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

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MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S OUTLINE OF SUBMISSIONS

PART 1 – FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the Internet.

PART 2 – ISSUES

20 2. On 4 March 2014 the first defendant (the **Minister**) purportedly acting under s 85 of the *Migration Act* 1958 (Cth) (the **Migration Act,** the **Act**) capped the maximum number of Protection (Class XA) visas that may be granted in the financial year 1 July 2013 to 30 June 2014 at 2774. He could only make that determination if the class of visas to which s 85 applied included the class created by s 36 of the Act. The single issue is one of construction. It should be held that the determination is invalid and the questions in the special case answered accordingly.

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Filed on behalf of: The plaintiff

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PART 3 – SECTION 78B NOTICES

3. The plaintiff does not consider that notice is required by s 78B of the *Judiciary Act 1903* (Cth).

PART 4 – MATERIAL FACTS

4. The material facts for the purpose of this case are as set out in the Special Case dated 16 April 2014.

5. The plaintiff has made a valid application (the **PV Application**) for a protection visa and is a person to whom Australia owes protection obligations pursuant to the Refugees Convention.[1] On 10 February 2014 a delegate of the Minister made a decision to refuse to grant to the plaintiff a Protection (Class XA) Visa (the **Refusal Decision**).[2]

6. On 4 March 2014 the Minister made a determination under s 85 of the Migration Act that the maximum number of Protection (Class XA) visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is 2774 (the **Determination**).

7. On 5 March 2014 legislative instrument IMMI4/026, which records the Determination, was registered in the Federal Register of Legislative Instruments. At the time the instrument was made there were approximately 125 days left in the financial year. If the cap applied, the Minister was incapable of meeting the duty in s 65A in relation to each application for a protection visa that was undetermined at the primary level at the time the cap commenced.

8. The maximum number of Protection (Class XA) visas as set by the Determination has been reached. By operation of s 86 of the Migration Act, the effect of the Determination, if valid, is that while it remains in effect the Minister cannot grant any further Protection (Class XA) Visas in the 2013/14 financial year.

9. On 16 April 2014 the Minister consented to an order that a writ of certiorari issue quashing the Refusal Decision. In the event that such a writ issues, the PV Application will be undetermined. In that circumstance, the Determination will have the effect that the Minister cannot decide to grant the PV Application notwithstanding that the plaintiff has done all things necessary for the purpose of having his application determined by the Minister in accordance with s 65 of the Migration Act.[3]

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1 Special case, paragraphs 11-12.
2 Special case, paragraph 15.
3 Special case, paragraph 14.

PART 5 - ARGUMENT

A: SUMMARY OF THE PLAINTIFF'S SUBMISSIONS

10. The question in the proceeding is whether the Determination is ultra vires the power conferred by s 85 of the Migration Act by reason that the class or classes of visa to which s 85 can have application do not include the class of visa created by s 36(1) of the Migration Act.

11. That question must be answered in the affirmative because the duty in s 65(A) of the Migration Act to determine an application for a protection visa within a specified period of time is a more specific provision that was introduced later in time and is inconsistent with the operation of s 85. Section 85 was impliedly repealed by the introduction of s 65A or must be read down to the extent of the inconsistency.

B: SUBMISSIONS

Section 85 does not apply to the class of protection visas

12. The plaintiff submits that the terms 'visas of a specified class' or 'specified classes' in s 85 do not include the class of visas established by s 36 of the Act; that is, protection visas.

13. That submission rests upon six related principles of statutory construction.

14. First, the statutory text must be considered in its context. That context includes legislative history and extrinsic materials.[4] Both are important here in fixing the meaning of the statutory text.

15. Secondly, objective discernment of statutory purpose is integral to contextual construction. In that regard, and as was said in *Thiess v Collector of Customs and Ors*,[5] s 15AA of the *Acts Interpretation Act 1901* (Cth) reflects a 'general systemic principle' that 'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning'.

