IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S61/2016

BETWEEN

PLAINTIFF S61/2016

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Defendant

PLAINTIFF'S SUBMISSIONS

Part I: Internet Publication

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

Part II: Issues

2. The plaintiff is a national of Afghanistan: Special Case (**SC**) [5]. Following the coalition invasion of Afghanistan, the plaintiff rendered assistance to US forces, leading to the Taliban murdering his father and attacking the plaintiff: SC p 82-3. The plaintiff fled Afghanistan and, after arriving in Australia an unauthorised maritime arrival (**UMA**) within the meaning of s 5AA of the *Migration Act 1958* (Cth), was granted a Protection (Class XA) visa: SC [8], [12].

3. The plaintiff's wife, daughter and siblings (**Visa Applicants**) are currently living illegally in Pakistan: SC p 340-1. They fled Afghanistan for fear of the Taliban, though by doing so they have not escaped all risk that the Taliban poses to them: SC p 248, 340-1. They have, together, applied for visas as members of the plaintiff's family (collectively, **the Visa Application**): SC [56]. The plaintiff is the sponsor of the Visa Applicants in the Visa Application: SC [56], p 286.

4. This case arises because the defendant (**Minister**), through his Department, refuses to consider processing the Visa Application. In doing so, the Department relies on a written direction given by the Minister under s 499 of the *Migration Act*: *Direction 62 – order for considering and disposing of Family Stream visa applications* (**Direction**). The Direction creates an order of priority for the consideration and disposal of applications for certain classes of visa (**Processing Order**) defined as the "Family Stream" (**Family Visas**).

5. The Visa Application is an application for Family Visas. The Processing Order gives the lowest processing priority to Family Visa applications "in which the applicant's sponsor… is a person who entered Australia as [a UMA] and who holds a permanent visa": Direction, s 8(1)(g); SC p 102.

6. On the Minister's construction of the Direction, absent a substantial reduction in the number of Family Visa applications, the Visa Application will not be processed unless and until the plaintiff becomes an Australian citizen. This is because any Family Visa

Date 25 July 2016

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application that is not sponsored by a UMA who holds a permanent visa (**PUMA**) will be processed before the Visa Application, even if it is made after the Visa Application. On the Minister's construction of the Direction, the Minister's delegates are not to process the Visa Application outside of the Processing Order, regardless of the circumstances of the Visa Applicants.

7. Questions 1 to 3 in the Special Case (**SC**) [95] reflect the ways in which the plaintiff challenges the Minister's reliance on the Direction. These submissions address questions 2 and 3 before question 1. The issues raised by the questions, in that order, are as follows.

8. First, whether, on its proper construction, the Direction allows delegates of the Minister to depart from the Processing Order when dealing with Family Visa applications in which the sponsor is a PUMA. The plaintiff submits that the Direction allows delegates to do so, and that the Department erred in refusing to consider processing the Visa Application outside of the Processing Order.

9. Secondly, whether, if the Direction does not allow delegates of the Minister to depart from the Processing Order when dealing with Family Visa applications in which the applicant's sponsor is a PUMA (a **PUMA Family Application**), the Direction is invalid because it is inconsistent with:

   a) the Minister's obligation under the *Migration Act* to consider and determine each Family Visa application within a reasonable time from the making of the application;

   b) s 51(1) of the *Migration Act*.

10. The plaintiff submits that the Direction is invalid on both bases.

11. Thirdly, whether the Department is, and was at all times, prevented from enforcing the Direction against the plaintiff because the Direction is a legislative instrument under the *Legislation Act 2003* (Cth) (***Legislation Act***). If the plaintiff's submissions on the construction of the Direction are accepted, or if the Direction is invalid, then the plaintiff accepts that the Direction was not a legislative instrument. However, if the plaintiff's submissions on construction are rejected, but the Direction is valid, then the Direction is (and was) a legislative instrument and the Department could not enforce it against the plaintiff because it was not registered under the *Legislation Act*.

Part III: No Constitutional Matter

12. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: No Judgment Below

13. This proceeding is in the Court's original jurisdiction under s 75(v) of the *Constitution*.

Part V: Facts

14. On 19 December 2013, the Minister gave the Direction under s 499 of the *Migration Act*: SC [14]. By s 8, the Direction sets out the Processing Order: SC p 102-3. At the time that the Direction was made, on the Minister's construction of the Direction, its effect was that, absent a substantial reduction in the level of Family Visa applications, Family Visa applications in which the applicant's sponsor was a PUMA would not be considered or

granted unless and until the sponsor became an Australian citizen:[1] SC [35]. This continues to be the effect of the Direction: SC [35].

15. On 25 February 2015, the Visa Applicants made the Visa Application: SC [56]. On the same day, the Department wrote to the Visa Applicants' representatives (**Fragomen**), stating that in "order to ensure fair and equitable outcomes for all our clients we process applications in the order in which they are received" and that the average processing time for the relevant visa class was "between 9 and 12 months": SC [60], p 311.

16. On 18 March 2015, the Department wrote to Fragomen stating that "as of now the average time to process this visa subclass is 12-18" months: SC [64], p 320.

17. On 6 May 2015, the Department wrote to Fragomen, advising that the Visa Application was subject to the Direction and would be given the lowest processing priority under the Direction: SC [66]. After Fragomen sent further information relating to the Visa Application to the Department (SC [67]-[69]), the Department wrote to Fragomen on 4 October 2015 stating that, due to the Direction, the Visa Application "will not be processed further at this stage", that there "is no priority given to affected family members facing compelling or compassionate circumstances" and that "[w]e are not able to take any further action on the application": SC [70], p 331.

