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

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150/2013

BETWEEN:

PLAINTIFF M150 OF 2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

DEFENDANTS' ANNOTATED WRITTEN SUBMISSIONS

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PART I: CERTIFICATION

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

PART II: ISSUES

2. These matters concern the validity of a determination made by the Minister for Immigration and Border Protection (**Minister**) on 4 March 2014 pursuant to s 85 of the *Migration Act 1958* (**Migration Act**) that the maximum number of Protection (Class XA) visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is 2,773 (**the March 2014 determination**).

3. In respect of matter number M150/2013, the sole issue is whether, as a matter of construction, the power of the Minister pursuant to s 85 extends to protection visas.

4. That issue is also raised in matter number S297/2013. However, that matter raises two further issues: *first*, whether, pursuant to s 56(1) of the *Legislative Instruments Act 2003* (Cth) (**the LI Act**), registration of the instrument by which the Minister made the March 2014 determination satisfied the requirement of s 85 of the Migration Act that the determination be "by notice in the *Gazette*"; and *secondly*, whether the March 2014 determination was made for an improper purpose.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. The defendants consider that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED FACTS

6. The facts in each matter are to be drawn from the special cases which have been filed.[1] In matter number M150/2013, an order in the form referred to in M150 SC [19] was made by French CJ by consent on 22 April 2014.

PART V: LEGISLATION

7. In addition to the provisions identified in the plaintiff's outline of submissions filed in M150/2013 on 17 April 2014 (**plaintiff M150's submission**) at [70] and the plaintiff's submissions filed in S297/2013 on 22 April 2014 (**plaintiff S297's submissions**) at [123], the provisions set out in the annexure are relevant.

PART VI: ARGUMENT

8. In summary, the defendants submit that:

   (a) s 85 of the Migration Act, properly construed, extends to protection visas;

   (b) the enactment of s 65A of the Migration Act did not impliedly repeal s 85 so far as it applied to protection visas;

   (c) pursuant to s 56(1) of the LI Act, registration of the instrument recording the March 2014 determination satisfied the requirement in s 85 of the Migration Act that the determination be by notice in the *Gazette*; and

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[1] Special case in matter number M150/2013 dated 16 April 2014 and filed 22 April 2014 (**M150 SC**); special case in matter number S297/2013 dated and filed 22 April 2014 (**S297 SC**).

(d) the March 2014 determination was not made for an improper purpose.

(a) APPLICATION OF s 85 TO PROTECTION VISAS: CONSTRUCTION

9. On its terms, s 85 applies to all classes of visa, including protection visas. The plaintiffs submit that references to the "class" or "classes" of visa in s 85 should be construed as not including protection visas. That submission should be rejected.

(i) Ordinary and natural meaning of the words of s 85

10. Contrary to plaintiff M150's submissions,[2] the starting point is the ordinary and natural meaning of the words of s 85.[3] Plainly, those words do not except protection visas.

11. Section 85 allows the Minister to determine the maximum number of visas of a specified "class" that may be granted in a year. The use in that section of the word "class" directs attention to s 31, which is headed "Classes of visa". Section 31(1) provides that there are to be prescribed classes of visa, and s 31(2) then states that "As well as the prescribed classes, there are the classes provided for" by various identified sections, including s 36. That is, the Migration Act expressly provides that a protection visa is one of the "classes" of visa under the Act. That is not surprising, because otherwise core provisions in the Migration Act (concerning, for example, applications for visas) would not apply in relation to protection visas (see, eg ss 41(1), 45 and 46(1)(a)).

12. Given the above, plaintiff M150's submission that the phrase "visas of a specified class" in s 85 does not extend to protection visas could be accepted only if the Court gives the word "class" a different meaning in s 85 than it carries everywhere else in the Migration Act. The plaintiffs cannot succeed by "adjusting the meaning" of the words "class" and "classes" in s 85, as the "context" of s 85 does not provide any warrant for redrafting its terms.[4] Although they have not confronted or acknowledged it, the reality is that the plaintiffs' submissions require the Court to read the words "other than protection visas" into s 85.

13. Reading words into a statutory provision is not to be done lightly. The circumstances in which this is permitted have been described in various ways: the phrases "clear necessity",[5] "clear reason"[6] and "irresistible conviction"[7] have all been used in formulating the test. The stringency of these expressions reflects the separation of legislative and judicial functions mandated by the Constitution.[8]

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2 Plaintiff M150's submissions at [21] state that the starting point is s 65A.

3 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs J, 320–1 per Mason and Wilson JJ; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398 per *curiam*; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ; *Australian Education Union v Department of Education & Children's Services* (2012) 248 CLR 1 at [26] per French CJ, Hayne, Kiefel and Bell JJ.

4 Plaintiff M150's submissions at [14]–[16], [51].

5 *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Western Australia v The Commonwealth (Territory Senators Case (No 1))* (1975) 134 CLR 201 at 251 per Stephen J.

6 *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445 per Lord Loreburn.

7 *Weedon v Davidson* (1907) 4 CLR 895 at 905 per Barton J.

8 *Taylor v The Owners - Strata Plan No 11564* (2014) 88 ALJR 473 at [40] per French CJ, Crennan and Bell JJ.

14. In *Taylor v The Owners - Strata Plan No 11564*,[9] a majority of this Court said:

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

15. The majority approved[10] the application in the Court of Appeal below of the conditions for reading in words stated in *Wentworth Securities Ltd v Jones*,[11] as reformulated in *Inco Europe Ltd v First Choice Distribution (a firm)*.[12] Those conditions are that the court is abundantly sure of three matters: (a) the intended purpose of the statute or provision in question; (b) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (c) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

16. For the following reasons, there is no basis to read into s 85 the words "other than protection visas".

(ii) Express exclusion of protection visas in s 39 and other provisions

17. The Court cannot be "abundantly sure" of any of the three matters identified above. In particular, it cannot be sure that s 85 of the Migration Act was not intended to apply to protection visas, and that the failure to exclude protection visas from the operation of that section was inadvertent. The proposition that the possible impact of s 85 on the grant of protection visas was simply overlooked is inherently incredible. It is also inconsistent with the parliamentary record.[13]

18. When Parliament wishes to exclude protection visas from the operation of particular provisions, it does so expressly.[14] In that respect, s 39(1) is particularly important, given its similarity to s 85. Section 39(1) provides that a prescribed criterion for visas of a class other than protection visas may be that the grant of the visa would not cause the number of visas of that class granted in a financial year to exceed the number fixed by the Minister by legislative instrument. Section 39(2) provides that where such a criterion prevents the grant of any more visas of a particular class in a financial year, outstanding applications are "taken not to have been made".

19. Section 39 was introduced about a year before s 85 (although both provisions have since been renumbered).[15] The provisions operate differently. If a regulation prescribes a criterion of the kind specified in s 39(1) and the cap specified in a determination made pursuant to that regulation is exhausted, all outstanding applications for visas of that class are "taken not to have been made". Accordingly, no decision, or any other step,

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9 (2014) 88 ALJR 473 at [38] per French CJ, Crennan and Bell JJ.

10 (2014) 88 ALJR 473 at [39] per French CJ, Crennan and Bell JJ.

11 [1980] AC 74 at 105 per Lord Diplock.

12 [2000] 1 WLR 586 at 592 per Lord Nicholls; [2000] 2 All ER 109 at 115.

13 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1992, pp 2038, 2042–2043, 2045, 2054–2055.

14 See, eg, in addition to s 39(1) (discussed below), ss 40(3A)(a), 41(2)(a), 50, 72(2), 161(5), (6), 164D, 195(2).

15 Section 39 was introduced as s 23(3A) and (3B) by the *Migration Amendment Act (No 2) 1991* (Cth), s 4, commencing 15 January 1992. Section 85 was introduced as s 28A by the *Migration Laws Amendment Act 1992* (Cth), s 7, commencing 16 December 1992.

is thereafter required in respect of those applications. Any applicants for such visas no longer have a pending application for a visa. That may have a variety of consequences for the operation of other provisions of the Migration Act. Those consequences include engagement of the removal provision in s 198(2) and 198(6). That is one obvious reason why protection visas may have been excluded from the scope of s 39(1).

