a visa. Accordingly, when s 65A(1) speaks of the Minister making "a decision under section 65", that can only be understood as the Minister granting or refusing to grant a protection visa under s 65(1).

58. *Secondly*, the requirement in s 65A(1) that the Minister "grant" or "refuse to grant" a protection visa under s 65(1) is directly inconsistent with the injunction in s 86 that "no more visas of the class ... may be granted". To that extent, s 65A effected an implied partial repeal of s 86, and necessarily repealed s 85 to the same extent.

59. *Thirdly*, although s 89 provides that compliance with s 86 "does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa", that does not answer the proposition that s 86 purports to relieve the Minister of the duty imposed by s 65A, which renders the two provisions irreconcilable.

ii. The extrinsic material confirms the plaintiff's construction

60. Section 65A was intended to "build on reforms to immigration detention arrangements"[33] and "improve the speed and transparency of protection visa decision making".[34] During the second reading of the bill, the responsible Minister explained:[35]

> *On 17 June [2005], the Prime Minister made a commitment that all primary protection visa applications will be decided within three months of the receipt of the application. ... Schedule 1 to this bill provides a 90-day time limit for decision on all primary protection visa applications and any subsequent RRT review of such decisions. This implements the commitment made by the Prime Minister that primary decisions be made within three months.*

61. It could not have been suggested, consistently with the Prime Minister's commitment, that the Minister retained power to delay grants from one financial year to the next. The nature of the commitment, and the emphasis on reforms to immigration detention arrangements, precludes the ongoing existence of such a power. The effect of the commitment on liberty was recognised by Mr Tony Burke, member for Watson, during debate:[36]

> *There is a good reason why we want the 90-day rule that is in this bill, and it is simple: mandatory detention should not mean indefinite detention. Mandatory detention should not mean that people can go on in detention for the rest of their lives.*

62. Prior to the enactment of s 65A, the Minister was able to control the number of protection visas granted in each financial year by the Minister's capacity to control the allocation of resources within the Department. Once a notional 'target' had been set for protection visa grants, it was straightforward to estimate the number of applications that would need to be processed in each week of the financial year to achieve that 'target', and to determine the number of delegates necessary to process that many applications. If resources were allocated accordingly, the number of protection visas granted in that financial year would approximate the 'target' that had been set.

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33 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 121 (John Cobb, Minister for Citizenship and Multicultural Affairs).

34 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 124 (John Cobb, Minister for Citizenship and Multicultural Affairs).

35 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 121 (John Cobb, Minister for Citizenship and Multicultural Affairs).

36 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 127 (Tony Burke).

63. That approach is now partially foreclosed by the timeframe in s 65A. It is not completely foreclosed by s 65A because the Minister retains the capacity to make decisions under s 65 within a different timeframe in circumstances prescribed by the regulations (s 65A(1)(d)). The plaintiff does not come within the circumstances presently prescribed by reg 2.06AA.

64. Section 65A effected an implied partial repeal of Subdiv AH. In the absence of regulations modifying the timeframe in s 65A for the plaintiff, the Minister must comply with it.

2. The determination was not made in accordance with s 85

65. Section 86, which prohibits the grant of visas, does not operate unless there has been "a determination of the maximum number of visas of a class or classes that may be granted in a financial year". The text of s 86, and the structure of Subdiv AH, require the conclusion that the "determination" to which s 86(a) refers is a determination provided for by s 85.

66. Section 85 does not authorise the Minister, without more, to determine the maximum number of visas for a specified class in a specified financial year. In particular, s 85 does not authorise the Minister to make a freestanding administrative determination of a maximum number of visas having its own legal force and effect. Nor does s 85 authorise the Minister to make such a determination by legislative instrument. Section 85 provides that the Minister "may, by notice in the Gazette, determine the maximum number".

