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

DEFENDANTS' ANNOTATED WRITTEN SUBMISSIONS

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PART I: CERTIFICATION

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

PART II: ISSUES

2. This matter concerns the validity of a decision on 17 July 2014 by the Minister for Immigration and Border Protection (**Minister**) to refuse to grant a protection visa to the plaintiff pursuant to s 65 of the *Migration Act 1958* (**Migration Act**). The sole reason for the Minister's decision was that the Minister was not satisfied that the criterion prescribed by cl 866.226 of sched 2 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**) was satisfied.[1]

3. Clause 866.226 makes it a criterion for the grant of a protection visa that: "The Minister is satisfied that the grant of the visa is in the national interest." The sole issue in this matter is the validity of this provision.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The defendants consider that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED FACTS

5. The relevant facts are set out in the special case.

PART V: LEGISLATION

6. In addition to the provisions identified in the plaintiff's outline of submissions filed 29 October 2014 (**plaintiff's submissions**) at [79], the provisions set out in the annexure are relevant.

PART VI: ARGUMENT

7. In summary, the defendants submit that:

   - cl 866.226 is not inconsistent with ss 501(3) and 501C of the Migration Act (see **section B** below);[2]
   - cl 866.226 is not inconsistent with the "scheme for protection visas" provided for by the Migration Act (see **section C** below);[3] and
   - in considering the "national interest" in cl 866.226, the fact that the applicant is an unauthorised maritime arrival is a permissible consideration (see **section D** below).[4]

   It follows that each of the grounds upon which the plaintiff contends that cl 866.226 is invalid should be rejected.

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1 See the special case dated 22 September 2014 (**SC**) [25] at court book (**CB**) 3.

2 cf plaintiff's submissions at [21]–[41].

3 cf plaintiff's submissions at [42]–[56].

4 cf plaintiff's submissions at [57]–[64].

8. Questions of relief and costs are addressed in **section E** below. The questions in the special case should be answered as set out in **section F** below.

9. Before addressing the plaintiff's submissions in detail, it is useful to set out certain matters of context.

A. THE "NATIONAL INTEREST", THE MIGRATION ACT AND PROTECTION VISAS

10. Section 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class, expressly including the class of "protection visas" created by s 36 of the Migration Act. Section 504(1) relevantly provides:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed ...

It is to be noted that it is "the strong term 'inconsistent' in s 504(1) which controls the relationship between the statute and delegated legislation, not the need, if possible, to give an harmonious operation to a statute as a whole".[5]

11. Clause 866.226 is a criterion for a specified class of visa, namely the protection visa created by s 36 of the Migration Act and referred to in the Migration Regulations as the Protection (Class XA) Subclass 866 (Protection) visa. Accordingly, the plaintiff's burden is to demonstrate that this criterion is inconsistent with the Migration Act. That is, the plaintiff must demonstrate that, despite the fact that the Migration Act contemplates that there may be criteria for a protection visa beyond those specified in s 36(2),[6] it is inconsistent with the Migration Act to make it a criterion for the grant of a protection visa that the Minister is satisfied that the grant is in the national interest. In assessing the plaintiff's submissions to that end, the following matters of context are relevant.

12. *First*, a criterion for a visa based upon the "national interest" is readily seen to be consistent with the basic object of the Migration Act. Thus, s 4(1) of the Migration Act provides:

> The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. [emphasis added]

As Gummow J observed in *Plaintiff M47*,[7] any asserted inconsistency with the Migration Act must take account that the Migration Act includes s 4(1). That observation has compelling force where the impugned criterion expressly pursues the very object identified in s 4(1) of the Migration Act.

13. *Secondly*, there is nothing in the Refugees Convention that denies to State parties to that Convention the right to make decisions about the admission of non-citizens by reference to their national interest. This Court has long recognised that parties to the Convention have jealously guarded that right. The Convention requires State parties to afford certain rights to refugees within their territories, and not to engage in *refoulement*, but it confers no right to asylum (let alone a right that cannot be denied

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5 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 (***Plaintiff M47***) at 52 [86] per Gummow J.

6 See paragraphs 43 and 45 to 46 below.

7 (2012) 251 CLR 1 at 52 [86].

even if a State thinks that to be in its national interest).[8] As Gummow A-CJ, Callinan, Heydon and Crennan JJ stated in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*:[9]

> The [Migration] Act is to be read against the consistent refusal of nation states to accept, apart from any limitations imposed by treaties to which they are parties, any abridgment of their authority to determine for themselves whether or not a right of entry and of permanent settlement should be afforded to any individual or group of individuals.

Given the above, there is no foundation for any suggestion that a criterion for a protection visa that permits the refusal of such a visa based on the "national interest" is in any way inconsistent with the Refugees Convention.

14. *Thirdly*, cl 866.226 has been a criterion for the grant of a protection visa since the Migration Regulations were first made. It came into force on 1 September 1994[10] at the same time as the provisions of the *Migration Reform Act 1992* (Cth) (**the Reform Act**) by which the present basic scheme of the Migration Act, including for protection visas, was largely introduced.[11] These contemporaneous regulations assist to understand the nature of the scheme so as to better interpret the Migration Act in light of its purpose.[12] In particular the prescription of additional criteria for protection visas by regulations — and the "national interest" criterion in particular — has always been part of the scheme.[13]

15. *Fourthly*, the "national interest" criterion was also present in the immediate predecessors to the protection visa, prior to the Reform Act. It appeared in the "domestic protection (temporary) entry permit", introduced into the then *Migration Regulations 1989* (Cth)[14] by the *Migration Regulations (Amendment) 1991* (Cth)[15] with effect from 27 February 1991. The purpose of this entry permit was "to provide temporary residence in Australia for persons granted refugee status by the Minister".[16] Its criteria included the following:[17]

> The additional criteria for a domestic protection (temporary) entry permit are that, when a decision on the application for the permit is made:

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[8] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273–274 per Gummow J; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 35–36 [42]–[44] per McHugh and Gummow JJ; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169–170 [16] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; *Plaintiff M47* (2012) 251 CLR 1 at 178–179 [486]–[487] per Bell J (with whom Gummow J relevantly agreed); *T v Home Secretary* [1996] AC 742 at 753–754 per Lord Mustill.