20. In contrast, while s 86 provides that upon exhaustion of a cap imposed under s 85 no further visas can be granted, the applications remain extant: all other steps in respect of the applications may continue to be taken pursuant to s 88, including processing and refusal and, upon the commencement of the next financial year, the applications must be dealt with as normal in accordance with the Migration Act. As the visa applications remain undetermined, the exhaustion of a cap imposed under s 85 would not have any effect on the engagement of the removal obligation under s 198.

21. Given the similarities between ss 39(1) and 85,[16] it is most significant that s 39(1) expressly excludes protection visas but s 85 does not. Had it been intended that s 85 be subject to the same exclusion, it is to be expected that that would have been stated expressly. The absence of such an exclusion from s 85, given its presence in s 39(1), points strongly to the conclusion that s 85 is not subject to such an exclusion.

(iii) Harmonious operation of ss 65, 65A, 85 and 86

22. Much of the plaintiffs' argument rests upon the supposed disharmony that the application of s 85 to protection visas would create with s 65A. While it is necessary, if the language permits, to give the provisions of the Migration Act a harmonious operation,[17] the application of s 85 to protection visas does not produce disharmony.

23. In contending otherwise, the plaintiff's submissions tend to obscure that s 65A must be read together with s 65. Section 65(1) is a general provision, applicable to all visa classes. It imposes a duty upon the Minister, after considering a valid application for a visa, to grant the visa if satisfied of various specified matters and otherwise to refuse to grant the visa. It thus imposes a duty upon the Minister to make a decision whether to grant or refuse to grant the visa.[18]

24. Plainly, where a determination under s 85 applies, even if the Minister has considered a valid application for a visa and is satisfied of the matters in s 65(1), the duty to grant the visa imposed by s 65(1) must give way to the prohibition in s 86. That is, s 86 prohibits the Minister from making the decision otherwise required by s 65(1). Section 86 is thus the leading provision and s 65(1) is the subordinate provision.[19]

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[16] Both were directed to the ability to impose caps on the numbers of visas granted, consistent with planned figures for the migration program: see the Explanatory Memorandum to the Migration Amendment Bill (No 2) 1991 (Cth), p 2 [4]; second reading speech to the Migration Amendment Bill (No 2) 1991 (Cth), Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 1991, pp 1928–1930; second reading speech to the Migration Laws Amendment Bill 1992 (Cth), Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, p 185.

[17] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ; *Certain Lloyd's Underwriters Subscribing to Contract NO IH00AAQS v Cross* (2012) 248 CLR 378 at [24] per French CJ and Hayne J, [88] per Kiefel J.

[18] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [119] per Gummow J; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

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

25. This is the context in which s 65A must be considered. Section 65A provides that if an application for a protection visa was validly made or is remitted to the Minister "then the Minister must make a decision under section 65 within" a specified time. Importantly, as both plaintiffs accept,[20] s 65A refers to and assumes the existence of the duty to make a decision whether to grant or refuse to grant the visa imposed by s 65. Section 65A does not create such a duty. It merely specifies the time within which that duty must be fulfilled. Indeed, that time may be subject to adjustment by regulations, pursuant to s 65A(1)(d).

26. That s 65A is concerned only with the time within which the duty imposed by s 65 must be fulfilled, not the creation of that duty, is clear from the text of s 65A(1). It is also evidenced by the fact that s 65A(2) provides that failure to comply with the time limit imposed by s 65A(1) "does not affect the validity of a decision made under section 65". And it is apparent from the extrinsic material, which shows that the mischief to which s 65A was directed was not some perceived failure in s 65 to impose an obligation to determine protection visa applications, but merely with the time within which those applications were determined.[21]

27. Accordingly, the reference in s 65A(1) to "a decision under section 65" means "the decision required to be made by section 65". Section 65A(1) is thus premised on the assumption that a decision is required to be made by s 65. Where s 65(1) does not require a decision to be made by reason of the operation of ss 85 and 86, s 65A is not contravened. Just as compliance with s 86 does not cause the Minister to breach s 65(1), so too it does not cause the Minister to breach s 65A(1). When s 65A is read with s 65, the appearance of inconstancy between s 65A and s 86 disappears.[22]

28. The above conclusion is confirmed by s 89. Its effect is that, where the Minister complies with the prohibition in s 86 and therefore does not make a decision that would otherwise be required by s 65(1), that "does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa". The plaintiff's argument that there is "actual contrariety"[23] between s 65A and ss 85 and 86 depends upon treating the Minister's failure to make a decision as a result of ss 85 and 86 as if it causes a "failure to make a decision" that is required by ss 65 and 65A. But the sole purpose of s 89 is to deny the legitimacy of reasoning of that kind. By enacting s 89, Parliament has expressly addressed the conflict that would otherwise arise between ss 65 (and, following its enactment, s 65A) and 86. It has addressed that conflict in favour of s 86, by stating that, when s 86 applies, there is deemed to be no failure to make a decision (and therefore no non-compliance with s 65 or 65A).

29. Contrary to plaintiff M150's submissions at [45], this does not render s 65A "nugatory". There will not always be a determination under s 85 applicable to protection visas. Even where there is such a determination, before the cap it imposes is reached s 65A(1) requires the determination of applications to be made within the specified times. A provision is not "nugatory" or otiose simply because there are some circumstances in which that provision does not apply. On plaintiff M150's argument, s 85 could never operate, because whenever it applies it would render s 65 "nugatory" with respect to the class or classes of visa specified in a determination.

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[20] Plaintiff S297's submissions at [57]; plaintiff M150's submissions at [25].

[21] See, esp, Explanatory Memorandum to the Migration and Ombudsman Legislation Amendment Bill 2005 (Cth) at [6]–[8].

[22] cf plaintiff M150's submissions at [40]–[44].

[23] cf plaintiff M150's submissions at [42]. See also Plaintiff S297's submissions at [59].

30. Once the prohibition on granting a visa imposed by s 86 is lifted at the commencement of the next financial year, the obligation under s 65(1) once again applies. It is not necessary for the disposition of this matter for the Court to determine whether, during the pendency of the prohibition, the time specified in s 65A stops running. That is an open construction: the reference to "days" in s 65A(1) may be construed as "days during which the decision under s 65 was required to be made". If that is not how "days" is construed, s 65A may require an immediate grant of the visa upon the commencement of the new financial year. But that would not be surprising, as s 88 provides that processing of the visa application may continue during the pendency of the prohibition. On either construction, contrary to plaintiff M150's submissions at [46], there is no necessary breach of s 65A(1).

31. Construction of ss 65, 65A, 85 and 86 based on the words actually used in those provisions is a surer guide than the maxim *generalia specialibus non derogant*.[24] In any event, plaintiff M150's submission[25] that s 65A is the specific provision and s 85 the general is contestable: the converse proposition, that s 65A is the provision which applies generally and at all times while s 85 is the specific provision operating only in respect of particular financial years and particular visa classes as determined by the Minister, is equally open. The maxim thus has no utility in this case.

32. The fact that s 65A(1) is expressed so as to cast a duty upon the Minister is of little moment. Section 65(1) does the same, yet is plainly subject to ss 85 and 86. In neither case is it apt to say, as in plaintiff M150's submissions at [57], that what is expressed as a duty is converted into a discretion. The duty remains in all cases where the power under s 85 has not been exercised.

33. The plaintiffs' reliance[26] on the fact that s 65A was inserted into the Migration Act after s 85 is misplaced. While that is relevant to the implied repeal argument, it is irrelevant to construction. Consistently with principle, legislation is construed as always speaking, with the consequence that provisions inserted at different times should nevertheless be construed as operating harmoniously irrespective of the time of their enactment.[27] The construction advanced above reads ss 65, 85 and 86, together with the subsequently inserted s 65A, in that way. And that harmonious construction is achieved without any need for words to be read into the Migration Act.

(iv) "Prolonging" detention

34. The plaintiffs seek to justify implying words into s 85 by an assertion that the application of s 85 to protection visas would confer upon the Minister a power to "prolong" the plaintiff's detention at the unconstrained discretion of the Executive.[28] That argument should be rejected.