67. A determination under s 85 is made, and can only be made, "by notice in the Gazette".

68. Notably, s 85 does not provide for two steps, being a determination by the Minister in the first instance, and the publication of that determination in the Gazette.[37] For a provision drafted in those terms, the publication requirement might be satisfied by registration of a legislative instrument: s 56(1) *Legislative Instruments Act 2003* (Cth). Section 85, however, is not drafted in those terms. Section 85 provides that it is "by notice in the Gazette" that the power conferred by the section is to be exercised.

69. There having been no "notice in the Gazette", there was no determination under s 85.

70. The preamble to the explanatory memorandum described the power in similar terms:[38]

> *Part 2 of the Bill establishes a scheme which will provide the Minister with a flexible power to publish in the Gazette an upper limit or cap on the number of visas in a specified class or classes that may be granted in a particular financial year.*

71. The power conferred by s 85 is a "power to publish in the Gazette an upper limit or cap", not to make a determination having its own force and effect which should subsequently be published in the Gazette. That was made explicit later in the explanatory memorandum:[39]

> *The cap is set by publishing a notice in the Gazette specifying the maximum number of visas in a nominated class, or nominated classes, that can be granted in a particular financial year.*

3. The determination was made for an improper purpose

72. For the reasons given in the balance of these submissions, the Minister made the March 2014 determination for an improper purpose.

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37 By contrast, see ss 5(1A), 45B(3)-(4), 255(2)-(3) of the Migration Act and reg 3.10(5).

38 Explanatory Memorandum, Migration Legislation Amendment Bill 1992 (Cth) at 3.

39 Explanatory Memorandum, Migration Legislation Amendment Bill 1992 (Cth) at 6 [9].

B THE MINISTER HAS ENGAGED IN A PATTERN OR PRACTICE OF EXERCISING POWER UNDER THE MIGRATION ACT FOR AN IMPROPER PURPOSE

73. The only protection visa presently recognised by law is that provided for by s 36 of the Migration Act, item 1401 of Sch 1 and item 866 of Sch 2 of the Migration Regulations: the Protection (Class XA subclass 866) visa. It is a permanent visa.[40] The plaintiff, an unauthorised maritime arrival and refugee, has made a valid application for that visa.

74. The Minister has a duty to grant a protection visa to any applicant who satisfies the criteria for that visa, and does not have authority to refuse to grant a protection visa to an unauthorised maritime arrival by reason of that status alone.[41] Since at least November 2013, the Minister has publicly and repeatedly affirmed, in absolute terms, that the Minister will never grant permanent protection visas to unauthorised maritime arrivals. The Department has advised the Minister that, without legislative change, this objective "likely" cannot be met "in the medium to long term".[42]

75. In order to achieve the Minister's policy objective "in the immediate short term",[43] the Minister has sought "to delay being forced to grant"[44] protection visas to unauthorised maritime arrivals until such time as the Minister may be able to secure the legislative change necessary to empower the Minister lawfully to carry out his policy objective.

76. The plaintiff has been in immigration detention for almost two years. By the purported exercise of power under the Migration Act, the Minister has prolonged the detention of the plaintiff and others like him to achieve the Minister's policy objective of denying to those persons the protection visas for which they have applied and to which they might otherwise be entitled. In particular, the Minister has prolonged the plaintiff's detention until at least the end of the financial year, and has stated in effect that the plaintiff will "remain in detention ... until temporary protection visas are restored".[45]

77. For three reasons, as explained in these submissions, the steps taken by the Minister towards the making of the December 2013 determination and the March 2014 Determination were steps taken for an improper purpose:

    a. the Minister seeks to deny protection visas to unauthorised maritime arrivals;

    b. the Minister seeks to prolong the plaintiff's detention; and

    c. those purposes are inconsistent with the Migration Act.

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40 Clause 866.511 of Sch 2 of the Migration Regulations.

41 Section 65(1) of the Migration Act. By reason of ss 47(1)-(2) and 65A(1) of the Migration Act, the Minister must generally consider and determine applications for protection visas within 90 days.

