ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P58 OF 2016

BETWEEN: **MEHAKA LEE TE PUIA**

Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

Respondent

ANNOTATED SUBMISSIONS OF THE DEFENDANT AND THE COMMONWEALTH ATTORNEY-GENERAL (INTERVENING)

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Filed on behalf of the Commonwealth by:

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PART I PUBLICATION

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

PART II ISSUES

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth). Following are the joint submissions of the Defendant (**Minister**) and the Attorney-General (**Commonwealth**). The Commonwealth agrees with the Applicant's statement of issues.

PART III NOTICE OF CONSTITUTIONAL MATTER

3. The Commonwealth considers that the Applicant's notices under s 78B of the *Judiciary Act* 1903 (Cth) are sufficient.

PART IV FACTS

4. The Commonwealth agrees with the statement of facts in [4]-[5] and [12] of the Applicant's Annotated Submissions (**AS**).

5. The matters at AS [6]-[11] are in the nature of submissions about the effect of the Minister's reasons for decision, which should be read as a whole.

6. The matter at AS [13] is not agreed. The agreed fact, as reflected in [8.b] of the Special Case, is that Attachment Z did not form part of the Court Book prepared by the Minister in WAD 732 of 2015 and was not otherwise provided to the Federal Court in that proceeding. The Applicant made no attempt to compel the production of the protected information to the Court.

PART V APPLICABLE PROVISIONS

7. The Commonwealth accepts the Applicant's statement of the applicable provisions and would add s 3A of the *Migration Act 1958* (Cth) (**Act**) as an additional provision. That section is set out in the Annexure to these submissions.

PART VI ARGUMENT

Submissions on constitutional issues

8. The Applicant's case does not raise any distinct constitutional issues not raised in M97 of 2016 (*Graham v Minister for Immigration and Border Protection*) (***Graham***).

9. The Commonwealth adopts paragraphs [6]-[62] of its written submissions dated 25 January 2017 and filed in *Graham*.

Allegation of practical unexaminability

10. The factual matters canvassed at AS [17]-[20] and [25] do not add to the constitutional arguments advanced and answered in *Graham*.

11. Contrary to AS [17], there is no vice in the Applicant's inability to argue on judicial review that he is not a member of the group or that the group is not involved in criminal conduct, not least because those are merits matters that could never be relevant to an application for judicial review.

12. At the revocation stage under s 501C, the Applicant's inability to advance certain arguments has nothing to do with the validity of the immunity conferred by s 503A(2)(c). No court is involved. It is a question, at most, of procedural fairness to a person in the position of the Applicant. Section 501C is predicated on a cancellation decision having been made under a power that is expressly not conditioned by any obligation to afford procedural fairness: see ss 501(5) and 501A(4). The provision for *any* revocation avenue at all is an amelioration of that abrogation of procedural fairness. There is no constitutional problem with the revocation procedure being less generous than it might have been. The fact that revocation might prove to be difficult or even impossible to achieve in a particular case is of no significance to the validity of s 503A. Indeed, there are cases which expressly recognise that seeking revocation will sometimes be futile.[1]

13. The matters at AS [18]-[20] are sufficiently addressed in *Graham*.

Allegation of information being withheld "unnecessarily"

14. AS [21]-[25] proceed on an unstated assumption that immunity from production can be conferred on information only if it is "necessary" according to the Applicant's own assessment, or perhaps the court's own assessment, of what the public interest requires. Thus, the Applicant asserts that "other reasons have nothing to do with the public interest": AS [22]. That unstated assumption is wrong. Parliament can identify what the competing public interests are and can strike the balance of those interests, as explained in the submissions in *Graham*.

Submissions on Applicant's additional ground of review

15. The Minister found that cancelling the Applicant's visa would be in the national interest on the basis of his suspected membership of a group suspected of being involved in criminal conduct "insofar as excluding such persons from the Australian community will contribute to national law enforcement efforts to disrupt and disable such groups".[2] There was open source material, on which the Minister expressly relied, to connect those national law enforcement efforts with an assessment of the national interest.[3]

16. The matters canvassed at AS [27]-[32] are directed to the merits of the Minister's assessment of the national interest criterion and cannot be engaged with, much less accepted, by the Court in this proceeding.

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1 See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [190].

2 SCB 155 [12].

3 SCB 155 [9]-[10]

17. As submitted in *Graham*, what is in the national interest is, of course, "largely a political question" [4] that is "entrusted by the legislature to the Minister".[5]

Conclusion

18. For the foregoing reasons, the questions of law stated for the opinion of the Full Court should be answered as follows:

Question 1: No.

Question 2: Yes.

Question 3: No.

Question 4: None.

Question 5: The Applicant.

PART VII ESTIMATE OF TIME

19. The Commonwealth estimates that it will require 2 hours for the presentation of oral argument in this matter and in *Graham*.

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4 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40].

5 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 at [89], citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 447, 698.

Annexure

Migration Act 1958

No. 62, 1958

Compilation No. 133

Compilation date: 17 November 2016

Includes amendments up to: Act No. 67, 2016

Registered: 18 November 2016

3A Act not to apply so as to exceed Commonwealth power

(1) Unless the contrary intention appears, if a provision of this Act:

(a) would, apart from this section, have an invalid application; but

(b) also has at least one valid application;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

(5) In this section:

application means an application in relation to:

(a) one or more particular persons, things, matters, places, circumstances or cases; or

(b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

invalid application, in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

valid application, in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power.