35. It is a feature of the Migration Act that a non-citizen in the migration zone must hold a visa to be a "lawful non-citizen" and is otherwise an "unlawful non-citizen" (ss 13–14),[29] and that unlawful non-citizens within the migration zone must be detained (s 189(1)).

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[24] See, eg, *Minister for Immigration & Multicultural Affairs v Nystrom* (2006) 228 CLR 566 at [54] per Gummow and Hayne JJ; *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120 at [51] per *curiam.*

[25] Plaintiff M150's submissions at [53] and [56].

[26] Plaintiff S297's submissions at [55]; plaintiff M150's submissions at [55].

[27] *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 per Brennan CJ, Dawson and Toohey JJ; *Commissioner of Police v Eaton* (2013) 87 ALJR 267 at 286 [97] per Gageler J.

[28] Plaintiff S297's submissions at [22]–[33]; Plaintiff M150's submissions at [63].

[29] This is subject to an immaterial exception in s 13(2).

That is so for applicants for any class of visa awaiting determination of their applications and who have not in the meantime been granted another visa. The obligation to detain non-citizens is not limited to applicants for protection visas.

36. It is misleading to submit, as plaintiff S297 does,[30] that he "was detained upon his arrival for the purpose of the Minister considering whether to exercise power under s 46A of the Migration Act" to permit him to apply for a protection visa. In fact, plaintiff S297 was detained on arrival at Christmas Island pursuant to the statutory duty imposed by s 189(3). That the Minister then decided to consider whether to exercise his power under s 46A does not change the fact that plaintiff S297 was required to be detained until he is either granted a visa or removed. The duration of his detention is fixed by the occurrence of the events specified in s 196(1), not by the Minister's purpose.

37. Any exercise of power under s 85 may cause applicants for the specified class of visa — not limited to protection visas — to be unable to obtain visas for the balance of the financial year which they would otherwise have obtained. That may have the consequence that those applicants not granted some other visa must remain in detention for longer than they otherwise would have (unless they ask to be removed from Australia pursuant to s 198(1)). But that is a necessary consequence of the operation of ss 85 and 86, together with the requirement for mandatory detention of unlawful non-citizens. No construction of s 85, motivated by the "principle of legality"[31] or otherwise, can avoid that consequence. Moreover, it is a consequence which applies generally, not just to protection visa applicants. It thus is not a basis to say that s 85 does not extend to a particular visa class, namely protection visas.

38. Contrary to plaintiff S297's submissions, there is no legitimate basis to distinguish the effect of ss 85 and 86 in this regard in the case of protection visas and other visa classes. In each case, those applicants principally affected by the determination are those whom the Minister is satisfied should be granted the visa applied for.[32] In each case, the effect is to delay the applicant's release into the community.[33] In each case, the "administrative priorities" founding a determination under s 85 have the consequence that the applicant's detention may be prolonged.[34]

39. The effect of a determination under s 85 may be harder for an applicant for a protection visa to avoid than would be the case for an applicant for another class of visa, because a protection visa applicant is unlikely to choose to be removed to the country from which he or she has fled.[35] But in some cases a protection visa applicant may ask to be removed.[36] That may occur for a variety of reasons, including that the person never had a well-founded fear of persecution, or does not now have such a fear (including as a result of changes in the situation in his or her home country since departure) . In other cases, removal to a third country may be possible. Accordingly, it cannot be

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30 Plaintiff S297's submissions at [9]. See also at [19].

31 Plaintiff S297's submissions at [27].

32 Plaintiff S297's submissions at [23].

33 Plaintiff S297's submissions at [24].

34 Plaintiff S297's submissions at [25].

35 Plaintiff S297's submissions at [26]–[32].

36 Contrary to plaintiff S297's submissions at [30], it should not be assumed that limits held to apply to compulsory removal under s 198(2) are relevant to removal under s 198(1) when a non-citizen asks to be removed. This Court has previously correctly regarded the existence of the option to request removal as significant, even for persons claiming protection: see, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 175 CLR 1 at 34 per Brennan, Deane and Dawson JJ, 72 per McHugh J; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 16 [30] per Gleeson CJ, 38 [95] per McHugh J.

assumed as a general proposition that protection visa applicants who cannot be granted a visa by reason of a determination under s 85 will never chose to bring their detention to an end by seeking removal from Australia. Nor can it properly be said that making a determination capping the number of protection visas results in detention at the Minister's "unconstrained discretion". On the contrary, any detention that occurs pending a decision on an application for any class of visa remains constrained by ss 189, 196 and 198.

(v) Inconsistency with s 36(2)

40. Plaintiff S297 submits that unless s 85 excludes protection visas, it would be inconsistent with s 36(2).[37] Plaintiff M150 faintly makes a similar submission.[38] That submission turns on two propositions: *first*, that there is a legislative policy that those who satisfy the criterion in s 36(2) are entitled to protection visas; and *secondly*, that s 85 interferes with that policy. Neither proposition should be accepted.

41. The Migration Act has never contemplated that applicants for protection visas who are refugees,[39] and who thus satisfy the criterion in s 36(2), are entitled to protection visas. Section 36(2) provides that "'A criterion — not, it should be emphasised, 'the criterion'"[40] for the grant of a protection visa is that the applicant is "a non-citizen in Australia" in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention. Plaintiff S297 is incorrect to say that s 36(2) is "the enactment by the Parliament of a statutory duty to grant protection visas in response to Australia's international obligations".[41] No such duty exists.

42. On the contrary, s 31(3) "explicitly provides"[42] that criteria for protection visas additional to those in s 36 may be prescribed. The power in s 40 to prescribe that visas of a specified class may only be granted in specified circumstances is likewise naturally read as extending to protection visas.

43. Consistently with those provisions, from the inception of the scheme for the grant of protection visas enacted by the *Migration Reform Act 1992* (Cth) (**the Reform Act**), applicants have been required to satisfy criteria in addition to the statutory criterion of being a person to whom Australia had protection obligations.[43] Those criteria were contained in sched 2 to the Migration Regulations, made contemporaneously with the coming into force of the Reform Act.[44] These contemporaneous regulations assist to

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37 Plaintiff S297's submissions at [34]–[39].

38 Plaintiff M150's submissions at [27], [49]–[50].

39 A "person to whom Australia has protection obligations under" the Refugees Convention describes no more than a person who is a refugee within the meaning of art 1: *NAGV v Minister for Immigration* (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

40 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1399 [90] per Gummow J. See also at 1434 [283] per Heydon J.

41 Plaintiff S297's submissions at [38].

42 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1439 [316] per Heydon J.

43 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1428 [265] per Heydon J, 1467–1468 [472] per Bell J.

44 The criteria included that the applicant had undergone a medical examination and in some case a chest x-ray (cll 866.223, 866.224), that the applicant satisfied specified public interest criteria (cl 866.225) and that the Minister was satisfied that the grant of the visa is in the national interest (cl 866.226). The specified public interest criteria include, for example, that the applicant has not been determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country (cl 866.225, giving effect to sched 4, PIC 4003). See also PIC 4004, concerning debts to the Commonwealth.

understand the nature of the scheme established by the Migration Act so as to better interpret the Act in light of its purpose.[45] The prescription of additional criteria for protection visas by regulations has always been an integral part of the scheme.[46]

44. It follows that "an applicant to whom the Minister is satisfied Australia has protection obligations under the Convention yet may fail to qualify for a protection visa".[47] The scheme contemplates and has always contained criteria that may require a protection visa to be refused despite the fact that the applicant for that visa is a refugee and therefore satisfied the criteria in s 36(2).[48]

45. The first premise for this limb of the plaintiffs' argument therefore fails, because there is no legislative policy that those who satisfy the criterion specified in s 36(2) are entitled to protection visas.

46. That is not to deny the relevance to the construction of the Migration Act of the recognition that it is, in part, directed to the purpose of responding to international obligations which Australia has undertaken in the Refugees Convention.[49] But statements in this Court that the Migration Act "focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system"[50] must be read in context. Those statements were made to emphasise that the Migration Act does not enact into Australian municipal law protection obligations of Contracting States found in Chs II, III and IV of the Refugees Convention. They do not suggest that the criterion stated in s 36(2) is the sole criterion for the grant of a protection visa.