[9] (2006) 231 CLR 1 at 5 [2].

[10] Migration Regulations, reg 1.02.

[11] Section 2(3) of the Reform Act as enacted provided that the provisions commenced on 1 November 1993. However, that date was altered to 1 September 1994 by s 5 of the *Migration Laws Amendment Act 1993* (Cth).

[12] *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109–110 [19] per *curiam*; *Plaintiff M47* (2012) 251 CLR 1 at 128 [324] per Heydon J; *Alphapharm Pty Ltd v H Lundbeck A-S* [2014] HCA 42 at [39] per Crennan, Bell and Gageler JJ.

[13] See further paragraphs 46–47 below.

[14] Statutory Rules 1989 No 365.

[15] Statutory Rules 1991 No 25.

[16] Explanatory Statement to the *Migration Regulations (Amendment) 1991* (Cth) (Statutory Rules 1991 No 25).

[17] *Migration Regulations 1989* (Cth) (Statutory Rules 1989 No 365), reg 117A. Regulation 117A was introduced by reg 9 of the *Migration Regulations (Amendment) 1991* (Cth) (Statutory Rules 1991 No 25).

(a) the applicant is in Australia; and

(b) the applicant has been granted refugee status by the Minister; and

(c) the applicant has undergone:

(i) a medical examination by a medical officer of the Australian Government Health Service; and

(ii) a chest X-ray examination by a medical practitioner who is qualified as a radiologist in Australia; and

(d) the Minister is satisfied that the grant of the permit is in the national interest. [emphasis added]

The similarity to the criteria for the grant of a protection visa, specified in s 36 of the Migration Act and cll 866.221–866.226 of Sched 2 to the Migration Regulation as made, is apparent.

16. The Reform Act, as originally passed, introduced the protection visa as a statutory class of visa in the Migration Act, at which time it was a temporary visa.[18] However, pursuant to the *Migration Legislation Amendment Act 1994* (Cth), the word "temporary" was deleted before the relevant provisions of the Reform Act came into force.[19]

17. The contemporaneous extrinsic material shows that the protection visa was, ultimately, the replacement for the domestic protection (temporary) entry permit.[20] However, in the interim, from 1 March 1994, the domestic protection (temporary) entry permit[21] was replaced by the "protection (permanent) visa" and the "protection (permanent) entry permit" pursuant to the *Migration (1993) Regulations (Amendment) 1994* (Cth).[22] Relevantly, the criteria for the visa were:[23]

817.321 The applicant has arrived in, but not entered, Australia.

817.331 The applicant has been determined by the Minister to be a refugee.

817.332 The applicant has undergone a medical examination carried out by a Commonwealth medical officer.

817.333 The applicant:

(a) has undergone a chest X-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

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[18] See Reform Act, s 10, inserting Migration Act, s 26B.

[19] See *Migration Legislation Amendment Act 1994* (Cth), s 9.

[20] See the Explanatory Memorandum to the Migration Legislation Amendment Bill 1994 (Cth) at [31]–[32].

[21] By then found in *Migration (1993) Regulations 1992* (Cth) (Statutory Rules 1992 No 367), sched 2, pt 784. The *Migration (1993) Regulations 1992* (Cth) replaced the *Migration Regulations 1989* (Cth) from 1 February 1993.

[22] Statutory Rules 1994 No 11.

[23] *Migration (1993) Regulations 1992* (Cth) (Statutory Rules 1992 No 367), sched 2, pt 817. The criteria for the entry permit (set out in regs 817.721–817.738) were relevantly identical.

(b) is below the age of 16 years and is not a person in respect of whom a Commonwealth medical officer has requested such an examination.

817.334 The applicant satisfies public interest criteria 4001 to 4004.

817.335 The Minister is satisfied that the grant of the visa is in the national interest. [emphasis added]

Again, the similarity to the criteria for the grant of a protection visa, specified in s 36 of the Migration Act and cll 866.221–866.226 of Sched 2 to the Migration Regulation as made, is apparent.

18. A clear line thus connects the domestic protection (temporary) entry permit, the protection (permanent) visa and entry permit, and the statutory protection visa ultimately introduced in s 36 of the Migration Act. The Reform Act was enacted against the background of a "national interest" criterion being present as one of the essential criteria that had to be satisfied before the grant of the predecessors of the protection visa.

19. It is therefore not surprising that the Migration Regulations, commencing contemporaneously with the coming into force of the Reform Act, contained among the criteria for the new statutory protection visa the same national interest criterion that applied to its immediate predecessors. In light of the history above, the continuation of that criterion must be taken to have been contemplated as permissible when the Reform Act was made and amended. There is no basis to contend that this criterion was repugnant to the scheme of the Migration Act as amended by the Reform Act. On the contrary, such a criterion has been a characteristic feature of the protection visa (or entry permit) ever since it was first conceived.

20. *Fifthly*, criteria very similar to the "national interest" criterion in cl 866.226 may be found in the other refugee and humanitarian entry permits and visas both before and after the Reform Act, to the present day. Thus, in the *Migration Regulations 1989* (Cth) as made,[24] it was a requirement of the various refugee and humanitarian visas and entry permits that settlement of the applicant in Australia "would not be contrary to the interests of Australia".[25] That criterion was carried over into the refugee and humanitarian visas in the present Migration Regulations, following the commencement of the Reform Act.[26] Thus, far from the prospect of refusal of a visa on the grounds of national interest being unique to the protection visa,[27] that has long been a feature of all refugee and humanitarian visas, both before and after the Reform Act. That is yet a further reason against the proposition that the national interest criterion in cl 866.226 is repugnant to the scheme of the Migration Act as amended by the Reform Act.

