IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

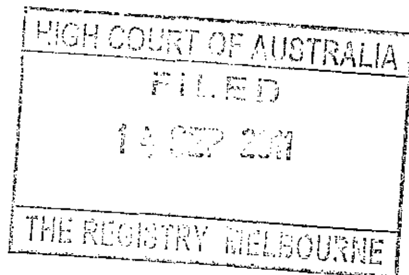
No. M10 of 2011

BETWEEN:

Sayed Abdul Rahman SHAHI

Plaintiff

and



Minister for Immigration and Citizenship

Defendant

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DEFENDANT'S SUBMISSIONS ON SPECIAL CASE

Part I: Publication

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

Part II: Issues

2. The sole issue is whether, in the circumstances specified in the special case, the Minister's delegate made a jurisdictional error in finding that the plaintiff's mother did not meet the requirements of cl 202.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**).

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The defendant does not consider that notices need to be given under s 78B of the *Judiciary Act 1903* (Cth).

Filed on behalf of the defendant on 14 September 2011

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Maria Ngo

Part IV: Material facts

4. The factual material that the court may rely upon is that contained in the special case. The defendant accepts the accuracy of the plaintiff's chronology.

Part V: Applicable statutory provisions

5. The plaintiff's statement concerning applicable statutory provisions (Plaintiff's Submissions (**PS**) at [38]) and the related Plaintiff's Annexure do not contain all of the material to which the defendant will make reference. An annexure to these submissions contains additional materials.

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Part VI: Defendant's argument

Overview

6. The defendant contends that the relevant clauses of Schedule 2 required, as a precondition for the granting of the plaintiff's mother's visa application, the Minister's delegate to be satisfied that the plaintiff's mother was "a member of the immediate family" (as that expression is defined[1]) of the plaintiff at three points in time:

   a) when the plaintiff applied for a protection visa (on 14 September 2009[2]), by operation of cl 202.211(2)(b)(ii) of Schedule 2;[3]

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   b) when the plaintiff's mother applied for her visa (on 4 December 2009[4]), by operation of cl 202.211(2)(c) of Schedule 2;[5]

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1 Plaintiff's Annexure (**PA**) at page 4 (line 20)
2 SCB 10[3]
3 SCB 59 (line 20)

c) when the delegate made a decision whether or not to grant the plaintiff's mother's visa application (on 7 September 2010[6]), by operation of cl 202.221 of Schedule 2.

7. The definition of "member of the immediate family" is such that, as between two points in time, a person (person A) who was the member of the immediate family of another (person B) at one point in time may cease to be such a member at a later point in time. This can happen, for example, if:

a) person A and person B get divorced;

10 b) person A, being a dependent child of person B, ceases to be dependent on person B;

c) where person A is the parent of person B, person B turns 18 years of age.

8. This construction of the relevant provisions gives all clauses meaningful work to do and serves *inter alia* the purpose that a visa is not granted to a person who is no longer a member of the proposer's immediate family at the time of grant (for example because the visa applicant and proposer have been divorced while the visa application was awaiting determination).

20 *Introduction to decision-making framework imposed by Act*

9. Section 29 of the *Migration Act 1958* (Cth) (the **Act**) relevantly provides that the defendant may grant permission to a non-citizen to remain in Australia.[7] Such permission is known as a visa. Subsection 31(1) of the Act provides that there are to be prescribed

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4 SCB 10[4]
5 SCB 60 (line 8)
6 SCB 12[14]
7 PA at 2 (line 2)

classes of visas. Subsection 31(3) provides that the Regulations may prescribe criteria for a visa or visas of a specified class.

10. Section 45 of Act provides that a non-citizen who wants a visa must apply for a visa of a particular class.[8] Applications generally need to be made in writing. Visa applicants are entitled to supplement their visa applications with additional material in the period after the making of the visa application and prior to the Minister having made a decision on the application and the Minister is obliged to have regard to that information (s 55 of the Act).

11. Subsection 65(1) of the Act relevantly provides that, after considering a valid visa application:[9]

    a) the defendant or his delegate must, if satisfied that prescribed criteria have been satisfied, grant the visa; and

    b) if not so satisfied, the defendant or his delegate must refuse to grant the visa.

12. The satisfaction that the prescribed criteria are met must exist "after considering a valid application for a visa". However, as detailed below, the satisfaction may be about matters at some earlier point in time such as the time of making the visa application or earlier.

13. Apart from prescribed criteria, the Act envisages the prescription of: circumstances that must exist before a visa may be granted (s 40(1) of the Act); conditions to which visas may be made subject (s 41); and the way in which a visa is to be evidenced (s 70).