16. Thirdly, a legislative instrument is to be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. It follows from that proposition that, where conflict appears to arise from the language

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4 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at 107, [39].

5 *Thiess v Collector of Customs and Ors* [2014] HCA 12, per curiam, referring to *Cabell v Markham* 148 F 2d 737 at 739 (1945).

of particular provisions, 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[6] (recognising that there are some cases where that reconciliation will not be possible – see the final proposition below).

17. Fourthly, to achieve that reconciliation it will often be necessary to determine which is the leading provision and which is the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions in that way will it be possible to achieve a harmonious and unified construction that best gives effect to the text and the statutory design.[7]

18. Fifthly, a court construing a statutory provision must strive to give meaning to every word of the provision. The lengths to which the Court must go to in that regard are usefully captured by the passage from Griffith CJ's reasons in *Commonwealth v Baume*[8] extracted in *Project Blue Sky* at [71]:

> ...such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.[9]

19. Sixthly, the process of construction involving two provisions may reveal an inconsistency ("actual contrariety" or "repugnancy") such that the two cannot stand or live together (or cannot be "reconciled").[10] That may arise where the two provisions contain conflicting commands that cannot both be obeyed or produce irreconcilable legal rights or obligations[11]. Where that situation arises, the later provision repeals the earlier provision to the extent of the inconsistency.[12]

20. In the current matter, for reasons developed below, there exists a direct conflict between the duty imposed by s 65A (read with s 65) and ss 86 and 89 (read with s 85). Unless ss 85, 86 and 89 are construed in the manner

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6 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at 381-382, [70].
7 *Project Blue Sky* at 382, [70].
8 (1905) 2 CLR 405 at 414.
9 See also *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 at 1419, [206].
10 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138, [18].
11 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571, [2].
12 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 146, [47].

proposed by the plaintiff the Minister may, by the exercise of a discretionary power, render superfluous or insignificant the duty imposed by s 65A.

Section 65A

21. Turning then to the text of the Act, one starts with s 65A. Section 65A imposes a duty upon the Minister which is enlivened, inter alia, if an application for a protection visa is validly made under s 46 of the Act.

22. By force of s 47(1) of the Act, the Minister is required to consider such an application. By force of s 47(2) of the Act, the requirement to consider such an application continues until the application is withdrawn, the Minister grants or refuses to grant the visa, or consideration is prevented by s 39 (limiting number of visas) or s 84 (suspension of consideration).

23. Once enlivened, s 65A provides that the Minister 'must make a decision under s 65' within 90 days starting on, relevantly, the day on which the application was made.

24. That immediately directs attention to the terms of s 65. The decision making process described there is a binary one. If the Minister reaches the state of satisfaction provided for by s 65(1)(a) (including, in the case of a protection visa, that the criterion prescribed by s 36(2)(a) is satisfied – see s 65(1)(a)(ii)) she or he is to 'grant the visa'. If not so satisfied, she or he 'is to refuse to grant the visa': s 65(1)(b).

25. That obligation to grant or to refuse to grant the visa is the 'decision under s 65' to which s 65A refers. The Minister must 'make' that decision, in the sense of either granting or refusing to grant the visa, within the specified time frame.

26. Section 65A(2) makes clear that, if the Minister or her or his delegate makes a decision under s 65 after the 90 day time limit, then that decision is not invalid merely by reason of the fact that the Minister has failed to comply with the duty imposed by s 65A(1). However, s 65A(2) does not speak to the circumstance in which the Minister fails to make any decision at all. In that circumstance, the duty imposed by s 65A(1) is enforceable by writ of mandamus.[13]

27. It is through the grant of a protection visa under s 65 that Australia responds to the international obligations in the Convention which have, at least partially, been incorporated into the Act. The central criteria on which that

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13 cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at 224, [41].

grant depends are that the person is in Australia and is a person to whom Australia owes protection obligations. At least for those persons who are eligible to apply for a protection visa, the Act contemplates that there will be an assessment of protection obligations and that once the criteria are met the obligations (which extend beyond non refoulement) will be reflected in the grant of the visa. A power that the Minister can suspend processing and thus suspend the recognition of protection obligations does not sit comfortably with the scheme.