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[24] Then titled the *Migration (Criteria and General) Regulations 1989* (Cth).

[25] See regs 101 (refugee visa), 102 (in-country special humanitarian program visa), 103 (global special humanitarian program visa), 104 (emergency rescue visa), 105 (woman at risk visa), 106 (camp clearance visa), 116 (refugee A (restricted) visa or entry permit), 117 (refugee B (restricted) visa or entry permit), 138 (refugee (after entry) permit), 141 (humanitarian grounds entry permit). See also reg 107 (Lebanese concession visa), for which it was a requirement that "the Minister is satisfied that resettlement of the applicant in Australia would not be contrary to the national interests of Australia".

[26] See Migration Regulations, sched 2, cl 200.224 (Subclass 200 (Refugee)), reg 201.224 (Subclass 201 (In-country Special Humanitarian)), 202.224 (Subclass 202 (Global Humanitarian)), 203.224 (Subclass 203 (Emergency Rescue)) and 204.222A (Subclass 204 (Woman at Risk)).

[27] cf plaintiff's submissions at [20].

21. In light of this context, the Court should be slow to conclude that cl 866.226 is inconsistent with Migration Act. For the following reasons, each of the plaintiff's specific submissions in favour of that conclusion should be rejected.

B. SECTIONS 501(3) AND 501C OF THE MIGRATION ACT

22. The plaintiff's first submission is that cl 866.226 is inconsistent with ss 501(3) and 501C, both of which commenced on 1 June 1999.[28] For the following reasons, that submission should be rejected.

23. Inconsistency arises where an Act deals specifically with a subject matter and regulations under the Act purport to deal with the same subject matter in a different way.[29] In identifying inconsistency, it is therefore critical to identify correctly the "subject matter" dealt with by the Act.

(a) The powers conferred by s 501

24. Section 501 may conveniently be described as addressing "character grounds".[30]

(a) Section 501(1) contains a general power to refuse to grant a visa that can be exercised by the Minister, or by a delegate, where the applicant for the visa does not satisfy the Minister that he or she passes the character test (as exhaustively defined in s 501(6)).

(b) Section 501(3) relevantly permits the Minister, acting personally (s 501(4)), to refuse to grant a visa to a person without according natural justice (s 501(5)) to that person if:

(i) the Minister reasonably suspects that the person does not pass the "character test"; and

(ii) the Minister is satisfied that the refusal is in the national interest.

25. Section 501(3) defines the extent to which the Minister's reasonable suspicion as to character grounds may result in the refusal of a visa without the Minister having accorded a person natural justice (subject to the possibility that such a decision may be revoked under s 501C in cases where a person can satisfy the Minister that he or she passes the character test). But if natural justice is accorded to a person, the Minister and/or a delegate may refuse a visa on character grounds without any obligation to consider the "national interest".

26. Section 501(3) is not properly characterised as a power to refuse visas on national interest grounds (cf eg, plaintiff's submissions at [21]), let alone as a provision that regulates the entire field of the refusal of visas in the national interest. That characterisation ignores the scheme and text of the provision, in that it omits any reference to the defining characteristic of all the powers conferred by s 501, being suspected failure of the character test. Section 501(3) says nothing, expressly or

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[28] On the commencement of the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

[29] *Morton v Union Steamship of New Zealand Ltd* (1951) 83 CLR 402 at 410, 412 per *curiam*; *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ; *Plaintiff M47* (2012) 251 CLR 1 at 64–65 [133]–[134] per Gummow J.

[30] See the section heading.

implicitly, about the circumstances in which visas can or cannot be refused in the national interest with respect to non-citizens who pass the character test.

27. In context, consideration of the national interest under s 501(3)(d) arises only in a subset of the character cases with which s 501 is concerned.[31] The role of the "national interest" limb is to confine the Minister's personal power to refuse a visa on character grounds without according natural justice, leaving all other potential character refusals to be addressed under s 501(1).

28. Accordingly, contrary to the plaintiff's submissions at [39], s 501(3) does not "appoint a course to be followed in refusing to grant a visa in the national interest". It appoints the course to be followed if the Minister wishes personally to refuse to grant a visa on character grounds without first according natural justice. Otherwise, the national interest is irrelevant to the scope of the powers conferred by s 501 of the Act.

29. Section 501(3) could limit the power to prescribe a national interest criterion for visas only if it is interpreted as impliedly providing that the concept of regulating entry into Australia in the "national interest" in s 4(1) of the Migration Act is confined to regulating entry on character grounds. But plainly, in order to achieve the object of regulating "in the national interest, the coming into, and presence in, Australia of non-citizens", it may be necessary for the Minister to refuse a visa on national interest grounds in circumstances that have nothing whatsoever to do with the character of a visa applicant.

30. Accordingly, in prescribing the character grounds upon which a visa may be refused, Parliament should not be taken to have implicitly provided that a visa cannot be refused on any grounds other than those addressed in s 501. In particular, Parliament should not be taken, by amending the Migration Act in 1998 for the express purpose of strengthening the Minister's powers in character cases, thereby by implication to have invalidated long established regulations made pursuant to ss 31(3) and 504(1) that provide for the refusal of visas on national interest grounds. That is confirmed by s 501H, which was inserted into the Migration Act at the same time as s 501(3), and which relevantly provides that "A power under section 501 ... to refuse to grant a visa to a person ... is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person".

