HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PLAINTIFF M47/2012 PLAINTIFF

AND

DIRECTOR GENERAL OF SECURITY & ORS DEFENDANTS

Plaintiff M47/2012 v Director General of Security
[2012] HCA 46
5 October 2012
M47/2012

ORDER

Question 2A of the Further Amended Special Case dated 20 June 2012 should be amended and the questions stated in the Special Case (as so amended) should be answered as follows:

Question 1

In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?

Answer

No.

Question 2

Does s 198 of the Migration Act *1958 (Cth) authorise the removal of the Plaintiff, being a non-citizen:*

2.1 to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

2.2 whom ASIO has assessed poses a direct or indirect risk to security;

to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention as amended by the Refugees Protocol?

Answer

It is not necessary to answer this question.

Question 2A

If the plaintiff's application for a protection visa is refused by reason of the plaintiff's failure to satisfy public interest criterion 4002 within the meaning of clause 866.225 of Schedule 2 of the Migration Regulations 1994, is that clause to that extent ultra vires the power conferred by section 31(3) of the Migration Act *1958 (Cth) and invalid?*

Answer

The prescription of public interest criterion 4002 as a criterion for the grant of a protection visa is beyond the power conferred by s 31(3) of the Act and is invalid.

Question 3

Do ss 189 and 196 of the Migration Act *1958 (Cth) authorise the Plaintiff's detention?*

Answer

The plaintiff is validly detained for the purposes of the determination of his application for a protection visa.

Question 4

Who should pay the costs of the special case?

Answer

The defendants.

Representation

R M Niall SC with C L Lenehan, K L Walker and M P Costello for the plaintiff (instructed by Allens Lawyers)

S P Donaghue SC with C J Horan, F I Gordon and N M Wood for the defendants (instructed by Australian Government Solicitor)

Interveners

J G Renwick SC with K M Richardson intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

J K Kirk SC with S J Free and A E Munro intervening on behalf of Plaintiff S138/2012 (instructed by King & Wood Mallesons)

D S Mortimer SC with A D Pound and K E Foley intervening on behalf of the Australian Human Rights Commission (instructed by Australian Human Rights Commission)

CATCHWORDS

Plaintiff M47/2012 v Director General of Security

Citizenship and migration – Migration – Refugees – Protection visas – Inconsistency between *Migration Act* 1958 (Cth) and Migration Regulations 1994 (Cth) – Plaintiff found to be a refugee but refused protection visa due to adverse security assessment by Australian Security Intelligence Organisation – Clause 866.225(a) of Sched 2 to Regulations prescribes public interest criterion 4002 as criterion for grant of protection visa – Public interest criterion 4002 requires that applicant not be assessed by Australian Security Intelligence Organisation to be risk to security – Whether prescription of public interest criterion 4002 as criterion for grant of protection visa beyond power conferred by s 31(3) of Act.

Administrative law – Procedural fairness – ASIO interviewed plaintiff – ASIO issued adverse security assessment in relation to plaintiff – Plaintiff therefore did not meet requirements for protection visa – Whether ASIO denied plaintiff procedural fairness.

Citizenship and migration – Mandatory detention – Plaintiff held in detention as unlawful non-citizen – No third country currently available to receive plaintiff – Whether ss 189 and 196 of Act authorise plaintiff's detention.

Words and phrases – "character test", "decision ... relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)", "inconsistent", "protection obligations", "security".

Australian Security Intelligence Organisation Act 1979 (Cth), ss 4, 37.
Migration Act 1958 (Cth), ss 31(3), 36(2), 65, 189, 196, 500, 501, 504(1).
Migration Regulations 1994 (Cth), Sched 2, cl 866.225(a), Sched 4, item 4002.

FRENCH CJ.