28. The process of construction requires that attention be directed to the purpose of s 65A. Identification of the statutory object starts with the observation that Parliament has imposed a time limit in respect of the decision making process for a single class of visa, namely, protection visas. Why has it singled out that particular visa class?

29. The explanation is to be found in the criterion prescribed by s 36(2)(a) for the grant of a protection visa. As has just been noted, an aspect of that criterion is that the applicant is a 'non-citizen in Australia'. That term embraces any non-citizen 'in Australia', regardless of the circumstances in which the particular applicant came to be present in Australia. It therefore necessarily includes applicants who, on arrival became 'unlawful non-citizens' within the meaning of the Act and were therefore required to be detained under s 189.

30. It was also understood from the time that protection visas were introduced to the Act that the potential applicants for such a visa would include:

> ...those who arrive without any lawful authority and are held in custody while their application—usually for recognition of refugee status—is considered.[14]

31. The particular mischief to which s 65A was addressed was the position of those people, for whom a timely decision making process stood to mean a timely return to liberty.

32. That understanding of the statutory design may be confirmed by reference to the extrinsic materials. In particular, it was said in the explanatory memorandum to the *Migration and Ombudsman Legislation Amendment Bill 2005* that the addition of s 65A was an aspect of:

> ...various measures to ensure that immigration policy is administered with greater flexibility and fairness, and in a timely

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[14] Commonwealth, *Parliamentary Debates*, Senate, 8 December 1992, 4462, Senator Tate (representing the Minister for Migration) - he described those persons as a 'very small group'.

manner. The protection visa decision time limit amendments provide for greater transparency and efficiency in the finalisation of protection visa applications, and complement measures introduced to the Migration Act by the *Migration Amendment (Detention Arrangements) Act* 2005.[15]

33. The 'complementary measures' introduced by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) included the following provisions of the Act as it presently stands:

    a. s 4AA, which affirms that detention of minors is a last resort; and

    b. s 195A, which confers discretion on the Minister to grant visas to unlawful non-citizens who are in immigration detention; and

    c. the residence determination scheme in Subdivision B of Division 7 which permits, in specified circumstances, unlawful non-citizens to be held in community detention.

34. Overlaid on these provisions of more general application, s 65A evinces a particular concern with the position of detained protection visa applicants.

35. It is also necessary to note that s 65A takes its place amongst other elements of the Act, which together create a scheme that authorises (and places a clearly defined upper limit on) the detention of unlawful non-citizens. Relevant for present purposes, that scheme has the following elements:

    a. The primary temporal limitation on the power to detain is provided by the statutory duty to remove an unlawful non-citizen from Australia as soon as reasonably practicable: s 198(2). Further detention is only authorised if it is under and for the purposes of the Act;[16]

    b. The duty imposed by s 198(2) is qualified so as to accommodate detention for the purposes of considering whether to grant a person a visa, including a protection visa. Indeed, it follows from this Court's decision in *Plaintiff M70 v The* Commonwealth *and Another*[17] (**M70**) that removal under s 198(2) cannot take place without any claim for protection having first been assessed in Australia;[18]

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15 Explanatory memorandum, *Migration and Ombudsman Legislation Amendment Bill 2005* at 3, [6].

16 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (**M76**) (2013) 88 ALJR 324 at 343, [99] per Hayne J.

17 (2011) 244 CLR 144.