42 SC [50] at 402 [2], [4], being SM2014/00106 at 3 [2], [4].

43 SC [50] at 402 [2], being SM2014/00106 at 3 [2].

44 SC [50] at 400 [2], 402 [3], being SM2014/00106 at 1 [2], 3 [3].

45 SC [41] at 339.6. If the Minister's March 2014 determination is valid, the Minister has disabled himself from granting a protection visa to the plaintiff before 1 July 2014. As there is no evidence that the Minister has decided to consider exercising power under s 195A to grant a different visa to the plaintiff, the plaintiff is entitled to have the matter determined on the basis that his present detention is indefinite: *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38 at [4] (Allsop CJ and Katzmann J), [131] (Buchanan J).

1. The Minister seeks to deny protection visas to unauthorised maritime arrivals

78. Between November 2013 and April 2014, the Minister made at least 25 public statements to the effect that the Minister intends to deny permanent protection visas to unauthorised maritime arrivals.[46] On 3 December 2013, the Prime Minister stated the intention of the Executive Government:[47]

> *I want to make it absolutely crystal clear today that this Government will never allow people who come here illegally by boat to gain permanent residency in Australia …*

79. Strategies "to reduce the likelihood that we will be required to grant a permanent Protection visa" were put in place as early as 8 October 2013,[48] the first such strategy being the making of the TPV Regulation.[49] It was recognised even at that stage that "[i]f the TPV option is unavailable when [all legal criteria prescribed for a permanent protection visa are satisfied], grant of a PPV may be unavoidable".[50] As shown later in these submissions, the objective of avoiding that outcome has been carried by the Minister through to April 2014.

80. The statements made by the Minister and the Prime Minister are unequivocal and have been repeated over a period of at least five months. There can be no doubt that the Minister has sought and continues to seek to give effect to that policy objective.

2. The Minister seeks to prolong the plaintiff's detention

81. On 4 December 2013, two days after making the December 2013 determination, the Minister stated that the December 2013 determination meant that "no further permanent protection visas can be granted to any onshore applicants this financial year, thereby denying permanent residence to any of the 33 000 people onshore in Australia who arrived illegally by boat".[51]

82. The Minister then announced the intended consequence of that action for detainees:[52]

> *Illegal boat arrivals … will either remain in detention or on bridging visas … This situation will remain until temporary protection visas are restored.*

83. The plaintiff is apparently one of the arrivals who will "remain in detention", and remain there until "temporary protection visas are restored". That event is attended by so much uncertainty that the plaintiff's detention should presently be regarded as indefinite. The Minister had no authority to seek to prolong the plaintiff's detention in that way. The position is the same under the March 2014 determination.

84. The Minister's policy objective of denying permanent protection visas to unauthorised maritime arrivals is causing the continued prolongation of the plaintiff's detention.

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46 FASOC at [21]-[25], [32]-[33], [42]-[43], [45]-[51], admitted in defence at [8]-[12], [19]-[20], [29]-[30], [32]-[38].

47 SC [39] at 306.5; FASOC at [22(a)], admitted in defence at [9].

48 SC [35] at 264 [6], being SM2013/03183 at 3 [6].

49 SC [35] at 264 [7], being SM2013/03183 at 3 [7].

50 SC [35] at 266 [19], being SM2013/03183 at 5 [19].

51 SC [41] at 339.5; FASOC at [23(c)], admitted in defence at [10].

52 SC [41] at 339.6; FASOC at [23(d)], admitted in defence at [10].

3. The Minister's purpose was inconsistent with the Migration Act

85. Section 47 imposes a continuing duty on the Minister to consider the plaintiff's application for a protection visa. Section 65(1) imposes a duty on the Minister, having considered the plaintiff's application, to grant or refuse to grant a protection visa. The "condition precedent to the discharge of that obligation"[53] is the Minister's satisfaction or non-satisfaction of the matters in s 65(1)(a).

86. The state of satisfaction to be reached by the Minister about the matters in s 65(1)(a) must be one that is formed about those matters as they relate to the plaintiff's application for a protection visa, namely, a Protection (Class XA subclass 866) visa.

