ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S138 of 2012

BETWEEN:

PLAINTIFF S138/2012
Plaintiff

and

DIRECTOR GENERAL OF SECURITY
First Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Second Defendant

COMMONWEALTH OF AUSTRALIA
Third Defendant

DIRECTOR, DETENTION OPERATIONS, NSW/ACT
Fourth Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Fifth Defendant

HIGH COURT OF AUSTRALIA
FILED
11 JUN 2013
THE REGISTRY SYDNEY

PLAINTIFF'S REPLY SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1 This submission is in a form suitable for publication on the internet.

PART II: REPLY TO THE ARGUMENT OF THE DEFENDANTS

Erroneous reliance on PIC 4002

2 The defendants' submissions do not accurately describe the error in the Secretary's treatment of the plaintiff's request to be allowed to apply for a visa.[1] The 2009 direction did not in terms hinge on the making of an adverse security assessment (**ASA**). The Minister's direction was to the effect that all criteria for the grant of a visa, including the "security" criteria (which at the time included the criterion purportedly given effect through PIC 4002), should be considered before a request was referred to the Minister. It is clear from the Department's actions that this was the effect and understanding of the 2009 direction. The letter from the Department to the plaintiff dated 6 April 2010 explained that the reason why the plaintiff was not eligible for the grant of a visa (and, therefore, referral to the Minister) was the non-satisfaction of PIC 4002. The erroneous reliance on PIC 4002 was not immaterial.

[1] Defendants' submissions ("**DS**") at [48].

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3 The 2012 direction cannot change the legal character of what occurred in 2010.[2] The change in the Minister's policy does not mean that the previous legal error is of no consequence or that declaratory relief would produce no foreseeable consequences. Notwithstanding the 2012 direction, it would be open to the Minister to consider the plaintiff's request to lift the s. 46A bar. It ought not be assumed that the Department (or the Minister) will apply the 2012 direction inflexibly. In any case, the 2012 direction is only said to describe the cases that the Minister will "generally" consider for the exercise of his public interest powers.[3] The 2012 direction also provides for the Minister personally to request that a particular case be referred to him for consideration.[4] It is within the discretion of the Minister to take a favourable view of the plaintiff's request. There is a real possibility that a declaration of the kind sought here may have a bearing on the exercise of a dispensing power by the current Minister or a future Minister.

4 The prospect that the Department would apply the 2012 direction to any reconsideration of the plaintiff's request is not a sound basis to refuse relief. The defendants rely on the fact that the 2012 direction refers to the making of an ASA (rather than the application of PIC 4002) as a generally disqualifying criterion. However, this is not sufficient to avoid the legal error identified in *M47*.[5] French CJ at [71], Hayne J at [204] and Crennan J at [399] all held that an ASA made for the purposes of PIC 4002 involved the application of criteria that were not consistent with the Act and negated important parts of the statutory scheme. Their Honours' reasoning was not limited to the inconsistency with merits review rights under s. 500 of the Act; they also identified an underlying inconsistency between the criteria for an ASA and the criteria in Articles 32 and 33(2) of the Convention relating to national security. This in turn signals an inconsistency with the statutory scheme, given that the Act is directed to the purpose of responding to the international obligations which Australia has undertaken in the Convention and the Refugees Protocol: *Offshore Processing Case* (2010) 243 CLR 319 at [27]; *M47* at [65].

5 This reasoning extends beyond the proposition that PIC 4002 is an invalid regulation. It has the consequence that an ASA is not a valid criterion on which the exercise of powers under the Act can turn. Whilst the Minister's power under s. 46A is discretionary, the Minister cannot exercise that power (or direct his Department to apply a process directed to making recommendations relating to the exercise of that power) in a manner that is inconsistent with the subject-matter, scope and purpose of the Act, including the purpose of adhering to the understanding of Australia's obligations under the Convention that informs other provisions of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-41; *Offshore Processing Case* at [34]; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24 at [32], [91]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616 at [30]. The 2012 direction documents the latest implementation of the Minister's decision to consider exercising his power to lift the s. 46A bar: *Offshore Processing Case* at [66] and [70]; *Plaintiff S10/2011* at [45]. The process provided for in the 2012 direction must be a process that applies correct legal principles.[6] The 2012 direction directs the Department to determine requests in accordance with incorrect legal principles by rejecting requests

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[2] Contra DS at [48].

[3] SC Tab 14 at p 3.

[4] SC Tab 14 at p 4.

[5] Contra DS at [51].

[6] See plaintiff's submissions at [15]-[17].

where ASIO – a different decision-maker under a different statute applying criteria that are not harmonious with the Act or the Convention – has issued an ASA. This is not to say that the Minister is bound to consider certain classes of cases.[7] Rather, it is to point out that the Department cannot be directed to distinguish between requests for consideration on a basis which is alien to the Act.