(b) The national interest

31. The matters which may be relevant to the "national interest" are very broad. They plainly extend far beyond matters relevant to the character of visa applicants. As Kirby J said in *Re Patterson; Ex parte Taylor*:[32]

> [T]he designation of the minister as the repository of the power, and the specification that the minister personally must exercise the power of the kind mentioned in s 501(3) of the Migration Act, obviously reflect the importance, potential controversy and need for political accountability in such a decision and the high responsibility that ministers bear in protecting the national

[31] See generally *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 418–419 [78]–[80] per Gaudron J.

[32] (2001) 207 CLR 391 at 502 [330]–[331] (citations omitted). See also, in the context of the textually unconfined discretion to grant a temporary entry permit, *Minister for Immigration & Ethnic Affairs v Maitan* (1988) 78 ALR 419 (FCAFC) at 428 per Beaumont and Gummow JJ: "the discretion is to be exercised in the light of what, in the judgment of the Minister, is in the best interests of Australia. In deciding what is in the public interest, the Minister will need to balance the competing claims of possible advantage on the one hand and of possible detriment on the other so far as the national interest is concerned".

> interest in this and other fields. What is the "national interest" does not readily lend itself to the compartmentalisation of the considerations involved.
>
> The wide range of subject matters that may be taken into account in making decisions "in the public interest" has been acknowledged by this court. The present Migration Act deals with many subjects of great importance to the composition and safety of the Australian community. It would be contrary to principle for the words "in the national interest" to be given a confined meaning.

32. To similar effect, as this Court recently said in the context of the power of the Minister to designate a country as an offshore processing country if the Minister thinks that to be in the national interest: "What is in the national interest is largely a political question".[33]

33. There are numerous similar statements in the Federal Court as to the breadth of the concept of the "national interest".[34] These cases have expressly rejected submissions akin to those advanced by the plaintiff in this case to the effect that s 501(3) is to be understood as applying only in "exceptional or emergency circumstances" (cf plaintiff's submissions at [23]). As French, O'Loughlin and Whitlam JJ said: "The question of what is or is not in the national interest is an evaluative one and is entrusted by the legislature to the Minister to determine according to his satisfaction which must nevertheless be obtained 'reasonably'."[35]

34. The subject matter of s 501(3) is thus considerably more confined than that of cl 866.226, as the former power applies only to applicants with respect to whom character issues arise. That circumstance renders the present case distinguishable from *Plaintiff M47*[36] (cf plaintiff's submissions at [35]–[38]). In that case, there was a close connection between the matters the subject of the impugned visa criterion (that the applicant was not assessed by ASIO to be directly or indirectly a risk to security) and that aspect of the character test set out in s 501(6)(d)(v) (that if there was a significant risk that, in the event that the person were allowed to enter or to remain in Australia, the person would represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that were disruptive to, or in violence threatening harm to, that community or segment, or in any other way). Even in the context of that close overlap in subject-matter, it was only by a narrow majority that the Court held that the purported visa criterion was inconsistent with the Migration Act.[37] The case for inconsistency in relation to cl 866.226 is far weaker than it was in *Plaintiff M47*, as that clause does not deal with the same subject matter as ss 501(3) and 501C, instead embodying an express object of the Migration Act as a whole.

35. The plaintiff's reliance upon the *Anthony Hordern* principle is likewise misplaced (cf plaintiff's submissions at [39]–[41]). At most, the application of that principle would mean that s 501(3) would "abstract" from cl 866.226 so far as there were an overlap

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[33] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690 at 698 [40] per *curiam*.

[34] See, eg, *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 440 at [52]–[53] per *curiam*; *Maurangi v Minister for Immigration and Citizenship* [2012] FCA 15; (2012) 200 FCR 191 at 203 [70] per Lander J; *Tewao v Minister for Immigration and Citizenship* (2012) 126 ALD 185 (FCAFC) at 199 [43] per *curiam*.

[35] *Madafferi v Minister for Immigration & Multicultural Affairs* (2002) 118 FCR 326 (FC) at 353 [89] per *curiam*.

[36] (2012) 251 CLR 1.

[37] See esp *Plaintiff M47* (2012) 251 CLR 1 at 87 [208] per Hayne J.

between them. Clause 866.226 would not be rendered wholly invalid. Rather, cl 866.226 would be read down so as to exclude, from those matters permissibly the subject of consideration, the "character grounds" the subject of s 501(3).[38] In this case, none of the matters which the Minister thought relevant to the national interest in respect of the plaintiff concerned character at all.[39] None were even distantly related to the matters the subject of s 501(3). The *Anthony Hordern* principle is therefore irrelevant.

36. In any event, the *Anthony Hordern* principle could operate only if it were possible to say that, by reason of s 501(3), the Migration Act confers only one power to refuse a visa on the grounds of "national interest".[40] For the reasons already addressed above, that is not so. Here, s 501(3) could never have applied to the plaintiff, as there was no basis for suspecting that he did not pass the character test.

37. The Court should find that s 501(3) and cl 866.226:[41]

> create two sources of power, by which a person in the position of the [plaintiff] may be exposed, by different processes, and in different circumstances, to similar practical consequences. There is nothing novel, or even particularly unusual, about that. It does not of itself mean that only one source of power is available.

That was the view of the Full Court of the Federal Court in *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs*,[42] upholding the decision of Crennan J at first instance,[43] concerning the relationship between s 501 and cl 866.222A of sched 2 to the Migration Regulations. That analysis should be accepted in this case.[44]

38. Finally, in so far as the plaintiff suggests that, if cl 866.226 is valid, that gives s 501(3) no work to do, the submission ignores the fact that s 501(3) applies to <u>all</u> visa classes, not just to protection visas. Accordingly, s 501(3) plainly has a "useful and pertinent"[45] operation whether or not cl 866.226 is valid.