18. On 8 October 2015, Fragomen sent the Department a document relating to the Visa Application: SC [71]. The Department replied, stating that "this application will only be actively processed once the sponsor acquires Australian Citizenship": SC [72], p 333.

19. On 19 January 2016, Fragomen wrote to a delegate within the Department, requesting the delegate to inform Fragomen whether the delegate considered that the Direction was mandatory or discretionary: SC [75], p 337. Fragomen requested that the processing of the Visa Application be afforded priority in light of the special circumstances of the Visa Applicants and the plaintiff, which were outlined in the letter: SC p 339-42.

20. On 3 February 2016, the Department replied, stating that the Direction gave the lowest priority to Family Visa applications sponsored by a PUMA, and that this "means these applications will only be processed after all other Family Stream applications have been processed": SC [76], p 349. The Department stated that as there "is no exception in the Direction for affected family members facing compelling or compassionate circumstances" and there "are currently other Family Stream application where the sponsor did not arrive as a [UMA] remaining to be processed", the Visa Application "can not [sic] be processed further at the present time": SC p 349. These proceedings commenced shortly thereafter.

Part VI: Argument

Question 2 – the construction of the Direction

The terms of the Direction

21. In s 4(1), the Direction states that it applies "to delegates who consider valid applications for Family Stream visas under section 47 of the Act, and perform functions or exercise powers under subsection 51(1) of the Act to consider and dispose of applications for" Family Visas: SC p 99. In s 7, the Direction states that in "determining the order for

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[1] Unless s 4(2) of the Direction applied. Subsection 4(2) states that the Direction does "not apply to applications where it is readily apparent that the criteria for the grant of the visa would not be satisfied". It is unnecessary to consider s 4(2) in these submissions because these proceedings concern instances where it is not readily apparent that the criteria will not be satisfied, and therefore when referring to the effect of the Direction, s 4(2) will be left to one side.

considering and disposing of Family Stream visa applications under section 51 of the Act, and in complying with the obligation to consider valid Family Stream visa applications under section 47 of the Act, delegates are to have regard to" the Processing Order: SC p 102 (underlining added).

22. The Processing Order sets out seven processing categories. The first category (given the highest priority) includes only applications where the Minister has "exercised powers of intervention under sections 351, 417 and 195A of the Act": Direction, s 8(1)(a). Generally speaking, those sections are unlikely to be applicable to PUMA Family Applications. Whatever possibility there may be of a PUMA Family Application being considered and disposed of as part of the category described in s 8(1)(a) may be put to one side for the purposes of this case. None of the plaintiff's arguments, outlined below, are affected if there is some possibility that rare PUMA Family Applications fall within this first category under the Processing Order, and it is not necessary to make further reference to that possibility in these submissions.

23. The next five categories all specifically exclude PUMA Family Applications from their scope. The last category, given the lowest priority, consists only of PUMA Family Applications.

24. In s 9(1), the Direction states that, notwithstanding the Processing Order, "when deciding the order for considering and disposing of Family Stream visa applications, delegates are to take into account any special circumstances of a compelling or compassionate nature": SC p 103. However, s 9(2) states that s 9(1) does not apply to certain types of Family Visa applications, including PUMA Family Applications: SC p 103.

Construction of the Direction

25. The Direction should not be construed as obliging delegates to follow the Processing Order in every case when determining whether to consider or dispose of a PUMA Family Application (**the Minister's Construction**). Rather, the Direction's effect is only to make the Processing Order a mandatory consideration (the Court need not enter into the question of the weight to be given to the Processing Order).

26. The natural meaning of s 7 of the Direction supports this view. As noted above, s 7 states only that delegates "are to have regard to" the Processing Order. That phrase is not apt to exclude all other factors from the consideration.[2] The Direction could easily have said that delegates were to "follow" or "comply with" the Processing Order if it were to be mandatory to do so in every case aside from those in which s 9(1) applies.

27. By s 9(1), the Direction makes "special circumstances of a compelling and compassionate nature" a mandatory consideration for delegates who decide the order for consideration and disposal of certain Family Visa applications. For those applications, s 9(1) merely makes explicit what would otherwise have already been the position: the circumstances of the case must be considered along with the Processing Order. Although PUMA Family Applications are excluded from the operation of s 9(1), s 9 does not go so far as to oblige delegates to ignore any special circumstances of a PUMA Family Application. The circumstances of the PUMA Family Application thus remain a relevant consideration.

28. It may be that this reading of s 9 means that s 9 has little work to do, and that such a reading would not normally be adopted. However, if s 9 were read such that the Minister's Construction of the Direction prevailed, then for the reasons outlined below in relation to

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2 See, eg, *Reg v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.2-9.8; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at [71]-[75].

question 3, the Direction would be invalid. As the Direction is "to be read so as to ensure that it is not ultra vires",[3] given the choice between reading s 9 in the manner outlined above and reading it such that the Direction fails, the above reading is to be preferred. The result is that question 2 should be answered "no".

Question 3 - the Direction is invalid

The Direction's effect

29. Question 3 arises if the Direction is construed in accordance with the Minister's Construction. The plaintiff's submissions on these questions proceed on the premise (which is denied) that the Direction is construed in that way.