47. Further, in the nearly 20 years since the commencement of the Reform Act, Parliament has made numerous amendments to the Migration Act that emphasise that s 36(2) is not intended to result in the grant of a protection visa to every person in respect of whom Australia has protection obligations under the Refugees Convention. In particular, s 46A(1) expressly renders invalid an application for a visa by an unauthorised maritime arrival in Australia who is an unlawful non-citizen. The validity of that section has been upheld by this Court.[51] Its effect, subject only to the personal and non-compellable power of the Minister, is to deny unauthorised maritime arrivals the ability to apply for any class of visa, including a protection visa. Allied with s 46A, Subdivision B of Division 8 of Part 2 provides for the taking of unauthorised maritime arrivals to regional processing countries, whether or not they are persons to whom Australia has protection obligations (see s 198AA(b)). So too, non-citizens to whom Subdivision AI of Division 3 of Part 2 applies (concerning "safe third countries") and non-citizens to whom Subdivision AK applies (concerning non-citizens with access to protection from third countries) cannot in general make valid applications for protection

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[45] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109–110 [19] per *curiam*. See further *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1441 [324] per Heydon J.

[46] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J.

[47] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1406 [136] per Gummow J. See also at 1414 [181] per Hayne J (accepting that the Migration Act allows the creation of additional criteria, or "hurdles", beyond those found in s 36(2)), 1429 [271], 1434 [283] per Heydon J, 1470–1471 [485]–[490] per Bell J.

[48] This has long been accepted: see eg *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 (FC) at 347–349 [23]–[32] per Branson J (Beaumont and Lehane JJ agreeing).

[49] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27] per *curiam*.

[50] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45] per McHugh and Gummow JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14–15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

[51] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 345–348 [53]–[61] per *curiam*.

visas regardless of whether they satisfy s 36(2).[52] Further, even when a valid application for a protection visa can be made, it may be refused on character grounds under s 501 whether or not the applicant satisfies s 36(2).[53]

48. In this light, the place of s 85 in the Migration Act with respect to protection visas is not at all incongruous or in tension with s 36.[54] Unlike the many provisions referred to above, s 85 does not qualify the extent to which an applicant for a protection visa who satisfies the criterion specified in s 36(2) may obtain such a visa. It simply permits the determination of a limit to the number of protection visas that can be granted in a particular financial year. That qualification, not on the capacity of an applicant to obtain a protection visa but on the immediacy with which they may do so, is entirely consistent with the scheme established by the Migration Act for the grant of protection visas.

(vi) Inconsistency with s 36(2) concerning family members

49. Plaintiff S297 submits that the application of s 85 to protection visas would be inconsistent with the treatment of family members in s 36(2).[55]

50. Section 36(2)(b) provides that an alternative criterion for a protection visa to that specified in para (a) is that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in para (a) or holds a protection visa.[56] What constitutes membership of the same family unit is defined in s 5(1) so as to be entirely prescribed by the regulations.[57]

51. Section 87(1) provides that s 86 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 *inter alia* the holder of a permanent visa that is in effect. Thus, s 86 would not prevent the grant of a protection visa to such a person. But whether s 36(2)(b) operates more or less broadly than s 87(1) depends entirely on the definition of "member of the family unit" in the regulations. Thus, nothing can be drawn from the fact that, as the regulations stand at a given time, only some of the family members to whom s 36(2)(b) is capable of applying fall within s 87(1): at a different time, with different regulations, all may do so.[58] Whether s 85 applies to protection visas cannot depend upon the definition of "member of the family unit" in the regulations from time to time.

52. In any event, the prospect that only some of the family members to whom s 36(2)(b) applies fall within s 87(1) does not suggest that protection visas are excluded from s 85. There is nothing incongruous about excepting only the closest family members from the effect of any determination under s 85, leaving more distantly related family members to await the grant of a visa at a future time like all other applicants.

(vii) Purpose of s 65A

53. Plaintiff M150 relies upon the purpose of s 65A.[59] It may be accepted that s 65A evinces a particular concern with the position of protection visa applicants, and that it

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[52] See ss 91E and 91P.

[53] As was recognised in *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372.

[54] cf plaintiff S297's submissions at [38].

[55] Plaintiff S297's submissions at [40]–[43].

[56] There are similar provisions in s 36(2)(aa) and (c) but it is sufficient to focus upon s 36(2)(a) and (b).

[57] See the definitions of "member of the family unit" and "member of the same family unit".

[58] cf plaintiff S297's submissions at [43].

[59] Plaintiff M150's submissions at [28]–[35].

recognises that some such applicants (like other unlawful non-citizens) will be detained pending determination of their visa applications. But a concern to limit periods of detention cannot provide a complete statement of the purpose of s 65A, because s 65A applies to all applicants for protection visas, not just those who are in detention. Further, even as it applies with respect to visa applicants who are detained, the purpose of s 65A is not determinative, for as this Court recently observed "no legislation pursues its purposes at all costs".[60]

54. The question here is how s 65A is to be reconciled with ss 85 and 86. A statement of the general purpose of s 65A does little to assist in answering that question, because ss 85 and 86 plainly cut across what would otherwise be the operation of ss 65 and 65A in pursuit of competing interests. In such a case, stating the purpose of s 65A is unlikely to solve any difficulty of interpretation.[61] Rather, "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention".[62] That language, in s 85, is unqualified and, as explained above, requires no qualification to work harmoniously with ss 65 and 65A.

(viii) Purpose of s 85

55. Plaintiff S297 submits, based on the second reading material, that "[t]here was no apparent intention that s 85 would apply in any way to protection visas".[63] That submission falls into the error of seeking to identify the meaning that the provision was subjectively intended to have by those responsible for its enactment, rather than the meaning of the words actually used.[64] Further, it relies not only upon the second reading speech of the Minister responsible for the Bill by which the predecessor of s 85 was introduced, but statements of opposition members during the debate which followed. There is no basis to assume that these statements reflected a majority view, even were that to be relevant.

56. Plaintiff S297 also relies upon an assertion that s 85 has not previously been used to place a limit on protection visas.[65] Implicitly, this seeks to call in aid the views of successive governments as to the meaning of s 85, after its enactment. Not only does that submission fall into the error identified immediately above, it relies impermissibly upon material post-dating the enactment of the provision. In any event, the material in the special case relied upon by plaintiff S297 reveals that the reason s 85 has not previously been used to place a limit on protection visas was not any view about its

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60 *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [41] per *curiam*, quoting *Rodriguez v United States* (1987) 480 US 522 at 525–526.

61 *Carr v Western Australia* (2007) 232 CLR 138 at [5] per Gleeson CJ, quoted approvingly in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [40] per *curiam*.

62 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

63 Plaintiff S297's submissions at [49].

64 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ, citing *Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC; *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [31]–[32] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Byrnes v Kendle* (2011) 243 CLR 253 at [96]–[97] per Heydon and Crennan JJ; *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

65 Plaintiff S297's submissions at [50]–[52].

construction, but the fact that such a cap has not been necessary given the different structure of the Humanitarian Programme in previous years.[66]

57. Plaintiff M150 submits that the object of s 85, being to facilitate a planned approach to the grant of particular classes of visa such that the total number of visas granted in a particular class remains within certain levels,[67] has no "obvious application to protection visas" because the circumstances in which Australia must respond to its international obligations "are not readily planned for in advance".[68] The implicit premise in that submission is that protection visas must be granted to any person who satisfies the criterion specified in s 36(2). For the reasons in paragraphs 40 to 48 above, that premise is false. It is equally false to submit that a planned approach to the number of visa grants each financial year has no application to protection visas, for it may readily be seen why, for protection visas as for other visas, it may be desired to control the number of visas granted in any given financial year.[69]

58. Given the different operation of s 39 from s 85, discussed in paragraphs 19–20 above, it does not follow from the exclusion of protection visas from s 39 that "Parliament has determined that the application of planning or management mechanisms in the form of numerical caps is inapt in the context of protection visas".[70] It merely follows that Parliament considered that the different and more severe mechanism in s 39 was not apt to such visas. Far from showing that s 85 is limited in the manner the plaintiffs suggest, the difference in language between ss 39 and 85 strongly indicates that s 85 applies to all classes of visa.

