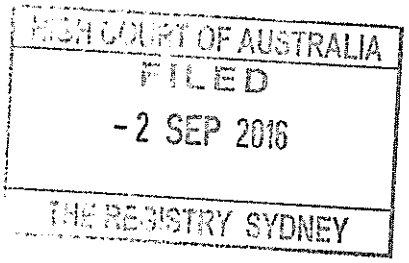
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S61/2016

BETWEEN

PLAINTIFF S61/2016

Plaintiff



and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

PLAINTIFF'S REPLY

Part I: Internet Publication

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

Part II: Argument

2. This reply addresses the following submissions made by the Minister (adopting the defined terms in the plaintiff's submissions in chief (**PS**) and the Special Case):

   a) first, that the Direction, as construed by the Minister, is not inconsistent with s 51(1) of the *Migration Act*: Minister's submissions (**DS**) [69]-[75];

   b) secondly, that although, on the Minister's construction, the Direction may operate inconsistently with the Reasonable Time Obligation, it may be saved from complete invalidity by a reading down: DS [50]-[68];

   c) thirdly, that the Direction should be construed as the Minister contends: DS [7]-[21].

3. This reply then addresses why, even if the Minister's submissions referred to above were accepted, the plaintiff would be entitled to relief. The approach now proposed by the Minister to the operation of the Direction sees the Direction's operation as less than absolute. That is different to the previous approach of the Department to the Direction.

4. Before turning to these points, the plaintiff concedes that, in light of the matters referred to at DS [32]-[34] and [37]-[41], question 1 in the Special Case must be answered "no".

The Direction and s 51(1) of the *Migration Act*

5. The Minister accepts that the Direction fetters delegates in the exercise of the discretion under s 51(1): DS [72]. He claims, however, that such fettering is lawful under the *Migration Act*, relying on s 496(1A), s 499(1) and (1A), and the subject matter of s 51(1): DS [71]-[73]. Those submissions should be rejected. They are contrary to authority, and reflect an incorrect construction of the *Migration Act*.

6. The Minister does not contend that he could lawfully fetter, in the sense of adopting a binding policy that prevented consideration of all relevant circumstances, his own exercise of

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the s 51(1) discretion.[1] That is unsurprising, as the *Migration Act* provides no basis for such a submission. As outlined at PS [74]-[75], the discretion under s 51(1) is unconfined in its terms, and exists in order to allow flexibility that is essential for good administration.

7. Once it is accepted that the Minister, if exercising the s 51(1) discretion himself, must be unfettered, the Minister's submissions on s 51(1) must fail. The *Migration Act* does not permit the Minister, having delegated the power under s 51(1) to determine the order for considering and disposing of visa applications, to use a s 499 direction to force the delegate to exercise the power in a way that would be unlawful if done by the Minister himself. Reading the *Migration Act* to permit such an outcome would permit the Minister to use the s 499 power to erode significantly the effect of numerous provisions within the *Migration Act* that confer a discretion (generally capable of being delegated: s 496(1)) on the Minister.

8. This does not mean that s 499 has no work to do. Rather, its purpose is to enable the giving of directions "to ensure consistency in administrative decision-making and to draw to the decision-maker's attention aspects of the policy of the government": *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 (***Martinez***) [61]. It provides "a valuable means" of ensuring that departmental officers "have appropriate regard to the objectives or policies of the government" in exercising their powers and functions: *Martinez*, [65]. There are many authorities that distinguish between s 499 directions that perform this function, and those that go further and fetter a delegate's discretion. The former variety of direction, which accords with the purpose of s 499, is generally lawful, but not the latter.[2]

9. The Minister ignores those authorities on the interaction between s 499 and discretions under the *Migration Act*. Instead, he relies on s 499(1A). But the authorities in question were decided after s 499(1A) was inserted into the *Migration Act*.[3] They remain good law.

10. Further, contrary to DS [71], the example given in s 499(1A) does not show that directions may be made under s 499 to fetter the relatively unconfined discretion under s 51(1). It would, as outlined above, be strange if the Minister could cause his delegates to exercise the discretion in a manner that could not lawfully be done by the Minister. Much clearer words than those in s 499(1A) would be needed before a construction of s 499 that permitted the Minister to undermine the provisions of the *Migration Act* that confer broad discretions on him could be accepted. Whatever may be said regarding the implications that s 499(1A) has for the Minister's power to give directions to delegates who must choose between powers that are both available in overlapping circumstances, s 499(1A) provides no basis for construing the *Migration Act* as permitting the fettering of a delegate who, in exercising a power, has a discretion under a provision of the *Migration Act*.