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8 PA at 2 (line 25)

9 PA at 2 (line 28)

The prescription of visa criteria and the structure of Schedule 2

14. Regulation 2.01 relevantly states that, for the purposes of s 31 of the Act, the prescribed classes of visas are such classes as are set out in the respective items in Schedule 1. In the case of Refugee and Humanitarian (Class XB) visas, the relevant visa class is set out in item 1402 of Schedule 1 to the Regulations [see SCB 17-18]. Subitem 1402(2) specifies four subclasses of this class of visa.

15. Regulation 2.02 provides that Schedule 2 is divided into Parts, each identified by the word "Subclass" followed by a 3-digit number (being the number of the subclass of visa to which the Part relates) and the title of the subclass. A Part of Schedule 2 is relevant to a particular class of visa if the Part is listed under the sub-item "Subclasses" that refers to that class of visa.

16. Regulation 2.03(1) relevantly provides that, for the purposes of s 31(3) of the Act, the prescribed criteria for the grant to a person of a visa of a particular class are: the primary criteria set out in a relevant Part of Schedule 2 ; or the secondary criteria.

17. The structure of every Part of Schedule 2 is identical:

a) It begins with the word "Subclass", a three digit number and then a name for the Part.

b) There is then a division which adds ".1" after the relevant three digit number and the word "Interpretation".

c) There is then, in each Part, the following six divisions:

i) ".2" entitled "Primary criteria", containing the criteria referred to in reg 2.03(1) and prescribed under s 31(3) of the Act;

ii) ".3" entitled "Secondary criteria" also containing the criteria referred to in reg 2.03(1) and prescribed under

s 31(3) of the Act. Secondary criteria are drafted in a manner so as to apply to certain family members of one or more persons who are seeking to meet the primary criteria;

iii) ".4" entitled "Circumstances applicable to grant", setting out the circumstances referred to in reg 2.04(1) and prescribed under s 40(1) of the Act;

iv) ".5" entitled "When visa in effect", specifying periods during which a visa of the relevant kind will be in effect referred to in reg 2.05(3), prescribed under s 29 of the Act;

v) ".6" entitled "Conditions", containing mandatory or discretionary conditions applicable to visa of that kind, referred to in reg 2.05(1) and (2) and prescribed under s 41 of the Act; and

vi) ".7" entitled "Way of giving evidence", setting out how the visa can be evidenced under s 70 of the Act.

d) In each division dealing with primary criteria, the criteria are divided into two subdivisions which are numbered respectively ".21" and ".22". The criteria in each of those subdivisions are described by the Schedule respectively as "criteria to be satisfied at time of application" and "criteria to be satisfied at time of decision". There are two equivalent subdivisions for secondary criteria, numbered respectively ".31" and ".32".

18. The Minister contends that, at least generally, when a visa application is being considered, he or one of his delegates is required to reach a state of satisfaction (at the time of making the decision) as to whether the criteria in the subdivision entitled "criteria to be satisfied at time of application" were met by reference to circumstances as at the time when the visa applicant lodged his or her visa application. That is, it is a present state of

satisfaction (reached on the basis of evidence as at the date of the decision) concerning matters as at the earlier point in time (the time of the making of the visa application). When a delegate is considering the criteria in the subdivision containing "criteria to be satisfied at time of decision", the delegate will reach a present state of satisfaction as to the relevant matters at the then present time.

19. By operation of s 13(1)(a) of the *Legislative Instruments Act 2003* (Cth) and s 13 of the *Acts Interpretation Act 1901* (Cth), Schedule 2 to the Regulation is deemed to be a part of the regulation.[10]

10 20. The Minister contends that, save for exceptional circumstances, the criteria in Schedule 2 should be construed in accordance with the above design and structure of the Schedule. An exceptional circumstance arose in *Berenguel v Minister for Immigration and Citizenship* (2010) 84 ALJR 251 (**Berenguel**). That case, unlike the present case, concerned perceived non-compliance with a criterion located in the subdivision entitled "criteria to be satisfied at time of application". In that case, the court did not accept that the location of the criterion in that subdivision was decisive as to how the criterion was to be construed. The court concluded that the
20 criterion needed to be assessed as at the time when the delegate made the decision whether or not to grant the visa. This conclusion was supported by:

a) the purpose of the criterion that the court was able to discern (at [21] and [24]);

b) the contrasting of the relevant criterion with other surrounding criteria which were more obviously applicable to the time of application (at [24]);

c) the language of the criterion was directed to currency of English language abilities, suggesting that fulfillment of the

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10 *Berenguel v Minister for Immigration and Citizenship* (2010) 84 ALJR 251 (**Berenguel**) at [15]

criterion as at the time of decision would meet its object (at [25]); and

d) the construction for which the Minister contended would, it was determined, lead to "such plain unfairness and absurdity that it is not to be preferred" (at [26]).