(b) APPLICATION OF s 85 TO PROTECTION VISAS: IMPLIED REPEAL

59. The plaintiffs next submit, in the alternative, that the enactment of s 65A impliedly repealed s 85 so far as the latter provision applied to protection visas.[71] That submission should be rejected.

60. There is a strong presumption against implied repeal, and that instead "the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other".[72] When ss 65, 65A, 85 and 86 are properly construed, in the manner explained above, there is no inconsistency between them of the kind that would be necessary to support the conclusion that the enactment of s 65A effected an implied repeal of s 85 to the extent that it applied to protection visas.

(c) REQUIREMENT OF PUBLICATION IN THE *GAZETTE*

61. Section 85 provides that "[t]he Minister may, by notice in the *Gazette*, determine the maximum number of" visas that may be granted in a financial year. The March 2014

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66 S297 SC p 460 [6]–[7]. The reference at SC p 209, quoted in plaintiff S297's submissions at [51], that "it is not possible to cap or limit the number of places onshore" may have been a reference to s 39 of the Migration Act. But in any case, the practice of past Governments is plainly irrelevant to the legal meaning of s 85.

67 Plaintiff M150's submissions at [39].

68 Plaintiff M150's submissions at [60].

69 Including due to the need to plan and budget for government funded settlement services to properly meet the needs of humanitarian entrants: see S297 SC p 209.

70 Plaintiff M150's submissions at [61].

71 Plaintiff S297's submissions at [54]–[59]; plaintiff M150's submissions at [68]–[69].

72 *South Australia v Tanner* (1989) 166 CLR 161 at 171 per Wilson, Dawson, Toohey and Gaudron JJ; *Shergold v Tanner* (2002) 209 CLR 126 at 137 [34]-[35] per *curiam*; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18] per Gummow and Hayne JJ

determination has not been published in the *Gazette*.[73] Rather, an instrument recording the determination was registered in the Federal Register of Legislative Instruments (**the Register**).[74] The defendants submit that, by reason of s 56(1) of the LI Act, upon registration the requirement in s 85 concerning notice in the *Gazette* was taken to be satisfied. Plaintiff S297 contests that submission. For the following reasons, the defendants' submission should be accepted.

62. Legislative instruments (as defined in ss 5 to 7 of the LI Act) must be registered under the LI Act (s 24). Section 20 of the LI Act established the Register, and the LI Act provides for registration of "legislative instruments" in electronic form.[75] The Register thus comprises a database of all registered legislative instruments (s 20(2)). The Register is taken to be complete and accurate, and judicial notice may be taken of its contents (s 22). Further, the objects of the LI Act include "improving public access to legislative instruments" (s 3(d)),[76] and s 20(1A) provides that "[t]he First Parliamentary Counsel must cause steps to be taken to ensure that legislative instruments that are registered are available to the public".[77] The Register is publicly accessible via the Internet.[78]

63. In this context, s 56(1) of the LI Act provides:

> If the enabling legislation in relation to a legislative instrument as in force at any time before the commencing day required the text of the instrument, or particulars of its making, to be published in the *Gazette*, the requirement for publication in the *Gazette* is taken, in relation to any such instrument made on or after that day, to be satisfied if the instrument is registered.

The "commencing day" is defined in s 4(1) as the day on which s 20 commences, which was 1 January 2005 (s 2(1), item 2).

64. The purpose of s 56(1) was plainly to facilitate replacement of the historical system of publication in the *Gazette* with registration, thereby attracting the new regime created by the LI Act. The historical purposes of publication in the *Gazette* — being notification to the public of the exercise of delegated legislative power, and authoritative recording of the terms of such exercise[79] — are now achieved by registration.[80] To require both registration and publication in the *Gazette* would involve unnecessary and wasteful duplication. Section 56(1) obviates that duplication, in a way that avoids the need to amend the many legislative provisions predating the LI Act that require publication in the *Gazette*.

65. Plaintiff S297 submissions at [68] contend that s 56(1) of the LI Act applies only to enabling legislation which is expressed in two parts, first empowering the making of delegated legislation and then separately requiring the text of the delegated legislation or particulars of its making be published in the *Gazette*. On that approach, s 56(1) does

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73 S297 SC [26].

74 S297 SC [27].

75 See the definition of "register" in LI Act, s 4(1).

76 See also the Explanatory Memorandum to the Legislative Instruments Bill 2003 (Cth), p 13.

77 "First Parliamentary Counsel" means the person appointed to that position under s 4(1) of the *Parliamentary Counsel Act 1970*" (LI Act, s 4(1)).

78 As was contemplated in the Explanatory Memorandum to the Legislative Instruments Bill 2003 (Cth), p 2.

79 See generally *Watson v Lee* (1979) 144 CLR 374.

80 See also Administrative Review Council, *Rule-Making by Commonwealth Agencies* (1992), ch 8. The LI Act originated from this Report: Explanatory Memorandum to the Legislative Instruments Bill 2003 (Cth), p 2.

not apply to s 85 of the Migration Act, although it would have done so if s 85 had been expressed in two sub-sections, the first empowering the making of the determination and the second requiring that a notice recording that determination be published in the *Gazette*.

66. This submission is a triumph of form over substance. Its acceptance would defeat the object of s 56(1) of the LI Act, which on that approach would not apply to the many Commonwealth provisions expressed in the same from as s 85 of the Migration Act.[81] It would require the Court to construe the words of s 56(1) in a much more constrained fashion than their ordinary and natural meaning would suggest, despite the fact that to do so would not advance any discernible public interest.

67. Section 56(1) of the LI Act applies wherever a statute requires publication of the text of a legislative instrument, or particulars of its making, in the *Gazette*: that requirement is taken to be satisfied by registration. On the ordinary meaning of the words of s 56, it does not matter whether the requirement to publish in the *Gazette* is expressed as being the means of the exercise of delegated legislative power (as in s 85 of the Migration Act) or an obligation subsequent to that exercise. The ordinary and natural construction of s 56(1) would best achieve its purpose.[82] It should be preferred.

68. A determination pursuant to s 85 of the Migration Act which is registered is a legislative instrument within the meaning of the LI Act. Section 85 of the Migration Act, which was in force before 1 January 2005, is the "enabling legislation" in relation to that legislative instrument. It requires the text of that instrument to be published in the *Gazette*. By force of s 56(1), the requirement for such publication is taken to be satisfied by registration. Accordingly, on registration of the March 2014 determination, it was taken to satisfy the requirement that it be made by notice in the *Gazette*.

(d) IMPROPER PURPOSE

(i) Summary

69. Plaintiff S297 submits that in making the March 2014 determination the Minister had the purpose of denying permanent protection visas to the plaintiff and other unauthorised maritime arrivals. He contends that this purpose was improper, with the result that the March 2014 determination is invalid.

70. The Court should reject the factual basis of this submission. The Minister's purpose in making the March 2014 determination was to give effect to a longstanding plan that the number of permanent protection visas granted in the 2013–2014 financial year be limited to 2,750, so as to preserve places in Australia's humanitarian program for visas to be granted to persons outside Australia who are in need of protection. That was plainly a proper purpose for the exercise of the power under s 85.

71. It is not in dispute that it is the intention of the Government, and the Minister, that unauthorised maritime arrivals should not be granted permanent protection visas. Nor is it in dispute that, prior to the making of the March 2014 determination, the Government and the Minister took various steps directed to that purpose (although it is

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[81] In the Migration Act, see, eg, ss 37A(2) and (3), 84(1), 137J(2), 489. In other contexts see, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 4; *Broadcasting Services Act 1992* (Cth) s 115; *Corporations Act 2001* (Cth) s 791C, 820C; *Customs Act 1901* (Cth) s 15; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14; *Historic Shipwrecks Act 1976* (Cth) s 5.