18 *M70* at 178, [54], 191-2, [95]-[98] and 231-2, [239].

c. If a valid application is made under s 46, then for the period that application is being considered (s 47) up to the time it is decided (s 65), detention of the applicant is authorised by s 196(1)(c);

d. Other than the additional time taken to exercise any relevant review rights so as to 'finally determine' the application (s 198(2)(c)(ii)), s 65A fixes the period of that further detention at the outset;[19] and

e. If a protection visa application is ultimately unsuccessful, the Act reverts to the primary limitation on the power to detain, being the duty to remove as soon as reasonably practicable (s 198(2)).

Sections 85, 86 and 89

36. Section 85 confers upon the Minister (being the same person to whom the duty in s 65A is addressed) a discretionary power to determine the maximum number of visas of a specified class or specified classes that may be granted in a particular financial year (in effect, a 'cap').

37. The effect of a determination made under s 85 is provided for by s 86. In essence, if a determination is made under s 85 and the number of visas granted in a financial year reaches the 'cap' specified in that determination, then no more visas of the relevant class may be granted in that financial year. The consequence provided for in s 86 is mandatory, save to the extent provided for in ss 87 and 87A.

38. Those provisions were first introduced to the Act by the *Migration Laws Amendment Act 1992* (Cth). The mischief to which the provision was directed was described by the then Minister in the following terms:

> The suspension power in s 28 of the Act has not been exercised but it forms a powerful administrative tool in ensuring that program levels are not exceeded. However, it is also a very blunt one. There is no facility to set a numerical limit. It also unnecessarily suspends all processing, even where that processing would not result in the program being exceeded.[20]

39. The 'suspension power' referred to is now to be found in s 84 of the Act. As is apparent from their text, and confirmed by the extrinsic materials, the 'suspension power' and the 'capping power' serve a common statutory

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19 See in that regard, M76 per Hayne J at 343, [99].

20 See the Second Reading Speech to the Bill that became the *Migration Laws Amendment Act 1992* (Cth), House of Representatives Hansard, 19 August 1992, 185, Mr Hand.

object: that is, facilitating some form of planned approach to the grant of particular classes of visa, such that the total number of visas granted in a particular class remains within what the then Minister described as 'program levels'.

Collision between section 65A and sections 85 and 86

40. If the terms 'class' or 'classes' as used in ss 85 and 86 of the Act include the class of visa created by s 36(1), conflict arises between the duty imposed by s 65A and the disabling effect of s 86.

41. For, if a determination is made in respect of protection visas then, in the case of any application in respect of which the 90 day decision making limit fell after the making of the determination and before the end of the financial year, (putting to one side the effect of s 89):

    a. if the Minister obeys the command in s 86, she or he would be in breach of the duty in s 65A in respect of any applications for protection visas that exceeded the cap; or

    b. if the Minister complies with the duty in s 65A, she or he would contravene the command in s 86 that no more visas of that class be granted in the year.

42. "Actual contrariety" exists because of the nature of the competing commands in respect of the same application for a protection visa. Section 65A commands the Minister to "make a decision" within a specified time limit, but if a determination is made under s 85 and the cap is reached, the Minister is prevented from granting the visa. The former provides that the Minister must grant (no discretion is involved) and the latter says the Minister must not grant. They are both concerned with the time at which the commands are to be obeyed: within 90 days on the one hand and within the balance of the specified financial year on the other.

43. The collision between s 65A and s 85 (if it is applied to protection visas) is the intersection of two competing commands - one affirmative (the duty to make a decision under s 65(1)) and one negative (the obligation not to grant a visa of the requisite class once the cap is reached). It is not a situation where there are two powers both of which remain "effective in their terms".[21]

44. Section 89 exacerbates, rather than resolves, those textual difficulties. It provides that the fact that the Minister has neither granted nor refused to

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21 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 585 [49] per Gummow and Hayne JJ.

grant a visa of a class to which a determination under s 85 applies does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa.

