IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150 of 2013

B E T W E E N

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

Plaintiff

and

10 **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S ANNOTATED WRITTEN SUBMISSIONS IN REPLY

Date of document: 5 May 2014
Filed on behalf of: The plaintiff

Allens
Lawyers
Deutsche Bank Place
126 Philip Street
Sydney NSW 2000

Tel (02) 9230 4828
Ref 12041600.ymss.rtrs
Contact Name: Malcolm Stephens

The defendants' argument assumes its own correctness in a circular fashion

1. The plaintiff's primary argument is that there exists an apparent conflict between the duty imposed by s 65A of the *Migration Act 1958* (Cth) (**Migration Act**) (which must be read together with s 65) and the provisions of sub-division AH (principally ss 85, 86 and 89). The need to reconcile that apparent conflict animates the principle in *Project Blue Sky*.[1] That is, that the conflict must be alleviated as far as possible by adjusting the meaning of the competing provisions to achieve the result that will best give effect to the statutory purpose and language of those provisions while maintaining the unity of the instrument as a whole.

2. The defendants' argument is that the *Project Blue Sky* principle is not engaged, because there is, in fact, no relevant disharmony by reason of the construction the defendants seek to advance at DS [22]-[33].

3. Importantly, both the defendants and the plaintiff proceed from a point of commonality: that is that the use of the term 'decision' in s 65A(1) is to be understood as the set of obligations imposed by ss 65(1)(a) and 65(1)(b): DS [23], [26] [27] and see PS [25].

4. Using the term 'decision' in that sense, the defendants' argument involves the following steps: first, s 65A(1) is 'premised upon the assumption that a decision is required to be made under s65': DS [27]. Secondly, that where it applies, 's 86 prohibits the Minister from making the decision otherwise required by s 65(1)': DS [24]. Thirdly, that where s65(1) 'does not require a decision to be made by operation of ss 85 and 86, s65A is not contravened': DS [27].

5. The first and the second propositions are expressed in terms that are apt to obscure the real issue. For, regardless of whether ss 65A or 85 are or are not engaged, a decision under s 65 still has to be made. Both ss 65A and 86 address the question of <u>when</u> a decision is to be made, not whether it is to be made at all. And that exposes a significant logical flaw in the defendants' argument. The defendants simply assume that the 'prohibition' in s 86 is to be applied in a manner that necessarily precludes s 65A from being engaged at all. But assigning the label 'prohibition' to s 86 does not alter the fact that both it and s 65A are equally addressed to the timing of the decision. And there is no reason in principle, at least none identified by the defendants, to give a general provision as to time preference over a specific provision that operates only upon protection visas.

6. If that is right, the defendants' submissions reduce to an attempt to meet the plaintiff's case by giving primacy to s 86 and then arguing that there is no inconsistency. That involves no more than an assertion that their argument should be accepted. It does not provide a reason for accepting it.

---

[1] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

7. In context, ss 65 and 65A have to be read together as a reflection of the duty imposed in relation to protection visas. Section 65A does not simply assume the existence of the duties in s 65 (cf the first proposition of the defendants' argument identified above): it qualifies s 65 as to the time in which the duties there identified are to be performed. As such, the time limit in s 65A forms part of the duties that are otherwise defined in s 65. Interposing s 86 before one applies s 65A distorts the language and operation of s 65A by making it subservient to the discretion of the Minister.

Defendants' proposed 'harmonious operation' in fact produces discord

8. The defendants' argument also overlooks two further critical points: first, ss 85 and 86 are actually only directed to one aspect of the 'decision' to be made under s 65. Secondly, and by contrast, s 65A deals comprehensively with all aspects of that 'decision' making process and mandates that, whatever the outcome, they must be completed by a specified time. For the reasons below, it follows from those features of the text that the defendants' proposed 'harmonious' construction, simply maintains the existing discord.

9. As to the first point, and as submitted in chief, neither s 85 nor s 86 affect the Minister's obligation to consider a valid visa application: see s 47(1). The operation of ss 85 and 86 are not included amongst the circumstances that terminate that obligation: see s 47(2). And nor do ss 85 and 86 speak to the circumstance in which the Minister, after considering the application, determines that she or he is not satisfied of the matters in s 65(1)(a). The Minister will, upon reaching that state of satisfaction, be required to 'make a decision' to refuse a visa: s 65(1)(b).

10. Section 86 operates only upon matters subsequent to the formation of the state of satisfaction in s 65(1)(a), more particularly the obligation to grant a visa that arises where the Minister holds that state of satisfaction. If the conditions in ss 86(a) and (b) are met, then, notwithstanding the obligation imposed by s 65(1)(a), the Minister is required not to 'grant the visa' for the remainder of the relevant financial year.

11. Little difficulty arises in applying those provisions to classes of visas other than protection visas.

12. If s 86 is engaged, the Minister may process claims for those classes of visas (see, confirming that this is so, s 88) and is required to refuse claims where the relevant visa criteria are not met or where the Minister is not satisfied of the other matters specified in s 65(1)(a). Where the Minister is satisfied as to the matters specified in s 65(1)(a), but the conditions in s86 are also enlivened, the obligation to grant such a visa is suspended. Importantly, in those circumstances the 'decision' required by s 65 may take place at different times, depending upon whether it is a 'decision to grant' or a 'decision to refuse' the relevant visa. But there is no provision in the Act

that prevents the resulting temporal disjuncture in the decision making process.