[82] *Acts Interpretation Act 1901* (Cth) s 15AA.

in dispute that this purpose can be characterised as "improper" without analysis of the particular powers that were exercised in pursuit of that purpose). Thus:

(a) On 17 October 2013, by the *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (**the TPV Regulation**), the Government introduced as a subclass of the Protection (Class XA) visa the Subclass 785 (Temporary Protection) visa.[83] The TPV Regulation was disallowed by the Senate on 2 December 2013.[84]

(b) On 2 December 2013, the Minister made a determination under s 85 capping the number of Protection (Class XA) visas that may be granted in the 2013–2014 financial year at 1,650 (**the December 2013 determination**),[85] with the intention that this would stop the grant of any further permanent protection visas that financial year, including to unauthorised maritime arrivals.[86] On 19 December 2013, the Minister revoked that determination,[87] with a view to permitting grants of permanent protection visas to persons other than unlawful maritime arrivals (who were by then precluded from being granted such visas by the regulation discussed below).[88]

(c) On 12 December 2013, by the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**the UMA Regulation**), the Government introduced a criterion for the grant of Protection (Class XA) Subclass 866 visas that could not be met by *inter alia* unauthorised maritime arrivals.[89] On 27 March 2014, the Senate disallowed the UMA Regulation.[90]

72. The fact that the Minister made the above decisions — being decisions the validity of which is not in issue in this proceeding — by which he has sought to pursue the purpose identified by plaintiff S297 is not to the point. The relevant question is whether plaintiff S297 has proved that the March 2014 determination would not have been made but for the alleged improper purpose. He has not done so.

(ii) Applicable principles

73. The expression "improper purpose" connotes a purpose that is beyond the scope of the purposes for which a power is conferred.[91] An improper purpose will vitiate an exercise of power only if it is a substantial purpose, meaning that the power would not have been exercised but for the improper purpose.[92]

74. The onus of establishing that the Minister would not have made the March 2014

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83 S297 SC [16]

84 S297 SC [17]

85 S297 SC [18].

86 S297 SC [19]. For the reasons in paragraphs 34 to 39 above, the references in plaintiff S297's submissions at [81]–[84] and [92] to an intention to prolong plaintiff S297's detention are apt to mislead. The prolongation of the plaintiff's detention is a consequence of the scheme of mandatory detention instituted by the Migration Act.

87 S297 SC [23].

88 See S297 SC pp 377–81.

89 S297 SC [22].

90 S297 SC [22], [29].

91 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 per Williams, Webb and Kitto JJ; *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 at 186 per Gibbs CJ, 233 per Aickin J.

92 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 per Williams, Webb and Kitto JJ; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467 at 468–9 per *curiam.*

determination if not for the asserted improper purpose is on plaintiff S297.[93] Having regard to the material in the special case, he cannot discharge that onus. That is particularly so given that the presumption of regularity will be applied, so that an inference of improper purpose will be drawn only if the evidence cannot be reconciled with the proper exercise of the power.[94]

(iii) Context

75. Since the 1970s, successive Australian governments have adopted a regular and planned Humanitarian Program.[95] That program has had both an offshore and an onshore component. For many years the onshore component has been met by the grant of protection visas to non-citizens in Australia, ie Protection (Class XA) visas. The offshore component has been met by the grant of visas to people overseas in need of humanitarian assistance, normally through the grant of Refugee and Humanitarian (Class XB) visas.[96] There are five subclasses of Refugee and Humanitarian (Class XB) visas: 200 (Refugee); 201 (In-country Special Humanitarian); 202 (Global Special Humanitarian); 203 (Emergency Rescue); and 204 (Woman at Risk). Subclasses 200, 201, 203 and 204 are considered part of the "refugee program" and subclass 202 is considered part of the "special humanitarian program".[97]

76. For many years, the size of the Humanitarian Program has been set by the Australian government from financial year to financial year.[98] The onshore and offshore components of the Humanitarian Program were linked in 1996, so that onshore protection visa grants were drawn from an annual allocation of visa places that was shared with the special humanitarian program.[99]

77. To illustrate, in 2010–2011, the Humanitarian Program was set at 13,750 places, including 6,000 refugee places and 7,750 other places that were shared between the onshore protection program and the special humanitarian program.[100] The same figures were adopted for the 2011–2012 Humanitarian Program.[101] On this model, for every protection visa granted onshore, the offshore special humanitarian component was reduced by one place.[102]

78. In 2011–2012, for the first time in its 35 years of operation, the Humanitarian Program resulted in more onshore protection visa grants than the total number of visas granted offshore to refugees and special humanitarian program applicants.[103]

79. On 23 November 2012, the then Opposition Leader and Shadow Minister for Immigration and Citizenship issued a joint press release which stated that, if elected, the Opposition would set Australia's humanitarian intake at 13,750, with a minimum of

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93 *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343; *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 671 per Gaudron J.

94 *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 672 per Gaudron J.

95 S297 SC p 167.

96 S297 SC p 165.

97 S297 SC p 194.

98 S297 SC p 165.

99 S297 SC pp 169, 205.

100 S297 SC p 202.

101 S297 SC p 220.

102 S297 SC p 224 [1.19].

103 S297 SC p 224 [1.20]. See also SC p 460 [7].

11,000 places reserved for offshore applicants.[104] A booklet released by the then Opposition in January 2013 reiterated that, if elected, the Opposition would reserve 11,000 of the 13,750 refugee places each year for offshore applicants.[105]

80. Consistently with those announcements, on 5 December 2013 the new Government decoupled the onshore and offshore components of the Humanitarian Program, and determined that the total programme for 2013–2014 would have 13,750 places, with a minimum of 11,000 places offshore and the balance of 2,750 for permanent protection visas granted onshore.[106] That decision is reflected in an Information Paper issued by the Department of Immigration and Border Protection (**the Department**) dated December 2013,[107] in the Mid-Year Economic and Fiscal Outlook 2013–2013 released on 17 December 2013[108] and in a submission to the Minister from the Department dated 18 December 2013.[109]

81. It has plainly been a longstanding policy of the Government, since before it was elected, that the number of permanent protection visas granted in the 2013–2014 financial year would be 2,750.

(iv) The March 2014 determination

82. The March 2014 determination was made following a submission to the Minister dated 4 March 2014.[110] That submission referred to the Government's decision on 5 December 2013 to set the Humanitarian Program at 13,750 places, and to set the onshore component of that program at 2,750 places. It then informed the Minister that, as at 2 March 2014, 2,686 permanent protection visas had been granted and that the figure of 2,750 was likely to be met "in the next 2 days".[111] It noted that, if the onshore component planning level was exceeded, there would be "costing impacts for the department and a range of other agencies with programmes and services associated with the Humanitarian Programme".

83. The submission included a draft instrument capping the number of Protection (Class XA) visas for the 2013–2014 financial year at 2,773. That figure comprised 2,750 Subclass 866 visas (ie permanent protection visas). It also included 23 Subclass 785 (Temporary Protection) visas that had been granted prior to the disallowance of the TPV Regulation because, although such visas were <u>not</u> counted by the Government for administrative purpose in the Humanitarian Programme, as a subclass of Protection (Class XA) visas their grant did count towards the number of visas that could be granted prior to the cap on that class of visa being reached.[112]

84. At the date of the submission to the Minister summarised above, the imposition of a cap on the grant of protection visas was not necessary to stop unauthorised maritime arrivals from obtaining such visas. To the contrary, unauthorised maritime arrivals were at that time precluded from obtaining permanent protection visas by the criterion introduced by the UMA Regulation. That regulation had not been disallowed.

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[104] S297 SC pp 246–7.

[105] S297 SC p 249.

[106] S297 SC p 459 [1].

[107] S297 SC p 231.

[108] S297 SC p 245.

[109] S297 SC p 377 [5], [7].

[110] S297 SC pp 458–464.

[111] S297 SC p 459 [2].

[112] S297 SC p 459 [4].

Accordingly, the various documents upon which plaintiff S297 relies in which the Department raised the possibility that the Minister could reimpose a cap in the event that the UMA Regulation was disallowed are not to the point, because the March 2014 determination plainly was not a response to any such disallowance.

85. The purpose of the March 2014 determination appears plainly on the face of the submission that led to the making of that determination. There is nothing in the submission to suggest that the Minister was actuated in making the March 2014 determination by any purpose other than to implement the policy as to the structure of the Humanitarian Program that had been announced as far back as 23 November 2012. The timing of the making of that determination further supports that inference, given that the determination was made just days before the number of on-shore visa grants was expected to reach the 2,750 figure.