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1 DS [64] contends that it is a "permissible consideration", in determining the order for processing visa applications, that "no one should receive a migration advantage as a result of arriving in Australia as a UMA". Even if that submission is accepted, the Minister must still have regard to any other relevant considerations.

2 Eg, cases in which the Court, on the basis that a direction (or part thereof) falls into the former category, refuses to hold that the direction (or part thereof) is invalid: *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 [40]-[42], [65]-[67], [73]; *Martinez* [70]-[75]; *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822 [29]-[30]; *Bustescu v Minister for Immigration and Multicultural Affairs* (1999) 57 ALD 161 [40]-[41], and cases in which the Court states that a direction of the latter category is or would be invalid, or inconsistent with or not authorised by the *Migration Act*: *Taniela v Minister for Immigration and Border Protection* (2014) 225 FCR 424 [142]-[143]; *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497 [36]; *Jahnke v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 268 [15], [17]-[18]; *Ruhl v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 401 [37]; *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667 [28]; *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268 [20].

3 Subsection 499(1A) was inserted by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) (**1998 Act**), s 3, Sch 1 item 16 on 1 June 1999: see 1998 Act s 2(1) and the relevant proclamation at Gazette No GN 6, 10 February 1999 at 365.

11. The Minister submits (DS [73]), that the "discretion conferred by s 51(1) is naturally a topic" on which s 499 directions may be given, as the processing order for visas "may properly be the subject of government policy". That is so, however, it does not advance the Minister's case. The submissions above show that a s 499 direction may be used to ensure that delegates have appropriate regard to governmental policy. But policy (like a direction) must be consistent with the *Migration Act*. It "must allow the Minister to take into account the relevant circumstances": *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (***Drake***) at 640. It must not "preclude consideration of relevant arguments running counter to an adopted policy which might be reasonably advanced in particular cases" (as to which in the present case, see the correspondence at SC p 326, 337-346, 349): *Drake* at 640.

12. Insofar as the Direction, as construed by the Minister, reflects the Government's policy, that policy is "an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute", not "a lawful policy which leaves the range of discretion intact while guiding the exercise of the power": *Drake* at 641. The point is made plain by *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 (***Plaintiff M64***), relied upon at DS [74]. Contrary to the Minister's claim that his "point is somewhat similar to one accepted" in *Plaintiff M64*, *Plaintiff M64* shows that the Minister cannot do what, on his construction of the Direction, he has purported to do in this case. As the plurality said, it "may be accepted that the priorities policy could not lawfully be applied rigidly so as to preclude the consideration by the Delegate of the circumstances of each applicant": [58], see also at [68], [71] per Gageler J. Yet that is what the Minister claims that the Direction does. As he construes it, the Direction is inconsistent with s 51(1) of the *Migration Act*. If question 3(b) in the Special Case is answered, the answer must be "yes".

The Direction and the Reasonable Time Obligation

The Reading Down Argument

13. The Minister accepts that, on his construction, the Direction may operate inconsistently with the Reasonable Time Obligation (DS [53]) and so the *Migration Act*. He seeks to preserve the Direction's validity (or part thereof) by reading down the Direction so that it "can properly be applied by delegates unless and until an applicant submits that a reasonable time has elapsed": DS [58], [62]. When (if) that submission is made, "the delegate would be required to consider that submission", and determine whether the Direction could, consistently with the Reasonable Time Obligation, continue to apply to the visa application: DS [58], [62].

14. This submission must be rejected. It fails at the outset. *First*, if the Direction is to apply until a visa applicant "submits that a reasonable time has elapsed", then if that applicant's submission is correct, the Reasonable Time Obligation will already have been breached. Reading down the Direction in the manner suggested by the Minister will therefore not prevent the Direction from being inconsistent with the *Migration Act*.

15. *Secondly*, compliance with the Reasonable Time Obligation is not conditional upon a visa applicant requesting that his or her application be processed. A valid visa application must be considered and determined within a reasonable time, regardless of whether the applicant prompts the Minister to do so. Again, the proposed reading down fails to cure the Direction's inconsistency with the *Migration Act*.