C. THE "SCHEME FOR PROTECTION VISAS"

39. The plaintiff's second submission is that ss 31(3) and 504 must be read as not authorising the prescription of criteria for the grant of a protection visa that depart from the "scheme for protection visas".

40. The plaintiff's argument is obscured by his repeated references to consistency with that "scheme", the elements of which are not clearly identified (eg plaintiff's

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[38] *Legislative Instruments Act 2003* (Cth) s 13(2); *Pidoto v Victoria* (1943) 68 CLR 87; *Harrington v Lowe* (1996) 190 CLR 311 at 323 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

[39] See SC 150–151.

[40] *Minister for Immigration & Multicultural & Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ; *Plaintiff M70/2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144 at 187–188 [84] per Gummow, Hayne, Crennan and Bell JJ.

[41] *Minister for Immigration & Multicultural & Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571 [2] per Gleeson CJ.

[42] (2005) 147 FCR 135.

[43] [2005] FCA 336.

[44] See also *Plaintiff M47* (2012) 251 CLR 1 at 125 [317] per Heydon J, cf 48 [70]–[71] per French CJ.

[45] cf *Plaintiff M47* (2012) 251 CLR 1 at 86 [206] per Hayne J.

submissions at [42], [46], [51], [55]). Further, the point at which the plaintiff draws the line between visa criteria that are consistent with that "scheme" and those that are not is not apparent, nor is the legal principle that is said to support the drawing of that line.

41. On this branch of the argument, the plaintiff does not contend that the express provisions of the Migration Act and cl 866.226 create "conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations".[46] Instead, he seeks to draw various implications which cut down the otherwise unqualified words of ss 31(3) and 504. The drawing of such implications is of course possible. However, it requires more than an assertion that the Migration Act has been drafted on the basis of certain assumptions or underlying premises. To limit the regulation-making power in the Migration Act by reference to a scheme discerned in its express provisions it is necessary to do more than show that the asserted limit is consistent with the scheme: it must be shown that the absence of the limit is inconsistent with the scheme. To rest an implication on anything less would be a "naked usurpation of the legislative function under the thin guise of interpretation".[47]

42. In light of these principles, the defendants submit, *first*, that there is no inconsistency with the "scheme for protection visas" to prescribe additional criteria in general and, *secondly*, that there is no such inconsistency to prescribe cl 866.226 in particular.

(a) No inconsistency with the "scheme" to prescribe additional criteria in general

43. The plaintiff apparently concedes that some persons who meet the criteria enacted in s 36(2) of the Migration Act need not be granted a protection visa. It seems, for example, that he does not dispute the validity of s 36(1B),[48] which was inserted into the Migration Act in response to the decision of this Court in *Plaintiff M47*.[49] That subsection makes it a criterion for a protection visa that the applicant is not assessed by ASIO to be directly or indirectly a risk to security. The plaintiff also apparently accepts that the refusal of a protection visa on character grounds under s 501 is permissible, presumably because that occurs by force of the Migration Act itself. It necessarily follows that the plaintiff accepts that there will be cases where the Migration Act itself contemplates that a non-citizen cannot be granted a protection visa despite the fact that the non-citizen is a refugee.

44. Nevertheless, despite his acceptance that the Migration Act itself contemplates that result, the plaintiff apparently submits that the regulations cannot validly contain some criteria that would deny protection visas to persons in respect of whom Australia has protection obligations under the Refugees Convention. But even here the argument is unclear, because the plaintiff concedes[50] that health criteria may validly be prescribed.[51] The legal principle that would support the implication of limits on the

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[46] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571–572 [2] per Gleeson CJ.

[47] *Magor and St Mellons Rural DC v Newport Corp* [1952] AC 189 at 191 per Lord Simonds, approved in *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J (Menzies J agreeing); *Parramatta CC v Brickwords Ltd* (1972) 128 CLR 1 at 12 per Gibbs J (Barwick CJ, Menzies, Owen and Walsh JJ agreeing). See also *Taylor v The Owners - Strata Plan No 11564* (2014) 88 ALJR 473 at 483 [40] per French CJ, Crennan and Bell JJ.

[48] Plaintiff's submissions at [42], [52].

[49] See *Migration Amendment Act 2014* (Cth), sched 3, cl 1.

[50] See esp plaintiff's submissions at [55].

[51] See esp plaintiff's submissions at [44], [46], [51], [53], [55]–[56].

regulation-making power conferred in broad terms by ss 31(3) and 504(1) of the Migration Act that would allow the prescription of health criteria, but would not support the "national interest" criterion in cl 866.226, is not clear.

45. Despite the various concessions identified above, at times the plaintiff's argument appears to involve the proposition that there is no power to prescribe criteria for a protection visa that would preclude the grant of a visa to non-citizens who satisfy s 36(2). That argument is much the same as an argument that was advanced in *Plaintiff M47*, where it was not accepted by any member of the Court.[52] As Gummow J noted, s 36(2) provides that "'A criterion — not, it should be emphasised, 'the criterion'"[53] for the grant of a protection visa is that the applicant is "a non-citizen in Australia" in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention. It follows, as Gummow J observed, that "an applicant to whom the Minister is satisfied Australia has protection obligations under the Convention yet may fail to qualify for a protection visa".[54] So much was likewise accepted by Hayne, Heydon and Bell JJ.[55]

46. Section 31(3) "explicitly provides"[56] that criteria for a protection visa additional to those found in s 36 may be prescribed. The power to prescribe additional criteria was, from the inception of the scheme, expressly stated to apply in respect of protection visas. Whether or not the class of protection visas "stands apart from other classes of visa" (plaintiff's submissions at [49]), effect must be given to the terms of the Migration Act that expressly permit the prescription of criteria in addition to that specified in s 36(2).