86. Given the above facts, it is impossible for plaintiff S297 to prove that the substantial purpose (in the requisite sense) for which the March 2014 determination was made was the purpose alleged by plaintiff S297, namely to deny permanent protection visas to the plaintiff and others like him. He plainly cannot prove that the March 2014 determination would not have been made but for that purpose.

87. Contrary to plaintiff S297's submissions at [97], the fact that at the time of the March 2014 determination the UMA Regulation was facing challenge in this Court and disallowance by the Senate does not undermine this conclusion. There is no basis to infer that the Minister believed, at the time of making the March 2014 determination, that either the challenge in this Court or the disallowance motion in the Senate would succeed. The Minister's knowledge that there was a risk that the UMA Regulation would be disallowed or held invalid does not provide any foundation for an inference that the purpose of the March 2014 was as stated above. Indeed, even if the UMA regulation had <u>not</u> been disallowed, and even if its validity had been <u>upheld</u> in this Court prior to 4 March 2014, it seems clear that the March 2014 determination would still have been made. Without it, the Minister would not have been able to structure the Humanitarian Program in the way that had been announced.

88. It is untenable to submit, as in plaintiff S297's submissions at [98]–[100], that the March 2014 determination was a step towards the policy objective of denying permanent protection visas to unauthorised maritime arrivals while continuing to grant such visas to lawful arrivals. The effect of the March 2014 determination is to stop any further grants of protection visas for this financial year to both unauthorised maritime arrivals <u>and others</u>. The March 2014 determination is entirely inapt to achieving the purpose for which plaintiff S297 asserts it was made.

89. In short, while the March 2014 determination was made at a time when the Government and the Minister had an intention that unauthorised maritime arrivals should not be granted permanent protection visas, plainly not every decision taken by the Minister is directed to that purpose. Many are not. On the facts, the March 2014 determination was not. It was directed to an entirely different, and proper, purpose. Plaintiff S297 has not proved that the determination would not have been made but for the improper purpose he alleges, and as a consequence this ground must fail.

(v) The "pattern" alleged by plaintiff S297 and the claimed injunction

90. For the reasons above, the March 2014 determination was not made for an improper purpose. Plaintiff S297 is not entitled to any relief directed to that determination.

91. Plaintiff S297 also alleges that the Minister has engaged in a "pattern" of exercising power under the Migration Act for the improper purpose of denying Protection

(Class XA) visas to unauthorised maritime arrivals. This is said to support an injunction restraining the Minister from taking any step towards the exercise of power under the Migration Act for the purpose of denying a Protection (Class XA) visa to the plaintiff unless and until the Minister has considered and determined he is not satisfied of the matters in s 65(1)(a) in respect of the plaintiff's' application for such a visa.

92. The Court should not grant such an injunction. Apart from the March 2014 determination, the only exercise of power which plaintiff S297 submits was actuated by an improper purpose was the December 2013 determination. Plaintiff S297's submissions correctly do not submit that the making of the TPV Regulation or the UMA Regulation was actuated by an improper purpose. Even if the December 2013 was made for an improper purpose, that single exercise of power, now revoked, is an insufficient foundation upon which to base an extraordinary order of the kind sought.

93. In any event, the injunction sought is inappropriate. It assumes that it is possible for the Court to determine, in advance, that the exercise of any power under the Migration Act that might deny him a protection visa (other than a determination under s 65(1)) is improper, but that is impossible to determine in the abstract. The range of variables that would bear upon whether any future exercise of power by the Minister is lawful are such that the plaintiff cannot establish an apprehended breach of his legal rights that would provide a proper basis for the proposed injunction.

(e) COSTS

94. So far as the costs of the special case are concerned, contrary to plaintiff S297's submissions at [119], there is no reason to depart from the ordinary principle that costs follow the event.[113] If the plaintiffs are successful, the defendants should pay their costs; if the defendants are successful, the plaintiffs should pay their costs.

95. No particular approach is taken to costs in litigation ventured by a party ostensibly in the public interest: litigants espousing the public interest are not thereby granted an immunity from costs or a "free kick" in litigation.[114] The fact that a proceeding was brought otherwise than for the personal or financial gain of the plaintiff does not detract from the general proposition that costs follow the event, though these matters may be relevant to the discretion to make a different order.[115]

96. The proceeding here was directed principally to benefiting the plaintiffs. That there are others in a similar position does not detract from this fact. That is routinely the case in litigation about the Migration Act, and that does not result in any departure from the ordinary principles. For example, in *Plaintiff M79/2012 v Minister for Immigration and Citizenship*,[116] the Court ordered the plaintiff to pay costs, notwithstanding that the decision plainly had implications for the legal position of thousands of others granted temporary safe haven visas. There is no constitutional point, or other point of general public importance, that would justify any departure from the ordinary approach to costs.

97. There is likewise no basis for plaintiff S297's claim to costs concerning the earlier stages of the proceeding. In so far as the submissions imply that the December 2013 determination was revoked in response to the commencement of this proceeding, that submission is plainly contrary to the evidence. The evidence shows that that

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[113] Plaintiff M150 does not advance such a submission.

[114] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 122–123 [134(6)] per Kirby J.

[115] *Ruddock v Vardarlis (No 2)* (2002) 115 FCR 229 (FC) at 237–238 [18] per Black CJ and French J.

[116] (2013) 87 ALJR 682

Determination was revoked, following the commencement of the UMA Regulation, to permit the Department to continue to grant protection visas to persons not affected by that regulation.[117] Nor should the Court accept the assertion that the UMA Regulation was "obviously invalid", particularly in circumstances where the validity of that regulation will be the subject of full argument in another proceeding that is before the Court.[118] Finally, the defendants should not be required to pay the costs of the aborted hearing on 7 March 2014. That hearing was adjourned by the Court of its own motion, as a result of a combination of matters (including the adjournment of the disallowance motion in the Senate until after that date) which were not within the defendants' control.

98. The appropriate disposition as to the costs of the earlier stages of the proceeding is that the parties bear their own costs.[119]

(f) ORDERS

99. In M150/2013, the questions in the special case[120] should be answered as follows:

(1) Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid? No.

(2) What, if any, relief should be granted to the plaintiff? None.

(3) Who should pay the costs of the special case? The plaintiff.

100. In S297/2013, the questions in the special case[121] should be answered as follows:

(1) Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid? No.

(2) What, if any, relief sought in the further amended writ of summons and further amended statement of claim, dated 1 April 2014, should be granted to the plaintiff? None.

(3) Who should pay the costs of the proceeding? The plaintiff should pay the costs of the special case. Otherwise, the parties should bear their own costs.

PART VII: ORAL ARGUMENT

101. The defendants estimate that presentation of their oral argument will require 2 hours.

Dated: 30 April 2014

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[117] S297 SC p 377 [6].

[118] Proceeding S89 of 2014.

[119] The question of the costs of the earlier stages of the proceeding in M150/2013 is not before the Full Court on the phrasing of question 3 in the special case in that matter.

[120] M150 SC [23].

[121] S297 SC [57].

ANNEXURE
Additional relevant legislative provisions

The *Migration Act 1958* (Cth) (current):

5. Interpretation

(1) In this Act, unless the contrary intention appears:

...

member of the family unit of a person has the meaning given by the regulations made for the purposes of this definition.

member of the same family unit: one person is a member of the same family unit as another if either is a member of the family unit of the other or each is a member of the family unit of a third person.

...

13. Lawful non-citizens

(1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

(2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

14. Unlawful non-citizens

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

(2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

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.

41. Conditions on visas

(1) The regulations may provide that visas, or visas of a specified class, are subject to specified conditions.

(2) Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:

(a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a temporary visa of a specified kind) while he or she remains in Australia; or

(b) a condition imposing restrictions about the work that may be done in Australia by the holder, which, without limiting the generality of this paragraph, may be restrictions on doing:

(i) any work; or

(ii) work other than specified work; or

(iii) work of a specified kind.

(2A) The Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

(3) In addition to any conditions specified under subsection (1), the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection.

45. Application for visa

(1) Subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.