The content of procedural fairness in the present case

6 The defendants seek to reduce the obligation to disclose issues of concern to an obligation to disclose issues "only at a broad level of generality" (DS [27]). This is apt to cause practical unfairness because it undermines the capacity of the affected person to respond in a meaningful way to the decision-maker's concerns. Natural justice requires that critical issues or factors be brought to a person's attention so that the person may have an opportunity of dealing with them: *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J. That purpose is not served if the issue is disclosed only in general terms.

7 The defendants also pay insufficient regard at DS [34] to the principle that a person whose rights or interests may be affected by a decision is to be given an opportunity to deal not only with the "issues" of concern but also with adverse information that is credible, relevant and significant to the decision. This is a fundamental principle of natural justice: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [2]. Yet in the defendants' submission, that principle is subject to whether "security requires otherwise" – implicitly in the view of ASIO itself.

8 The provisions of the *ASIO Act* to which the defendants refer do not reveal a legislative intention that procedural fairness should have such limited content as the defendants suggest. Under s. 37(2), particular information relied on may be withheld from a notice of assessment if, in the opinion of the Director General, disclosure would be "contrary to the requirements of security" (s. 37(2)(a)). Pursuant to s. 38(2), notice of a security assessment may be withheld if the Attorney-General has certified that the withholding of notice is "essential to the security of the nation" or disclosure to a person of the statement of some or all of the grounds "would be prejudicial to the interests of security" (s. 38(2)). Such specific provision for the withholding of some information and notices in these confined circumstances does not evince a general legislative intention that in conducting assessments ASIO is not required to accord procedural fairness beyond disclosing issues of concern at a general level. Indeed such an approach would undermine the more precise accommodation of security concerns achieved by these provisions.

9 In any event, given s. 36, neither s. 37(2) nor s. 38 apply in this type of case, and the general law fills the gap as to the implicit content of the duty. Nor does it follow that because non-citizens in the position of the plaintiff have no entitlement to be notified of an adverse security assessment (s. 36(b)) there is a lesser obligation of procedural fairness in assessing such persons. The only effect of s. 36(b) is to exclude an aspect of the statutory regime concerning procedural fairness, by denying such persons a statement of the grounds for the assessment: *Leghaei v Director General of Security* (2007) 241 ALR 141 at [19]. It would not be inconsistent with the statutory scheme to require procedural fairness to be provided to persons who do not have an entitlement to reasons following the decision.[8] This is a common state of affairs.

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[7] Contra DS at [51].

[8] Contra DS at [20.5].

10 The content of procedural fairness to be accorded by ASIO is not constrained by an *a priori* assumption that because ASIO's functions are related to security and because "intelligence information is ordinarily kept secret"[9] it is not possible to advise a person who is being assessed of specific issues of concern and the information proposed to be relied upon. The *ASIO Act* takes the opposite approach of assuming the disclosure of grounds and information unless there is a particular identification of sensitive material which needs to be kept secret. The need to protect sensitive aspects of information may affect the way in which procedural fairness is accorded in particular circumstances: see, for example, *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 223. That does not translate into a general lowering of the standard of procedural fairness to be provided for a particular type of decision.

11 It is not correct that to disclose the issues involved in a security assessment would be to disclose the thought processes of a decision-maker, such that a requirement to disclose the issues of concern to ASIO would go beyond the ordinary requirements of procedural fairness.[10] There is nothing special about ASIO's functions in this regard. The principle that a decision-maker is not obliged to expose his or her mental processes or provisional views is subject to the qualification that the decision-make is obliged to identify any critical issue which is not already apparent: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219.

12 Nor is the "evaluative" character of the ASA process a sound basis for reducing the content of procedural fairness.[11] In his second affidavit the Director General was able to articulate that his reasons for the ASA included the conclusions set out in paragraph 4.[12] The Director General also indicates in his first affidavit that he relied upon adverse information that he considered at the time of the affidavit could not have been disclosed.[13] It can hardly be said that in the circumstances of this case it was impossible for ASIO to identify the specific issues of concern arising in respect of the plaintiff and the adverse information proposed to be relied upon.

The plaintiff was not accorded procedural fairness

13 The defendants acknowledge that, subject to security concerns, the plaintiff was theoretically entitled to be given an opportunity to address adverse information personal to him.[14] However, this chance was not afforded here. During his two interviews with ASIO the plaintiff was made aware, with varying degrees of directness, that ASIO wanted to know whether he was a supporter of the LTTE and what his attitude was to the LTTE and its methods. The ASIO interviewer raised two specific issues regarding the veracity of the plaintiff's account of his time in Sri Lanka – the length of his engagement to his now wife[15] and his account of the authorities having been looking for him.[16] The disclosure of those general topics does not amount to identification of the specific issues of concern that are reflected in the conclusions in 4.1, 4.3 and 4.4 of the Director General's second

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[9] DS at [26].

