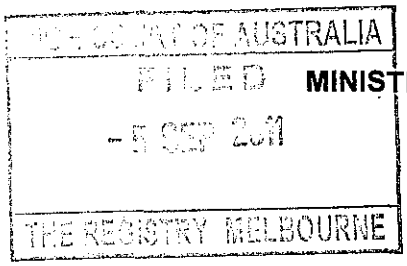
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M10 of 2011

BETWEEN

SAYED ABDUL RAHMAN SHAHI

Plaintiff



MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

10 **PLAINTIFF'S SUBMISSIONS**

Part I:

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

Part II:

2. Under the *Migration Act* 1958 (Cth) (the **Act**) and the Migration Regulations 1994 (Cth) (the **Regulations**), there is a prescribed class of visa known as Refugee and Humanitarian (Class XB) visa. There are five subclasses in Class XB, which are numbered: 200, 201, 202, 203 and 204. Each of the five subclasses consists of two streams.

3. Under the first stream, an application may be made by a person who is
20 subject in their home country to persecution or to substantial discrimination amounting to gross violation of human rights, or who is female and is either subject to persecution or is registered as a person of concern with the UNHCR. Under the second stream, the applicant must stand in a close family relationship with a person who has been granted a refugee or humanitarian visa under the Act and who proposes the applicant for the grant of a Class XB visa, but there is no requirement to demonstrate that the person is subject to persecution or substantial discrimination. The second stream is colloquially known as "split family".

Filed on behalf of the Plaintiff by:

Victoria Legal Aid
350 Queen Street
Melbourne VIC 3000
Email: Krystyna@vla.vic.gov.au

Date of this document: 5 September 2011

DX 210646 Melbourne
Tel: 03 9269 0416
Fax: 03 9629 0210
Ref: 10F996295 / Krystyna Grinberg

4. The issue in this case is the proper construction of the criteria applicable to the grant of a Refugee and Humanitarian (Class XB) visa, in any one of the five subclasses, when the applicant seeks to satisfy those criteria under the "split family" stream. As the Plaintiff, who is the proposer of his mother's application for a Refugee and Humanitarian (Class XB) visa, had earlier been granted a Protection (Class XA) visa, subclass 866, the relevant subclass in this case is 202 (Global Special Humanitarian).

5. The specific question presented is as follows:

> "Does an applicant who satisfies the criterion in clause 202.211 under the 'split family' stream because the applicant satisfies the requirement of being a 'member of the immediate family' of the proposer at the two points in time identified in subclause (2)(b)(ii) and (c), also satisfy the criterion in clause 202.221 even if, at the time when the criterion in clause 202.221 comes to be considered, the applicant is no longer a 'member of the immediate family' of the proposer?"

Part III:

6. The Plaintiff considers that notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) is not required.

Part IV:

7. The matter is in the original jurisdiction of this Court.

Part V:

8. The relevant facts are set out in the special case. **[SCB 10-13]** In brief, they are as follows.

9. The Plaintiff was born in Afghanistan. He has never known his precise date of birth. **[SCB 10 at [1]]**

10. On or about 18 May 2009, the Plaintiff arrived in Australia at Christmas Island as an unaccompanied minor without a valid visa. On 14 September 2009, the Plaintiff applied for a Protection (Class XA) visa. On 16 September 2009, the Plaintiff was granted a Protection (Class XA) visa, subclass 866. **[SCB 10 at [2]-[3]]**

11. On 4 December 2009, the Plaintiff's mother, who was living outside of Australia, applied for a Refugee and Humanitarian (Class XB) visa. She sought to satisfy the criteria for the grant of a subclass 202 visa under the "split family" stream, which meant that she was not required to meet the criterion of being subject to substantial discrimination, amounting to gross

violation of human rights, in her home country, Afghanistan. The Plaintiff's brothers and sisters and his niece were included as secondary applicants. The Plaintiff was the proposer in respect of his mother's application. He was, at that time, under the age of 18 years. **[SCB 10-12 at [4], [6]-[8], [10], [12]-[13], [15]]**

12. On 7 September 2010, a delegate of the Defendant refused the mother's application for a Refugee and Humanitarian (Class XB) visa. The delegate was not satisfied that at the time of decision the mother continued to be a member of the immediate family of the Plaintiff. The Plaintiff was, by then, over the age of 18 years. **[SCB 12-13 at [16]-[17]]**

Part VI:

The statutory and regulatory framework and this Court's decision in Berenguel

13. This Court has considered the relevant statutory and regulatory framework in *Berenguel v Minister for Immigration and Citizenship.*[1] At issue in that case was Part 885 of Schedule 2 of the Regulations. The primary criteria for the grant of a visa prescribed by that Part were divided into two categories, appearing under the two headings "Criteria to be satisfied at time of application" and "Criteria to be satisfied at time of decision". This Court said (in terms which are also applicable to Part 202 of Schedule 2):

> "[15] The criteria for the grant of a "Skilled—Independent" visa are to be found in Pt 885 of Sch 2 to the Migration Regulations. The primary criteria are contained in Div 885.2 of Pt 885 and are divided into two categories designated 'time of application' criteria and 'time of decision' criteria. By virtue of s 13(1)(a) of the *Legislative Instruments Act* 2003 (Cth), where enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears, the *Acts Interpretation Act* 1901 (Cth) applies to the instrument 'as if it were an Act and as if each provision of the legislative instrument were a section of an Act'. The Migration Regulations fall within the definition of 'a legislative instrument' in ss 5 and 6 of the Legislative Instruments Act. This will attract to them the application of s 13 of that Act. The headings of the parts, divisions and subdivisions into which an Act is divided are deemed to be part of the Act. Every schedule to an Act is deemed to be part of it. So Sch 2 to the Migration Regulations is 'part of' those regulations. Thus, the criteria designations appearing as headings, not otherwise defined, in Sch 2 may be taken as 'part of' the Migration Regulations. There is no provision otherwise giving substantive operation to the headings in which the designations appear. Nor are they otherwise defined."

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1 (2010) 264 ALR 417 at 420-421 [11], [13]-[14].

14. The specific issue in *Berenguel* involved criterion 885.213, set out under the heading "Criteria to be satisfied at time of application". It required, relevantly, that the applicant "has vocational English" or "has competent English". Elsewhere, the Regulations provided that a person applying for a General Skilled Migration visa "has vocational English if the person satisfies the Minister that the person has achieved, in a test conducted no more than 2 years before the day on which the application was lodged ... an IELTS test score of at least 5 for each of the 4 test components ...".

15. The applicant had not, prior to the time of making his application for the visa, done the IELTS test. He sat and passed that test in the month following the making of the application. He then submitted the test result to the Department of Immigration and Citizenship. The delegate refused the grant of the visa, having found that criterion 885.213 was not satisfied at the time of application because at that time the applicant had no IELTS score at all, and accordingly he failed to have "vocational English".

16. This Court held that although criterion 885.213 was set out under the heading "Criteria to be satisfied at time of application", that heading did not connect grammatically to the terms of the criterion. The heading was part of the Regulations and it could, for that reason, inform the construction of those Regulations, but it did no more than that. In particular, it did not follow from the fact that a criterion was set out under the heading "Criteria to be satisfied at time of application" that it spoke "exclusively to satisfaction at the time of application".[2] The Court further observed that another criterion set out under the same heading spoke of satisfaction of the Minister in the present tense. This also indicated that the heading was not conclusive as to the construction of the clauses that were set out below it.[3]

17. It follows from this Court's decision in *Berenguel* that the headings "Criteria to be satisfied at time of application" and "Criteria to be satisfied at time of decision" are not determinative of the proper construction of any matter involving issues of timing that may need to be considered in determining whether the particular criterion is satisfied.

18. How a criterion for the grant of a visa is capable of being satisfied, including as to each matter provided by it, is to be determined according to normal

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2 (2010) 264 ALR 417 at 422-423 [26].

3 Under section 65(1)(a)(ii) of the Act the Minister must be satisfied that the criteria for the particular visa prescribed by the Regulations have been satisfied. It is, therefore, of little import that some of the criteria set out in a Part contained within Schedule 2 of the Regulations are drafted commencing with the words: "The Minister is satisfied that ..." (see, eg, clause 885.212 considered in *Berenguel*), while other criteria only state the matter of which the Minister must be satisfied without being prefaced by those words (see, eg, clause 885.213 considered in *Berenguel*).

principles of construction. That process of construction must always begin by examining the context of what is being construed,[4] bearing in mind that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".[5]

History of the five subclasses in Class XB

19. The five subclasses for the class of visas prescribed in item 1402 of Schedule 1 of the Regulations, Refugee and Humanitarian (Class XB), are:

200 (Refugee)
201 (In-country Special Humanitarian)
202 (Global Special Humanitarian)
203 (Emergency Rescue)
204 (Woman at Risk)

20. The five subclasses have been part of the Regulations since 1 September 1994.[6] They were then the only subclasses for the class of visas prescribed by item 1127 of Schedule 1 of the Regulations, Refugee and Humanitarian (Migrant) (Class BA). Relevantly, they provided as follows:

"SUBCLASS 200-REFUGEE

...