Introduction

1 This case concerns a regulation made under the *Migration Act* 1958 (Cth) ("the Migration Act"). The regulation requires that the Minister for Immigration and Citizenship ("the Minister") refuse to grant a refugee a protection visa if the Australian Security Intelligence Organisation ("ASIO") assesses the refugee to be directly or indirectly a risk to security. The merits of such an assessment cannot be challenged. The plaintiff, who applied for a protection visa, was refused a visa pursuant to the regulation. He challenges the validity of the regulation, the fairness of the assessment process, and the lawfulness of his continuing detention under the Migration Act.

2 The Minister is given power under the Migration Act to refuse to grant a refugee a visa on grounds related to security which are recognised by the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Convention"). In such a case the Minister's decision can be reviewed on its merits unless, in the national interest, the Minister issues a certificate declaring the refugee to be an excluded person. In that event the Minister has to exercise the power personally and lay the certificate before the Houses of Parliament.

3 Critical to the disposition of this case is the question whether the regulation, which effectively vests in ASIO the power to refuse a visa on security grounds, is consistent with the scheme of the Migration Act, including the responsibility it imposes on the Minister and the Minister's officers, the system of merits review which it establishes and the personal responsibility and accountability of the Minister for decisions precluding review. As appears from the following reasons, the answer to that question is no. The regulation is invalid. The plaintiff is entitled to have his application for a protection visa considered according to law. In the meantime he can lawfully be detained pursuant to s 196 of the Migration Act.

Factual and procedural background

4 At about 11.10pm on 29 December 2009 the plaintiff, a national of Sri Lanka, entered the Australian territory of Christmas Island on a special purpose visa. The visa expired at midnight. It has not been renewed nor has any other visa been granted. Since midnight on 29 December 2009, therefore, the plaintiff has been an unlawful non-citizen within the meaning of s 14 of the Migration Act and has been held in immigration detention pursuant to ss 189 and 196 of that Act.

5 The plaintiff applied for a protection visa under s 36 of the Migration Act. A delegate of the Minister concluded that the plaintiff had a well-founded fear of

persecution on the basis of his race and political opinion if he were to be returned to Sri Lanka. As a former member of the Liberation Tigers of Tamil Eelam ("LTTE") he was at risk of being targeted by the Sri Lankan Government and/or paramilitary groups in Sri Lanka. As a person who had refused to rejoin the LTTE he was at risk of persecution from Tamil separatist groups. The delegate also found, and it is common ground in these proceedings, that should the plaintiff be returned to Sri Lanka there is a real chance that he would be subject to abduction, torture or death. The plaintiff was therefore a refugee within the meaning of the Convention. On 18 February 2011, in spite of finding the plaintiff to be a refugee, the delegate refused the application for the grant of a protection visa. The reason for that refusal was that on 11 December 2009, ASIO had issued to the Department of Immigration and Citizenship ("the Department") an assessment of the plaintiff under s 37 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). The assessment stated that:

> "ASIO assesses [the plaintiff] ... from the Oceanic Viking caseload to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

Because of that assessment the plaintiff did not meet public interest criterion 4002 set out in the Migration Regulations 1994 ("the Regulations") for the grant of a protection visa. That criterion requires that an applicant for a protection visa is not assessed by ASIO to be directly or indirectly a risk to security. The Refugee Review Tribunal ("the RRT"), unable to look behind the security assessment[1], affirmed the delegate's decision not to grant the plaintiff a protection visa.

6 The plaintiff was interviewed by officers of ASIO on or about 4 November 2011 so that they could make a new security assessment. That interview was audio recorded and a transcript of it was before the Court. On or about 9 May 2012, ASIO furnished the Department with a new security assessment ("the 2012 assessment") that the plaintiff was directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act. The 2012 assessment superseded the assessment made in 2009. As a result of the 2012 assessment the plaintiff continues to be unable to satisfy public interest criterion 4002.

7 The Australian Government does not intend to remove the plaintiff to Sri Lanka. There is presently no other country to which he can be sent. Steps taken by the Minister and by the Federal Government to find a country to which the plaintiff can be removed pursuant to s 198 of the Migration Act have been

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1 ASIO Act, s 36(b) read with definition of "prescribed administrative action" in s 35(1).

unsuccessful. On the basis of what appears in the Special Case it is unlikely that a country will be found willing to accept the plaintiff within the foreseeable future.