13. And, properly understood, s 89 speaks only to an aspect of the result of that permissible temporal disjuncture in the case of visas other than protection visas. Where the Minister arrives at a 'positive decision' under s 65(1)(a), but is precluded from granting such a visa in the relevant financial year by operation of s 86, s 89 makes plain that mandamus is not available to compel an exercise of the duty conferred by s 65, notwithstanding the fact that the Minister will have neither granted, nor refused to grant, the relevant visa.

14. But the position is different in the case of protection visas by reason of s 65A. It is different because of the second point identified above: that is, that s 65A requires that the Minister 'must make a decision under s 65 within 90 days' (emphasis added). The singular and imperative language of that subsection indicates that there must be a decision, one way or the other, by a specified time. In other words, by the end of 90 days, the Minister must have discharged one or other of the obligations imposed by ss 65(1)(a) and 65(1)(b).

15. If sub-division AH applies to protection visas, then a clear command directed to finality and certainty in the administrative decision making process is given a distorted and inherently improbable operation. If the defendants are correct then, where the conditions in s 86 are met in respect of protection visas, the term 'a decision under s 65' is to be read, for the balance of the financial year, as if it said 'a decision under s 65(1)(b)'.

16. Not only does that do violence to the language of s 65A, it is inconsistent with the statutory object, which, as submitted in chief, is directed to the mischief arising from the notorious fact that applicants for protection visas often arrive in Australia without a visa and must therefore be detained: see ss 13(1), 14(1) and 189. The correlative object was to ensure that detained protection visa applicants were the subject of a timely and certain decision making process, thus ensuring that the upper limit on their potential detention for that purpose was clearly defined: PS [30]-[34]. It is difficult to see why Parliament would have extended that guarantee of certainty only to those who were unsuccessful in their application for a protection visa.

17. When that is understood, it is wrong to suggest that the plaintiff's argument requires that s 85 could never operate because it 'would render s65 "nugatory" with respect to the class or classes of visa specified in a determination [other than protection visas]': DS [29]. Section 85 (and sub-division AH more generally) operates in such circumstances in the manner just identified. But all of that serves to emphasise that the Act has a very different operation in respect of protection visas by reason of s 65A.

18. The defendants' submissions at [29] and [30] otherwise miss the mark. The point of the plaintiff's submissions at PS [45] and [46] was that it is improbable that Parliament intended that a duty directed to the mischief just identified would for a period be relegated to a duty of imperfect obligation (PS [46]) and then re-emerge as an enforceable duty at the conclusion of the financial year (at which point the Minister will, on any view, be in breach of that obligation, absent a further determination under s 85). For the reasons given above, the construction advanced by the defendants does not avoid those difficulties.

10 ***Proper construction does not require reading in***

19. The defendants' argument that the plaintiff seeks to 'read in' words that do not appear in the statute mischaracterises the plaintiff's submissions. As the plaintiff's primary submissions make clear the question is the proper construction of the terms of subdivision AH in the context of the scheme as a whole (PS [12]-[20], PS [51]-[64]). That involves what Gleeson CJ characterised as 'a commonplace exercise'[2] whereby the general words in a statute are read in light of other provisions in the legislative scheme. By an analysis of that nature, the Court in *Project Blue Sky* discerned that the legal meaning of the words of s 122 of the *Broadcasting Services Act 1992*
20 (Cth) did not correspond to their grammatical meaning.[3]

20. A sharp distinction is to be drawn between that exercise – being the one the plaintiff invites the court to embark on - and the implication of additional words into the statute. The first course resolves 'consistently with the advancement of the underlying purpose or object of the legislation'[4] ambiguity in the language of the statute, which here arises by reason of the apparent inconsistency between the identified provisions. The defendants' reliance on *Taylor v The Owners – Strata Plan No 11564* (2014) 88 ALJR 473 (***Taylor***) is therefore misplaced.

21. In any event, as the majority specifically observed in *Taylor*:

30 > ... it is unnecessary to decide whether Lord Diplock's three conditions [for reading in] are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted.[5]

22. That task, as the majority made clear, involves a judgment as to matters of

---

[2] *Carr v Western Australia* (2007) 232 CLR 138 at 146 [15] per Gleeson CJ.
[3] *Project Blue Sky* at 385, [80].
[4] *Carr v Western Australia* (2007) 232 CLR 138 at 146 [17] per Gleeson CJ.
[5] *Taylor* at 483, [39] per French CJ, Crennan and Bell JJ.

degree and is not to be constrained by the 'adoption of rigid rules'.[6] But, particularly in an Australian constitutional context by reason of the entrenched separation of powers, that judgment does not extend to the adoption of a purposive construction that departs 'too far' from the statutory text (for example by making an 'insertion' that is 'too big, or too much at variance with the language in fact used by the legislature').[7]

23. The principle from *Project Blue Sky* which the plaintiff invokes sits comfortably within that area of permissible judgment: see, applying that principle to 'read words into' a statute, *Peldan v Anderson* (2006) 227 CLR 471 at 487-488, [44]-[47]. There, as here, any reading in is supported by other aspects of the statutory design, including s39 (see PS [61] and cf DS [17]-[21]).

Richard Niall QC
(03) 9225 7225
richard.niall@mc8.com.au

Craig Lenehan
Tel (02) 8257 2530
Craig.lenehan@stjames.net.au

Siobhan Keating
Tel (03) 9225 6846
skeating@vicbar.com.au

[6] *Taylor* at 482, [37], referring to *Collector of Customs v Agfa-Gaevaert Ltd* (1996) 186 CLR 389 at 401.
[7] *Taylor* at 483 [38], [40].