16. *Thirdly*, leaving aside the first two points, the proposed reading down is contrary to authority. Accepting that the question of whether the Direction can be read down as the Minister suggests is to be determined with reference to s 46(2) of the *Acts Interpretation Act 1901* (Cth), the cases on provisions of that nature show that the answer to that question is "no".

17. Reading down must not occur in the face of a contrary intention.[4] The Direction's validity is only in issue if the Minister's construction of the Direction is accepted. On that construction, the Processing Order is mandatory. Section 9 of the Direction permits deviation from the Processing Order in limited cases of Family Visa applications, in relation to which delegates are to take into account "special circumstances of a compelling or compassionate nature". Delegates are, on the Minister's construction, implicitly commanded not to consider special circumstances of a compelling or compassionate nature when deciding the order for considering and disposing of PUMA Family Applications: PS [16].

18. Yet circumstances of that nature are significant in determining what is a reasonable time within which a visa application must be processed. The Minister's reading down would require delegates to consider such circumstances if an applicant sponsored by a PUMA submitted that the delegate should depart from the Processing Order. The proposed reading down would thus require delegates to do precisely what the Direction commands them not to do. The Minister's approach also fails to recognise that, in s 9(2), the Minister has already specified the applicable qualifications to s 8 of the Direction: cf *Tajjour* [52]. The provision of those express qualifications, absent the qualification that the Minister seeks to achieve by his reading down, suggests that the reading down was not intended.

19. Further, aside from being contrary to the text of the Direction, the Minister's approach is contrary to the intention of the Minister in making the Direction as reflected in the Department's submission to the Minister on the making of the Direction, and in the Department's letter to migration agents shortly after the Direction was made.

20. The departmental submission noted that there "may be around 200 existing [UMA]-sponsored applications that are grant-ready": SC p 95 [5b]. The submission stated that "those applications would not be finalised while delegates have other higher priority applications to process": SC p 96 [14]. There was no caveat to that statement, suggesting that any of those applications may, in light of the Reasonable Time Obligation, be finalised outside of the Processing Order. Further, the submission envisaged that effort would be expended to ensure that such applications were *not* determined: SC p 95 [5b]. Expending effort to ensure the non-finalisation of "grant-ready" applications further reflects that the Minister did not intend the Direction to be subject to the Reasonable Time Obligation.

21. The letter from the Department to migration agents shortly after the Direction was made confirms this point. Migration agents were informed, without qualification, that the effect of the Direction was that processing of PUMA Family Applications would now "take several years" and that there was "no priority" for families sponsored by a UMA facing compelling or compassionate circumstances: SC p 304. These unqualified statements are inconsistent with an intention that the Processing Order being subject to the Reasonable Time Obligation.

22. The Direction must not be read down contrary to the intention that its text and extrinsic material disclose. The Minister's reading down argument should fail for that reason alone. However, there are further obstacles to the adoption of the Minister's approach.

23. In order to read down the Direction, the reduced form of the Direction that results "must operate upon the persons and things affected by it in the same manner as the enacted words would have operated upon those persons and things" had the Direction been wholly valid.[5] The Minister's reading down would not see certain visa applications, visa applicants or

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4 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) [52]; *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) [248]; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (***Strickland***) at 492.

5 *Strickland* at 493; see also, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339, 348; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 371; *Pidoto v Victoria* (1943) 68 CLR 87 at 111.

delegates excluded from the operation of the Direction, with the Direction operating on its terms in relation to those persons or applications not so excluded. Rather, the Direction would apply to all delegates to whom it is directed (see the Direction, s 4(1)) up to a point. Once that point were reached, it would cease to apply. That is a different operation, in respect of those delegates (and in respect of the Family Visa applications and applicants in question), to the operation that the Direction would otherwise have (and, as discussed above, that the Direction was intended to have). Reading down the Direction to produce such a different operation would be akin to the Court itself exercising the power that s 499 vests in the Minister: cf *Pape* [251]. That outcome cannot be accepted.

24. These matters are sufficient to show that the Minister's approach is contrary to authority. But there are yet more problems with the suggested reading down. At DS [67], the Minister submits that, in light of the "time averages and ranges of processing times referred to in the special case", it is "simply impossible" to find, at this stage, that the Visa Application "will not be determined within a reasonable time". No doubt this same submission would be deployed if an application for mandamus were made as the Minister's approach envisages (DS [58]), making the task of a PUMA-sponsored Family Visa applicant who wishes to be processed outside of the Processing Order, as the Minister says, "simply impossible".