8 The plaintiff says that the public interest criterion which led to the refusal of his application for a protection visa is invalid. He contends that it is inconsistent with the provisions of the Act which in effect cover the refusal of protection visas on the basis of national security concerns and which provide for a process of review by the Administrative Appeals Tribunal ("the AAT"). The plaintiff says also that he was denied procedural fairness by ASIO in connection with the 2012 assessment. He argues that his detention under s 196 of the Migration Act is unlawful because, absent any prospect of his removal to another country, it does not serve any legitimate purpose under that Act. The plaintiff has filed an application in this Court seeking, among other relief, an order absolute for a writ of habeas corpus against the officer in charge of the Melbourne Immigration Transit Accommodation where he is presently held, and the Secretary of the Department.

9 On 6 June 2012, Hayne J directed that a Special Case filed by the parties be set down for hearing by a Full Court on 18 June 2012 and reserved four questions for the Court. A fifth question was added, by leave, at the hearing.

Questions reserved in the Special Case

10 The questions reserved for the Full Court in the Special Case were:

"1. In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?

2. Does s 198 of the *Migration Act 1958* (Cth) authorise the removal of the Plaintiff, being a non-citizen:

2.1 to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

2.2 whom ASIO has assessed poses a direct or indirect risk to security;

to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention as amended by the Refugees Protocol?

2A. If the answer to question 2 is 'Yes' by reason of the plaintiff's failure to satisfy public interest criterion 4002 within the meaning of clause 866.225 of Schedule 2 of the *Migration Regulations*

1994, is that clause to that extent *ultra vires* the power conferred by section 31(3) of the *Migration Act 1958* (Cth) and invalid.[2]

3. Do ss 189 and 196 of the *Migration Act 1958* (Cth) authorise the Plaintiff's detention?

4. Who should pay the costs of the special case?"

Australia's obligations under the Convention

11 In any dispute about the application of an Australian law which gives effect to an international Convention, the first logical step is to ascertain the operation of the Australian law[3]. However, where, as in the case of the Migration Act, the Act uses terminology derived from or importing concepts which are derived from the international instrument, it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of the Act.

12 The Migration Act contains what was described in the *Offshore Processing Case*[4] as:

> "an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol."

The Act does not translate into Australian domestic law the obligations of the Contracting States under the Convention. It focusses upon the definition of "refugee" in the Convention as the criterion of operation of the protection visa system[5]. Nevertheless, the Convention informs the construction of the provisions

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2 Question 2A was added by leave at the hearing of the proceeding.

3 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 71 [61] per Callinan, Heydon and Crennan JJ, Gummow ACJ generally agreeing at 55 [1]; [2006] HCA 54; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 311-312 [92] per Hayne and Heydon JJ; [2008] HCA 31.

4 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41.

5 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45] per McHugh and Gummow JJ; [2002] HCA 14, quoted in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ; [2006] HCA 53.

of the Migration Act and the Regulations which respond to the international obligations which Australia has undertaken under it[6]. It is necessary in this case to refer to those obligations before turning to the Act and Regulations.

13 Australia's obligations under the Convention are owed to the other State parties to the Convention. They are obligations which require Australia to afford a degree of protection to the persons to whom the Convention applies. The word "protection" appears in the preamble to the Convention which begins with a recitation of the principle affirmed by the Charter of the United Nations and the Universal Declaration of Human Rights that "human beings shall enjoy fundamental rights and freedoms without discrimination."[7] Obligations accepted by the signatories to the Convention appear in a number of Articles which require Contracting States to treat refugees within their territories no less favourably than their nationals in relation to the enjoyment of various rights and freedoms and social benefits[8].

14 A number of observations about the nature of the Convention and the obligations it imposes on Contracting States were set out in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[9]. They included the following:

- the obligations created by the Convention are owed by the Contracting States to each other and not to refugees[10];

- the Convention does not detract from the right of a Contracting State to determine who should be allowed to enter its territory[11];

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6 See ss 15AB(1) and 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth), referred to in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34].