46. Valid visa application

(1) Subject to subsections (1A), (2) and (2A), an application for a visa is valid if, and only if:

(a) it is for a visa of a class specified in the application; and

(b) it satisfies the criteria and requirements prescribed under this section; and

(ba) subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and

(c) any fees payable in respect of it under the regulations have been paid; and

(d) it is not prevented by section 48 (visa refused or cancelled earlier), 48A (protection visa), 91E (CPA and safe third countries), 91K (temporary safe haven visa), 91P (non-citizens with access to protection from third countries), 161 (criminal

justice), 164D (enforcement visa), 195 (detainees) or 501E (visa refused or cancelled on character grounds).

...

46A. Visa applications by unauthorised maritime arrivals

(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival 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 unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

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

...

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

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

...

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).

...

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.

...

(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.

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 may detain the person.

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is a citizen of Papua New Guinea; and

(b) 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), (3A) 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).

198AA. Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

198AB. Regional processing country

(1) The Minister may, by legislative instrument, designate that a country is a regional processing country .

(1A) A legislative instrument under subsection (1):

(a) may designate only one country; and

(b) must not provide that the designation ceases to have effect.

(1B) Despite subsection 12(1) of the *Legislative Instruments Act 2003*, a legislative instrument under subsection (1) of this section commences at the earlier of the following times:

(a) immediately after both Houses of the Parliament have passed a resolution approving the designation;

(b) immediately after both of the following apply:

(i) a copy of the designation has been laid before each House of the Parliament under section 198AC;

(ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

(2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.

(3) In considering the national interest for the purposes of subsection (2), the Minister:

(a) must have regard to whether or not the country has given Australia any assurances to the effect that:

(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and

(b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

(4) The assurances referred to in paragraph (3)(a) need not be legally binding.

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

(6) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.

(7) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (6).

(9) In this section, ***country*** includes:

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

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

198AC. Documents to be laid before Parliament

...

198AD. Taking unauthorised maritime arrivals to a regional processing country

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:

(a) place the unauthorised maritime arrival on a vehicle or vessel;

(b) restrain the unauthorised maritime arrival on a vehicle or vessel;

(c) remove the unauthorised maritime arrival from:

(i) the place at which the unauthorised maritime arrival is detained; or

(ii) a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:

(a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and

(b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in immigration detention (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198AE. Ministerial determination that section 198AD does not apply

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

(1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.

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

(3) The rules of natural justice do not apply to an exercise of the power under subsection (1) or (1A).

...

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) or (1A) in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

(8) An instrument under subsection (1) or (1A) is not a legislative instrument.

198AF. No regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if there is no regional processing country.

198AG. Non-acceptance by regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

198AH. Application of section 198AD to certain transitory persons

...

198AI. Ministerial report

...

198AJ. Reports about unauthorised maritime arrivals

...

501. Refusal or cancellation of visa on character grounds

Decision of Minister or delegate--natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: Character test is defined by subsection (6).

...

Decision of Minister--natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

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

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

(6) For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the character test.

Substantial criminal record

(7) For the purposes of the character test, a person has a substantial criminal record if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: Visa is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

The *Migration Regulations 1994* (Cth) (as made):

SCHEDULE 2

PROVISIONS WITH RESPECT TO THE GRANT OF SUBCLASSES OF VISAS

...

SUBCLASS 866—PROTECTION (RESIDENCE)

866.1 INTERPRETATION

866.111 In this Part:

"Refugees Convention" means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

866.2 PRIMARY CRITERIA

[NOTE: All applicants must satisfy the primary criteria.]

866.21 Criteria to be satisfied at time of application

866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; or

(b) claims to me a member of the family unit of a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class AZ) visa.

866.22 Criteria to be satisfied at time of decision

866.221 The Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):

(a) the Minister is satisfied that the applicant is a member of the family unit of a person who has made specific claims under the Refugees Convention; and

(b) the person of whose family unit the applicant is a member has been granted a Protection (Residence) visa.

866.223 The applicant has undergone a medical examination carried out by a Commonwealth medical officer.

866.224 The applicant:

(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

(b) is under 16 years of age and is not a person in respect of whom a Commonwealth medical officer has requested such an examination.

866.225 The applicant satisfies public interest criteria 4001 to 4004.

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

...

SCHEDULE 4

PUBLIC INTEREST CRITERIA

...

4003. The applicant is not determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.

4004. The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

...

The *Legislative Instruments Act 2003* (current):

2. Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions(s)	**Commencement**	**Date/Details**
1. Sections 1, 2 and 2A and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	17 December 2003
2. Sections 3 to 62	A single day fixed by Proclamation, subject to subsections (3) and (4)	1 January 2005
3. Schedule 1	Immediately after the commencement of Schedule 1 to the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*	1 January 2005

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

3. Object

The object of this Act is to provide a comprehensive regime for the management of Commonwealth legislative instruments by:

(a) establishing the Federal Register of Legislative Instruments as a repository of Commonwealth legislative instruments, explanatory statements and compilations; and

(b) encouraging rule-makers to undertake appropriate consultation before making legislative instruments; and

(c) encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users; and

(d) improving public access to legislative instruments; and

(e) establishing improved mechanisms for Parliamentary scrutiny of legislative instruments; and

(ea) repealing spent legislative instruments or provisions that merely amend or repeal other legislative instruments, or provide for the commencement of legislative instruments or Acts; and

(f) establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.

4. Definitions

(1) In this Act, unless the contrary intention appears:

...

commencing day means the day on which section 20 of this Act commences.

Note: Section 20 of this Act commenced on 1 January 2005 (see section 2).

...

register, in relation to an instrument, an explanatory statement, or a compilation, means recording the instrument, explanatory statement or compilation in the Register in electronic form.

5. Definition—a legislative instrument

(1) Subject to sections 6, 7 and 9, a legislative instrument is an instrument in writing:

(a) that is of a legislative character; and

(b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

(3) An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.

(4) If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

6. Instruments declared to be legislative instruments

...

7. Instruments declared not to be legislative instruments

...

20. Federal Register of Legislative Instruments

(1) The First Parliamentary Counsel is to cause to be maintained a register to be known as the Federal Register of Legislative Instruments.

(1A) The First Parliamentary Counsel must cause steps to be taken to ensure that legislative instruments that are registered are available to the public.

(2) The Register comprises, at any time, a database of all legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered under this Act.

22. The status of the Register and judicial notice of legislative instruments and compilations

(1) The Register is, for all purposes, to be taken to be a complete and accurate record of all legislative instruments that are included in the Register.

(2) A compilation that is included in the Register and that relates to a particular legislative instrument is to be taken, unless the contrary is proved, to be a complete and accurate record of that legislative instrument as amended and in force at the date specified in the compilation.

(3) In any proceedings, proof is not required about the provisions and coming into operation (in whole or in part) of a legislative instrument as it appears in the Register.

(4) A court or tribunal may inform itself about those matters in any way that it thinks fit.

(5) It is presumed, unless the contrary is proved, that a document that purports to be an extract from the Register is what it purports to be.

(6) If:

(a) subsection (5) applies to a document; and

(b) the document purports to be a copy of, or a copy of a part of, a legislative instrument that was registered on a particular day and at a particular time;

then it is presumed, unless the contrary is proved and subject to the operation of section 36 in the circumstances described in that section, that the legislative instrument was registered on that day and at that time.

24. Legislative instruments required to be registered under this Division

If a legislative instrument:

(a) is made on or after the commencing day; or

(b) is to be treated, under subsection 55(2), as if made on that day;

the legislative instrument must be registered in accordance with this Division.

Note: See subsection 29(2) concerning the lodgment for registration of instruments made before the commencing day that are amended by instruments made on or after that day.

56. Relationship of certain gazettal requirements to registration requirements

(1) If the enabling legislation in relation to a legislative instrument as in force at any time before the commencing day required the text of the instrument, or particulars of its making, to be published in the *Gazette*, the requirement for publication in the *Gazette* is taken, in relation to any such instrument made on or after that day, to be satisfied if the instrument is registered.

(2) If the enabling legislation in relation to a legislative instrument as enacted, or as amended, at any time on or after the commencing day requires the text of the instrument, or particulars of its making, to be published in the *Gazette* the requirement for publication in the *Gazette* is taken in respect of any such instrument to be in addition to any requirement under this Act for the instrument to be registered.