200.2 PRIMARY CRITERIA

...

200.21	Criteria to be satisfied at time of application
200.211	The applicant is subject to persecution in the applicant's home country.
200.212	The applicant is living in a country other than the applicant's home country.
200.22	Criteria to be satisfied at time of decision
200.221	The applicant continues to satisfy the criteria in clauses 200.211 and 200.212.

...

SUBCLASS 201-IN-COUNTRY SPECIAL HUMANITARIAN

...

201.2 PRIMARY CRITERIA

...

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4 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [69] (McHugh, Gummow, Kirby and Hayne JJ).

5 *Commissioner for Railways (NSW)* v *Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ).

6 Date of commencement of SR 1994 No.268.

201.21 Criteria to be satisfied at time of application

201.211 The applicant is subject to persecution in the applicant's home country.

201.212 The applicant is living in the applicant's home country.

201.22 Criteria to be satisfied at time of decision

201.221 The applicant continues to satisfy the criteria in clauses 201.211 and 201.212.

...

SUBCLASS 202-GLOBAL SPECIAL HUMANITARIAN

...

202.2 PRIMARY CRITERIA

...

202.21 Criteria to be satisfied at time of application

202.211 The applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country.

202.212 The applicant is living in a country other than the applicant's home country.

202.22 Criteria to be satisfied at time of decision

202.221 The applicant continues to satisfy the criteria in clauses 202.211 and 202.212.

202.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

202.223 The permanent settlement of the applicant in Australia would be consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds.

202.224 The Minister is satisfied that permanent settlement in Australia:

(a) is the appropriate course for the applicant; and

(b) would not be contrary to the interests of Australia.

202.225 The applicant is proposed for entry to Australia, in accordance with approved form 681, by:

(a) a person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; or

(b) a body operating in Australia.

...

SUBCLASS 203-EMERGENCY RESCUE

...

203.2 PRIMARY CRITERIA

...

203.21 Criteria to be satisfied at time of application

203.211 The applicant is subject to persecution in the applicant's home country, whether the applicant is living in the applicant's home country or in another country.

203.22 Criteria to be satisfied at time of decision

203.221 The applicant continues to be subject to persecution in the applicant's home country.

...

SUBCLASS 204-WOMAN AT RISK

...

204.2 PRIMARY CRITERIA

...

204.21 Criteria to be satisfied at time of application

204.211 The applicant is a female person who is:

(a) subject to persecution; or

(b) registered as being of concern to the United Nations High Commissioner for Refugees.

204.212 The applicant is living in a country other than her home country.

204.22 Criteria to be satisfied at time of decision

204.221 The applicant continues to satisfy the criteria in clauses 204.211 and 204.212.

..."

21. Each of subclass 200, 201, 203 and 204 contained criteria, set out under the heading "Criteria to be satisfied at time of decision", broadly equivalent to criteria 202.222, 202.223 and 202.224, reproduced above. Subclass 202 was the only subclass to have a criterion, set out under the heading "Criteria to be satisfied at time of decision", requiring the applicant to be proposed for entry to Australia.

22. The "split family" stream was inserted in each of Parts 200, 201, 202, 203 and 204 of the Regulations by the Migration Regulations (Amendment) 1997.[7] The 1997 amendments also inserted new regulation 1.12AA, which defined a member of the immediate family as the spouse or dependent child of a person, or the parent of a person who is less than 18 years old.

23. After the 1997 amendments, subclass 202 relevantly provided:

> "SUBCLASS 202-GLOBAL SPECIAL HUMANITARIAN
>
> ...
>
> 202.1 INTERPRETATION
>
> 202.111 For the purposes of this Part:
>
> '*Subclass 202 visa*' means:
>
> (a) a Subclass 202 (Global Special Humanitarian) visa; or
>
> (b) a Class 202 (global special humanitarian program) visa within the meaning of the Migration (1993) Regulations; or
>
> (c) a global special humanitarian visa (code number 202) within the meaning of the Migration (1989) Regulations; or
>
> (d) a transitional (permanent) visa granted on the basis of an application for a visa of a kind referred to in paragraph (b) or (c);
>
> '*Subclass 866 visa*' means:
>
> (a) a Subclass 866 (Protection) visa; or
>
> (b) a Class 817 (protection (permanent)) entry permit within the meaning of the Migration (1993) Regulations; or
>
> (c) a transitional (permanent) visa granted on the basis of an application for a visa of a kind referred to in paragraph (b).
>
> ...
>
> 202.2 PRIMARY CRITERIA
>
> ...
>
> 202.21 Criteria to be satisfied at time of application
>
> 202.211(1) The applicant:
>
> (a) is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; or
>
> (b) satisfies the requirements of subclause (2).
>
> (2) The applicant satisfies 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 permanent resident (in this subclause called 'the proposer'); and
>
> (b) either:

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7 SR 1997 No.137, which commenced on 1 July 1997.

(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; 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 Immigration.

202.22 Criteria to be satisfied at time of decision

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

202.222 [unchanged]

202.223 [unchanged]

202.224 [unchanged]

202.225 [unchanged]

..."

(The other subclasses had similar changes made to them.)

24. The explanatory statement that accompanied the 1997 amendments stated that the purpose was to amend the Regulations to give effect to Government decisions on:

> "...enabling permanent refugees and humanitarian visa holders to propose the entry to Australia of members of their immediate family so that the latter are included under the Humanitarian program rather than the Preferential Family program.
>
> In particular, the Regulations will:
>
> - allow humanitarian visa holders who are permanent residents to propose members of their immediate family for grant of a visa and to provide that such visas will be included in the humanitarian program ..."

25. The explanatory statement stated that regulations 14, which amended Part 202 (Global Special Humanitarian) in Schedule 2, did as follows:

> "Subregulation 14.1 inserts definitions of a 'Subclass 202 visa' and a 'Subclass 866 visa' for the purposes of this Part.
>
> Subregulation 14.2 omits existing clauses 202.211 and 202.212 and retains the provisions of those clauses in a new clause 202.211. The new clause also allows a member of the immediate family of a permanent resident who is, or has been, a Subclass 202 or Subclass 866 visa holder to be proposed by their spouse, parent or child for a Subclass 202 visa provided that, before the grant of the Subclass 202

or Subclass 866 visa, the relationship had been declared to the Department of Immigration.

Subregulation 14.3 makes a consequential amendment to clause 202.221 to reflect the omission of clauses 202.211 and 202.212 and the insertion of a new clause 202.211. ..."

26. Further amendments were made in 1998,[8] permitting an Australian citizen, as well as a permanent resident, to be the proposer in respect of an application by a member of his/her immediate family, and providing that the application under the "split family" stream had to be made within 5 years of the grant of the visa to the proposer.

Construction of clauses 202.211 and 202.221

27. In its current form, clause 202.211(2) relevantly provides:

> "(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 permanent resident (in this subclause called *the proposer*); and
>
> (b) either:
>
> ...
>
> (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
>
> ...
>
> (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 Immigration."

28. The drafting of subclause (2) deploys verbs in various tenses:

- "the applicant *meets* the requirements ...";
- "the applicant's entry to Australia *has been proposed* ...";
- "the proposer *is*, or *has been,* the holder ...";
- "the applicant *was* a member ...";
- "the application *is made* within 5 years ...";
- "the applicant *continues to be* a member ...";
- "that relationship *was declared* ...".

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8 Migration Amendment Regulations 1998 (No.9) (SR 1998 No.304), which commenced on 1 December 1998.

29. Some of the matters in subclause (2) will be either true or false at whatever time they might be considered by the delegate.

(a) Because paragraph (b)(ii) allows for the possibility of the proposer being the holder of a subclass 866 visa or having been the holder of such a visa, the matter will always be satisfied provided that the proposer, at whatever point in time but prior to proposing the applicant, has been granted a subclass 866 visa.

(b) Again with respect to paragraph (b)(ii), whether or not the applicant was a member of the immediate family of the proposer on the date the proposer applied for the subclass 866 visa will not vary depending on whether the delegate considers this matter at the time of application or at the time of decision.

(c) The application for the subclass 202 is either made within 5 years of the grant to the proposer of the subclass 866 visa, or it is not.

(d) The relationship between the applicant for the subclass 202 visa and the proposer was either declared before the grant to the proposer of the subclass 866 visa, or it was not.

30. One purpose of subclause (2) is to set a timeline for the different matters with which the subclause deals. The relative timing of some matters is informed by the heading "Criteria to be satisfied at time of application", being the heading under which clause 202.211 appears.