30. Before turning to each of the limbs of question 3, it should be recalled that the Direction's effect is that (and at the time it was made, was that), absent some substantial reduction in the level of Family Visa applications, PUMA Family Applications will not be considered or determined unless and until the sponsor became an Australian citizen: SC [35]. It does not appear, from the factual inferences that the Minister may ask the Court to draw (SC [89]-[94]), that the Minister seeks to defend the Direction on the basis that the level of Family Visa applications might change such that PUMA Family Applications might be processed prior to the relevant sponsors becoming Australian citizens. That is unsurprising, as there is nothing in the Special Case to suggest that a substantial reduction in the level of Family Visa applications is likely to occur.

31. The Special Case shows that, each financial year from FY 2009-2010 to 2014-2015, the number of Family Visa applications on foot with the Department has increased, more than doubling from 73,074 as at the end of FY 2009-2010 to 162,978 at the end of FY 2014-2015: SC [28]. In the Department's discussion paper released in November 2015, titled "Planning the 2016–17 Migration Programme", the Department stated that demand for places in the Family Stream "continues to be higher than the places available": SC [19], p 150.

32. The number of PUMA Family Applications in the backlog is likely to be a relatively small part of the backlog. In December 2013, the Departmental submission to the Minister on the making of the Direction estimated that there were 10,000 applicants for Family Visas with a UMA sponsor: SC p 94. However, even that estimate was inflated insofar as PUMA Family Applications are concerned. It was based on the number of Family Visa applications from UMA "source countries" (and so would include some applications not sponsored by a UMA): SC p 95. It also did not distinguish between PUMAs and Australian citizen UMAs: SC p 94. Family Visa applications sponsored by the latter are not PUMA Family Applications.

33. Further, the number of permanent visas granted to UMAs has decreased to negligible rates (SC [29]), with changes to the *Migration Regulations 1994* (Cth) having their desired effect.[4]

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3 *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268 at [20]; *Legislation Act 2003* (Cth) s 13(1)(c) / *Acts Interpretation Act 1901* (Cth) s 46(1)(c).

4 On 16 December 2014, sch 2 cl 29 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**Legacy Act**) amended sch 1 cl 1401(3) of the *Migration Regulations* such that, prospectively, an application by a UMA for a Protection (Class XA) visa (ie, a permanent protection visa: see *Migration Regulations*, sch 2 cl 866.511) would not be a valid visa application. Also on 16 December 2014, sch 2 cl 38 of the Legacy Act inserted reg 2.08F into the *Migration Regulations*. Regulation 2.08F had the effect that a valid application for a Protection (Class XA) visa that had been made by a UMA was, if the Minister had not made a decision on the application (or in various other circumstances), taken to always have been an application for a Temporary Protection (Class XD) visa. The practical effect of these

That being so, the number of PUMAs, having peaked in about FY 2012-2013, declined in FY 2013-2014 and 2014-2015: SC [30]. In light of the general unavailability of permanent protection visas for UMAs, that decline has likely continued. A declining number of PUMAs will lead to a further diminution of the number of PUMA Family Applications in the backlog, thus increasing the portion of the backlog that must be processed before any PUMA Family Application is processed.

34. These matters highlight just how substantial a reduction in the level of Family Visa applications is required before any PUMA Family Application will be processed prior to the relevant sponsor becoming an Australian citizen. The reduction would not only need to be such that the backlog of Family Visa applications ceased increasing, but such that the backlog was significantly diminished.

35. The Direction's validity cannot depend upon the possibility that this significant diminution in the Family Visa application backlog *might* occur at some unforeseeable point, especially as the Minister cannot identify any point at which that change is likely to occur. The validity of the Direction must be assessed on the basis that it prevents the consideration or determination of PUMA Family Applications unless and until the relevant sponsor becomes an Australian citizen.

Question 3(a)

UMAs and obtaining citizenship

36. In light of the Direction's effect, and since a UMA will generally only be able to become a citizen by applying under s 21 of the *Australian Citizenship Act 2007* (Cth) (***Citizenship Act***), the following should be noted regarding the process involved in such an application.

37. First, an application under s 21 of the *Citizenship Act* can result in citizenship only if it is approved by the Minister: ss 24(1), 26(1), (2) and 28(1).

38. Secondly, the Minister must not approve a s 21 application "unless the person is eligible to become an Australian citizen under" s 21(2), (3), (4), (5), (6), (7) or (8): s 24(1A). Of those subsections, for UMAs, generally only s 21(2) has any potential application.

39. Thirdly, in order for a person to be eligible to become an Australian citizen under s 21(2), the Minister must be satisfied of matters including that:

    a) at the time of making the s 21 application, the person satisfied one of the residence requirements in ss 22, 22A, 22B or 23: s 21(2)(c). Of those, a UMA will generally have to rely only upon the general residence requirement in s 22; and

    b) the person has successfully completed a test approved in a determination under s 23A (**Citizenship Test**): s 21(2)(d)-(f) and (2A). The test may only be sat after an application is lodged under s 21.[5]

40. As to the general residence requirement in s 22, this includes requirements that:

    a) the UMA was in Australia as a lawful non-citizen for a total of at least three years in the four years immediately before the s 21 application is made: s 22(1)(a), (b) and (1A);

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changes is that now only in unusual circumstances may a UMA obtain a permanent protection visa. The only permanent protection visa granted to a UMA in FY 2014-2015 (SC [29]) appears to be the plaintiff in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

5 See attachment 1 to the determination in force under s 23A at [1(c)], [20(a)] and [36(a)]: SC [51], pp 241, 244, 246.

b) the UMA held a permanent visa, and was not absent from Australia for any more than 90 days, throughout the 12 months immediately before the s 21 application is made: s 22(1)(c) and (1B).

