HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

PLAINTIFF S297/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff S297/2013 v Minister for Immigration and Border Protection
[2014] HCA 24
20 June 2014
S297/2013

ORDER

The questions asked by the parties in the special case dated 22 April 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid?

Answer

Yes.

Question 2

What, if any, relief sought in the further amended writ of summons and further amended statement of claim, dated 1 April 2014, should be granted to the plaintiff?

Answer

A writ of mandamus directing the first defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law.

Question 3

Who should pay the costs of the proceeding?

Answer

The defendants should pay the costs of the special case. The costs of the balance of the proceeding should be determined by a single Justice.

Representation

S B Lloyd SC with J B King for the plaintiff (instructed by Fragomen)

S P Donaghue QC with P D Herzfeld for the defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Plaintiff S297/2013 v Minister for Immigration and Border Protection

Migration – Refugees – Protection visas – Power of Minister under s 85 of *Migration Act* 1958 (Cth) to determine maximum number of visas of specified class granted in specified financial year, in circumstances where s 65A imposed time limit in which protection visa applications must be decided – Minister signed instrument limiting number of protection visas granted in current financial year – Plaintiff's protection visa application not determined by Minister pursuant to that determination – Whether power under s 85 extended to protection visas – Whether instrument valid.

Words and phrases – "harmonious construction", "implied repeal", "leading provision", "legislative instrument", "subordinate provision".

Legislative Instruments Act 2003 (Cth), s 56.
Migration Act 1958 (Cth), ss 36, 39, 65, 65A, 84, subdiv AH.

1 FRENCH CJ. The plaintiff is a national of Pakistan, who entered Australia by sea at Christmas Island on 19 May 2012 without a visa. He was thereby an "offshore entry person" within the meaning of s 5(1) of the *Migration Act* 1958 (Cth) ("the Migration Act") as it then stood. From 1 June 2013, he fell within the statutory definition of an "unauthorised maritime arrival"[1]. He was also, at all times, an "unlawful non-citizen" within the meaning of ss 5(1) and 14 of the Migration Act and, accordingly, was held in and remains in immigration detention pursuant to ss 189 and 196 of the Migration Act.

2 As an offshore entry person in 2012, the plaintiff was unable to make a valid application for a Protection (Class XA) visa[2] unless the Minister exercised a non-compellable personal discretion to allow him to do so[3]. The Minister took that step on 23 September 2012 and the plaintiff made an application for a protection visa on the same day. The application was refused by a delegate of the Minister on 11 February 2013. On an application by the plaintiff for review of that decision, the Refugee Review Tribunal ("the RRT"), on 17 May 2013, remitted the matter for reconsideration by the Minister on the basis that the plaintiff satisfied the criterion for the grant of a protection visa in s 36(2)(a) of the Migration Act. The plaintiff's application for a protection visa remains on foot. No decision has been made by the Minister, or his delegate, pursuant to the remitter by the RRT. The reasons for that are found in a number of events which occurred between October 2013 and March 2014.

3 A regulation, the Migration Amendment (Temporary Protection Visas) Regulation 2013 (Cth), which would have denied permanent protection visas to unauthorised maritime arrivals such as the plaintiff, was made on 17 October 2013 and disallowed by the Senate on 2 December 2013[4]. On the same day, the Minister made a purported determination, under s 85 of the Migration Act, that the maximum number of protection visas that could be granted in the financial year 1 July 2013 to 30 June 2014 was 1,650. The effect of that determination would have been to deny the grant of any further protection visas in the remainder of the year ending 30 June 2014.

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1 A term introduced into the Migration Act by the enactment of s 5AA pursuant to the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth), Sched 1, Pt 1, item 8.

2 Migration Act, s 46A(1) as it then stood.

3 Migration Act, s 46A(2) as it then stood.

4 The disallowance was made pursuant to s 42 of the *Legislative Instruments Act* 2003 (Cth).

4 On 12 December 2013, the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth) ("the UMA Regulation") was made. It came into effect on 14 December 2013. On 19 December 2013, the Minister revoked his determination of 2 December 2013. The object of the UMA Regulation was to deny permanent protection visas to unauthorised maritime arrivals, including the plaintiff.

5 On 4 March 2014, the Minister made a further determination under s 85 that the maximum number of protection visas that could be granted in the year ending 30 June 2014 was 2,773. The effect of that determination, if valid, was that no more protection visas could be granted between 24 March 2014, when the maximum number of protection visas was reached, and 30 June 2014. The UMA Regulation was disallowed by the Senate on 27 March 2014.