25. Of importance for present purposes, if the Minister is right in that there may be significant difficulties, at least within certain periods, in determining whether the continued application of the Direction to a PUMA Family Application will result in unreasonable delay in processing the application, this merely confirms that his reading down should be rejected. A delegate would, within that period where uncertainty prevailed, be unable to determine whether or not the Direction had ceased to apply to him or her in respect of the application in question. Presumably this explains why the Minister does not submit that the Direction is to be read down so as to automatically cease to apply once its continued application would cause a breach of the Reasonable Time Obligation. Such an approach would require delegates, in order to comply with the Reasonable Time Obligation and with s 499(2A), to continually monitor the delays attaching to each PUMA Family Application, and to determine with precision the point in time at which the Direction must cease to apply to each such application. At least in some cases, that may be a near impossible task. So instead, as outlined above, the Minister claims that the Direction may continue to operate up until "an applicant submits that a reasonable time has elapsed": DS [58], [62]. The flaws with that approach, as outlined above, are patent.

26. For these reasons, the Direction cannot be read down. As acknowledged by the Minister, on his construction, the Direction is apt to cause unreasonable delays in processing PUMA Family Applications. The Direction, on that construction, is invalid.

The Minister's other submissions in relation to invalidity and the Reasonable Time Obligation

27. The Minister's reading down argument is the only way in which the Minister seeks to provide a complete answer to the plaintiff's submissions on question 3(a). Once the reading down submission is rejected, question 3(a), if answered, must be answered "yes". Nevertheless, the Minister makes other submissions in relation to the three ways in which the plaintiff puts his case on question 3(a), and in relation to the Reasonable Time Obligation generally. The plaintiff responds to these as follows.

28. Dealing first with DS [68], the Minister submits that, if he selects an order of priority in the exercise of his s 51(1) discretion, the order of priority must be taken into account in assessing whether a delay is unreasonable: DS [68]. This is despite his earlier concession that the Reasonable Time Obligation is not subject to the discretion in s 51(1): DS [51]. All valid visa

applications must be considered and determined within a reasonable time, regardless of the order in which the Minister or a delegate may wish to process any given application.

29. The submission at DS [68] must be rejected. As explained in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 [37], what is a reasonable time "is ultimately for determination by a court". It depends not on the Minister's opinion of what is reasonable, but must be determined with regard to "the circumstances of the particular case within the context of the decision-making framework established by the Act". The Minister's submission does not accord with this approach. It seeks, by the backdoor, to subject the Reasonable Time Obligation to the power in s 51(1). It would mean that, although it is for a court to determine what a reasonable time is by having regard to all the circumstances, significantly different answers to the question of what is a reasonable time might be given in cases that a court would otherwise have regarded as relevantly the same.

30. The present case provides a good example. Under the Direction, PUMA Family Applications fall into the lowest category in the Processing Order. However, Family Visa applications that are sponsored by an Australian citizen UMA (a **CUMA**) do not. The Minister submits that the evident rationale behind the Direction is that "no one should receive a migration advantage as a result of arriving in Australia as a UMA": DS [64]. Yet if a court had to decide whether a delay in processing a visa application were reasonable, then, on the Minister's approach, there would be an excuse for delay available if the application were a PUMA Family Application, but not if the sponsor were a CUMA.

31. In determining what a reasonable time is for the processing of a visa application, the answer must be the same for applications that are relevantly indistinguishable. Contrary to the Minister's approach, in determining what a reasonable time is, the Court must decide for itself what differences between visa applications are relevant, and what reasons for delay are reasonable. Where applications are relevantly indistinguishable, the intentional infliction of significant delay in processing some applications, but not others, would be arbitrary, not reasonable.

32. Three further points should be made in relation to the matters that bear upon what is a reasonable time to consider and determine a visa application. *First*, if, despite the above, a court must consider any processing order that is in place in deciding what a reasonable time is for processing a visa application, then it would also be relevant to consider matters such as whether that processing order caused breaches of Australia's international obligations. A processing order that infringed a person's rights under, eg, the *International Covenant on Civil and Political Rights* (see, eg, SC p 132) could not carry much, if any, weight.

33. *Secondly*, where the Minister or his Department specifically encourages a class of persons to apply for visas of a certain type (see, eg, SC p 95 [9], 96 [15], 166-7, 232 [11], 233 [20]), it would be relevant for a court to take that fact into account when those persons are later subjected to processing delays specifically because they are persons of that class who applied for visas of that type.