7 Charter of the United Nations, Preamble; Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Art 7.

8 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 196 [117] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 32.

9 (2005) 222 CLR 161; [2005] HCA 6.

10 (2005) 222 CLR 161 at 169 [16] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

11 (2005) 222 CLR 161 at 169-170 [16].

- the determination of the status of refugee is a function left by the Convention to the competent authorities of the Contracting States which may select such procedures as they see fit for that purpose[12];

- the Convention sets out the status and civil rights to be afforded within Contracting States to those accorded the status of refugee[13].

It is also well settled that the Convention does not impose an obligation upon Contracting States to grant asylum to refugees arriving at their borders or a right to reside in those States[14]. Nor may any individual assert a right under customary international law to enter or remain in the territory of a State of which that individual is not a national[15].

15 The protections for which the Convention provides are conferred on persons who answer the description "refugee". Article 1 is headed "Definition of the Term 'Refugee'". The well-known words of Art 1A(2)[16] define a refugee as a person who:

> "owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

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12 (2005) 222 CLR 161 at 170 [17].

13 (2005) 222 CLR 161 at 170 [19].

14 *T v Home Secretary* [1996] AC 742 at 754 per Lord Mustill; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273 per Gummow J; [1997] HCA 4; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 45 [137] per Gummow J, 72 [203] per Hayne J; [2000] HCA 55; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42] per McHugh and Gummow JJ; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [14] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ. See also Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (2011) at 1335.

15 (2005) 222 CLR 161 at 169 [14] and authorities there cited. See also *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 345-346 [14] per Branson J, Beaumont and Lehane JJ agreeing at 343 [1] and 351 [43].

16 Article 1A(2) refers to s A of Art 1. Sections C to F of Art 1 are similarly designated in these reasons.

The reach of that definition is qualified by Arts 1C to 1F inclusive, which provide that the Convention ceases to apply or does not apply to a person in the circumstances specified in those sections[17]. How a refugee is to be defined or accorded recognition as such, or to be entitled to continue to avail himself of protection, is expressly and exhaustively the subject of Art 1[18].

16 It was not suggested that any of the disqualifying sections of Art 1 was capable of application to the plaintiff. Article 1F relates to persons who have committed crimes against peace, war crimes, crimes against humanity or serious non-political crimes outside the country of refuge, or who have been guilty of acts contrary to the purposes and principles of the United Nations. The Minister's delegate, in refusing the plaintiff's application for a protection visa, found she did not have serious reason to consider that the plaintiff should be excluded from the protection of the Convention under Art 1F. The defendants expressly conceded that Art 1F had no application to the plaintiff.

17 Articles 32 and 33 deal with expulsion and refoulement of refugees and impose "significant obligations" on the Contracting States[19]. Under Art 32 the Contracting States agree that they shall not expel a refugee lawfully in their territory save on grounds of national security or public order[20]. Such expulsion shall only be in pursuance of a decision reached in accordance with due process of law[21]. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority[22].

18 The defendants submitted that Art 32 had no application to the plaintiff who, being in Australia without a visa, was not a refugee "lawfully in [Australian] territory". That issue need not be resolved in this case which, in the

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17 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [43].

18 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 19 [48] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

19 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 170 [20].

20 Convention, Art 32(1).

21 Convention, Art 32(2).

22 Convention, Art 32(2).

end, concerns the construction and interaction of provisions of the Migration Act and the Regulations. As appears later in these reasons, the Migration Act provides for the refusal or cancellation of a protection visa relying upon Art 32[23]. A visa holder whose visa is cancelled may be lawfully within Australia for the purposes of domestic law and of Art 32 of the Convention at least until his or her visa is cancelled. The mere designation of an applicant for a visa, who does not hold a visa, as an "unlawful non-citizen" under domestic law does not resolve the question whether that person is lawfully within Australia for the purposes of Art 32 of the Convention.