6 The legal minuet between the Minister and the Parliament was reflected in the shifting form of these proceedings, which commenced on 16 December 2013. A special case was referred to the Full Court, based on the proceedings as they now stand, for determination of the following questions:

1. Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid?

2. What, if any, relief sought in the further amended writ of summons and further amended statement of claim, dated 1 April 2014, should be granted to the plaintiff?

3. Who should pay the costs of the proceeding?

7 The plaintiff submits that s 85 did not empower the Minister to make a determination in relation to protection visas. For the reasons I have given in *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection*[5], that submission should be accepted. It is therefore not necessary to consider the further submissions by the plaintiff that the Minister exercised his power for an improper purpose and that the requirement of s 85 that the determination be "by notice in the *Gazette*" was not met. The answers to the questions in the special case should be:

1. Yes.

2. The question of relief should be remitted for determination by a single Justice.

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5 [2014] HCA 25.

3. The defendants should pay the costs of the special case. The costs of the proceeding otherwise should be remitted to a single Justice.

HAYNE AND KIEFEL JJ.

The facts

8 The plaintiff is a Pakistani national. In May 2012, he entered Australia at Christmas Island. He had no visa permitting him to enter or remain in Australia. At the time he entered Australia, he was an "offshore entry person" within the meaning of s 5(1) of the *Migration Act* 1958 (Cth) ("the Act") as it then stood. Upon the commencement of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth), he became an "unauthorised maritime arrival" within the meaning of s 5AA(1) of the Act.

9 In September 2012, the then Minister permitted[6] the plaintiff to make a valid application for a protection visa, and the plaintiff did so. The plaintiff has been found to be a refugee within the meaning of the Refugees Convention[7]. The Minister has not decided the plaintiff's visa application.

10 It is not necessary to describe all the regulatory and other steps which have been taken between October 2013 and March 2014 that have been thought to prevent the Minister deciding pending applications for a protection visa made by the plaintiff and others. Those steps have included the making[8] and the subsequent disallowance[9] of regulations, and the making[10] and subsequent revocation[11] of a determination limiting the number of protection visas that may be granted during the financial year ending on 30 June 2014.

11 Instead, attention may be confined to the Minister's determination, made on 4 March 2014, limiting the number of protection visas that may be granted

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6 s 46A(2).

7 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

8 Migration Amendment (Temporary Protection Visas) Regulation 2013 (Cth) ("the TPV Regulation"), made on 17 October 2013; Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth) ("the UMA Regulation"), made on 12 December 2013.

9 The Senate disallowed the whole of the TPV Regulation on 2 December 2013 and disallowed the whole of the UMA Regulation on 27 March 2014.

10 On 2 December 2013.

11 On 19 December 2013.

during the financial year ending on 30 June 2014 to 2,773. The limit was reached on 24 March 2014.

12 If the limit was validly determined, the plaintiff can neither be granted nor refused a protection visa during the financial year. Whether or when it could be granted thereafter would depend upon whether the Minister made a further determination limiting the number of protection visas which may be granted in the next financial year and, if the Minister did that, in what order the Minister considered applications. (The Minister is *not* bound[12] to consider in any particular order applications for a class of visas in respect of which a limit has been fixed.)

The plaintiff's claims and the special case

13 The plaintiff made three arguments. First, he alleged that the Act did not permit the Minister to make any determination of a limit on the number of protection visas that may be issued in a financial year. Second, he alleged that the Minister acted for an improper purpose in making the determination. Third, the plaintiff alleged that, if the Minister had power to determine a limit on the number of protection visas which could be issued during a financial year, the determination should have been, but was not, published in the *Commonwealth of Australia Gazette*.

14 The parties joined in stating the questions of law arising in the matter in the form of a special case. This case was heard at the same time as the special case in the proceeding brought by Plaintiff M150 of 2013.

Conclusion and orders

15 For the reasons given[13] in the proceeding brought by Plaintiff M150 of 2013, the Minister had no power to make the determination limiting the number of protection visas which may be granted during the financial year ending on 30 June 2014. This being so, it is neither necessary nor appropriate to consider either of the other issues which the plaintiff sought to agitate.

16 Question 1 asks whether the Minister's determination made on 4 March 2014 pursuant to s 85 of the Act is invalid. That question should be answered: "Yes".

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12 ss 90 and 91; cf s 51, which also provides that the Minister may consider and dispose of applications for visas "in such order as he or she considers appropriate".

13 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25.