45. So, assuming again that s 85 may be validly applied to the class of protection visas, and a determination was made, then, in the case of any application in respect of which the 90 day decision making limit fell after the making of the determination and before the end of the financial year, s 89 would operate to deem that the Minister had not failed to meet that duty in respect of any outstanding applications. That effectively renders s 65A nugatory for the remainder of that financial year and would be an answer to any writ of mandamus. Section 65A becomes a hollow duty of imperfect obligation, which seems an inherently unlikely construction given the objects identified above. The principle of construction identified in *Project Blue Sky* by reference to *Baume* indicates that such a construction is not to be adopted if by any other construction the words of s 65A may all be made useful and pertinent.

46. The strain between the provisions becomes even more pronounced at the end of the financial year. For, at that time, unless a further cap is imposed, the Minister will not have made a decision under s 65 and yet nor will s 89 operate to deem that the Minister has not failed to make a decision – there is at that time no 'determination under s 85 [that] applies'. The Minister will have been required by one provision of the Act to contravene another.

47. The existence of conflict between s 65A and s 85 can also be seen to arise before a determination is made. At the point of making a determination under s 85 the Minister is given a discretionary power informed by general considerations relating to an orderly migration program. In exercising the power the Minister is faced with the mandatory duty in s 65A, which reflects the priority that the Act requires to be afforded to protection visas. This priority is also reflected in s 39, which prevents a determination under s 85 being a criterion preventing the grant of a protection visa. It would be inconsistent with the statutory scheme for the Minister to use discretion to avoid the duty and impose a different priority to that which the Act mandates. There would be no basis for the Minister to determine, based on generalised considerations, that the duty in s 65A should not be complied with.

48. The process of determining whether to exercise a discretionary power necessarily involves a synthesis of competing considerations, with the weight to be accorded to the various factors to be determined by the decision maker (but confined by the scope and purpose of the Act and its

real object).[22] It is readily apparent that an affirmative statutory obligation to do a particular act within a prescribed time period is not to be weighed against competing discretionary considerations as to migration planning levels that tend in favour of a delay beyond the mandated time limit. As an expression of the specific will of the Parliament, the obligation in s 65A is not amenable to being weighed against the full range of unspecified factual considerations that might operate on the exercise of the discretion under s 85.

49. The duty imposed by s 65A exists regardless of domestic exigencies. It does not operate by reference, express or implied, to the terms of a planned program. It is indifferent to the number of valid applications made. Rather, s 65A operates in relation to a class of visa that: **firstly** is responsive, by way of the criterion set by s 36(2), not to an orderly migration program but to Australia's international obligations,[23] which are engaged by the exigency of persecution; and **secondly** is available in the circumstance of an applicant being present 'in Australia'.

50. In that regard, the purpose for which the s 85 discretion may be exercised is wholly foreign to the criterion in s 36(2) of the Act, in relation to which the s 65A obligation operates.

Textual reconciliation

51. The plaintiff's primary submission is that the resolution of the conflict identified above is achievable, and in a relatively straight forward manner: in accordance with the principle of construction identified above, one adjusts the legal meaning of the terms 'class' and 'classes' in subdivision AH such that they do not apply to the class of protection visas.

52. That construction is supported by the following matters.

53. First, the hierarchy or relationship between the provisions is determined, at least in part, by the maxim *generalia specialibus non derogant.*[24] Applied here, s 65A is the more specific provision. It operates on applications for visas of a particular class and in the particular circumstances identified in

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22 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 *Minister for Immigration v Li* (2013) 87 ALJR 618 at 629 [23] per French CJ and 638, [67] per Hayne, Keifel and Bell JJ.

23 See *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (**M61**) at 339, [27], per curiam; M70 at 176, [49] per French CJ and at 189, [90] per Gummow, Hayne, Crennan and Bell JJ; *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 at 1399, [90] per Gummow J and at 1458-1459, [416]-[417] per Kiefel J.