34. *Finally*, the submission (DS [53]) that "the number of staff allocated to process visas of different kinds and the geographic location of those staff" is a matter to be taken into account in determining what is a reasonable time must be treated with caution. Whilst the resources available to the Minister may bear upon what is a reasonable time, a decision to allocate those resources to the processing of certain types of visa applications instead of others can be of only limited relevance insofar as excusing delay is concerned. Indeed, this kind of allocative decision could be a significant cause of unreasonable delay.

35. As to the balance of DS, in DS [60] the first sentence is inconsistent with the Minister's proposed reading down of the Direction, which would see delegates consider whether a

reasonable time had elapsed in relation to individual applications if requested to do so by the visa applicant: DS [58], [62]. The second sentence observes, correctly as a matter of law, that there is nothing in the *Migration Act* that requires the Minister to delegate the power under s 51(1). But it is unclear how this advances the Minister's case. The Direction is directed to "delegates who... perform functions or exercise powers under" s 51(1): Direction, s 4(1).

36. The facts of the Special Case do not, unsurprisingly, indicate that the Minister exercises the s 51(1) discretion personally in relation to Family Visa applications. Rather, they indicate that the processing order for such applications is determined under the Direction (so presumably by delegates on whom the Direction is binding): SC [35]. It may be that a delegate who considers a visa application under s 47 of the *Migration Act* may be different from the delegate who exercises the s 51(1) discretion, but this does not matter. If the Processing Order is mandatory, it still prevents the circumstances of the case from being taken into account by the delegate who determines when a PUMA Family Application will be processed. For the reasons at PS [55]-[56], that is inconsistent with the *Migration Act.*

37. As to DS [61], the first two sentences raise a question that need not be considered: whether a mandatory processing order that was subject to an exception such as that in s 9(1) (without s 9(2)) of the Direction would be inconsistent with the Reasonable Time Obligation. The third sentence raises the possibility of a mandatory processing order within which "the lowest priority cases would nevertheless be decided within a reasonable time". This submission reflects a misunderstanding of "reasonable time" and the Reasonable Time Obligation. It fails to recognise that what is a reasonable time depends in part on the volume of applications in question. All other things being equal, a lower number of applications would mean that the relevant reasonable time would be shorter. The Minister's submission also assumes, incorrectly, that it is possible, prospectively, to say that no visa application that falls into the lowest priority in a mandatory processing order will have circumstances such that, to comply with the Reasonable Time Obligation, it must be processed outside of that processing order.

38. The last sentence of DS [61] makes much the same error as discussed at [11]-[12] above. Rational administrative decision making is undermined, not served, by policies that do not admit of exceptions: *Plaintiff M64* [58], [68], [71]; *Drake* at 640-1; *Sacharowitz v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 480 at 485-6.

39. DS [62]-[63] depend upon acceptance of the Minister's reading down argument, which is addressed above. DS [64] goes more to the question of inconsistency with s 51(1) than the Reasonable Time Obligation. Even if the Minister's concerns about family members of UMAs obtaining a migration advantage are a permissible consideration under the s 51(1) discretion, that still leaves other relevant considerations that the Minister must consider. Otherwise, like DS [62]-[63], DS [64] depends upon the Minister's reading down argument.

40. DS [65] fails to appreciate that Family Visa applicants have no control over whether their sponsor travels outside Australia, or obtains Australian citizenship. The fact of a Ministerial direction that creates delays for PUMA Family Applications if the sponsor fails to obtain citizenship is an irrelevant consideration insofar as concerns the question of deciding whether that delay is reasonable. In any case, the plaintiff relies on the submissions at [28]-[31] above.

41. DS [66] depends upon acceptance of the Minister's reading down argument. DS [67] does not answer what is said at PS [61]-[73], and otherwise creates the problem for the Minister identified at [25] above.

Construction of the Direction

42. The Minister construes the words "have regard to" in s 7 of the Direction as though they read "have regard only to": DS [12]. He does so even though, on his own admission, this

reading may cause the Direction to operate inconsistently with the *Migration Act*: DS [53]. The Minister then seeks to overcome this difficulty by reading down the Direction.

