IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P49 of 2016

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

YOGESH KUMAR AND ORS
Respondents

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument in reply

2. Four matters arise from the Respondents' submissions.

   (a) The First Respondent was not prevented from making a visa application after 12 January 2016

3. Contrary to the Respondents' submissions at [12] and [16], the First Respondent's capacity to make a valid application for a visa in Subclass 572 did not depend on him holding a Subclass 485 visa. The relevant provisions have been referred to in chief. They had the result that the First Respondent's application was valid whether it was made before or after the expiry of his Subclass 485 visa.

4. This misconception affects the whole of the Respondents' submissions. Among other things it leads them to state the issues in a manner that can lead to only one answer, and to ignore the second of the issues identified by the Appellant.[1]

5. At one point the Respondents seek to cloud the issues by suggesting that there was a "last day" on which the First Respondent could apply for a visa "as a holder of a Subclass 485 visa".[2] That, however, impermissibly conflates the ability to make a valid application – the thing which the *Migration Act* 1958

1 Respondents' Submissions at [2].
2 Respondents' Submissions at [14] (see also at [17.1]).

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(Cth) relevantly "allows" – with the criteria which the Minister must apply in considering such an application. The suggestion that a visa application could be directed at a particular visa criterion (and somehow not "valid" if that criterion was unable to be met) is contrary to the text and structure of the *Migration Act*. Section 31(1) provides that there are to be prescribed classes of visa. Sections 45 and 46(1)(a) provide for applications to be made for visas of a "particular class" or a "specified class" of visa. An application for a visa is, therefore, a single application for a class of visa, not a collection of applications made by reference to alternative visa criteria.

6. Nor is it to the point that the First Respondent was found not to meet cl 572.211(3)[3] and his application therefore failed before the delegate and the Tribunal. Poor prospects of success did not mean that the application was not "allowed" to be made under the *Migration Act*. It was a "valid" application which gave rise to obligations on the Minister under ss 47 and 65. Further, even having failed in the Tribunal, the application could in principle lead to the grant of a visa under s 351 of the *Migration Act*.

7. The importance of this is that, while it may be accepted that s 36(2) of the *Acts Interpretation Act* can apply where the *effect* (rather than the terms) of a statute "requires or allows" a thing to be done before a particular date, there was nothing allowed to be done by the *Migration Act* which the First Respondent could not do either before or after the expiry of his Subclass 485 visa. Section 36(2) therefore has no application in this case.

(b) The Respondents' reliance on the "effect" of the legislation

8. As noted above, the Respondents contend that s 36(2) of the *Acts Interpretation Act* 1901 (Cth) operates not only where the provision in question expressly imposes a "last day" for doing something, but also where the statute has the effect of imposing a time limit.[4] In so doing, the Respondents mischaracterise the submissions of the Minister. The Minister does not submit that the operation of s 36(2) is limited to provisions which expressly stipulate a "last day" for a thing to be done. It could also apply where the time limit arises from the operation of statue on a set of facts. Consistently with previous authority, the "last day" for doing something under a statute may be calculated by reference to an external event, for example the service of a statutory notice[5], the presentation of bankruptcy petition[6] or the accrual of a cause of action[7].

9. However, whether the stipulation of a "last day" is express or implied, that stipulation must be found in the statutory provisions. This is because the text of s 36(2) provides that it must be the "Act" that "requires or allows a thing to be done". It is also because s 36(2) is no more than an interpretation provision which assists in the interpretation of time limits found in other legislation. It is

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3 *cf* Respondent's Submissions at [17.2].
4 Respondents' submissions at [20], [21] and [45].
5 *Associated Dominions Insurance Society Pty Ltd v Balmford* (1950) 81 CLR 161.
6 *Roskell v Snelgrove* (2008) 246 ALR 175.
7 *Price v J F Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278.

not a general cure for disadvantages that may flow from a change in an individual's circumstances over time. Whether an individual has a particular status at a particular time may have consequences for how an Act applies to them, but it does not mean that the legislation, expressly or impliedly, imposes a last day upon which a "thing" must be done.