24 See eg *Perpetual Executors and Trustees Association of Australia Limited v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29-30 per Dixon J; *Smith v R* (1994) 181 CLR 338 at 348, per Mason CJ, Gaudron, Dawson and McHugh JJ.

subsections (1)(a) and (b). The more general words of ss 85, 86 and 89 must give way to that later enacted and more precisely targeted provision.

54. Secondly, it is to be remembered that statutes are "always speaking continuously in the present"[25] and that, as a corollary, where a statute is amended, the statute and the amending statute are "to be read together as a combined statement of the will of the legislature".[26] Put another way, "under modern practice it is the intention of the legislature when effecting textual amendment of an Act to produce a revised text which thereafter and as to subsequent events is to be construed as a whole".[27] Thus, the effect of an amending Act may be to alter the meaning which the remaining provisions of the amended Act bore before the amendment.[28]

55. Section 65A was enacted as a specific provision after s 85. The legal meaning of s 85 was at that time altered by that more specific provision, having regard to the text and object of s 65A. As to the text, it may be noted in particular that s 65A does not contain any express limitation that would make it subject to a determination under s 85: compare the terms of s 39(1) (which permits a s 85 determination to be a criterion for visas other than protection visas).

56. Thirdly, s 65A applies to a single class of visa and, in setting a time limit for decision, stands apart from the more general provisions of the Act which do not restrict the decision making sequence or the time in which a decision under s 65 is to be made. In terms of hierarchy, a specific duty must trump discretion to make a delegated instrument that is inconsistent with the performance of that duty according to its terms.

57. Fourthly, s 65A is cast as a statutory duty on the Minister. If the Minister could decide whether or not he should comply with the duty and, by the exercise of discretion, make a subordinate instrument that requires him to avoid the duty, the duty in s 65A would be converted to discretion, contrary to its imperative language.

58. In contrast, the construction advanced by the plaintiff avoids the terms of s 65A becoming, during the period of a determination, essentially meaningless or superfluous by operation of the deeming effect of s 89 identified above.

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25 *Commissioner of Police v Eaton* (2013) 87 ALJR 267at 286, [97] per Gageler J.

26 *Commissioner of Police v Eaton* (2013) 87 ALJR 267at 286, [97] per Gageler J; see also *Acts Interpretation Act 1901* (Cth), s s11B.

27 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* [1995] HCA 44; (1995) 184 CLR 453 at 479, per McHugh and Gummow JJ.

28 *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 463 at [44], per Brennan CJ, Dawson and Toohey JJ.

59. Fifthly, that construction is one that will best give effect to the statutory purpose and language of those provisions while maintaining the unity of the instrument as a whole.

60. For the reasons already given, the object of subdivision AH identified above, by reference to its text, is not an object that has obvious application to protection visas, being an element of the statutory design to provide a 'power to respond' to Australia's international obligations. The circumstances in which that 'power to respond' may be sought to be invoked are unpredictable. They are not readily planned for in advance. For example, it is notorious that an aspect of those circumstances includes people arriving 'in Australia' by boat and without a visa. The number of potential applicants who are 'in Australia', having been granted a visa of another class, is equally unpredictable from year to year. The very terms of s 36(2)(a) render the exercise inherently uncertain.

61. Those difficulties explain other aspects of the statutory design. For example, s 39 provides that a criterion for visas of a class, other than protection visas, may be that the grant of the visa would not cause the number of visas of that class granted in a particular year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of visas that may be granted in that year. While there is no similar express exclusion in subdivision AH, that suggests that the Parliament has determined that the application of planning or management mechanisms in the form of numerical caps is inapt in the context of protection visas. The plaintiff's suggested adjustment of the legal meaning of the terms 'class' and 'classes' in subdivision AH may therefore be seen to promote the unity of the statute as a whole.