41. A UMA holding a Protection (Class XA) visa may leave and re-enter Australia at will for five years from the date the visa is granted: *Migration Regulations*, sch 2, cl 866.511. If he or she wishes to continue to leave and re-enter Australia after that five year period expires, the UMA may apply for a Return (Residence) (Class BB) Subclass 155 Five Year Resident Return visa (**RRV**). If the UMA is, or was in the past, a permanent resident, and spent at least two of the preceding five years in Australia, the UMA may obtain an RRV permitting the UMA to leave and re-enter Australia at will for five years from the date of its grant: *Migration Regulations*, sch 2, cl 155.212(2) and 155.511(b). At the end of that five year period, the UMA may obtain a further RRV (and so on). The *Migration Act* and *Migration Regulations* thus permit a PUMA to continue to hold a permanent visa, even if the PUMA never spends sufficient time in Australia to satisfy the general residence requirement under s 22 of the *Citizenship Act*. In circumstances where a PUMA who is sponsoring a Family Visa application is likely to have close family members overseas, the PUMA may well wish to exercise this ability to spend a significant amount of time outside of Australia.

42. As to the requirement of passing a Citizenship Test, the failure rates for all applicants, and for persons applying under the Humanitarian stream (persons who hold either a Protection (Class XA) or Refugee and Humanitarian (Class XB) visas), for FYs 2012-2013, 2013-2014 and 2014-2015 are set out at SC [47]-[49]. The failure rates for UMAs or only persons holding permanent protection visas are not available: SC [50].

43. UMAs who sit a Citizenship Test must be PUMAs (see ss 5 and 21(2)(b) of the *Citizenship Act*). The great majority of PUMAs hold Protection (Class XA) visas rather than other classes of permanent visa: SC [29]. As such, the failure rates for PUMAs are likely to be closer to the figures for the Humanitarian stream (11.2% in FY 2012-2013, 7.6% in FY 2013-2014 and 8.8% in FY 2014-2015) than the overall average. Those figures show that PUMAs face a real chance of failing the Citizenship Test (and even the overall average figures show that the risk of failure is not hypothetical). But without passing the Citizenship Test, a PUMA is not eligible to become an Australian citizen under s 21(2).

44. Fourthly, even if a PUMA is eligible to become an Australian citizen under s 21(2), the Minister may nevertheless refuse the PUMA's application: s 24(2). Eligibility to become a citizen is thus not to be confused with an "entitlement" to citizenship, and s 24(2) makes "it clear that entitlement to make an application [does] not imply entitlement to approval": *Singh v Minister for Immigration and Citizenship* (2012) 199 FCR 404 (*Singh*) [54], [56]. The power under s 24(1) to approve or refuse a s 21 application is conferred "without any presumption for or against either alternative": *Singh* [56].

45. Moreover, in order to be eligible to become a citizen under s 21(2), a person must have satisfied the Minister that the person is "of good character at the time of the Minister's decision on the application": s 21(2)(h). Thus, the discretion to refuse to approve a person who is eligible to become a citizen even extends to refusing a person who satisfies this character requirement: *Grass v Minister for Immigration and Border Protection* (2015) 231 FCR 128 (***Grass***) [55]. The "discretion is not expressly conditioned by any considerations" and is "illustrative of the highly discretionary" nature of the citizenship process: *Grass* [55].

46. In light of these matters, it is unclear on what basis the Minister may ask the Court to infer that the "overwhelming likelihood is that, if a [PUMA] is eligible for and applies for a grant of Australian citizenship, they will be granted Australian citizenship": SC [90]. Regardless, as the Direction's validity is to be tested on the basis that it prevents the consideration or determination of PUMA Family Applications unless and until the sponsor obtains

Australian citizenship, it is sufficient for the plaintiff's case to note that the sponsor's doing so depends upon the favourable exercise of the Minister's discretion under the *Citizenship Act*.

The Migration Act and the obligation *to consider and determine a valid visa application within a reasonable time*

47. Generally, a non-citizen who wishes to obtain a visa must apply for the visa: *Migration Act*, s 45. By s 47(1), the Minister is obliged "to consider" a valid application. By implication, the consideration and determination of a visa application must be performed within a reasonable time (**the Reasonable Time Obligation**): *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 (***Plaintiff S297***) [37]. What amounts to a reasonable time depends on "the circumstances of the particular case within the context of the decision-making framework established by the Act": *Plaintiff S297* [37].

48. Subsection 47(2) states that the obligation to consider a valid visa application (and so the obligation to do so within a reasonable time) continues until one of three things occurs: the application is withdrawn, the Minister grants or refuses to grant the visa, or further consideration is prevented by s 39 or s 84.

49. Under s 51(1), the Minister "may consider and dispose of applications for visas in such order as he or she considers appropriate". Under s 51(2), the "fact that an application has not yet been considered or disposed of although an application that was made later has been considered or disposed of does not mean that the consideration or disposal of the earlier application is unreasonably delayed".

50. Section 51 does not prevent delay that results only from decisions as to the order in which to process visa applications from constituting unreasonable delay. As it is not clear that the Minister will contend otherwise, at present it suffices to note two matters in relation to the interaction between s 51, s 47 and the question of unreasonable delay.