47. As addressed in detail above, from the time that the protection visa was first enacted by the Reform Act, an applicant for such a visa has been required to satisfy, in addition to the statutory criteria in s 36(2), other criteria specified in sched 2 to the Migration Regulations. For a long period after the protection visa was created,[57] those criteria included for example, that a protection visa must be refused to a person determined by the Foreign Minister to be a person whose presence in Australia would prejudice relations between Australia and a foreign country.[58] Thus, far from the Migration Act establishing the criteria in s 36(2) as the exclusive or exhaustive criteria for the grant of a protection visa, the prescription of additional criteria by the Migration Regulations has always been an integral part of the scheme.

48. In the 20 years since the commencement of the Reform Act, Parliament has made numerous amendments to the Migration Act that emphasise that s 36(2) is not intended to result in the grant of a protection visa to every person in respect of whom Australia has protection obligations under the Refugees Convention. In particular, s 46A(1) expressly renders invalid an application for a visa by an unauthorised maritime arrival in Australia who is an unlawful non-citizen. The validity of that section

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[52] See esp *Plaintiff M47* (2012) 251 CLR 1 at 79–80 [181] per Hayne J, 173–174 [472], 180 [490] per Bell J (with whom Gummow J relevantly agreed at 66 [138]) and 128–129 [327] per Heydon J.

[53] *Plaintiff M47* (2012) 251 CLR 1 at 52–53 [90]. See also at 106 [270], 114 [283] per Heydon J.

[54] *Plaintiff M47* (2012) 251 CLR 1 at [136].

[55] *Plaintiff M47* (2012) 251 CLR 1 at 79–80 [181] per Hayne J (accepting that the Migration Act allows the creation of additional criteria, or "hurdles", beyond those found in s 36(2)), 106 [271], 114 [283] per Heydon J, 178–180 [485]–[490] per Bell J.

[56] *Plaintiff M47* (2012) 251 CLR 1 at 65 [136] per Gummow J. See also at 124–125 [316] per Heydon J.

[57] *Plaintiff M47* (2012) 251 CLR 1 at 104 [265] per Heydon J, 173–174 [472] per Bell J.

[58] See cl 866.225, giving effect to sched 4, public interest criterion 4003. See also PIC 4004, concerning debts to the Commonwealth. Clause 866.225 no longer gives effect to PIC 4003 or 4004.

has been upheld by this Court.[59] Its effect, subject only to the personal and non-compellable power of the Minister, is to deny unauthorised maritime arrivals the ability to apply for any class of visa, including a protection visa. Allied with s 46A, Subdivision B of Division 8 of Part 2 provides for the taking of unauthorised maritime arrivals to regional processing countries, whether or not they are persons to whom Australia has protection obligations (see s 198AA(b)).

49. So too, non-citizens to whom Subdivision AI of Division 3 of Part 2 applies (concerning "safe third countries") and non-citizens to whom Subdivision AK applies (concerning non-citizens with access to protection from third countries) cannot in general make valid applications for protection visas regardless of whether they satisfy s 36(2).[60]

50. The recent enactment of s 36(1B) provides yet a further circumstance where the Migration Act itself may operate to prevent the grant of a protection visa to a non-citizen even if that non-citizen satisfies the criteria in s 36(2).

51. These legislative provisions deny any basis for the submission that there is a "clear necessity",[61] "clear reason"[62] or "irresistible conviction"[63] in favour of an implication limiting the power to prescribe criteria for protection visas. In particular, they deny any sure foundation for an implication premised on the centrality of s 36(2) in ensuring that Australia complies with its obligations under the Refugees Convention. That follows because s 36 cannot now be regarded as the only — or even the principal — mechanism by which the Migration Act responds to Australia's international obligations under the Refugees Convention. Australia can comply with its obligations under the Refugees Convention without granting protection visas.[64] In recent times it routinely does so by reliance on the regional processing provisions.

52. None of the above denies the relevance to the construction of the Migration Act of the recognition that it is, in part, directed to the purpose of responding to international obligations which Australia has undertaken in the Refugees Convention.[65] But neither the *Offshore Processing Case*,[66] nor any of the cases that have followed it, suggest that compliance with Australia's obligations under the Refugees Convention requires refugees to be granted protection visas (see paragraph 13 above). Absent any such obligation, it is entirely consistent with the purpose of the Migration Act in responding to the Refugees Convention to recognise that criteria can validly be prescribed that restrict access to the protection visa regime, leaving Australia to comply with its obligations under that Convention in other ways.

(b) No inconsistency with the "scheme" to prescribe cl 866.226 in particular

53. In addition to the considerations above, the more particular considerations applicable to cl 866.226 set out in paragraphs 12–21 above deny the submission that that criterion is inconsistent with the "scheme for protection visas" identified by the

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[59] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 345–348 [53]–[61] per *curiam*.

[60] See ss 91E and 91P.

[61] *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Western Australia v The Commonwealth (Territory Senators Case (No 1))* (1975) 134 CLR 201 at 251 per Stephen J.

[62] *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445 per Lord Loreburn.

[63] *Weedon v Davidson* (1907) 4 CLR 895 at 905 per Barton J.

[64] *Plaintiff M47* (2012) 251 CLR 1 at 119 [294] per Heydon J, 185 [509] per Bell J.

[65] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27] per *curiam*.

[66] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

plaintiff. In particular, that scheme was enacted against the background of the existence of precisely that criterion in the immediate predecessors to the protection visa, and very similar criteria in closely related visas and entry permits. There is nothing to suggest that, in enacting the Reform Act, Parliament sought to prevent the continued application of the "national interest" criterion that had previously applied to the visas and entry permits that were the predecessors to the class of visa created by s 36 of the Act.

54. In this light, it cannot be said that the enactment of s 36(2) reflected a legislative judgement that satisfaction of its terms means that it will always be in the national interest for a protection visa to be granted (cf plaintiff's submissions at [52]). That was not so in the predecessors to the current protection visa. It is not so now.