17 Question 2 asks what relief the plaintiff should be granted. As in the proceeding brought by Plaintiff M150 of 2013, the exact form of relief to be granted should be a matter for the single Justice making orders finally disposing of the proceeding and the question should be answered accordingly. As the matter presently stands, it would seem probable that the plaintiff would be entitled to relief which included a declaration that the Minister's determination is invalid and an order for mandamus directed to the Minister requiring the Minister to determine according to law the plaintiff's application for a protection visa.

18 Question 3 asks who should pay the costs of the proceeding. The defendants should pay the plaintiff the costs of the special case. What other order for costs should be made should again be a matter for the single Justice who finally determines the proceeding. Question 3 should be answered accordingly.

CRENNAN, BELL, GAGELER AND KEANE JJ.

Introduction

19 On 4 March 2014, the Minister for Immigration and Border Protection ("the Minister") signed an instrument ("the instrument") which was registered the following day in the Federal Register of Legislative Instruments ("the Register") established under the *Legislative Instruments Act* 2003 (Cth) ("the Legislative Instruments Act").

20 The instrument purported, from the day after its registration, to determine under s 85 of the *Migration Act* 1958 (Cth) ("the Act") the maximum number of Protection (Class XA) visas that may be granted in the financial year 1 July 2013 to 30 June 2014. That maximum number has now been reached.

21 The plaintiff in this proceeding in the original jurisdiction of the High Court under s 75(v) of the Constitution is an unlawful non-citizen who has made a valid application for a Protection (Class XA) visa in respect of which the Minister is yet to make a decision under s 65 of the Act. A special case in the proceeding reserves questions for the consideration of the Full Court. One question asks whether the instrument is invalid. Another asks what, if any, relief is to be granted. The last asks about costs.

22 The special case has been heard concurrently with the special case in *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection*[14]. Submissions made in that case on the issues in this case have been taken into account in these reasons.

23 The answer to the first question is that the instrument is invalid. The instrument is in the form of an instrument under s 85 of the Act. The instrument is, however, beyond the substantive scope of the power conferred by s 85 of the Act. In light of the requirement of s 65A that the Minister make a decision under s 65 granting or refusing to grant a protection visa within a specified period of 90 days, s 85 is not to be construed as empowering the Minister to determine the maximum number of protection visas that may be granted in a financial year. That construction of s 85 makes it unnecessary to examine the legal and factual basis of a distinct allegation of the plaintiff that the Minister made the instrument for an improper purpose.

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14 [2014] HCA 25.

24 The answer to the second question is that there is to be a writ of mandamus directing the Minister to consider and determine the plaintiff's application for a protection visa according to law. The plaintiff's costs of the special case are to be paid by the Minister and the Commonwealth.

25 The reasoning underlying those answers necessarily begins by locating s 85 within the scheme of the Act in its current amended form. "Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible", in the manner indicated in *Project Blue Sky Inc v Australian Broadcasting Authority*[15], "by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions". The numerous amendments that have been made to the Act form part of its legislative history and bear legitimately on its construction[16]. They are to be construed as part of the Act[17], so as to be read together "as a combined statement of the will of the legislature"[18]. The timing of amendments might assist in determining the "hierarchy" of apparently conflicting provisions of the Act as amended[19], but notions of "implied repeal" have no place.

The Act

26 The stated object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"[20]. "To advance its object", the Act "provides for visas permitting non-citizens to enter or remain in

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15 (1998) 194 CLR 355 at 382 [70]; [1998] HCA 28.

16 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at 107 [39]; 293 ALR 257 at 268-269; [2012] HCA 55.

17 Section 11B(1) of the *Acts Interpretation Act* 1901 (Cth).

18 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44.

19 Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]. See also *Ross v The Queen* (1979) 141 CLR 432 at 440; [1979] HCA 29.

20 Section 4(1).

Australia" and explains that "the Parliament intends that [the] Act be the only source of the right of non-citizens to so enter or remain"[21].

27 Within the nomenclature of the Act, a "visa" is a grant of permission to a non-citizen to do either or both "travel to and enter Australia" or "remain in Australia"[22]. A visa to remain in Australia is to be either a permanent visa or a temporary visa[23]. A non-citizen in the "migration zone" (an area consisting of the States and Territories and certain installations[24]) who holds a visa is a "lawful non-citizen"[25]. A non-citizen in the migration zone who is not a lawful non-citizen is an "unlawful non-citizen"[26]. Subject to immaterial exceptions, an unlawful non-citizen in the migration zone is to be detained[27]; is then to be kept in immigration detention until granted a visa or removed from Australia[28]; and is to be removed from Australia as soon as reasonably practicable if the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone, or, if the non-citizen has made a valid application for such a visa, when that application has been finally determined[29].