[10] DS at [29].

[11] DS at [31].

[12] SC Tab 10.

[13] SC Tab 9.

[14] DS at [34.2].

[15] SCB p 212 lines 31, 45.

[16] SCB p 224 line 26; p 229, line 41; p 230 line 45; p 231 line 20; p 267 line 12.

affidavit. Nor did ASIO disclose during the course of either interview anything about the information being relied upon by ASIO in respect of these conclusions.

14 Having regard to the defendants' case in relation to the security concerns, it is particularly significant that ASIO did not during the course of the interview disclose to the plaintiff issues of concern as now articulated in the Director General's second affidavit. For example, the reason expressed in paragraph 4.4 of the Director General's second affidavit is that "the plaintiff is likely to engage in acts prejudicial to Australia's security if he is granted a permanent protection visa". That is a specific and distinct issue related to the likelihood of the plaintiff doing things in the future. It was not raised, either directly or indirectly, during either ASIO interview. If it is accepted that ASIO failed to raise any of the issues now articulated in the Director General's reasons, it must follow that there has been a breach of procedural fairness, given that on the Director General's own evidence the non-disclosure of those issues cannot be justified on security grounds.

15 The interview conducted by ASIO with the plaintiff stands in contrast to that considered in *M47*. The level of detail in respect of the issues and information put to the interviewee by ASIO in *M47* is apparent from the description by Bell J at [501]. The interview with *M47* was directed to specific factual allegations put to the interviewee in respect of particular activities in the LTTE at particular times in particular places. The interviewee was thereby able to meet the allegations against him in a way which prevented practical unfairness. *M47*, unlike the plaintiff in the present case, had a legal representative present at his interview. This was the context in which Bell J, at [500], expressed the view that there was no relevant analogy with *Kurtovic* (1990) 21 FCR 193, wherein Gummow J held at 223 that a "general and unfocused invitation to make submissions" in respect of an identified general issue is not sufficient to discharge the duty to observe procedural fairness. Given the vague and general nature of the interviews conducted in the present case, it is submitted that ASIO's approach amounted to little more than a "general and unfocused invitation to make submissions".

16 The defendants' position appears to be that security concerns in the present case extinguished the entitlement to disclosure of adverse personal information. The Director General's affidavits do not have that consequence. The Director General does not have the power to certify such matters in the present context. Nor is there any other basis in law for treating an assertion by the decision-maker as to the secret nature of information and the discharge of obligations of procedural fairness as determinative. In the analogous context of a public interest immunity claim, such assertions would need to be made good, if necessary following the inspection of documents and the adducing of confidential evidence to the satisfaction of the court: see *Young v Quin* (1985) 4 FCR 483 at 489.

17 Here, in his first affidavit the Director General expressed a conclusion that any disclosure of issues and information beyond that which occurred in the interviews would be contrary to security requirements.[17] In his second affidavit the Director General indicated that he had "further considered" what could be disclosed without causing prejudice to national security and, having done so, was able to say "more specifically" that the reasons for the ASA included the matters set out in paragraph 4.[18] This reflects a material change in the assessment of the disclosure issue. It is also significant that the Director General does not describe any consideration being given to the disclosure of information in a form which

[17] SC Tab 9 at [5.1] and [5.2].

[18] SC Tab 10.

may have enlightened the plaintiff as to the allegations against him while still avoiding security concerns. Nor was consideration given to any alternative procedure, such as disclosure to an appointed special counsel.

Authority to detain under the Act

18 The defendants' analysis of the statutory scheme authorising detention ignores a critical element of the interaction between ss. 189, 196 and 198. The use of the word "until" in s. 196 does more than signify a temporal limit. It also establishes a purposive connection. Unless removal pursuant to the Act is available as a legal possibility, the detention lacks the character of being detention for the purposes of removal. It is therefore significant that the defendants have not answered the plaintiff's submissions about the absence of *any* power of removal under s. 198 in the present case. Irrespective of the problem of finding a country to which the plaintiff can be removed, if there is no applicable power to remove then the detention is unauthorised. Support for this approach is not confined to the minority in *Al-Kateb*. Hayne J, at [225]-[227], described s. 196 as providing for detention for the purposes of processing any visa application and removal. His Honour's conclusion that s. 196 authorised detention notwithstanding the factual obstacles to removal was predicated on the availability under the Act of a power to remove and the absence of any other provision of the Act restricting the places to which a non-citizen may be removed. If the Court accepts that there is no power to remove the plaintiff for the reasons developed at [37]-[42] of the plaintiff's submissions, then *Al-Kateb* is distinguishable (there being no legal power of removal here) and there is no authority to detain.