55. It may be accepted that an effect of cl 866.226 is that satisfaction of all other criteria for a protection visa is not sufficient to be granted a protection visa (plaintiff's submission at [52]). But so much may be said of any visa criteria. For the reasons above, the prescription of criteria in addition to that prescribed by s 36(2) of the Migration Act is permissible. Once that is accepted, it is no basis to hold cl 866.226 invalid that it may cause an applicant to be denied a protection visa to which he or she would otherwise be entitled.

D. THE NATIONAL INTEREST AND UNAUTHORISED MARITIME ARRIVALS

56. The plaintiff's final submission is that cl 866.226 is "repugnant" to s 46A of the Migration Act.

57. Section 46A(1) prohibits an unauthorised maritime arrival from making a valid application for a visa. Section 46A(2) empowers the Minister to lift this prohibition and permit the unauthorised maritime arrival to make a valid application for a visa of a specified class if the Minister thinks it in the public interest to do so.

58. The plaintiff's submission turns on the proposition that there is an "incongruity" between the power of the Minister in s 46A(2) and the criterion in cl 866.226, said to be demonstrated by the fact that the Minister thought it in the "public interest" to permit the plaintiff to apply for a protection visa but thought it not in the "national interest" to grant him such a visa (plaintiff's submissions at [61]). The plaintiff contends that that "incongruity" must be resolved by excluding from the "national interest" in cl 866.226 the fact that "the applicant is an unauthorised maritime arrival or has some of the statutory characteristics of an unauthorised maritime arrival" (plaintiff's submissions at [63]). For the following reasons, this submission should be rejected.

59. *First*, in substance, the plaintiff's submission is that the Migration Act precludes, as considerations relevant to the "national interest" in cl 866.226, the matters which the plaintiff has identified. However, as noted in paragraphs 31–32 above, the criterion of "national interest" is of the broadest ambit. It is not readily to be supposed that any matters are to be excluded in the absence of clear words to that effect.

60. *Secondly*, the fact that the Minister has exercised power under s 46A(2) does nothing more than lift the prohibition on an unauthorised maritime arrival from making a valid visa application. It places the unauthorised maritime arrival in the same position as any other non-citizen applying for a protection visa. On this branch of the plaintiff's argument, cl 866.226 is valid so far as it applies to such other non-citizens. Given that the purpose of the exercise of power under s 46A(2) is to place unauthorised maritime arrivals in the same position as other non-citizens, it would be surprising if that exercise of power had the effect that a criteria that validly applies to all other non-

citizens does not apply to unauthorised maritime arrivals (or, at the least, applies less fully). It would be equally surprising if the effect of s 46A is to render the grant of protection visas easier for unauthorised maritime arrivals than for other non-citizens.

61. *Thirdly*, there is no incongruity between an exercise of power under s 46A(2) and a refusal of the grant of a protection visa for non-satisfaction of cl 866.226. Section 46A(2) is directed to the question whether there may be a valid application for a visa. That is a distinct question from whether the visa will be granted.[67]

62. The fact that the Minister has thought it in the public interest to permit an unauthorised maritime to apply for a protection visa may say nothing about whether the Minister will consider it in the national interest to grant the unauthorised maritime arrival a protection visa. It is open to the Minister to exercise power under s 46A(2) with little or no inquiry into matters pertaining to the visa application which will be made. Thus, for instance, the Minister may form the view that, while it is generally not in the national interest that unauthorised maritime arrivals be granted protection visas, it is in the public interest that they be permitted to apply for such visas so that each person's circumstances and claims may be examined through the statutory process (including, if necessary, merits reviews through the specialist tribunal established for that purpose and the examination of character considerations under s 501). An individualised assessment of claims through the statutory process of an application for a protection visa may be in the public interest even if, absent exceptional circumstances, the Minister is likely to think that grant of a protection visa is not in the national interest, because the assessment will inform the powers that may thereafter be exercised with respect to the non-citizen (be they powers to grant other visas or the power under s 198 to remove a non-citizen only to a safe third country).

63. Even if, at the time of the exercise of power under s 46A(2), the Minister did give consideration to whether he or she might be satisfied of the national interest criterion at the time of grant (and there is no agreed fact or evidence to that effect in the special case), it would not be incongruous for the Minister, or his or her successor, to form a different view at the time power is exercised under s 65 to grant or refuse the visa application. For one thing, circumstances bearing on the national interest may have changed (including, for example, matters relating to international relations). It is for this reason that cl 866.226 must be satisfied at the time of decision, not the time of the application. For another thing, as noted in paragraph 31 above, the nature of the powers ("public interest" and "national interest"), and the person in whom those powers are reposed (a Minister), suggests that broad political considerations may be relevant, these being matters that may be influenced by the identity of the Minister and his or her political views. That tells against any fettering of the Minster's consideration of whether granting the visa is in the national interest by reference to an earlier conclusion, perhaps reached by the Minister's predecessor, that permitting an application for a visa was in the public interest.

64. In effect, the plaintiff contends that there has been a legislative judgment that a decision to exercise power under s 46A(2) to permit an application for a protection visa by an unauthorised maritime arrival determines the question whether it is in the national interest that that unauthorised maritime arrival be granted a protection visa. The premise to that contention is that it is impossible to reconcile an exercise of

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[67] See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 356 [85] per Hayne J: "Section 46A(2) did not provide for, or permit, the establishment of a system for the grant of visas to offshore entry persons. The power under s 46A(2) concerned only the making of a valid application for a visa."

power under s 46A(2) with a refusal to grant a protection visa on national interest grounds. The matters outlined above deny that premise.