19 Article 33 incorporates the "non-refoulement" obligation and provides:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

20 The prohibition on refoulement in Art 33(1) is qualified by the condition in Art 33(2). By reason of that qualification, Art 33(1) would not prevent the return of a refugee, who is a security risk, to a country where his life or freedom could be threatened for a Convention reason. As submitted by the defendants, the condition in Art 33(2) differs in terms from and sets a higher standard than the "national security or public order" grounds which engage Art 32[24]. The defendants conceded that the facts before the Court do not support the conclusion that the condition in Art 33(2) has been satisfied so as to permit the removal of the plaintiff to Sri Lanka consistently with the Convention.

21 Articles 32 and 33 have different functions. As Professor Shearer has written, Art 32 applies to a refugee who resides lawfully in a Contracting State. It precludes expulsion other than in accordance with due process of law. That

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23 Migration Act, s 500(1).

24 Stenberg, *Non-Expulsion and Non-Refoulement*, (1989) at 219-221; Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 134; Goodwin-Gill and McAdam, *The Refugee in International Law*, (2007) at 234-237.

process may include extradition. Article 33 applies to refugees lawfully or unlawfully within a Contracting State but embraces all measures of return including extradition to a country where their lives or freedom would be threatened[25]. Consistently with the text of those Articles and their place in the Convention, they apply to persons who are refugees. They do not qualify the reach of Art 1. The protection they provide is premised upon a person first falling within the definition of a refugee under Art 1[26].

The statutory framework - grant and refusal of protection visas

22 The plaintiff was at all times, after midnight on 29 December 2009, an "unlawful non-citizen"[27]. That term is defined in the Migration Act as a person in the migration zone who is not a lawful non-citizen[28]. A lawful non-citizen is a "non-citizen in the migration zone who holds a visa"[29]. Some classes of visa are created by the Migration Act[30]. Other classes of visa are prescribed by the regulations[31]. The regulations may prescribe criteria for a visa or visas of a

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25 Shearer, "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 205, quoted with approval in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [21].

26 Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (2011) at 1295, 1301, 1369; Hathaway, *The Rights of Refugees Under International Law*, (2005) at 304-305; Fitzpatrick and Bonoan, "Cessation of refugee protection", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 491 at 530; *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 158 [38] per Goldberg, Weinberg and Kenny JJ; Stenberg, *Non-Expulsion and Non-Refoulement*, (1989) at 92, 174; *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958 at 1001 per Lord Goff of Chieveley.

27 The word "unlawful" is a statutory designation not referable to any breach of the law.

28 Migration Act, s 14(1).

29 Migration Act, s 13(1).

30 Sections 32-38B (referred to in s 31(2)) provide for classes of visa in addition to the prescribed classes.

31 Migration Act, s 31(1) and definition of "prescribed" in s 5(1) as "prescribed by the regulations".

specified class[32]. The protection visa for which the plaintiff applied is provided for in s 36(1). Section 36(2)(a) specifies as a criterion for a protection visa that the applicant is:

> "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

The term "protection obligations" is not defined in the Migration Act.

23 Prior to amendments to the Migration Act in 1999[33], s 36 did no more than specify protection visas as a class of visa in s 36(1) and state the criterion in s 36(2). Sections 36(1) and 36(2)(a) are in relevantly the same terms as ss 36(1) and 36(2) when those provisions were considered in *NAGV*[34]. The Court has not been asked to depart from what was said in that decision. In a joint judgment, six Justices held that the phrase "to whom Australia has protection obligations":

- describes no more than a person who is a refugee within the meaning of Art 1 of the Convention[35];
- removes any ambiguity that it is to Art 1A only that regard is to be had in determining whether a person is a refugee, without considering whether the Convention does not apply or ceases to apply by reason of one or more of the circumstances described in the other sections in Art 1[36].