51. First, s 47(2) identifies the circumstances in which the obligation on the Minister under s 47(1) ceases or is suspended. The drafting of s 47(2) is not inclusive. Its inclusion in the *Migration Act* suggests that the Minister's obligation may not cease or be suspended in any circumstance aside from those expressly stated. Though the Minister may choose to process later visa applications before an application received earlier in time, the obligation to consider the earlier in time application continues while the Minister does so. If the delay caused by the processing of later applications was incapable of constituting unreasonable delay for earlier applications, then in practice the Minister could use the discretion under s 51 to turn the duty imposed by s 47(1) into one without a time limit, thereby making it "illusory".[6]

52. Secondly, the Explanatory Memorandum (**1992 EM**) to the *Migration Reform Act 1992* (Cth), which inserted ss 47 and 51 into the *Migration Act*,[7] supports the above view. As to s 51, the 1992 EM stated that it "is essential for good administration that the Minister has the flexibility to consider and dispose of applications as the Minister considers appropriate", and gave examples of an applicant having "a pressing need to travel quickly to Australia" or "using the application process to delay or avoid leaving Australia": [49]. At [50], the 1992

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6 *Re O'Reilly; Ex parte Australena Investments Pty Ltd; sub nom Commissioner of Taxation (Cth)* (1983) 50 ALR 577 at 578.

7 When first introduced into the *Migration Act*, ss 47 and 51 were respectively numbered ss 26N and 26S. The sections were later re-numbered to ss 47 and 51 (see s 83(5) of the *Migration Legislation Amendment Act 1994* (Cth)). In these submissions, the sections are referred to by their new numbering, regardless of the point in time in question.

EM stated that s 51 "allows the Minister this flexibility and makes it clear that there is no unreasonable delay, and hence no breach of law, where an application has not yet been considered or disposed of even though an application made later has been".

53. It is unnecessary in order for s 51 to achieve its purpose, of ensuring flexibility as to the order of processing visa applications, that s 51 be construed so as to permit the Minister to, in practice, avoid the obligation under s 47(1). There will be many cases, as the examples given by the 1992 EM show, where the processing of a later in time visa application in priority to an earlier in time application is unlikely to result in a delay that would otherwise be regarded as unreasonable. Subsection 51(2) ensures that the reason for that delay, as opposed to the mere delay itself, does not found an allegation of unreasonable delay.

Direction is invalid as it does not contain an exception to permit compliance with the Reasonable Time Obligation

54. The first way in which the Direction is inconsistent with the Reasonable Time Obligation is by creating a scheme that, for PUMA Family Applications, does not permit consideration to be given to the "circumstances of the particular case" (cf *Plaintiff S297* [37]).

55. In order to comply with the Reasonable Time Obligation, the delegates to whom the obligation to consider valid visa applications is delegated must be able to consider the circumstances of each application that may bear upon what constitutes a reasonable time for the consideration and determination of that application. It is thus implicit in the Reasonable Time Obligation that the Minister (and so his delegates) must have that ability. As the Reasonable Time Obligation is implicit in the *Migration Act*, it would be inconsistent with the *Migration Act* if that ability were extinguished. Yet this is the effect of the Direction insofar as PUMA Family Applications are concerned.

56. The case is thus a simple one of invalidity. The Direction would be inconsistent with the *Migration Act*, and so is not authorised by s 499(1): s 499(2). This would be so even if it were clear that, in the foreseeable future, the level of Family visa applications would decrease such that PUMA Family Applications would be considered prior to the relevant sponsor becoming a citizen. The fact that the Direction would not, in such a case, mean that no PUMA Family Applications would be considered until the sponsor obtained citizenship would not matter. The Direction would still be invalid for denying delegates an ability that the *Migration Act* implicitly requires them to have.

Direction is invalid as it makes processing of PUMA Family Applications contingent on the sponsor becoming a citizen

57. The second reason that the Direction is inconsistent with the Reasonable Time Obligation is that it makes the processing of PUMA Family Applications contingent on the sponsor becoming an Australian citizen. As the above discussion of the Reasonable Time Obligation and the *Migration Act* shows, the obligation under s 47(1) to consider a valid visa application ceases or is suspended only in the limited instances listed in s 47(2). Other than in those cases, the right[8] to insist upon the performance of the duty created by s 47(1) is contingent only on one thing: the effluxion of time.

58. If the Direction were valid, however, it would make the right to have a valid PUMA Family Application considered and determined contingent on the occurrence of a number of events that may not ever occur, regardless of how much time passes. Moreover, the visa applicant has no power to bring about any of the events, and even the sponsor cannot

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8 The obligation can be enforced by an application for mandamus: *Plaintiff S297* [37].

ensure that all of the events occur. The events in question, which appear from the discussion of UMAs and the *Citizenship Act* above at paragraphs 36 to 46, are:

a) the PUMA who is the sponsor in a PUMA Family Application remaining in Australia for a sufficient amount of time to satisfy the general residence requirement, which the PUMA need not, and may choose not to, do: see paragraphs 40 to 41 above;

b) the PUMA applying for citizenship under s 21 of the *Citizenship Act*. In this respect, it should be noted that there is generally no obligation on a permanent visa holder to apply for citizenship in order to remain in Australia as lawful non-citizens: SC [36]. A PUMA may continue to reside in, and travel to and from, Australia on an indefinite basis under the *Migration Act* without obtaining citizenship: see paragraph 41 above;

c) the PUMA passing the Citizenship Test, which the PUMA may well fail to do: see paragraphs 42 to 43 above; and

d) the Minister exercising his discretion to approve the PUMA's citizenship application: see paragraphs 44 to 46 above.