10 87. The Minister has no authority to make a decision to grant or refuse to grant a protection visa in respect of the plaintiff's application other than pursuant to s 65(1) of the Migration Act. It follows that the Minister has no authority to seek to achieve a particular outcome under s 65(1) by the exercise of powers that were not conferred for that purpose.

88. The power conferred by s 85 was not conferred for the purpose of authorising the Minister to seek to deny protection visas to persons determined to be refugees. The power conferred by s 85 is a power to defer, not deny, the grant of visas. But the Minister has no intention to grant a permanent protection visa to the plaintiff in any financial year. Meanwhile, the plaintiff remains in detention until he is "granted a visa" (s 196(1)(c)) or his application for a visa "has been finally determined" (s 198(2)(c)(ii)), neither of which can
20 occur while the Minister pursues his stated policy objective and is unable to change the law.

89. The Minister admits that in making the December 2013 determination he had the purpose of denying permanent protection visas to the plaintiff and others like him. For the reasons given in these submissions, that purpose continued to be held by the Minister after the December 2013 determination. Similarly, the Minister's purpose in making the March 2014 determination was to deny permanent protection visas to the plaintiff and others like him, and not merely to defer the grant of a permanent protection visa to the plaintiff until the next financial year.

4. The Minister exercised power for an improper purpose

(a) <u>The December 2013 determination</u>

30 90. On 2 December 2013, the TPV Regulation was disallowed by the Senate.[54] The Department identified the Minister's "key priority" at that time as being "to ensure no further grants of Subclass 866 (Protection) visa, 'permanent protection visa' (PPV) to illegal maritime arrivals (IMAs)".[55] "To achieve" that "key priority", the Minister signed, on the day of the disallowance, "an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme", being the December 2013 determination.[56]

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53 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

54 SC [17].

55 SC [40] at 314 [2], being SM2013-03752 at 2 [2].

56 SC [40] at 314 [2]-[3], being SM2013-03752 at 2 [2]-[3].

91. The Minister admits[57] that, in making the December 2013 determination, the Minister's purpose was to:

a. deny Protection (Class XA subclass 866) visas to unauthorised maritime arrivals who had made valid applications for that visa, including the plaintiff, in circumstances where the Minister had not formed a state of satisfaction about the matters in s 65(1)(a) of the Migration Act in respect of those applications; and/or

b. avoid forming a state of satisfaction about the matters in s 65(1)(a) of the Migration Act in respect of valid applications for Protection (Class XA subclass 866) visas by unauthorised maritime arrivals, including the plaintiff, unless and until such time as the law may be amended to permit the grant to those persons of visas other than Protection (Class XA subclass 866) visas.

92. By reason of the effect of administrative delay on the plaintiff's liberty, it must also be inferred that the Minister intended to prolong the plaintiff's detention for the purpose of achieving the Minister's objectives stated above.

(b) <u>The Minister's purpose continued after the December 2013 determination</u>

93. The Minister admits that, on 5 December 2013, the Minister agreed[58] or decided[59] to cause the Migration Regulations to be amended to ensure that any unauthorised arrival who had applied for a Protection (Class XA subclass 866) visa and had an ongoing application would not meet the time of decision criteria for the grant of that visa. That objective necessarily encompassed the purpose of denying permanent protection visas to unauthorised maritime arrivals.

94. A submission to the Minister identified the "intent" of the UMA Regulation as being "to support the Government to grant Permanent visas to non-IMAs, even while continuing to deny the grant of PPVs to IMAs".[60] In a letter to the Prime Minister dated 5 December 2013, the Minister wrote about the "objective of not granting Protection visas to illegal maritime arrivals",[61] confirming that the proposed UMA Regulation "would ensure that no further Protection visas will be granted to UMAs and UAAs".[62]

95. The explanatory memorandum for the UMA Regulation, the text of which was approved by the Minister,[63] described the intention behind it as follows:

> *It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa ('Protection visa') in Australia. Given the disallowance of the [TPV Regulation], Protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas. As such, to implement the Government's policy intention, the purpose of the [UMA Regulation] is to amend the [Migration Regulations] to introduce a new visa criterion so that Protection visa can only be granted to a person who [satisfies one of the three criteria pertaining to authorised arrival in Australia].*[64]

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57 SC [19]; FASOC at [27], admitted in defence at [14].