24 The Court rejected the proposition that a person who had a right to reside in and enjoy effective protection in a third country and who could be returned to that country consistently with Art 33, was not a person in respect of whom Australia had protection obligations. The 1999 amendment to s 36 was among a number of amendments to the Migration Act made to deal with non-citizen asylum seekers who have a right to enter and reside in another country.

25 Section 65, which applies to visa applications generally, provides that after considering a valid application for a visa, the Minister, if satisfied that the health and other criteria for the grant of the visa have been satisfied and that the

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32 Migration Act, s 31(3) read with s 504.

33 *Border Protection Legislation Amendment Act* 1999 (Cth).

34 (2005) 222 CLR 161 at 168 [11].

35 (2005) 222 CLR 161 at 176 [42].

36 (2005) 222 CLR 161 at 177 [47].

grant is not otherwise prevented by ss 40, 500A and 501 of the Migration Act (or any other provision of Commonwealth legislation), "is to grant the visa"[37]. If not so satisfied, the Minister is "to refuse to grant the visa."[38] In respect of protection visas, the satisfaction required of the Minister under s 36(2)(a) has been described as "a component of the condition precedent to the discharge of [the] obligation" imposed by s 65[39].

26 A visa, once granted, may be cancelled under s 116(1) if, inter alia, the presence of its holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community[40]. The Minister may also cancel a visa if "a prescribed ground for cancelling a visa applies to the holder."[41] Regulation 2.43(1)(b) of the Regulations prescribes as a ground for cancellation that:

> "the holder of the visa has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

That ground reflects the terms of public interest criterion 4002. However, cancellation of a protection visa under s 116 is not mandatory on that ground[42]. That was not always the case. The Minister must cancel the visa if the Regulations prescribe circumstances in which a visa must be cancelled[43]. Prior to March 2006, reg 2.43(2) provided that the Minister was required to cancel a visa if the holder of a visa was subject to a security assessment in the terms described in reg 2.43(1)(b). However, following an amendment to the Regulations in March 2006[44] the only circumstance in which a Minister is required to cancel a

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37 Migration Act, s 65(1)(a).

38 Migration Act, s 65(1)(b).

39 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 34-35 [107] per Gummow J, citing *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 306 [41]; [2000] HCA 19.

40 Migration Act, s 116(1)(e).

41 Migration Act, s 116(1)(g).

42 Migration Act, s 116(3) read with reg 2.43(2) and the definition of "relevant visa" in reg 2.43(3) which includes a subclass 866 visa, ie a protection visa.

43 Migration Act, s 116(3).

44 Migration Amendment Regulations 2006 (No 1), Sched 1, Items [1]-[4].

protection visa under s 116 is where the Minister for Foreign Affairs has personally determined that the visa holder's presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction. The reason given for the amendment to the Regulations was that it was necessary to[45]:

> "[ensure] that Australia's international legal obligations in respect of holders of certain protection and humanitarian visas are not adversely affected."

27 Section 501 provides that the Minister may refuse to grant or may cancel a visa if the applicant for the visa or the visa holder does not satisfy the Minister that he or she passes the character test[46]. Section 501(6) sets out the circumstances under which "a person does not pass the ***character test***". Those circumstances include possession of a substantial criminal record[47], association with persons or with a group or organisation whom the Minister reasonably suspects has been, or is, involved in criminal conduct[48], and want of good character on account of the person's past and present criminal and/or general conduct[49]. A person also does not pass the character test if:

> "(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
>
> (i) engage in criminal conduct in Australia; or
>
> (ii) harass, molest, intimidate or stalk another person in Australia; or
>
> (iii) vilify a segment of the Australian community; or
>
> (iv) incite discord in the Australian community or in a segment of that community; or

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45 Explanatory Statement, Migration Amendment Regulations 2006 (No 1), Attachment B, Sched 1, Item [1].

46 Migration Act, s 501(1) and (2).

47 Migration Act, s 501(6)(a).

48 Migration Act, s 501(6)(b).

49 Migration Act, s 501(6)(c).

> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way."