Time t-1

- The proposer applies for a subclass 866 visa; and
- the applicant is a member of the immediate family of the proposer.

Time t-2

- The relationship between proposer and applicant is declared.

Time t-3

- The proposer is granted a subclass 866 visa.

Time t-4

- The applicant applies for a subclass 202 visa;
- the proposer proposes the applicant;[9]

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9 Whilst linguistically subclause (2) allows for the possibility that the proposing of the applicant by the proposer could have occurred at a time prior to t-4, although subsequent to t-3, in practice the lodging of the application and of the proposing of the applicant in accordance with approved form 681 are done at the same time.

The Department of Immigration and Citizenship's guidelines, "PAM3 – Humanitarian visas (offshore & onshore) – Split Family Cases (Subclasses 200, 201, 202, 203, 204)" require that the "proposal form (form 681) must be submitted at the time the application is made": see section 41.2.

- the applicant continues to be a member of the immediate family of the proposer; and
- t-4 occurs no later than 5 years from t-3.

31. In the construction adopted by the delegate of the Defendant, the only matter where evaluation "at time of decision" may lead to a different result from evaluation "at time of application" is the matter provided in paragraph (c) of subclause (2). The result could differ because, as has occurred in this case, by the passage of time the proposer will no longer be "person B", as referred to in paragraph (c) of the definition set out in regulation 1.12AA ("Member of the immediate family"), with the respect to "person A", the applicant for the subclass 202 visa and the parent of the proposer. The relationship between them, of parent and child, will not have ceased to exist,[10] but the proposer will be over the age of 18 years.

32. However, the better construction of the subclause (2) is that it is directed at establishing the existence of the required relationship between the applicant for the subclass 202 visa and the proposer (who is or has been the holder of a subclass 866 visa), at two specified points in time:

(a) at the time the proposer applied for the subclass 866 visa; and

(b) at the time the applicant applied for the subclass 202 visa.

33. If the existence of that relationship is satisfied at those two points in time, the criterion in clause 202.211 will be met by reason of the applicant meeting the requirements of subclause (2).[11] The criterion in clause 202.221 will also be met – the applicant will continue to meet the requirements of subclause (2) of clause 202.211 because the applicant was a member of the immediate family of the proposer at the time of applying for the subclass 202 visa, and that result does not differ even if the matter is evaluated at "time of decision".

34. It follows that an applicant for a subclass 202 visa under the "split family" stream will have satisfied both the criterion in clause 202.211 and the criterion in clause 202.221 if he/she satisfies subclause (2) of clause 202.211. The time when a delegate of the Defendant considers whether subclause (2) is satisfied will not affect the result.

35. Clause 202.221 continues to have the field of operation with respect to the criterion in clause 202.211(1)(a) which it had prior to the 1997 amendments. The explanatory statement to the 1997 amendments supports the conclusion that no greater field of operation was intended for it.

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10 Save perhaps, and even then only arguably, in exceptional cases such as adoption of "person B" by someone other than "person A".

11 Other relevant matters also being satisfied.

36. The construction of clauses 202.211 and 202.221 advanced by the Plaintiff:

    (a) does not compromise the purpose of the Migration Regulations, which in the case of the "split family" stream is to allow close family to be reunited in Australia with a member of the family who has already been granted a refugee or humanitarian visa; and

    (b) avoids the plain unfairness of having the fate of an application for a "split family" visa being made to depend on how long a delegate of the Defendant will take to make a decision.

37. For the above reasons, the construction advanced by the Plaintiff is to be preferred to that adopted by the delegate of the Defendant.

Part VII:

38. The applicable statutory provisions and regulations, as in force at all times between the date of the Plaintiff's mother application for a Refugee and Humanitarian (Class XB) visa and the date of the delegate's re-notification of the decision refusing the grant of that visa, are set out in the Annexure. Those statutory provisions and regulation are still in force, in the same form, as at the date of these submissions.

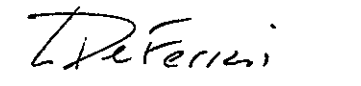
Part VIII:

39. The following question has been stated for the consideration of the Full Court:

> "Did the delegate make a jurisdictional error in finding that the Plaintiff's mother did not meet the requirements of clause 202.221 of Schedule 2 to the Migration Regulations 1994 (Cth)?"

40. It should be answered: Yes.

DATED: 5 September 2011



Lisa De Ferrari
Dawson Chambers
Telephone: 03 92295036
Facsimile: 03 92295060
lisa.deferrari@vicbar.com.au