58 FASOC at [28] admitted in defence at [15].

59 SC [21].

60 SC [40] at 315 [11], being SM2013/03752 at 3 [11].

61 SC [40] at 318, being SM2013/03752 attachment A.

62 SC [40] at 318, being SM2013/03752 attachment A.

63 SC [40] at 313 [4], being SM2013/03752 at 1 [4].

64 Explanatory Memorandum, UMA Regulation at 1.

96. For those reasons, the Minister continued to seek to give effect to the purpose alleged by the plaintiff throughout December 2013.

(c) The March 2014 determination

97. The Minister made the March 2014 determination for the same purpose as the December 2013 determination: to seek to deny permanent protection visas to unauthorised maritime arrivals. The March 2014 determination was made at a time when the Senate was considering a motion to disallow the UMA Regulation, and three days before this Court was due to hear the plaintiff's challenge to the validity of the UMA Regulation.

98. The purpose of the March 2014 determination was identified at the time of the December 2013 determination. A submission to the Minister explained that, should he revoke the December 2013 determination after the UMA Regulation came into effect, "[v]isas could then be granted to non-IMAs who engage Australia's protection obligations until the government's target of 2750 onshore grants was met".[65] It is plain that "the government's target of 2750 onshore grants" was to be made available only to lawful arrivals and was to be denied to unauthorised maritime arrivals.

99. The March 2014 determination was subsequently foreshadowed in the following terms:[66]

> *Following the commencement of [the UMA Regulation] you will receive a submission seeking your agreement to revoke the current 1650 cap on the onshore component of the Humanitarian programme to replace the cap at the original planning level of 2750. The combination of these two actions will allow grants of PPVs to non-IMAs to recommence.*

100. The last sentence reveals that the March 2014 determination was always intended to be one of many cumulative steps towards the overarching policy objective of denying permanent protection visas to unauthorised maritime arrivals while continuing to grant such visas to lawful arrivals. The importance to that objective of not increasing the cap until after the UMA Regulation had commenced was noted by the Department: "Non-IMA applicants who are grant ready but affected by the 'cap' will be able to have their visas granted should the cap be increased once the new Regulation is made."[67]

101. The same points were reiterated by the Department on 18 December 2013 in a submission in relation to the revocation of the December 2013 determination:

> *The Humanitarian Programme has been set at 13750 visas in the 2013-14 programme year; of this 2750 places were allocated to the Onshore Protection programme. ... Should you wish to do so, with the new Regulation in effect, it would be possible to resume granting PPVs to authorised arrivals.*

102. On 15 January 2014, the Department again identified the Minister's "key concern" as being "to ensure that no-one who arrived illegally in Australia by air or sea (hereafter referred to as IMAs) is granted a permanent protection visa (PPV)".[68]

103. The same submission described five strategies open to the Minister "to delay being forced to grant a PPV in the absence of a new temporary visa", and expressed the view that

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65 SC [40] at 315 [8], being SM2013/03752 at 3 [8].

66 SC [44] at 358 [3], being SM2013/03831 at 2 [3].

67 SC [44] at 364 [43], being SM2013/03831 at 8 [43].

68 SC [50] at 402 [1], being SM2014/00106 at 3 [1].

"[e]ach of these strategies is likely to be short lived as a consequence of decisions taken in Parliament to overturn them or in the Courts to invalidate them".[69]

104. The submission attached a flowchart illustrating likely timeframes, entitled "Possible TPV disallowance Responses; 'Best Case' Scenario – High Court may do the unexpected".[70] The flowchart sets out a series of possible actions and responses spanning the period from 1 January 2014 to 1 July 2014. The actions include the making of the UMA Regulation and the March 2014 determination, and the possible "invalidation" of those actions by this Court in February/March 2014 and March/April 2014 respectively, noting on each occasion that "PPV grant may be required to IMAs". The reference to the directions hearing held in this proceeding on 23 January 2014 makes plain that the flowchart was intended to illustrate the ways in which the challenges made by the plaintiff in this proceeding might be outflanked by further action on the part of the Minister.