(c) Legislative amendments

10. The Respondents submit that the effect of the amendment to s 36(2) effected by the *Acts Interpretation Amendment Act 2011* (Cth) does not strictly arise for consideration in the appeal.[8] That may be so, but the effect of the amendment has some relevance in that it was the basis on which North J distinguished the decision of the Full Court in *Zangzinchai v Millanta*[9] and was therefore central to his Honour's reasons. If (as the Appellant submits) the amendment did not alter the operation of s 36(2), the Respondents must argue that that case was wrongly decided.

11. The difficulty with his Honour's reasoning, and with the submissions of the Respondents[10], is that neither the text of the amendment nor the relevant extrinsic materials suggest an alteration in the operation of s 36(2). In particular, the replacement of the phrase "where the last day of any period prescribed or allowed by an Act" with the phrase "If... an Act requires or allows a thing to be done" merely reflects the modern drafting convention preferring the active voice over the passive voice. Under both iterations of the provision, both the requirement or permission to do a "thing" and the imposition of a time limit for doing it must find their source in the "Act" itself.

(d) Previous cases

12. Nothing in *Associated Dominions Insurance Society Pty Ltd v Balmford*[11] assists the Respondents.[12] The expiry of the period to show cause in that case could only be calculated by reference to facts external to the legislation in question (i.e. by reference to the date that on which a statutory notice was served), but the time stipulation was nevertheless one imposed by the Act. The finding that s 36(2) did not operate to otherwise alter legal rights by rendering valid an invalid notice[13] applies with the same force in this case. That is, s 36(2) did not operate to render the First Respondent's Subclass 485 visa valid (for any purpose) beyond its stipulated date of expiry.

13. The Respondents are correct to submit that the reasoning of Clyne J in *Re Tavella*[14] is somewhat opaque.[15] Subsequent authority confirms, however, that the decision in *Re Tavella* acknowledges a distinction between:

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8 Respondents' submissions at [23].
9 (1994) 53 FCR 35; see Appeal Book (**AB**) 136 at [24].
10 Respondents' submissions at [24]-[25].
11 (1950) 81 CLR 161.
12 Respondents' submissions at [44].
13 (1950) 81 CLR 161 at 181 (Williams J), 181-182 (Webb J) and 186-187 (Fullager J).
14 (1953) 16 ABC 166
15 Respondents' submissions at [46].

a. a statutory provision which requires or allows a "thing" to be done within a particular time period; and
b. a statutory provision that attaches a particular consequence to the existence of certain facts at a particular time.[16]

14. The additional authorities cited by the Respondents[17] do not change this position. Those decisions stand for the proposition that s 36(2) may operate regardless of whether the time limit in the legislation in question is framed as positive stipulation or a negative prohibition.[18] That proposition does not deny that the requirement that the "last day" for the "thing" to be done must be found in the Act. Nor does it diminish the distinction between a stipulation as to time and a stipulation that a particular consequence will follow from a particular status.

15. Finally, the majority reasoning in *Zangzinchai* does not suffer from the error attributed to it by the Respondents. The three sentences quoted by the Respondents[19] do not contain any suggestion that s 36(2) applied only if the stipulation of a time limit appeared "on the face" of the legislative provision. Rather, the majority held (correctly) that the provisions under consideration did not prescribe or allow a time for the doing of a thing at all. This is clear when relevant passage is read in its entirety.[20]

Dated: 10 November 2016

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16 *McPherson v Lawless* [1960] VR 363 at 369; *Re Arba Ex Parte: St Martins Investments Pty Limited* [1982] FCA 62; *Shephard v Chiquita Brands South Pacific Limited* [2004] FCAFC 76 at [17].

17 Respondents' submissions at [47]. *Thomson v Les Harrison Contracting Co* [1976] VR 238; *Price v J F Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278; *DPP v Papworth* [2005] VSCA 88.

18 For example, the provision may provide, using positive language, that "an action must be brought within three years of the accrual of the cause of action" or, using negative language, that "no action may be brought more than three years after the date on which the cause of action accrued": see *Thomson v Les Harrison Contracting Co* [1976] VR 238 at 242; *Price v J F Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278 at 286; *DPP v Papworth* [2005] VSCA 88 at [6]-[7].

19 Respondents' submissions at [34].

20 See the Appellant's submissions in chief at [30].