21. The Minister contends that *Berenguel* is distinguishable from the present case in relation to the first, second and fourth of the above features. As to the third, the Minister accepts that the criterion found not to have been met in the present case is suggestive of assessment at the time of decision. However, unlike in *Berenguel*, the criterion in the present case was in the subdivision relating to the time of decision and was assessed on that basis. In this way, *Berenguel* reinforces the correctness of the delegate's decision in this case.

22. The Minister's contention as to the general approach to construing criteria as between time of application and time of decision also gains support from the Explanatory Statement to the *Migration (1993) Regulations 1992*, which introduced the predecessor of the current Schedule 2, being a schedule in materially the same format. The Explanatory Statement relevant said:

> *Schedule 2 - Provisions With Respect of the Grant of Individual Classes of Visas and Entry Permits to Primary Persons*
>
> *This schedule lists the prescribed criteria for the grant of each class of visa and entry permit to primary applicants. The criteria for each visa and entry permit are further divided into criteria to be met for a visa before entry and after entry to Australia, and criteria to be met for an entry permit before entry and after entry to Australia. It is also* ***specified whether the criteria are to be met at time of application or at time of decision****.* [Emphasis added.]

23. More importantly, a number of substantive clauses in the Regulations are premised upon the above construction (which clauses applied at all relevant times). For example, reg 2.08 makes provision for the situation where a person who is a visa applicant has a baby after the visa application was made but before any

decision on that application. It applies to almost all classes of visa and provides:

> *(1) If:*
>
> *(a) a non-citizen applies for a visa; and*
>
> *(b) after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to the non-citizen;*
>
> *then:*
>
> *(c) the child is taken to have applied for a visa of the same class at the time he or she was born; and*
>
> *(d) the child's application is taken to be combined with the non-citizen's application.*
>
> *(2) Despite any provision in Schedule 2, a child referred to in subregulation (1):*
>
> *(a) must satisfy the criteria to be satisfied at the time of decision; and*
>
> *(b) at the time of decision must satisfy a criterion (if any) applicable at the time of application that an applicant must be sponsored, nominated or proposed.*

24. This regulation operates to deem the newborn baby to be an applicant for the same class of visa as his or her parent. It then provides that the baby need only meet the criteria to be satisfied at the time of decision and only certain criteria that were applicable as at the time of application but, for the baby, to be determined as at the time of decision. The clear implication is that, in the usual (non-baby) case, the criteria included in the subdivision pertaining to criteria to be satisfied at time of application have to be determined by the delegate by reference to the circumstances at that time.

25. A number of other provisions reinforce this implication and this manner of construing Schedule 2: regs 2.08AA ("...does not have to satisfy the secondary criteria in Schedule 2 that would, but for

this subregulation, need to be satisfied at the time of application"), 2.08A(2) and 2.08B(2).

Subclass 202 Global Special Humanitarian visas

26. One criterion which the plaintiff's mother needed to satisfy in the subdivision containing criteria to be satisfied at the time of application was subitem 202.211(2), which provided:

(2) The applicant meets the requirements of this subclause if:

(a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian
10 *permanent resident (in this subclause called* ***the proposer****); and*

(b) either:

(i) the proposer is, or has been, the holder of a Subclass 202 visa, and the applicant was a member of the immediate family of the proposer on the date of grant of that visa; or

(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(iia) the proposer is, or has been, the holder of a Resolution of Status
20 *(Class CD) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or*

(iii) the proposer is, or has been, the holder of a special assistance visa, and the applicant was a member of the immediate family of the proposer on the date of the application for that visa; and

(ba) the application is made within 5 years of the grant of that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to
30 *Immigration.*

27. It seems to be common ground between the parties that the elements of the criterion contained in sub-items 202.211(2)(a), (b), (ba) and (d), once met are incapable of changing at any later point in time.[11]

28. Sub-item 202.211(2)(c) uses language which does not, itself, attach to any point of time. The person has to "continue" to be a member of the immediate family of the proposer. One only gets the temporal point of reference from the subdivision in which the language is contained. Given that the delegate must first assess this criterion by reference to the time of application, the work done by sub-item 202.211(2)(c) is to connect with the relevant part of sub-item 202.211(2)(b) so as to require the visa applicant to be a member of the immediately family of the proposer continuously from the time specified in (b) until the making of the visa application for the subclass 202 visa.