105. One of the five strategies identified in the submission – "[r]e-capping the program if/when the 14 December Regulation is disallowed"[71] – was the making of the March 2014 determination. The Department noted that "[t]his would again prevent PPV grants to both IMAs and non-IMAs" and stated:[72]

> *Our advice is that the onshore programme allocation of 2750 may be close to being met by that time (subject to clearances being received from the external agency). If not met, consideration could be given to transferring the remaining places to next programme year.*

106. If the programme allocation of 2750 had not been met by the time of the March 2014 determination, there was only one reason why the Minister would consider "transferring the remaining places to next programme year": to deny those places to unauthorised maritime arrivals who might otherwise be entitled to them in the current financial year.

107. The Department also noted that upon the making of the March 2014 determination a challenge in this Court could be "expected to be lodged almost immediately",[73] and concluded with the observation that "[a]ny decision by the High Court that use of the cap was invalid would then be some months away".[74]

108. The Minister's purpose in making the March 2014 determination was confirmed by the explanatory statement that accompanied it:[75]

> *to support the Government's determination that no more than 2750 permanent Protection visas be granted to applicants who lawfully applied onshore under the onshore component of the 2013/2014 Humanitarian Programme.*

109. On 6 March 2014, two days after making the March 2014 determination, the Minister again reaffirmed that "[the] Government ... will take every step necessary to ensure that people who arrived illegally by boat are not rewarded with permanent visas".[76]

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69 SC [50] at 402 [3]-[4], being SM2014/00106 at 3 [3]-[4].

70 SC [50] at 413, being SM2014/00106 attachment A.

71 SC [50] at 402 [3(c)], being SM2014/00106 at 3 [3(c)].

72 SC [50] at 405 [12(a)], being SM2014/00106 at 6 [12(a)].

73 SC [50] at 405 [12(a)], being SM2014/00106 at 6 [12(a)].

74 SC [50] at 405 [12(c)], being SM2014/00106 at 6 [12(c)].

75 SC [27] at 144 [2], being Explanatory Statement, March 2014 determination at [2].

76 SC [54] at 465.8.

C THE APPROPRIATE RELIEF

110. The plaintiff claims mandamus requiring the Minister forthwith to consider and determine the plaintiff's application for a protection visa; an injunction restraining the Minister from taking any step towards the exercise of power for the purpose of denying a Protection (Class XA subclass 866) visa to the plaintiff unless and until the Minister has considered the plaintiff's application for a visa and granted or refused to grant the visa under s 65; and declaratory relief.

1. The plaintiff is entitled to mandamus

111. For the reasons given in these submissions, the March 2014 determination was invalid, and the Minister remains under the duty imposed by ss 47(1)-(2), 65(1) and 65A(1) to consider and determine the plaintiff's application for a Protection (Class XA subclass 866) visa.

112. Justice Lindgren has held that the duty imposed by s 65A(1) may be enforced by mandamus.[77] Compliance with s 65A(1) also has other consequences. Sections 65(1), 65A(1), 412(1)(b), 414A(1), 430A(1)-(2), 430D, 477(1) and 486A(1) of the Migration Act prescribe an interconnected scheme for determining valid applications for protection visas within the timeframes fixed by the Parliament.

113. But irrespective of the precise nature of the duty imposed by s 65A(1), the Minister remains under the enforceable duty imposed by ss 47(1)-(2) and 65(1) to consider and determine the plaintiff's application. There is no evidence in the special case to support the refusal of mandamus on discretionary grounds. Accordingly, there should be an order absolute in the first instance for a writ of mandamus in the terms sought by the plaintiff.