59. In these ways, the Direction qualifies,[9] or subjects to a favourable exercise of a Ministerial discretion,[10] or in some circumstances removes,[11] the right of a visa applicant (or sponsor) to have a valid visa application considered and determined within a reasonable time. There is no authority in the *Migration Act* for such interference with the right in question. It should be noted that the criteria for the grant of a visa such as those applied for in the Visa Application do not require that the sponsor is an Australian citizen; it suffices that the sponsor is a permanent resident: *Migration Regulations* sch 2, cl 309.211(2) and 309.221.

60. Put in a slightly different way, the Direction is such as to prevent delegates from discharging the Reasonable Time Obligation in a number of circumstances (namely, when any of the four events outlined above does not occur). Whichever way it is put, the conclusion is the same. The Direction is inconsistent with the *Migration Act* and is not a valid direction: s 499(2).

Direction is invalid because its effect is to cause unreasonable delay

61. The third way in which the Direction is inconsistent with the Reasonable Time Obligation is that, in some cases, it is likely to cause unreasonable delay in the consideration and determination of a PUMA Family Application.

62. Leaving aside that a UMA might never become eligible, or apply, to become an Australian citizen, and assuming that a UMA does so as soon as he or she possibly can (even though the UMA need not do so), that he or she passes the Citizenship Test, and that the Minister approves the application, the amount of delay that the Direction will cause depends upon:

a) when the UMA becomes a lawful non-citizen;

b) when he or she becomes a PUMA;

c) when the Family Visa application is made; and

d) how long it takes the UMA to obtain citizenship after applying to become a citizen.

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9 See *R v The Mining Warden at Gladstone; ex parte Midcoast Lands Pty Ltd* [1979] Qd R 427 at 433-4.

10 See *Herald & Weekly Times Ltd v The Victorian Civil and Administrative Tribunal* (2005) 11 VR 422 at [17], [24].

11 See *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 77 at [45]-[48].

63. As to the first and second of those points, by way of example, the plaintiff became a lawful non-citizen on 11 September 2012, and a PUMA on 11 December 2012: SC [11]-[12].

64. As to the third point, once a UMA becomes a PUMA, he or she may be a sponsor in a Family Visa application.[12] There is no reason why a Family Visa application could not be made immediately if it were prepared pre-emptively. However, even if it is assumed that the Family Visa application will not be made for another three months after the UMA becomes a PUMA, then for a UMA who progresses from immigration detention, to being a lawful non-citizen, to being a PUMA in a manner similar to the plaintiff, this would see the Family Visa application made six months into the four year period (*Citizenship Act*, s 22(1)) that must pass before the UMA may be eligible to apply to become a citizen.

65. Once the remaining three and a half years have passed, the PUMA may be eligible to become an Australian citizen under s 21(2) of the *Citizenship Act*, and may apply accordingly. Paragraphs [42]-[45] of the Special Case set out the average times taken between the making of an application for citizenship and the conferral of citizenship for applications made in FYs 2013-2014 and 2014-2015. The averages are provided for all applicants and for applicants from the Humanitarian stream, which, as outlined above at paragraphs 42 to 43, are likely to more closely reflect the position of PUMAs.

66. As at 12 June 2016, 19.5% of applications for citizenship made by persons from the Humanitarian stream in FY 2014-2015 were yet to be finalised: SC [45(b)]. This suggests that there is a real risk that a UMA who succeeds in obtaining citizenship will have to wait a year or more from the date of his or her s 21 application until the grant of citizenship.

67. The result is that, even in a case that is far from the most extreme,[13] the Direction may result in a four and a half year delay before consideration of the PUMA Family Application *begins*. The time taken to make a determination must then be factored in. That time may be upwards of three years (SC [55]), though even a quite quick processing time of six months (see SC [54]-[55]) would take the total time to determine the application to five years.

68. At this point, it may be noted that in September 2012, changes were made to the *Migration Regulations* for the express purpose of preventing UMAs who arrived on or after 13 August 2012 from sponsoring family members under the Special Humanitarian Program: SC [21]-[22], p 166-7. The Explanatory Statement to the amending Regulation stated that "[i]nstead, family reunion for [UMAs] should be achieved through the family stream of the Migration Program": SC p 167. That is what the plaintiff is (and other PUMAs are) trying to achieve.

69. In *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 (***Shahi***), the Court addressed the construction of sch 2, cl 202.221 of the *Migration Regulations*. The Minister submitted that the clause should be construed so as to avoid the Minister having to grant a visa to a person who, at the time of the visa application, was the spouse of an Australian citizen or permanent resident, but whose relationship broke down prior to the application being determined: [37]. French CJ, Gummow, Hayne and Bell JJ said that this submission depended "on the unstated premise that conformably with the due administration of the Act and the Regulations the interval between application and decision may be so long that

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12 See, eg, *Migration Regulations*, reg 2.01(definition of "Australian permanent resident") and sch 1, cl 309.211(2)(b) and 309.213(1)(a).

13 Especially as 1.2% of FY 2013-2014 citizenship applications from the Humanitarian stream remained outstanding as at 12 June 2016: SC [44(b)].

the relationship between proposer and visa applicant may deteriorate to the point of final rupture, even divorce" and that the "premise should not be accepted": [37].