29. One then comes to item 202.221, in the subdivision containing criteria to be satisfied at time of decision, which states:

> *202.221 The applicant continues to satisfy the criterion in clause 202.211.*

30. The Minister contends that this provision requires the delegate to determine whether each of the matters in sub-item 202.211, which are capable of varying over time, *continue* to be satisfied as at the time of the decision.

31. For a visa applicant who relied upon a contention that he or she was subject to substantial discrimination amounting to a gross violation of human rights (under sub-item 202.211(1)(a)), the delegate would need to be satisfied that the person *continued* to be subject to such discrimination as at the time of decision. It would not be sufficient for the delegate to be satisfied as at the time of the decision that the visa applicant had been subject to that discrimination at the time of application. Satisfaction of the

[11] PS at [29]-[32]

position at the time of application is the work done by sub-item 202.211 not sub-item 202.221.

32. Similarly, for a visa applicant who relied upon having been proposed in accordance with sub-item 202-211(1)(b), the delegate needs to be satisfied that each of the elements of sub-item 202.211(2) continue to be fulfilled at the time of decision. Given that each of elements of that criterion except that in sub-item 202.211(2)(c) remains met once originally fulfilled, the sole effective function of item 202.221 in respect of visa applicants to which item 202.211(2) applies is to ensure that the visa applicant has *continued* to be a member of the immediately family of the proposer up to the time of decision.

33. The plaintiff says that this is wrong. The plaintiff contends, in substance, that item 202.221 has no operation other than to require the delegate to be satisfied at the time of decision that the criterion applicable to the time of application continues to have been satisfied. However, those time of application criteria are assessed as at the time of decision. The plaintiff's construction gives sub-item 202.221 no work to do. It should be rejected.

34. In addition, the plaintiff's construction leads to results contrary to the apparent policy of the definition of "member of the immediate family", which tend to the absurd. For example, it is the policy of the defined expression that persons are outside the expression if they are children who are not dependent on the proposer parent. There is no reason why a person who has chosen to become independent of his or her parent while the visa is awaiting determination should be offered a visa irrespective of that decision.

35. More startlingly, the plaintiff's construction would oblige the Minister to grant a visa to a former spouse or former de facto spouse of the proposer, even after the person has divorced the proposer while the visa was being assessed. The Minister contends that this result is absurd and the construction leading to it should only be accepted if there is no other available interpretation. Here,

the construction advanced by the Minister is not only available, it is the natural construction in the context of scheme.

36. It needs to be noted that subclass 202 visas may by gazette notice be subject to a limit (item 202.226) imposed under s 85 of the Act. Once the gazetted limit is met for a financial year, the Minister may defer consideration of pending applications to the next financial year, giving such applicants at least an opportunity to obtain a visa of this class (ss 88-89 of the Act). While it may be true that circumstances may change adversely to the visa applicant during
10 such a delay, this is no worse than having a visa refused because the gazetted limit has been met for that year and a new visa application having to be made in the following year. While in some cases a delay may result in a visa applicant ceasing to be a member of the immediate family of the proposer, this is not a result that is "plainly unfair". This is the result of the possibility that a visa limit could be imposed on this subclass and not because of any unfairness in the construction of the visa criteria. Even where, as here, no limit has been gazetted, the provisions need to be construed against the possibility that this may occur. The visa criteria cannot be
20 construed differently if a delay in processing a visa application arises by reason of awaiting the availability of visas in a new financial year as opposed to if the delay arises for other reasons.

37. The plaintiff seems to place some reliance upon this court's decision in *Berenguel*. It is difficult to see how that cases offers the plaintiff any assistance in the present context. If one were to characterise as 'non-decisive' the subdivisions of primary criteria pertaining to the time of application and the time of decision, this would tend to lead to the position that the criterion that the visa applicant continue to be a member of the immediate family of the
30 proposer would be determined as at the date of the decision (this would be the analogous result with *Berenguel*). Such a construction would not assist the present visa applicant. Conversely, if *Berenguel* is distinguished and the categorisation of the criterion as between time of application and time of decision to relevantly inform and determine the time by reference to which the criteria are to be met,

then the need to give cl 202.221 meaningful work to do precludes the plaintiff from succeeding in this case.

Application of construction to the present case

38. In the circumstances of the present case, the plaintiff's mother was not a "member of the immediate family" of the proposer, within that defined expression, when the application was decided. It was open to the delegate to be satisfied of this.

39. Having reached that view, the delegate did not err in failing to be satisfied that the plaintiff's mother met the criterion in 202.221.

10 *Orders*

40. The question in the special case should be answered "No".

Dated the 14th day of September 2011

Stephen Lloyd