43. The Minister's approach thus requires a departure from the natural meaning of the words of the Direction in two senses. The Court must depart from the natural meaning of "have regard to".[6] Having done so, the Court must then depart from the natural meaning of other words in the Direction so as to prevent that the Minister's construction of "have regard to" from resulting in invalidity.[7] That is an unusual approach to construing the Direction, especially when, on the plaintiff's approach, the Direction has effect according to its natural meaning and avoids the problems of invalidity that are created by the Minister's approach. To the extent that s 9 is largely rendered surplus by the applicant's approach (DS [13]-[16]), that is merely an outcome of the natural meaning of the words used in the Direction and the application of the principle that a construction that avoids invalidity is to be preferred.

44. DS [17] relies on the differing usage of "take into account" (s 9(1)) and "have regard to" (s 7) in the Direction. Yet as the authorities relied on by the Minister show, the presumption "that where different words are used a change of meaning is intended... is of no great weight" (*King v Jones* (1972) 128 CLR 221 at 266) and "is of very slight force if the words in themselves are sufficiently clear": *Commissioner of Taxes (Vict) v Lennon* (1921) 29 CLR 579 at 590. The Minister's submission should be rejected: *Telstra Corp Ltd v ACCC* (2008) 171 FCR 174 [19].

45. DS [18] and [19] claim that the purpose of the Direction was to align the order in which delegates consider and dispose of Family Visa applications with the order of priority determined by the Government, and to give PUMA Family Applications the lowest priority. It is said that the Minister's construction best achieves that purpose. However, the plaintiff's construction also achieves that purpose. It is accurate to say that PUMA Family Applications have the lowest priority when, absent some relevant circumstance, such applications are generally to be processed last.

46. DS [20] makes the mistake of confusing a mandatory processing order with a processing order that admits of exceptions in appropriate circumstances. The latter may promote fair and rational decision making, but the former does the opposite: see [11], [12] and [38] above. The Minister's reliance on *Plaintiff M64* is, again, misplaced: see [12] above.

47. For these reasons, and those outlined in relation to the invalidity that results from the Minister's construction of the Direction, the plaintiff's construction should be adopted.

The plaintiff should have relief in any case

48. For the reasons outlined above, the plaintiff's construction of the Direction should prevail, and question 2 should be answered "no". If, however, the Court holds that the Minister's construction of the Direction is correct, and if the Court accepts the Minister's submissions on the validity of the Direction, then question 2 must still be answered "no". If the Minister is correct in that the Direction is to be read down, then, on its proper construction, the Direction does *not* oblige delegates of the Minister to follow the order of priority set out in s 8 of the Direction "in every case" when determining whether to consider or dispose of a PUMA Family Application.

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6 In some cases, "have regard to" effectively means "have regard only to" (DS [11]), but the natural meaning of the phrase "means no more than to take into account or to consider": *ACCC v Leelee Pty Ltd* (2000) ATPR 41-742 [81]; see also *Commissioner of AFP v Courtenay Investments Ltd (No 3)* (2014) 289 FLR 331 [16].

7 Thus on the Minister's approach, the words "applications for Family Stream visas" mean something less than what they would naturally mean: DS [56].

49. Moreover, should the Direction be construed and read down as the Minister submits, the plaintiff would nevertheless be entitled to relief. The Court should find that the Direction has not been implemented in the manner that the Minister now suggests that it operates. Rather, it has been implemented on the basis that it admits of no exceptions, based on the Reasonable Time Obligation or otherwise, in the case of PUMA Family Applications.

50. *First*, departmental submissions relating to consideration of the Direction by the Australian Human Rights Commission (**AHRC**) show this to be so. A departmental submission prepared for the Minister in July 2015 in relation to work done by the AHRC stated that the Direction gave Family Visa applications "sponsored by [a UMA] lowest priority and in effect, these applications will not be processed further while any other Family Stream applications remain to be processed. These applications will not be processed further for many years": SC p 105 [4], 107. That statement suggest that the Direction's application was not subject to the Reasonable Time Obligation. So does the statement that, under the Direction, "decision makers in the Department are unable to consider compelling and compassionate circumstances" for UMA-sponsored applications: SC p 106 [6]. If the Direction were being applied subject to the Reasonable Time Obligation, delegates would have been considering compelling and compassionate circumstances when considering what amounted to a reasonable time. A further departmental submission in February 2016 showed that the Department's approach had not changed: SC p 141 [5], 142 [11].