28 Within the scheme of the Act, a visa can only be of a class provided for either by regulations made under the Act[30], or by a section of the Act[31]. Regulations made under the Act are made by the Governor-General[32]. The

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21 Section 4(2).

22 Section 5(1) "visa" and s 29.

23 Section 30.

24 Section 5(1) "migration zone".

25 Section 13(1).

26 Section 14(1).

27 Section 189.

28 Section 196(1).

29 Section 198(2).

30 Section 31(1).

31 Section 31(2).

32 Section 504(1).

sections of the Act which provide for classes of visas are ss 32 to 38B. Some of those sections, ss 33, 34 and 35, expressly state that subdiv AH of Div 3 of Pt 2 does not apply to visas of the class for which they provide.

29 Section 36 of the Act provides for a class of visas to be known as protection visas[33] and goes on to provide that it is a criterion for a protection visa that the applicant for the visa is "a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[34]. As amended in 2012, to insert "in respect of" in the place of "to"[35], s 36 no longer proceeds on what had previously been identified as a "false but legislatively required" assumption that Australia's protection obligations under the Refugees Convention as amended by the Refugees Protocol are owed to individuals[36]. The section now correctly reflects the position in international law that protection obligations are owed to other Contracting States in respect of individuals[37].

30 Subject to the Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class[38]. Section 46 sets out the requirements for a valid application for a visa, which include that the application is for a visa of the class specified in the application[39]. Other sections provide that the

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33 Section 36(1).

34 Section 36(2)(a). Pursuant to s 5(1), the "Refugees Convention" means "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951"; the "Refugees Protocol" means "the Protocol relating to the Status of Refugees done at New York on 31 January 1967".

35 *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth).

36 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172 [27]; [2005] HCA 6; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90]; [2011] HCA 32.

37 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [16].

38 Section 45(1).

39 Section 46(1)(a).

regulations may prescribe criteria for visas, or visas of a specified class, including the class of protection visas provided for by s 36[40], and that the regulations may also provide that visas or visas of a specified class may only be granted in specified circumstances[41].

31 Section 39, to which it will be necessary to return, provides:

> "(1) ... a prescribed criterion for visas of a class, other than protection visas, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).
>
> (2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made."

The reference in s 39 to a "prescribed" criterion is to a criterion prescribed by regulation[42].

32 Section 47 of the Act imposes on the Minister a duty to consider a valid application for a visa[43], and a corresponding duty not to consider an application for a visa that is not a valid application[44]. The duty to consider a valid application continues, subject to exceptions, until the Minister grants or refuses to grant the visa[45] in the performance of a complementary duty imposed by s 65.

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40 Section 31(3).

41 Section 40(1).

42 Section 5(1) "prescribed".

43 Section 47(1).

44 Section 47(3).

45 Section 47(2)(b).

33 To the extent now material, s 65(1) provides:

"After considering a valid application for a visa, the Minister:

(a) if satisfied that:

...

(ii) the ... criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by … any other provision of this Act or of any other law of the Commonwealth; ...

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa."

34 The decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts – to grant the visa under s 65(1)(a), or to refuse to grant the visa under s 65(1)(b) – depending on the existence of one or other of two mutually exclusive states of affairs (or "jurisdictional facts"[46]) – the Minister's satisfaction of the matters set out in each of the sub-paragraphs of s 65(1)(a), or the Minister's non-satisfaction of one or more of those matters. The decision is not made, the duty is not performed, and the application is not determined, unless and until one or other of those legally operative acts occurs: that is to say, unless and until the Minister either grants the visa under s 65(1)(a) or refuses to grant the visa under s 65(1)(b). The Minister grants a visa by causing a record of it to be made[47].

35 Section 65A addresses the period within which the Minister must make such a decision under s 65 in respect of a valid application for a protection visa. Section 65A provides:

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46 Eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131]; [1999] HCA 21; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [37]; 207 ALR 12 at 20; [2004] HCA 32.

47 Section 67.

"(1) If an application for a protection visa:

(a) was validly made under section 46; or

(b) was remitted by any court or tribunal to the Minister for reconsideration;

then the Minister must make a decision under section 65 within 90 days starting on:

(c) the day on which the application for the protection visa was made or remitted; or

(d) in the circumstances prescribed by the regulations – the day prescribed by the regulations.

