HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ENT19
Plaintiff

and

MINISTER FOR HOME AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

DEFENDANTS' OUTLINE OF ORAL ARGUMENT

PART I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: Propositions to be advanced in oral argument

Factual issues

2. The following matters are correction of erroneous findings sought by the Plaintiff, which findings are treated by the Plaintiff as important:

   (a) the Plaintiff was sentenced on 19 October 2017, not 13 October (**AB 73, 252-254**);

   (b) the media reporting was not caused by a ministerial media release (**AB 254, 553-4**);

   (c) the Minister has previously made decisions under s 65 of the Act (eg *Plaintiff S297* (2015) 255 CLR 231 (**JBA 3, Tab 16 at 991**), *WAKJ* [2004] FCA 1336);

   (d) the Minister accepted in the Decision that the Plaintiff poses no risk of committing further people smuggling offences, but no broader concession (**AB 63 at [25]**); and

   (e) **RS [22]** wrongly identifies the Department's reason for briefing the Minister.

The "constitutional issue" / the "not authorised by the Act issue"

3. There is no challenge to the validity of either s 65 of the *Migration Act 1958* (Cth) or cl 790.227 of the *Migration Regulations 1994* (Cth) (**DS [12]**). The only question is whether the Minister's Decision to refuse the Plaintiff's visa application was authorised by the statute: *AJL20* (2021) 95 ALJR 567 at [43] (**JBA 5, Tab 25;** *contra* **Reply [6]-[9]**).

4. Contrary to the Plaintiff's major premise, an intention to deter conduct perceived as being harmful to Australia or its national interest is not inherently punitive: *Djalic* (2004) 139 FCR 292 at [74]-[75] (**JBA 5, Tab 26**). Deterrence is usually (if not always) not an end in itself. It serves the purpose of the law the contravention of which is being deterred. It is not something innately linked to criminal punishment.

5. Cases involving deportation or cancellation of a visa, which are cases involving the taking away of granted rights, are different from a case of not granting a visa, given such a person never had the right to enter Australia: cf *Re Sergi* (1979) 2 ALD 224; *Tuncok* [2004] FCAFC 172 (**JBA 6, Tabs 35 and 38**) (**DS [19]**).

6. Contrary to the Plaintiff's minor premise, even if the refusal to grant a visa for the purpose of general deterrence is punitive (which is denied), that was not the sole or substantial

purpose of this Decision, which is analogous to *ENT19* (2021) 289 FCR 100 at [154] (**JBA 5, Tab 27**) (**DS [28]**). In any purposive analysis, the Decision was not made to punish the Plaintiff but to achieve expressly stated national interest objectives.

7. The Decision was to not grant him a favourable migration outcome. The refusal of a benefit is not a punishment. It was the avoidance of signalling what might be an incentive.

8. It may be accepted that the Plaintiff is liable to be held in detention until he is removed. The Minister is under a duty to remove as soon as reasonably practicable. Further, there are other possible outcomes envisaged by the Act (**DS [35]-[36]**).

9. The Plaintiff's characterisation of the effect of the Decision as if it were a decision to detain him should be rejected. It was a decision not to grant a benefit. While that benefit would have brought release from detention, that is not the same as a decision to detain.

10. The Plaintiff conflates the purpose of the Decision with his concept of the effect of the Decision upon him. The Plaintiff's detention was a consequence of other provisions in the Act and his continuing status as an unlawful non-citizen: *Falzon* (2018) 262 CLR 333 at [63], [69], [84]-[85], [96] (**JBA 2, Tab 7**) (**DS [30]**).

The "misunderstanding of the law issue"

11. The proposition that the Minister did not understand that the Act conferred upon her power to grant a visa application is farfetched and should be rejected (**DS [39]**).

12. The fact that the Ministerial Submission contemplated that a grant decision would not be made personally by the Minister is not a basis to infer that the Minister did not understand that she had power to grant a visa. Regardless, that misunderstanding would be immaterial.

The "procedural fairness issue"

13. The fact that there had been media coverage of the Plaintiff's conviction was not "relevant information" within the meaning of s 57 of the Act because it was given by the applicant for the purpose of this visa application (**DS [48]**, s 57(1)(c)).

14. Further, and in any event, the information about the existence of this media coverage was not "the reason, or part of the reason for refusing to grant [the] visa" (**DS [47]**, s 57(1)(a)). It did not "in its terms" contain "a rejection, denial or undermining" of the Plaintiff's claims: *Plaintiff M174/2016* (2018) 264 CLR 217 at [9] (**JBA 3, Tab 14**), nor was it part of the Minister's reasoning (**AB 62-63, [24]**).

15. If the fact of media coverage was "relevant information", the Plaintiff must, but has not, identified how compliance with s 57 could have made a difference (**DS [49]**).

The "relevant considerations issue"

16. The Plaintiff's major premise – that the Minister, once she has made a choice as to the national interest matters that may be considered, must have regard to all that is relevant to each of those matters – is wrong: *Huynh* (2004) 139 FCR 505 at [71], [74], [80] (**JBA 5, Tab 30**) (**DS [50]-[53]**).

17. Even if the major premise were correct, it would then be necessary to identify the aspects of the national interest relied upon by the Minister, and to show that the "omitted" considerations identified by the Plaintiff (**AB 7**) were relevant to them.

18. The relevant considerations identified by the Plaintiff were either not relevant to the aspects of the national interest relied upon by the Minister, or were considered by the Minister.

The "relief issue"

19. If the Decision is invalid, the appropriate relief is an order quashing the Decision and an order requiring the Minister to make a new decision (**DS [55]**).

20. Even if Ground 1 is upheld, that would not foreclose the Minister from lawfully refusing to grant the visa in the national interest: cf *Plaintiff S297/2013* (2015) 255 CLR 231 at [41] (**JBA 3, Tab 16**) (**DS [61]**). Accordingly, the Court should not make an order of peremptory mandamus compelling the grant of a visa.

21. In addition, in any scenario in which the Plaintiff is successful, the detention of the Plaintiff would not be unlawful. Accordingly, there should be no order for habeas corpus (**DS [56]**).

Dated: 8 December 2022

Stephen Lloyd | Alison Hammond | Jackson Wherrett