51. *Secondly*, the same approach to implementing the Direction was evinced in correspondence with Fragomen in relation to the Visa Application. On 6 May 2015, the Department emailed Fragomen, stating that, the Direction meant that the Visa Application "will not be processed further as this stage and will not be able to be finalised for a number of years. There is no priority for families sponsored by [a UMA] who are facing compelling or compassionate circumstances": SC p 325. Fragomen replied on 21 May 2015, stating that if "any leeway can be given this would be most appreciated as the applicant, a mother and her kids, have had to leave Afghanistan for fear of persecution and are now living in a foreign land without much support": SC p 326. Fragomen asked if "any consideration can be given to processing this application within the usual processing time frames, the applicant, her spouse and kids will be extremely grateful for this. I would be happy to provide submissions as to why there is a need for the processing of the application to be completed within a practical time frame, please let me know if this is required?": SC p 326.

52. The Department never responded. If the Direction were being implemented in the manner for which the Minister now contends, a reply would have been expected.

53. In late September and early October 2015, Fragomen sent further communications to the Department: SC p 327-30. The Department replied, referring to the Direction, stating that there was no priority for family members facing compelling or compassionate circumstances and that "[w]e are not able to take any further action on the application or respond to any status updates on the application": SC p 331. There was (and until the Minister filed his submissions in this Special Case, had never been) any suggestion that the Direction's effect on PUMA Family Applications was anything less than absolute. On 8 October 2016, the Department stated that the Visa Application "will only be actively processed once the sponsor acquires Australian Citizenship", further confirming that the Direction was being enforced regardless of the Reasonable Time Obligation: SC p 333.

54. On 19 January 2016, Fragomen wrote a letter, addressed to a delegate, noting that the Direction, if mandatory, was inconsistent with the Reasonable Time Obligation, and requesting that the Visa Application "be afforded priority and decided within 12 months of lodgement" and "be processed without delay": SC p 338 [6], 339 [9], 341 [25], 342 [31]. The letter outlined the special circumstances of the case: SC p 339 [9] - 342 [30]. The

Department replied that the Direction meant that PUMA Family Applications "will only be processed after all other Family Stream applications have been processed... As there is no exception in the Direction for affected family members facing compelling or compassionate circumstances and there are currently other Family Stream applications where the sponsor did not arrive as [a UMA] remaining to be processed, the visa applications... cannot be processed further at the present time": SC p 349.

55. This correspondence shows that no consideration was given to processing the Visa Application outside of the Processing Order. There is not a single reference in the correspondence to the possibility of an exception to the Direction based on the Reasonable Time Obligation. An offer to provide a submission as to why the Processing Order should not be applied was ignored by the Department in May 2015. When a submission was made in January 2016, the response was that the Visa Application would be processed only in accordance with the Processing Order.

56. *Thirdly*, SC [35] reflects the manner in which the Direction has been implemented by the Department. That paragraph accords with, and only holds true on, the approach taken by the Department to implementing the Direction: that no PUMA Family Applications will be processed outside of the Processing Order (other than under s 4(2) of the Direction).

57. *Fourthly*, as outlined above at [20], the departmental submission preceding the making of the Direction envisaged that "grant-ready" PUMA Family Applications would not be finalised. This was so even though the Department considered that delay in granting those visa applications "could be seen as inconsistent with the obligation in section 65 of the Act to grant a visa when all of the relevant requirements are met": SC p 96 [14]. To specifically expend effort in ensuring that an application in which all criteria are met is not granted (see SC p 95 [5b]) is antithetical to the Reasonable Time Obligation.

58. For these reasons, even if the Minister's submissions on the construction and validity of the Direction are preferred, the plaintiff should have relief. The relief would be:

    a) a declaration that, the Direction does not oblige delegates of the Minister, in determining the order for considering and disposing of Family Stream visa applications under s 51 of the *Migration Act* and in complying with the obligation to consider valid Family Stream visa applications under s 47 of the *Migration Act*, to consider and dispose of applications in which the applicant's sponsor (or proposed sponsor) is a person who entered Australia as a UMA and holds a permanent visa by following the order of priority in s 8 of the Direction if doing so will cause the consideration and determination of such an application to occur otherwise than within a reasonable time;

    b) a writ of mandamus as stated in paragraph 4 of the Application.

59. Whether the case is resolved in this way, or as outlined at PS [85]-[86], question 5 is to be answered "the defendant".

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