2. The plaintiff is entitled to an injunction

114. The plaintiff has a statutory right to be granted the visa for which he applied upon the Minister being satisfied "of all of the s 65(1) factors" as they stood at the time he made his application,[78] subject to lawful amendments to the Migration Act or the Migration Regulations which provide to the contrary.

115. The Minister continues to reaffirm his policy objective of denying to persons such as the plaintiff the protection visas for which those persons have applied. In those circumstances, it is appropriate that the Minister be restrained in the terms sought by the plaintiff.

3. The plaintiff is entitled to declaratory relief

116. In addition or in the alternative to the foregoing relief, the plaintiff is entitled to declarations that the Minister's March 2014 determination and legislative instrument IMMI 14/026 are invalid.

4. The plaintiff is entitled to costs

117. If the special case is resolved in a manner according to which the first question is answered in the affirmative or the plaintiff is to obtain any form of the relief sought in the further amended writ of summons and further amended statement of claim, the defendants should be ordered to pay the plaintiff's costs of the proceeding.

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77 *SZLDG v Minister for Immigration and Citizenship* (2008) 166 FCR 230 at [2]-[7] (Lindgren J).

78 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 [27]-[28] (McHugh J).

118. If, however, the plaintiff were to be wholly unsuccessful in the special case, it is then necessary to consider:

a. the extent to which, if at all, the plaintiff should be ordered to pay the defendants' costs of the special case; and

b. whether the plaintiff is nonetheless entitled to costs for earlier stages of the proceeding in this Court.

119. The issues agitated on the special case – the purported validity of the cap (and the lawfulness of other conduct by the Minister) – affected all persons who have valid applications for protection visas, or at least all such persons who are refugees. Those who seek to make valid applications for protection visas are also affected. The litigation is designed not solely for the benefit of the plaintiff but of all persons affected. It falls into the category of cases that are of "very general importance", where the defendants should not ask for their costs.[79]

120. In relation to the earlier stages of the present proceeding, the matter originally involved a challenge by the plaintiff to the validity of the December 2013 determination. That determination was clearly invalid (involving as it did the setting of the cap at a level less than the number of visas already granted – a proposition later accepted by the Department[80]) and was ultimately revoked by the Minister following the commencement of this proceeding. The plaintiff should have his costs of the proceeding up to the time of the revocation of the December 2013 determination.

121. The Minister had also caused to be made the UMA Regulation notwithstanding that it was obviously substantially identical to the effect of aspects of an earlier regulation (the TPV Regulation) that had been recently disallowed. The plaintiff challenged the validity of the UMA Regulation to prevent the Minister from purporting to make a decision under s 65(1) based on that regulation in respect of the plaintiff's visa application. The Minister undertook not to do so pending this proceeding. The plaintiff was therefore wholly successful in achieving his objective of not having a decision made under s 65(1) based on the UMA Regulation, which was in any event obviously invalid.

122. Moreover, as the evidence in the special case shows, the UMA Regulation was part of a broader strategy by the Minister to delay persons in the position of the plaintiff from obtaining a protection visa until the law can be changed. In the circumstances, the plaintiff should have all his costs up to and including the aborted hearing to be held in this Court on 7 March 2014, which related to the validity of the UMA Regulations. That issue was not pursued in the present special case only because the plaintiff had already been wholly successful in preventing the Minister from relying upon the UMA Regulation.

VI. LEGISLATION

123. The applicable statutory provisions, regulations and instruments as they existed at the relevant times are set out verbatim in the annexure, along with copies of later instruments disallowing or revoking those provisions where those provisions are not still in force. Instruments included in the annexure to the special case have not been reproduced here.

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79 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [77].

80 SC [53] at 459 [4], being SM2014/00554 at 2 [4]; cf FASOC at [76]-[79].

VII. ORDERS SOUGHT

124. The questions on the special case should be answered as stated in paragraph 7 above.

VIII. ESTIMATE OF ORAL ARGUMENT

125. The plaintiff estimates that about two hours will be required for oral argument.

Dated: 22 April 2014

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