70. In the present case, Family Visas include, for example, the Partner (Provisional) (Class UF) visa (**Partner Visa**): SC p 101. There is one subclass for the Partner Visa, being subclass 309: *Migration Regulations*, sch 1, cl 1220A(4). For the Partner Visa, it is a time of application criterion that the applicant is the spouse or de facto partner of, or intends to marry, relevantly, an Australian permanent resident: sch 2, cl 309.211. The applicant must continue to satisfy that criterion at the time of decision: sch 2, cl 309.221.

71. Absent some special circumstances, in line with the majority's judgment in *Shahi*, it is not in conformity with the *Migration Act* that it should take in the vicinity of five (or even, say, four) years to determine a Partner Visa application regardless of the circumstances of the application. The same may be said in relation to other Family Visas, such as the Prospective Marriage (Temporary) (Class TO). This is especially so when, in order to minimise the delay, the sponsor must remain in Australia for sufficient time to satisfy the residence requirement in s 22 of the *Citizenship Act*, thus limiting the time that he or she may spend overseas[14] with the visa applicant (their reunion need not be in the sponsor's home country). Doing so will undermine the relationship that needs to continue to exist in order for the visa application to succeed. Similar comments may be made, for example, in respect of Child (Migrant) (Class AH) visas, which are also Family Visas. The *Migration Act* should not be read as envisaging that, in the processing of a visa application to allow parent and child to be together, a delay of four or five years is generally reasonable.

72. In a rare case, a delay of four to five years might be reasonable because of the particular circumstances of the case, which may include matters arising that are out of the Minister's control: see, eg, the matters outlined at SC [33]. But even if this is accepted, acknowledgement that delay of that magnitude is reasonable in rare cases does not translate into a general rule that delay of that magnitude is reasonable in every case, regardless of the circumstances of the case in question. Yet that is the effect that the Direction is likely to have, at least for some PUMA Family Applications. It should also be noted that the processing time of six months referred to in the paragraphs above would, in light of the data at SC [54]-[55], suggest that the circumstances of the application in question were not such as to cause any difficulty to the Minister in processing the application promptly.

73. It is inconsistent with the Reasonable Time Obligation that applicants for a Family Visa should suffer delays of four or five years (or more) regardless of the circumstances of their case. The Direction may inflict delays of periods such as these even where the sponsor does all he or she can do to obtain citizenship. For this reason, the Direction is invalid.

Question 3(b)

74. The Minister has a discretion under s 51(1) of the *Migration Act* to consider and dispose of applications for visas in such order as he or she considers appropriate: *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199 [40]. Unsurprisingly for a provision that confers an administrative discretion, the purpose of the provision is to allow the Minister flexibility that "is essential for good administration": see the 1992 EM [49]-[50], discussed above at paragraph 52.

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[14] See paragraph 41 above as to the way in which the *Migration Act* and *Migration Regulations* permits a PUMA to be absent from Australia for an amount of time such that the PUMA would never satisfy the s 22 residence requirement and yet maintain a permanent Australian visa.

75. There is nothing in the *Migration Act* that explicitly confines the exercise of the discretion under s 51, although, for the reasons discussed above at paragraphs 49 to 53, it could not be exercised so as to unreasonably delay the processing of a valid visa application. Given that the s 51 discretion is "in its terms... unconfined" the factors that may be taken into account in its exercise are similarly unconfined, except in so far the *Migration Act* implies some limitation: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. Other than the implicit limitation just referred to, there do not appear to be any limitations that are relevant to the present case.

76. Despite this being the nature of the discretion, on the Minister's Construction, for delegates exercising the Minister's powers under s 51 in respect of PUMA Family Applications, the Direction does away with the s 51(1) discretion almost entirely. The discretion would remain only to the extent of choosing the order in which to process PUMA Family Applications as between those applications (if any of those applications were ever reached).

77. That being so, the Direction is inconsistent with s 51. A s 499 direction cannot fetter a discretion conferred by the *Migration Act* any further than the discretion is fettered by the *Migration Act* itself,[15] yet in this case not only does the Direction purport do so, it purports to remove the very flexibility that s 51 was designed to provide: see 1992 EM [50]. In this respect, the Direction is no different from a policy, yet it is clear that policies regarding processing orders cannot lawfully preclude the consideration of the circumstances of each case.[16] Question 3(b) should be answered "yes".

Question 1

78. As outlined above at paragraph 11, if question 2 is answered "no" or either of question 3(a) or 3(b) is answered "yes", the plaintiff accepts that question 1 is "no". This is because, if question 2 is answered no, the Direction does not determine the law or alter the content of the law, and if either question 3(a) or 3(b) is answered yes, the Direction is invalid and of no effect. However, if question 2 is answered "yes" and questions 3(a) and (b) are each answered "no", then the answer to question 1 is "yes".

79. Question 1 may be resolved with reference to s 8(4) of the *Legislation Act* as now in force. Assuming that question 2 is answered "yes" and that the Direction is valid, it is a legislative instrument by virtue of that subsection. If the Direction is a legislative instrument under s 8(4), then it was also a legislative instrument, from its making on 19 December 2013, by virtue of s 5(1) of the *Legislative Instruments Act 2003* (Cth) (***LI Act***) (as the *Legislation Act* was known when the Direction was made). This is because if the Direction satisfies s 8(4)(a) and (b) of the *Legislation Act*, it also satisfied, respectively, s 5(1)(b) and 5(2) (and so s 5(1)(a)) of the *LI Act*.