As has happened in this case, the refusal or cancellation of a visa, if no other visa is granted, renders the applicant or visa holder, as the case may be, an unlawful non-citizen and engages the application of the mandatory detention regime.

Statutory framework – detention of unlawful non-citizens

28 The mandatory detention regime applicable to unlawful non-citizens is to be found in Div 7 of Pt 2 of the Migration Act. The obligation to detain unlawful non-citizens is imposed by s 189(1) which provides:

> "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person."

As soon as reasonably practicable after an officer detains a person under s 189 the officer must ensure that the person is made aware of the provisions of s 195 under which a detainee may apply for a visa and s 196 which provides for the duration of detention. The language of s 196(1) which is said to, in effect, support indefinite detention under some circumstances is as follows:

> "An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or
>
> (c) granted a visa."

That section, on its face, prevents the release of an unlawful non-citizen from detention (otherwise than for removal for deportation) unless the non-citizen has been granted a visa. Subsections (4) and (4A) mandate the continuance of the detention of persons detained as a result of the cancellation of their visas under s 501 or pending their deportation under s 200, unless a court finally determines that the detention is unlawful. Those provisions apply[50]:

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50 Migration Act, s 196(5)(a).

> "whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future".

Section 198 provides for the removal from Australia of unlawful non-citizens "as soon as reasonably practicable" when one or other of a number of events set out in s 198 have occurred. One of those events is that the non-citizen is a detainee who has made a valid application for a substantive visa which has been refused, the application has been finally determined and the non-citizen has not made another valid application for a substantive visa that can be granted while the applicant is in the migration zone[51]. As will be shown in these reasons, the plaintiff's application for a visa has not been finally determined because public interest criterion 4002, which was relied upon for its refusal, is invalid.

Statutory framework - refusal or cancellation of protection visas relying on Articles 1F, 32 or 33(2)

29 The plaintiff's current detention has resulted from the refusal of his application for a protection visa. That refusal was on the ground that he did not satisfy public interest criterion 4002. As appears from reserved question 2A, the validity of that criterion is challenged. That challenge rests upon its asserted inconsistency with provisions of the Migration Act providing for the refusal of protection visas on grounds, which include national security grounds, and which attract statutory review processes in the AAT. It is necessary to consider those provisions.

30 The relevant provisions provide for review by the AAT of decisions made by the Minister to refuse to grant a protection visa or to cancel a protection visa "relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)"[52]. The provisions may be summarised as follows:

- Section 500(1)(c) which provides for review by the AAT of such a decision, other than a decision to which s 502 applies.

- Section 500(3) which provides that a person is not entitled to make an application to the AAT for the review of such a decision unless the person would be entitled to seek review of the decision under Pt 7 (ie in the RRT) if the decision had been made on another ground.

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51 Migration Act, s 198(6).

52 Migration Act, s 500(1)(c).

- Section 500(4)(c) which provides that such a decision is not reviewable under Pt 7 of the Act.

- Section 500(5)(c) which provides that the President of the AAT, giving a direction as to the persons who are to constitute the AAT for the purpose of a proceeding for review of such a decision, must have regard, inter alia, to "the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia". The allocation of responsibility for such review to the AAT has been linked to the seriousness of the matters likely to be raised in such reviews[53].

- Section 502 which provides that if the Minister, acting personally, intends to make such a decision and decides that "because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person", the Minister may, as part of the decision, issue a certificate declaring the person to be an excluded person. Such a decision has to be made personally and notice of it laid before each House of Parliament.

- Section 503 which provides that a person in relation to whom such a decision has been made is not entitled to enter Australia or to be in Australia at any time during a period determined under the Regulations.

31 The plaintiff submitted that the power to refuse to grant a visa relying on one or more of Arts 32 or 33(2) was to be found in s 501. The submission did not refer to Art 1F[54]. The defendants accepted at the hearing that the criteria authorising expulsion or refoulement of a refugee under Arts 32 or 33(2) were subsumed within the criteria for the character test under s 501(6)(d)(v). In later written submissions however, the defendants argued that the Migration Act provides no power to make decisions refusing a protection visa relying on Arts 32 or 33(2) and that in that respect ss 500-503 were enacted upon a false premise. As appears below, that submission should not be accepted. It is necessary now to consider the significance of the references to Arts 1F, 32 and 33(2) in ss 500, 502 and 503.