(2) Failure to comply with this section does not affect the validity of a decision made under section 65 on an application for a protection visa."

36 Section 65A is complemented by s 91Y, which requires the Secretary of the Department of Immigration and Border Protection to provide a report to the Minister every four months containing information about each application for a protection visa in respect of which the Minister has not made a decision within the required 90 day period, together with reasons why the decision was not made within that period. Section 91Y goes on to require the Minister to cause a copy of the report to be tabled in each House of the Parliament.

37 The Act, in contrast, is silent as to the period within which the Minister must make such a decision in respect of a valid application for a visa of a class other than a protection visa. The duties of the Minister to consider a valid application for a visa of a class other than a protection visa and to make a decision granting or refusing such a visa are, by implication, to be performed within a reasonable time[48]. Section 51(2) acknowledges that implication in providing that the fact that an application has not been considered or disposed of, when a later application has, "does not mean that the consideration or disposal of the earlier application is unreasonably delayed". What amounts to a reasonable

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48 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574; [1949] HCA 65; *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36 at 36; 50 ALR 577 at 578; *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 174 [28]; [2011] HCA 52.

time is ultimately for determination by a court, on an application for mandamus against the Minister under s 75(v) of the Constitution or equivalent statutory jurisdiction, having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act.

38 Subdivision AH of Div 3 of Pt 2 of the Act, headed "Limit on visas", is part of that decision-making framework. Section 85 is within subdiv AH, and sets out the trigger for its operation. Section 85 provides:

> "The Minister may, by notice in the *Gazette*, determine the maximum number of:
>
> (a) the visas of a specified class; or
>
> (b) the visas of specified classes;
>
> that may be granted in a specified financial year."

The reference to "the *Gazette*" is to the *Commonwealth of Australia Gazette*[49], published routinely since 1 January 1901 in the exercise of non-statutory executive power.

39 One effect of a determination under s 85 for which subdiv AH provides is that set out in s 86:

> "If:
>
> (a) there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and
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> (b) the number of visas of the class or classes granted in the year reaches that maximum number;
>
> no more visas of the class or classes may be granted in the year."

Sections 87 and 87A each qualify the scope of s 86 by providing that "[s] 86 does not prevent the grant of" a visa to a person in specified circumstances.

40 Section 86 prohibits the Minister from deciding under s 65(1)(a) to grant a visa if, having considered a valid application, the Minister is satisfied of the

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49 Section 2B of the *Acts Interpretation Act* 1901 (Cth).

matters set out in each of the sub-paragraphs of s 65(1)(a). That decision is prohibited only during the remainder of the specified financial year if the maximum number specified for visas of that class has been reached. For s 86 not itself to result indirectly in the Minister being obliged to refuse to grant a visa under s 65(1)(b), it is apparent that the reference in s 65(1)(a)(iii) to the grant of a visa not being "prevented" by any other provision of the Act must be read as referring to the grant of the visa not being "permanently prevented".

41 Section 88 goes on to clarify the limited scope of that prohibition by stating that "[s] 86's prevention of the grant of a visa does not prevent any other action related to the application for it". Section 88 thereby makes clear that s 86 does not prohibit performance of the Minister's duty to consider a valid application under s 47. Section 88 thereby also makes clear that the effect of s 86 on the making of a binary decision under s 65 is asymmetric: s 86 does not prohibit the Minister deciding under s 65(1)(b) to refuse to grant a visa if, having considered a valid application, the Minister is not satisfied of the matters set out in each of the sub-paragraphs of s 65(1)(a). Implicit in s 88 is that a determination under s 85 has no effect on the existence of an application for a visa of a class specified in the determination.

42 Another effect of a determination under s 85 for which subdiv AH provides is that set out in s 89:

> "The fact that the Minister has neither granted nor refused to grant a visa of a class or classes to which a determination under section 85 applies does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa."

43 Section 89 has the effect that the duty imposed on the Minister by s 65 to make a binary decision either to grant or refuse to grant a visa of a class to which a determination under s 85 applies is suspended for the remainder of the financial year specified in the determination whether or not the maximum number specified for visas of that class has been reached. That is because failure by the Minister to make a decision, one way or the other, cannot be treated as a failure by the Minister to make a decision in the performance of the duty imposed by s 65.