65. *Fourthly*, the "reading down" which the plaintiff seeks is of very uncertain ambit. It is said that it is necessary to exclude from the matters that may be permissibly considered in assessing the "national interest" any aspect of the "statutory characteristics" of an unauthorised maritime arrival. But this is unclear. Would it preclude a conclusion by the Minister that the grant of protection visas to some classes of unauthorised maritime arrivals but not others is generally contrary to the national interest? What of a conclusion by the Minister that the grant of a protection visa to a particular unauthorised maritime arrival is contrary to the national interest because of something concerning the circumstances of his or her arrival which is atypical, but yet still part of the circumstances rendering him or her an unlawful maritime arrival? The uncertainty of the proposed reading down tells against its correctness.

66. For these reasons, s 46A(2) should be construed as doing no more than permitting the Minister to remove the disability placed on an unauthorised maritime arrival by s 46A(1). It does not limit the content of the matters that the Minister may consider in assessing whether it is in the national interest that a protection visa be granted to an unauthorised maritime arrival who is permitted to apply for a protection visa. For that reason, there is no inconsistency between s 46A and cl 866.226.

E. RELIEF

67. There are two consequential issues concerning relief. The first concerns the appropriate relief in the event that, contrary to the defendants' submissions, cl 866.226 is invalid. The second concerns costs.

(a) Relief if cl 866.226 is invalid

68. If cl 866.226 is invalid, either in whole or to the extent that the concept of the "national interest" is confined as asserted by the plaintiff, the defendants accept that the Minister's decision to refuse to grant a protection visa to the plaintiff was invalid. However, the precise relief which should be granted would depend on the extent of the invalidity, and on the form that the Migration Act and Migration Regulations take at the time that any relief is granted.

69. If cl 866.226 is wholly invalid, the defendants agree that a declaration to that effect should be made.[68] In that event, the defendants also accept that the plaintiff ought not to have been refused a protection visa on 17 July 2014 but, instead, should have been granted a protection visa. Mandamus would properly issue in such a case. The plaintiff contends that mandamus should issue commanding the Minister to grant the plaintiff a Protection (Class XA) Subclass 866 (Protection) visa forthwith.[69] If the law remains as it is now at the time that the Court comes to grant relief, the Minister would not resist such an order. However, there is a Bill presently before the Parliament that, if enacted, may have a bearing on any relief that should be granted.[70]

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[68] Plaintiff's submissions at [77].

[69] Plaintiff's submissions at [74].

[70] See Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), sched 2, item 38, which will insert a new regulation 2.08F the effect of which is to deem certain applications for Protection (Class XA) visas to be, and always to have been, applications for Temporary Protection (Class XD) visas, which class of visa is introduced as a statutory class of visa by the Bill (sched 2, item 5).

Accordingly, in the event that the plaintiff succeeds, the appropriate course is for the Full Court to decline to answer question 3, and to remit the matter to a single Justice so that the parties can make submissions as to the relevance of any legislative amendments.

70. If cl 866.226 is invalid only in part, it cannot be definitively concluded whether or not the Minister would be satisfied that the grant of a protection visa is in the national interest (however that expression is to be understood having regard to any judgment of this Court in this proceeding). At least some of the Minister's reasons for not being satisfied that it was in the national interest that the plaintiff be granted a protection visa may remain relevant considerations.[71] Accordingly, in this event, the defendants agree that mandamus should issue limited to commanding the Minister to consider the plaintiff's application for a protection visa according to law.[72] On this hypothesis cl 866.226 would not be wholly invalid, so no declaration of invalidity should be made.

(b) Costs

71. If cl 866.226 is invalid, either in whole or to the more limited extent asserted by the plaintiff in the alternative, the defendants accept that they should pay the costs of the special case.[73]

72. However, if cl 866.226 is not invalid as asserted by the plaintiff, the plaintiff should pay the defendants' costs (contrary to the plaintiff's submissions at [78]).

73. There is no reason to depart from the ordinary principle that costs follow the event. This proceeding was directed principally to benefiting the plaintiff. That there may be others in a similar position does not detract from this fact, as that is routinely the case in litigation about the Migration Act, and it does not ordinarily lead to any departure from the ordinary costs order. For example, in *Plaintiff M79/2012 v Minister for Immigration and Citizenship*,[74] after rejecting the plaintiff's challenge to the validity of the grant to him of a temporary safe haven visa, the Court ordered the plaintiff to pay costs notwithstanding that the decision plainly had implications for the legal position of thousands of others granted temporary safe haven visas. There is no constitutional point, or other point of general public importance, that would justify any departure from the ordinary approach to costs.

74. No particular approach is taken to costs in litigation ventured by a party ostensibly in the public interest: litigants espousing the public interest are not thereby granted an immunity from costs or a "free kick" in litigation.[75] Even had this proceeding been brought otherwise than for the personal gain of the plaintiff, that would not necessarily mean that costs would not follow the event (though that would be a relevant discretionary factor).[76]

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[71] See SC 150, second and third outer bullet points.

[72] Plaintiff's submissions at [76].

[73] Plaintiff's submissions at [78].

[74] (2013) 87 ALJR 682; 298 ALR 1. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690.

[75] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 122–123 [134(6)] per Kirby J.

[76] *Ruddock v Vardarlis (No 2)* (2002) 115 FCR 229 (FC) at 237–238 [18] per Black CJ and French J.

F. ANSWERS TO THE QUESTIONS IN THE SPECIAL CASE

75. The questions in the special case (SC [32] at CB 4) should be answered as follows:

(1) Is cl 866.226 of Sch 2 to the Migration Regulations invalid? No.

(2) Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the plaintiff made according to law? Yes.

(3) What, if any, relief should be granted to the plaintiff? None.

(4) Who should pay the costs of this special case? The plaintiff.

PART VII: ORAL ARGUMENT

76. The defendants estimate that presentation of their oral argument will require approximately 1.5 hours.

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