80. Turning to s 8(4) of the *Legislation Act*, s 8(4)(a) is satisfied in the present case, as the Direction is made under a power delegated by the Parliament to the Minister through s 499 of the *Migration Act*.

81. As to s 8(4)(b)(i), if question 2 is answered "yes", then the Direction alters the content of the law rather than determining the particular cases or circumstances in which the law is to apply or not apply. The Direction would not merely give directions on the exercise of the powers conferred by ss 47 and 51 of the *Migration Act* (cf *Uelese v Minister for Immigration and*

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15 See, eg, *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667 at [28]; *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580 at [119]-[123]; *Hong v Minister for Immigration and Multicultural Affairs* (1999) 32 AAR 268 at [20].

16 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 at [58], [68].

Border Protection [2016] FCA 348 (***Uelese***) at [50]). It would preclude the exercise of those powers to consider a PUMA Family Application prior to the sponsor becoming an Australian citizen. Delegates who previously had a discretion to consider and determine a PUMA Family Application prior to that time are, since the Direction was made, no longer able to do so.

82. As to s 8(4)(b)(ii), the Direction at least indirectly affects the Visa Applicants' and the plaintiff's interest in having the Visa Application considered and determined promptly. The Direction at least indirectly varies the Visa Applicants' and the plaintiff's right to have a decision made as to the timing of the consideration and determination of the Visa Application by reference to all the circumstances of their case rather than only by reference to the Processing Order and the citizenship status of the plaintiff.

83. For these reasons, if the answer to question 2 is "yes", and if the Direction is valid, then the Direction is a legislative instrument under s 8(4) of the *Legislation Act*. It was also a legislative instrument under s 5(1) of the *LI Act* when the Direction was made and thereafter.

Question 4

84. Question 4 asks what, if any, relief should be granted to the plaintiff. It should be answered as follows, depending on the answers given to questions 2, 3 and 1.

85. If question 2 is answered "no", then the plaintiff is entitled to relief. The Department misconstrued the Direction when applying it to the Visa Application and refusing to consider processing the Visa Application outside of the Processing Order. As much appears from the description of the effect of the Minister's construction of the Direction at SC [35], and the Department's final letter to the plaintiff's representatives before the plaintiff commenced litigation in this Court.[17] The plaintiff should be granted:

    a) a declaration that, on its proper construction, the Direction does not:

        i. oblige delegates of the Minister, in determining the order for considering and disposing of Family Stream visa applications under s 51 of the *Migration Act* and in complying with the obligation to consider valid Family Stream visa applications under s 47 of the *Migration Act*, to consider and dispose of applications in which the applicant's sponsor (or proposed sponsor) is a person who entered Australia as a UMA and holds a permanent visa only by following the order of priority in s 8 of the Direction; and

        ii. prevent those same delegates from considering all the circumstances of a Family Stream visa application in which the applicant's sponsor (or proposed sponsor) is a person who entered Australia as a UMA and holds a permanent visa when determining whether to consider or dispose of that application; and

    b) a writ of mandamus as stated in paragraph 4 of the plaintiff's amended application for an order to show cause (**Application**).

86. If either question 3(a) or (b) is answered "yes", then the plaintiff should be granted:

    a) a writ of prohibition as stated in paragraph 1 of the Application; and

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[17] The Department wrote that the Direction meant that the Visa Application "will only be processed after all other Family Stream applications have been processed… As there is no exception in the Direction for affected family members facing compelling or compassionate circumstances… the visa applications referred to in your letter can not be processed further at the present time": SC p 349 (underlining added).

b) a declaration or writ of certiorari as stated in paragraph 3 of the Application;

c) a writ of mandamus as stated in paragraph 4 of the Application.

87. If question 1 is answered "yes", then the Minister is prevented by s 15K of the *Legislation Act* from enforcing the Direction against the Visa Applicants and the plaintiff because it was not registered as a legislative instrument, and the Minister was previously prevented from doing the same by s 31 of the *LI Act*. When the Direction was applied to the Visa Application, the Direction was enforced: *Uelese* [63]. For these reasons, the plaintiff would be entitled to:

a) a writ of prohibition as stated in paragraph 1 of the plaintiff's Application, subject to the addition of the words "until such time as the Direction is registered as a legislative instrument under s 15H of the *Legislation Act 2003* (Cth)" at the end of that paragraph; and

b) a writ of mandamus as stated in paragraph 4 of the Application.

Part VII: Applicable Provisions

88. See annexure.

Part VIII: Orders Sought

89. Question 2 should be answered "no", and if it is, questions 3(a) and (b) should not be answered, and question 1 should be answered "no". If question 2 is answered "yes", each of questions 3(a) and (b) should be answered "yes", and if either question 3(a) or (b) is answered in this manner, question 1 should be answered "no". If question 2 is answered "yes" and each of questions 3(a) and (b) are answered "no", question 1 should be answered "yes".

90. The answer that the Court should give to question 4 depends upon the answers given to questions 1 to 3. The answers sought in each case are set out at paragraphs 85 to 87 above.

91. Question 5 asks who "should pay the costs of the special case and of the proceedings generally?" This question should be answered "the defendant".

Part IX: Estimate of Time

92. The plaintiff estimates that around two hours will be required for his oral argument.

Dated: 25 July 2016

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