44 Where triggered by a determination under s 85 of the maximum number of visas of a specified class that may be granted in a specified financial year, ss 86 and 89 therefore combine: to leave unaffected a valid application for a visa of that class; to leave unaffected the duty of the Minister under s 47 to consider that application; to suspend the duty of the Minister under s 65, having considered the application, to make a binary decision either to grant or refuse to grant a visa of

that class; once the specified maximum number of visas has been reached, to prohibit the Minister from deciding under s 65(1)(a) to grant a visa of that class if, having considered a valid application, the Minister is satisfied of the matters set out in each of the sub-paragraphs of s 65(1)(a); and to permit the Minister still to decide under s 65(1)(b) to refuse to grant a visa of that class if, having considered a valid application, the Minister is not satisfied of all of the matters set out in the sub-paragraphs of s 65(1)(a).

45 The remaining sections in subdiv AH are ss 90 and 91. It is not necessary to refer to their detail, other than to note that both operate to confirm that a determination under s 85 suspends the duty imposed on the Minister by s 65 to make a decision to grant or refuse to grant a visa of a class specified in the determination without affecting the existence of an application for a visa of that class. Section 90 does so by making clear that the consideration or disposal of an application for a visa of a class to which a determination applies is not taken to be unreasonably delayed by reason only of the consideration or disposal of a subsequent application for another visa of that class. Section 91 does so by conferring power on the Minister to dispose of outstanding applications for visas of a class to which a determination applies or has applied in such order as the Minister considers appropriate.

Formal validity

46 The instrument was not published in the *Gazette*. By force of s 56(1) of the Legislative Instruments Act, however, its registration was sufficient to result in the instrument satisfying the description in s 85 of the Act of a "notice in the *Gazette*".

47 The Legislative Instruments Act commenced on 1 January 2005 with the object of providing "a comprehensive regime for the management of Commonwealth legislative instruments" by means which include establishing the Register as a "repository of Commonwealth legislative instruments" and "improving public access to legislative instruments"[50]. It pursues that object in part by requiring maintenance of the Register, comprising a database which at any time includes all legislative instruments made on or after its commencement that have been registered[51], by providing that the Register is, for all purposes, to be taken to be a complete and accurate record of all legislative instruments that

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50 Section 3(a) and (d).

51 Section 20(1) and (2).

are included in the Register[52], and by requiring steps to be taken to ensure that legislative instruments that are registered are available to the public[53].

48 Subject to immaterial extensions and qualifications, the Legislative Instruments Act provides that an instrument that is registered is taken, by virtue of that registration and despite anything else in the Legislative Instruments Act, to be a legislative instrument[54]. It defines "enabling legislation" in relation to a legislative instrument to mean "the Act or legislative instrument, or the part of an Act or of a legislative instrument, that authorises the making of the legislative instrument concerned"[55].

49 The instrument, sufficiently by virtue of its registration, answers the description of a legislative instrument. Section 85 of the Act, by virtue of being a part of an Act pursuant to which the instrument as so registered was purportedly made, answers the description of enabling legislation.

50 Section 56 of the Legislative Instruments Act provides:

> "(1) If the enabling legislation in relation to a legislative instrument as in force at any time before [1 January 2005] required the text of the instrument, or particulars of its making, to be published in the *Gazette*, the requirement for publication in the *Gazette* is taken, in relation to any such instrument made on or after that day, to be satisfied if the instrument is registered.
>
> (2) If the enabling legislation in relation to a legislative instrument as enacted, or as amended, at any time on or after [1 January 2005] requires the text of the instrument, or particulars of its making, to be published in the *Gazette*, the requirement for publication in the *Gazette* is taken in respect of any such instrument to be in addition to any requirement under this Act for the instrument to be registered."

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52 Section 22(1).

53 Section 20(1A).

54 Section 5(3).

55 Section 4(1).

51 By virtue of giving legal operation before and after 1 January 2005 to a "notice in the *Gazette*", s 85 of the Act required and requires the text of the legislative instrument to be published in the *Gazette*. Section 85 of the Act has not been amended since subdiv AH of Div 3 of Pt 2 was inserted into the Act in 1992[56]. Section 56(1), rather than s 56(2), of the Legislative Instruments Act therefore applied in respect of the instrument at the time of its registration on 5 March 2014.

Substantive invalidity

52 The determinative issue is whether the instrument is within the substantive scope of the power conferred by s 85 of the Act. Turning to that issue, and before addressing the relationship between s 85 and s 65A, it is convenient to address arguments of the parties about the relationship between s 85 and s 39.