19 As to the further question of whether there is a practical possibility of removal (ie the *Al-Kateb* issue), the plaintiff has been in detention for nearly 4 years now, and has been subject to the ASA for 3.5 years. The defendants have not identified any real prospect of removal. On the contrary, they accept that "(despite considerable efforts) there is presently no country to which the Plaintiff can be sent at this moment" (DS [59.2]). The defendants' approach (DS [56]-[60]) suggests that unless one can exclude the possibility that at some point in the future circumstances might permit removal or the grant of a visa, then it must follow that there is a real likelihood of such an eventuality. For example, the defendants posit that the Independent Reviewer could potentially reach a favourable conclusion on one of the annual reviews scheduled to occur in the future (assuming that successive governments maintain this non-statutory process, that ASIO accepts any such favourable recommendation, and that the Minister then chooses to lift the bar on that basis). This is not the correct approach. The point arising from the statutory analysis is that, in order to be authorised by the statute, the detention must be for one of the authorised objects. Unless and until there is a real likelihood of removal occurring in the reasonably foreseeable future, detention cannot be said to be authorised for that purpose. This requires a positive state of satisfaction as to the real likelihood or prospect of that occurrence, not just a speculative possibility that cannot be excluded: see *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [136].

20 Contrary to DS [71]-[72], if constructional choices are open in respect of the power to detain, the principle of legality does dictate that the legislation be construed in a manner that minimises the intrusion on personal liberty. That is the essence of the principle. The distinction drawn by Hayne J in *Al-Kateb* at [219] between citizens and non-citizens does not displace the operation of the principle of legality in this context. Recognising that the

general scheme of the Act is to regulate permission to reside in Australia does not provide a warrant to adopt an expansive reading of limited powers of detention.

Constitutional limitation

21 The defendants quote at DS [78] the discussion by Gaudron J in *Kruger v The Commonwealth* (1997) 190 CLR 1, yet the fact that there are exceptions to a principle – in circumstances where perhaps the list of exceptions is not closed – does not preclude recognition of the principle. Indeed, the defendants appear to accept at DS [79] that there is *some* such principle.

22 The plaintiff submits that the principle is not limited to detention for punitive purposes, for the reasons given by Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [81]-[82]; see *Thomas v Mowbray* (2007) 233 CLR 307 at [114] per Gummow and Crennan JJ, note [353] per Kirby J; note *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [37], [108], [193] and [222]; note also *South Australia v Totani* (2010) 242 CLR 1 at [209]-[211] per Hayne J. Even if it was so limited, to detain persons on a practically indefinite basis because they are present in Australia without a visa is, in substance, to punish them. The defendants' submission at DS [83]-[85] that indefinite detention for the purpose of segregation is permissible should not be accepted. Segregation of persons from the community on an extended basis is punitive in its effects. Further, in the plaintiff's submission, the effluxion of time cannot simply be ignored in the assessment of the character of the detention. The Constitution looks to matters of substance and practical reality. The need to do so is all the greater where the important principle here, derived from Ch III, is at issue. In circumstances where significant time has elapsed, and there is no real prospect of removal in the imminent future, to characterise the purpose of detention as simply assessment and/or removal is to ignore the reality of the situation.

23 The defendants submit at DS [86] that a new exception to the immunity should be recognised with respect to detention of unlawful non-citizens who pose a risk to Australia's security. The plaintiff submits that no such unqualified exception – permitting ongoing indefinite detention – should be recognised. Whilst no doubt protection of Australia's security is an important and relevant consideration, assessment of whether that interest requires indefinite detention is a judgment that can and should be vested in the judicial branch. In any event, it has not been established here that the plaintiff constitutes a threat to *Australia's* security (as opposed to that of another country): cf the definitions of "security" and "activities prejudicial to security" in s. 4 of the *ASIO Act*.

24 As for the *Communist Party Case* principle (cf DS [88]-[94]), the defendants seek to ignore the substance of the matter. The practical reality is that the only matter standing in the way of the plaintiff's release is the ASA. It is self-evident that in a formal sense the ASA is subject to judicial review. But, if the plaintiff fails in his procedural fairness arguments, then the substance of the matter is that he is detained indefinitely in circumstances where he has been provided with very little information as to the reasons and adverse information supporting ASIO's conclusion, and he has little practical possibility of challenging its assessment. The defendants say that the plaintiff's complaint is about the operation of the general law. Yet the legislation at issue here operates in the context of that general law: cf *Plaintiff S10/2011* at [97]. It is that operation of the legislation which leads to the complaint.

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