62. In contrast, a construction whereby subdivision AH operates upon protection visas stands to do violence to important features of the scheme of the Act. As submitted above, s 65A, together with ss 65, 196(1) and 198(2), defines and limits the period for which detention of protection visa applicants is authorised by the Act. If s 65A is rendered superfluous for the period of a determination made under s 85, then, in substitution for the lawful boundaries of detention fixed at the outset by the Parliament in s 65A, detention continues at the will of the Minister.

63. Indeed, the careful arrangements described above by which the power to detain is both defined and limited are entirely derailed. Not only is the limit in s 65A rendered meaningless, the Act does not revert to the primary limitation on the power to detain, being the duty to remove as soon as reasonably practicable. As this Court observed in M61, it is not readily to

be supposed that a statutory power permits such a continuation of detention at the unconstrained discretion of the executive.[29]

64. Finally, the blunt instrument of s 85 applies to all visas of the relevant class and cannot be made in a way that accommodates the duty in s 65A. There is nothing in s 85 that would prevent the time continuing to run for the purposes of s 65A during the operation of the determination.

Implied repeal

65. Alternatively, if the two sets of provisions are unable to be reconciled, the enactment of s 65A impliedly repealed s 85 to the extent to which it applied to the class of visa created by s 36(1).

66. If, upon their true construction, there is an explicit or implicit contradiction between the two, the later impliedly repeals the earlier. Inconsistency is 'at the heart' of implied repeal.[30] This Court has referred to two 'cardinal considerations' raised by questions of implied repeal.[31] First, with reference to the decision of Gaudron J in *Saraswati v The Queen*, there must be very strong grounds to support an implied repeal by reason of the general presumption that the legislature intended that both provisions should operate.[32] Second, determination of whether there is such inconsistency that the two provisions cannot stand or live together 'requires the construction of, and close attention to, the particular provisions in question'.[33]

67. No conclusion can be reached about whether a later statutory provision contradicts an earlier without first construing both provisions. The question is whether the presumption that two laws made by the one legislature are intended to work together is displaced.[34]

68. In the present case, the construction identified in the paragraphs above evidences inconsistency of requisite kind. Section 85 is directed to 'a class' or 'classes' of visa. It is in general terms. The later provision, s 65A, contains an affirmative duty requiring the Minister to make the binary decision described above within a prescribed period. The effect of exercising the discretion in s 85 in relation to protection visas is that the Minister is compelled by operation of s 86 to delay the making of the decision mandated by s 65(1). Where s 65A is directed to timely decision-making and s 85 is directed to the delay or deferral of decision-making, the

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29 (2010) 243 CLR 319 at 338 [64].

30 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276 per Fullagar J, 290 per Windeyer J; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137, [34]-[35] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ.

31 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18].

32 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18].

33 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18].

34 *Commissioner of Police v Eaton* (2013) 87 ALJR 267 at 278, [48] per Crennan, Kiefel and Bell JJ.

presumption that the two provisions were intended to operate together is displaced in the relevant sense.

69. Where s 65A was introduced to the Act later in time, its introduction was inconsistent with the continued operation of s 85 in its terms. Necessarily, s 65A impliedly repealed s 85 to the extent to which it otherwise would have applied to protection visas.

PART 6 – Applicable constitutional provisions, statutes and regulations

70. The applicable provisions of the relevant statutes and legislative instruments are set out in annexure A.

PART 7 – Precise form of orders sought

71. The plaintiff seeks the questions stated in the special case to be answered as follows:

(1) Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid?

Answer: Yes.

(2) What, if any, relief should be granted to the plaintiff?

Answer:

A declaration that Legislative Instrument IMMI 14/026 is invalid.

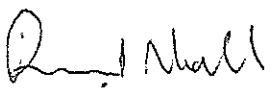
A writ of mandamus directing the first defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law.

(3) Who should pay the costs of the special case?

Answer: The defendants.

PART 8 – Estimate of time

72. The plaintiff estimates that he will require 1 hour for the presentation of his oral argument.



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