53 It is argued that the reference in s 39(1) of the Act to a "legislative instrument", by which the maximum number of visas of a class that may be granted in a financial year is fixed by the Minister, is a reference to a legislative instrument made under s 85 of the Act; and that the power conferred by s 85 is confined to making legislative instruments which determine the maximum numbers of visas of classes for which s 39(1) permits a criterion to be prescribed. As protection visas are expressly excluded from the classes of visas for which a criterion is permitted to be prescribed by s 39, it is argued, protection visas are necessarily excluded from the scope of the power conferred by s 85.

54 The Minister argues in response that s 39 and subdiv AH of Div 3 of Pt 2 provide separate and distinct mechanisms by which the Minister might choose, by legislative instrument, to fix the maximum number of visas of a class that may be granted in a financial year. Within those separate and distinct mechanisms, the Minister argues, s 39(1) (by implication) and s 85 (in its express terms) confer separate and distinct powers on the Minister to make different legislative instruments. Those different legislative instruments have different legislated consequences: the former, set out in s 39(2); the latter, set out in the subsequent sections in subdiv AH of Div 3 of Pt 2.

55 Both arguments appeal to legislative history: the Minister emphasising that the precursor to s 39 was inserted by amendment enacted in 1991[57], before

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56 *Migration Laws Amendment Act* 1992 (Cth).

57 *Migration Amendment Act (No 2)* 1991 (Cth).

subdiv AH of Div 3 of Pt 2 was inserted by amendment enacted in 1992[58]; the plaintiff emphasising the inapplicability of subdiv AH of Div 3 of Pt 2 when inserted to what were in 1992 entry permits (not visas) for refugees. None of that legislative history is of much weight given that s 39 was substituted, and subdiv AH of Div 3 of Pt 2 was left unchanged, when visas to remain in Australia replaced entry permits and when protection visas and mandatory detention of unlawful non-citizens were introduced by further amendment enacted later in 1992[59]. Section 39 and subdiv AH of Div 3 of Pt 2 (apart from the insertion of s 87A in 2000[60]) have remained substantially unaltered since the Act took what remains essentially its current structure with the commencement of that 1992 amendment in 1994.

56 Each argument proves too much. There is one power in the Act for the Minister, by legislative instrument, to fix the maximum number of visas of a class that may be granted in a financial year: the power expressly conferred by s 85. There is no need to imply another. The Minister's exercise of the power conferred by s 85 has the automatic consequences for the processing of applications for visas of the specified class which are set out in the subsequent sections in subdiv AH of Div 3 of Pt 2, to which reference has already been made.

57 Section 39(1) does not confer power on the Minister to make a different legislative instrument. It confers power on the Governor-General to prescribe by regulation a criterion for visas, of a class other than protection visas, which is to operate by reference to any legislative instrument made by the Minister under s 85. Subject to s 39(2), the criterion so prescribed is then one of the criteria given operative effect in the decision-making process by s 65(1)(a)(ii) and (1)(b).

58 If a criterion prescribed under s 39(1) would operate through s 65(1)(b) to prevent the grant in a financial year of any more visas of a particular class, because the maximum number specified in a legislative instrument made by the Minister under s 85 has been reached, s 39(2) intercepts that operation by introducing the additional automatic consequence that any outstanding applications for visas of that class are taken not to have been made. That consequence, attaching in those circumstances by force of s 39(2) to the criterion prescribed under s 39(1), renders otiose the consequences for the processing of

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58 *Migration Laws Amendment Act* 1992 (Cth).

59 *Migration Reform Act* 1992 (Cth).

60 *Migration Legislation Amendment Act (No 1)* 2000 (Cth).

applications which subdiv AH of Div 3 of Pt 2 attaches in the same circumstances to the legislative instrument under s 85. By requiring outstanding applications for visas of the specified class to be taken not to have been made, s 39(2) removes the basis on which the subsequent sections in subdiv AH of Div 3 of Pt 2 would otherwise operate. The result is that there is no tension between the operation of s 39(2) and ss 86 and 89; the starker consequence for which s 39(2) provides prevails, rendering ss 86 and 89 inapplicable by reason of the absence of an application.

59 The power in s 85 is capable of being exercised by the Minister so as to have the consequences set out in subdiv AH of Div 3 of Pt 2 independently of any exercise of power by the Governor-General under s 39(1). The express exclusion of protection visas from the scope of the power conferred by s 39(1) is insufficient to indicate that protection visas are to be excluded by implication from the power conferred by s 85.

