ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S297/2013

BETWEEN

PLAINTIFF S297/2013

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

Dated: 26 February 2014
Farid Varess
Fragomen
Level 19, 201 Elizabeth Street
SYDNEY NSW 2000

Tel: (02) 8224 8585
Fax: (02) 8224 8500
Ref: 757261
Email: fvaress@fragomen.com

UMA Regulation made in contravention of *Legislative Instruments Act*

The power to disallow

1. Although the defendants recognise that the *Legislative Instruments Act* permits both wholesale disallowance of a regulation as well as disallowance of individual provisions within the regulation,[1] there has been no recognition of the significance of that power for the purposes of this case.

2. Here, rather than disallowing only those provisions of the *TPV Regulation* that introduced Subclass 785, the Senate disallowed the whole regulation. It appears to be common ground that the Senate could have exercised its disallowance power so as to give the *TPV Regulation* the same effect as the *UMA Regulation*, or to permit any other subset of the provisions of the *TPV Regulation*. It did not. A subset of those provisions has now been remade in the form of the *UMA Regulation*. That discloses a situation akin to what Latham CJ described in *Victorian Chamber* as "a new set of regulations [being] so drafted as to deal in the same way with cases covered by disallowed regulations".[2]

3. The defendants' submission that, although the "cases" covered by each regulation are the same, the "cases" are dealt with in different ways, must be rejected.[3] One "case" covered by both regulations is the eligibility of an unauthorised arrival for a permanent protection visa, and that case was dealt with in exactly the same way under both regulations. That is enough to attract the invalidating operation of s 48.

4. Putting it another way, s 48 must be given "the fullest operation and effect".[4] The "fullest operation and effect" is given to s 48 only if the "substance" of the legislative instrument disallowed by the Senate is taken to include the subset of instruments that the Senate had power to permit. It must be recalled that s 48 and the disallowance power it seeks to protect represent a constraint placed by the Parliament on the ability of the Executive Government to traverse in its exercise of delegated legislative power within a particular period the substance of matters disallowed by either House of the Parliament. In that regard, giving "the fullest operation and effect" to s 48 serves best to achieve its legislative purpose.

5. To reject that construction is to reject that s 48 should be informed by the nature of the power which it seeks to protect.

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1 Defendants' submissions at [13]-[14].

2 *Victorian Chamber* at 361 (Latham CJ).

3 Defendants' submissions at [17], [30]-[32].

4 *Victorian Chamber* at 363 (Latham CJ).

The effect of the TPV Regulation and UMA Regulation

6. The defendants submit that the relevant 'effect' of the *TPV Regulation* was its separation of protection visa applicants "into two classes",[5] each of which was eligible for a visa of a subclass of Protection (Class XA). It thereby "did not prevent any person from obtaining a Protection (Class XA) visa".[6] But that is a matter of form. For those affected by the *TPV Regulation*, the significance of its legal effect lay not in the labels assigned to visa subclasses and the position of those subclasses in the regulatory hierarchy, but in the denial of the person's entitlement to a permanent visa. That was also ascribed significance in the explanatory statement.[7]

7. In any event, the distinction sought to be drawn by the defendants between the position of unauthorised arrivals under the *TPV Regulation* ("entitled to temporary protection visas") and the position of those persons under the *UMA Regulation* ("not entitled to protection visas at all") is illusory.[8] The explanatory statement to the *UMA Regulation* foreshadowed the use of temporary visas to comply with Australia's international obligations.[9] Indeed, Plaintiff M150 has now been granted a temporary humanitarian visa.[10] The *UMA Regulation* again permits the division of refugee applicants "into two classes":[11] those who will receive permanent visas and those who will receive temporary visas. Understood in the context of the Act under which it was made, the *UMA Regulation* enables the Executive Government to implement substantially the same scheme as under the *TPV Regulation*. It produces "in large measure, though not in all the details, the same effect as the disallowed regulation."[12]

8. Even if the omission of Subclass 785 from the *UMA Regulation* is a difference in substance, it is no more than one of those differences described by Latham CJ as "real, but quite immaterial in relation to the substantial object of the legislation".[13] The substantial object of both the *TPV Regulation* and the *UMA Regulation* is to deny permanent visas to unauthorised arrivals.

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5 Defendants' submissions at [25].

6 Defendants' submissions at [26].

7 Explanatory statement to the *TPV Regulation* at 1.8-9, attachment C at 6.3, 6.7, 7.7, 9.4, 16.1-2, 18.2.

8 Defendants' submissions at [31].

9 Explanatory statement to the *UMA Regulation*, attachment B at 1.5-1.7, 2.5.

10 Plaintiff M150's amended statement of claim filed 19 February 2014 at [17B]. The defendants have undertaken that no decision will be made by the Minister on Plaintiff S297's application for a protection visa until after the determination by the Court of the demurrer.

11 Defendants' submissions at [25]-[26].

12 *Victorian Chamber* at 364 (Latham CJ).

13 *Victorian Chamber* at 364 (Latham CJ).