60 The implication to be drawn from s 65A is different. When s 65A was inserted (together with s 91Y) in 2005[61], its purpose was identified as being to reflect the policy "that decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants". "Timeliness in the decision-making process will be enhanced by [s 65A]", it was explained, "as the Minister will be required to make all decisions within a set time frame"[62]. By so requiring the making of a timely decision, the section limits the potential for prolongation of detention of an unlawful non-citizen who has made a valid application for a protection visa during the decision-making process[63].

61 There is a conflict between the requirement of s 65A that the Minister perform the duty to make a decision under s 65 in respect of a valid application for a protection visa within the 90 day period to which s 65A refers and the consequences which subdiv AH of Div 3 of Pt 2 would attach to an instrument under s 85 determining the maximum number of protection visas that may be granted in a specified financial year.

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61 *Migration and Ombudsman Legislation Amendment Act* 2005 (Cth).

62 Australia, Senate, Migration and Ombudsman Legislation Amendment Bill 2005, Explanatory Memorandum, Sched 1 [3].

63 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 2005 at 121-122; Australia, Senate, Migration and Ombudsman Legislation Amendment Bill 2005, Explanatory Memorandum, Sched 1 [13].

62 The Minister recognises that conflict, but argues that it is addressed and resolved by s 89 in favour of the primacy of subdiv AH of Div 3 of Pt 2. By force of s 89, the fact that the Minister has neither granted nor refused to grant a protection visa could not mean for the purpose of s 65A (or any other purpose) that the Minister has failed to make a decision to grant or refuse to grant.

63 The conflict, however, is starker and more pervasive than the Minister's argument accommodates. What s 65A requires, within the time frame it sets, is the making in respect of a valid application for a protection visa of the binary decision for which s 65 provides: either granting the protection visa under s 65(1)(a) or refusing to grant the protection visa under s 65(1)(b). Were an instrument under s 85 to be capable of determining the maximum number of protection visas that may be granted in a specified financial year, s 65A would not merely conflict with the ability of the Minister, by reason of s 89, to delay the making of a decision during the remainder of that financial year. Section 65A would also conflict with the ability of the Minister, by reason of the limited prohibition in s 86 as clarified by s 88, not to decide to grant a protection visa under s 65(1)(a) once the maximum number of protection visas was reached yet still to decide to refuse to grant a protection visa under s 65(1)(b).

64 Unlike s 85, as the plaintiff points out, s 65A is expressed as a duty rather than as a discretion, and is addressed to applications for visas of a single identified class of visa. To resolve the conflict by giving primacy to s 65A best achieves the identified purpose of that section within the scheme of the Act, which, in a number of other respects, treats applications for protection visas differently from other classes of visas. Not only does giving primacy to s 65A provide the greater certainty for protection visa applicants, but it places the greater limits on the potential for the prolongation of their detention.

65 The conflict is resolved by construing the reference in s 85 to "visas of a specified class" as not extending to visas of the class for which s 65A makes provision: protection visas.

Relief

66 The plaintiff made a valid application for a protection visa on 23 September 2012. A delegate of the Minister refused to grant him a protection visa, following which he applied for review of the delegate's decision by the Refugee Review Tribunal. On 17 May 2013, the Tribunal remitted his application to the Minister with a direction that he satisfies the criterion of being a non-citizen in Australia in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

67 The Minister has not made a decision to grant or refuse to grant the protection visa despite more than 90 days having now elapsed since the application was remitted to him. The Minister has therefore failed to perform the duty imposed by s 65 in compliance with s 65A of the Act. The Minister having advanced no discretionary reason why that relief should not be granted, the plaintiff should have a writ of mandamus directing the Minister to consider and determine the plaintiff's application according to law. The plaintiff also seeks injunctive relief, but the availability of mandamus in those terms makes that further relief inappropriate.

Costs

68 The third question reserved by the special case asks who should pay the costs of the proceeding. There is no dispute that the costs of the special case should follow the event. There is a dispute as to whether the plaintiff should have the whole of his costs of the proceeding. The defendants should pay the costs of the special case. The costs of the balance of the proceeding should be determined by a single Justice.

Orders

69 The questions reserved should be answered as follows:

Question 1: Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Migration Act invalid?

Answer: Yes.

Question 2: What, if any, relief sought in the further amended writ of summons and further amended statement of claim, dated 1 April 2014, should be granted to the plaintiff?

Answer: A writ of mandamus directing the first defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law.

Questions 3: Who should pay the costs of the proceeding?

Answer: The defendants should pay the costs of the special case. The costs of the balance of the proceeding should be determined by a single Justice.