UMA Regulation inconsistent with s 36 of the *Migration Act*

The plaintiff's reliance on an implication

9. Acceptance of the proposition that compliance with Australia's international obligations does not require refugees to be granted protection visas[14] does not deny that, in some respects, "the provisions of the Migration Act may, at times, have gone beyond what would be required to respond to those obligations".[15]

10. In the *Offshore Processing Case*, the Court unanimously held (at [27]) that:

> *the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.*

11. One respect in which the provisions of the Act "have gone beyond" Australia's international obligations is by the creation of a statutory class of protection visas (s 36(1)) with a statutory criterion (s 36(2)).

12. Subject to the provisions of the Act pursuant to which visas may be refused, the creation of that class and the prescription of that criterion afford an irreducible level of protection to refugees who have made valid applications for protection visas. Section 36 was the "mechanism" by which the Parliament determined that Australia would respond to its "protection obligations".[16]

13. That the Parliament could have chosen other responses, such as removal of all refugees to another country known to be safe and willing to take them,[17] or detention of all refugees to that end even where not required for reasons such as national security,[18] does not alter the conclusion that s 36 was the mechanism in fact chosen by the Parliament.

14. The defendants' case entails the conclusion that the Executive Government could prescribe a criterion, for example, that an applicant not be a person who arrived after a specified date, effectively 'grandfathering' that statutory mechanism.

15. The function of s 36 as the principal mechanism for responding to Australia's protection obligations requires that the general powers contained in the Act

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14 Defendants' submissions at [53], [58].

15 *M61* at [27], citing *NAGV* at [54]-[59].

16 *NAGV* at [40].

17 Sections 198AA to 198AJ of the *Migration Act* authorise this response in respect of unauthorised maritime arrivals who entered Australia on or after 13 August 2012.

18 Mandatory detention of this kind would be inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights.

not be exercised so as to alter, impair or detract from its ability to perform that function. If it were otherwise, the response sanctioned by the Parliament could for all practical purposes be abolished by the Executive Government.

No provision of the Act denies an implication based on s 36

16. Section 46A[19] and Subdivisions AI and AK of Division 3 of Part 2[20] do not provide any guide to the construction of s 36(2). Those provisions speak only to persons who are unable to make valid applications for visas. The premise for the operation of s 36(2) is that a valid application for a protection visa has already been made. In construing s 36(2), it does not matter whether the application was able to be made because a statutory bar was lifted or because no bar ever applied. As the defendants appear to accept elsewhere,[21] once a valid application for a protection visa has been made, s 46A and Subdivisions AI and AK have no work left to do, and do not assist with the construction of s 36(2).

17. The defendants' reliance on Subdivision B of Division 8 of Part 2 (regional processing of unauthorised maritime arrivals) is similarly misplaced.[22] The operative provision of that subdivision (s 198AD) only applies to unauthorised maritime arrivals who entered Australia on or after 13 August 2012[23] and does not apply to either plaintiff.[24]

18. Accordingly, the defendants' submissions that the above provisions "deny any basis ... for an implication limiting the power to prescribe criteria for protection visas", and "deny any sure foundation for an implication premised on the centrality of s 36(2)", are wrong.[25] There are no provisions in the Act that have that effect.

The prescription of other criteria for protection visas

19. The plaintiff accepts that criteria may be prescribed for protection visas.[26]

20. There is nothing significant about the prescription of health criteria.[27] The 'criteria' are framed as mandatory health checks. Failure to submit to the

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19 Defendants' submissions at [52], [55]-[56].

20 Defendants' submissions at [54]-[56].

21 Defendants' submissions at [72].

22 Defendants' submissions at [52], [56].

23 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), sch 1, item 36.

24 Plaintiff S297 entered Australia on 19 May 2012: **DB353** [5]. Plaintiff M150 is not an unauthorised maritime arrival.

25 Defendants' submissions at [55].

26 Plaintiff S297's submissions at [44].

27 Defendants' submissions at [48].

health checks involves a failure to satisfy the criteria, but once an applicant has submitted, the outcome of the health checks has no bearing on whether a visa is granted. The 'criteria' are precursors rather than hurdles to the grant of a protection visa. The decision whether to 'satisfy' the 'criteria' is left within the control of the individual applicant and may be made after the applicant has entered Australia and lodged his or her application.

UMA Regulation inconsistent with s 46A of the *Migration Act*

21. The defendants' submission that s 46A does not operate as "a special power in the public interest to allow offshore entry persons to apply for protection visas"[28] runs counter to much of this Court's judgment in the *Offshore Processing Case* (see, eg, [34]).

22. Section 46A bars unauthorised maritime arrivals who are unlawful non-citizens in Australia from making valid applications for visas. In its application to persons barred by s 46A, the *UMA Regulation* is unnecessary. It follows that, in its application to persons who have received a favourable exercise of discretion under s 46A such as the plaintiff, the sole purpose and function of the *UMA Regulation* is to undermine and effectively negate the Minister's public interest determination to lift the bar.

Dated: 26 February 2014

Stephen Lloyd SC
Sixth Floor Selborne Chambers
T (02) 9235 3753
stephen.lloyd@sixthfloor.com.au

James King
Sixth Floor Selborne Chambers
T (02) 8067 6913
jking@sixthfloor.com.au

28 Defendants' submissions at [74].