32 The plurality in *NAGV* suggested, but did not decide, that Arts 32 and 33(2) may have been included in ss 500, 502 and 503 "for more abundant caution or as epexegetical of Art 1F in its adoption by the Act, with operation both at the

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53 *Daher v Minister for Immigration and Ethnic Affairs* (1997) 77 FCR 107 at 110.

54 As appears below, a decision refusing a protection visa under s 36(2) may rely upon Art 1F. A decision cancelling a protection visa in reliance upon Art 1F may be made under s 501.

time of grant and later cancellation of protection visas."[55] Their Honours did not discuss how Art 1F could be relied upon in relation to the cancellation of a protection visa, nor how Arts 32 and 33(2) could be invoked in relation to refusal or cancellation of a protection visa. Consideration of those matters requires reference to the legislative history of ss 500-503.

The legislative history of ss 500-503

33 The precursor of s 500(1)(c) was introduced into the Migration Act as part of a new section 180(1) by the *Migration (Offences and Undesirable Persons) Amendment Act* 1992 (Cth). Sections 180A, 180B and 180C, which were enacted by the same legislation, were the precursors of ss 501, 502 and 503. The new section 180(1) was said, in the Explanatory Memorandum to the Bill, to "[allow] applications to be made to the AAT for review of criminal deportation decisions under s 55[56] and decisions of the Minister under new section 180A."[57]

34 The new section 180(1) was said to provide the AAT with determinative jurisdiction to review decisions under the new section 180A to refuse or cancel a visa or entry permit on the grounds provided for in that section. That review is subject to the case in which the Minister has issued a certificate that the person affected by the decision be an excluded person[58]. The purpose of the new section 180(1)(c)[59] was[60]:

> "to extend the jurisdiction of the AAT to review decisions to refuse or cancel protection visas relying on Articles 1F, 32 or 33(2) of the Refugees Convention."

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55 (2005) 222 CLR 161 at 179 [57].

56 Such decisions are now made under ss 201 and 203.

57 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 2 [6].

58 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 2 [7].

59 Now s 500(1)(c).

60 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 3 [10].

Noting that protection visas would come into existence on the commencement of the *Migration Reform Act* 1992 (Cth), the Explanatory Memorandum continued[61]:

> "The Articles of the Refugees Convention referred to in new paragraph 180(1)(c) have the effect of removing the obligation to provide protection as a refugee to a person who has committed crimes against peace, war crimes, crimes against humanity, serious non-political criminal offences, or otherwise presents a threat to the security of Australia or to the Australian community."

35 The purpose of the new section 180(1) was linked in the Explanatory Memorandum to criminal deportation decisions and decisions to refuse or cancel visas under s 180A[62]. The explanation of the new section 180(1)(c) is consistent with the proposition that the grant of a protection visa might be refused under s 36(2) or refused or cancelled pursuant to s 180A by application of criteria derived from Arts 1F, 32 or 33(2) of the Convention. The Second Reading Speech was to similar effect. The Minister said[63]:

> "Protection visas will be granted on the basis that the applicant is entitled to protection under the United Nations convention and protocol relating to the status of refugees. Decisions to refuse protection visas will be reviewable by the Administrative Appeals Tribunal where adverse determinations are made against persons such that *character concerns* are sufficiently serious to engage those articles of the convention which provide for the exclusion of an individual from the provisions of the convention, article 1F, or for the expulsion of a refugee, articles 32 and 33(2). Such decisions will only be reviewable by the Administrative Appeals Tribunal on and after 1 November 1993." (emphasis added)

Against that background consideration may be given to the textual indications of the source of power under the Migration Act to make a decision refusing or cancelling a protection visa relying on one or more of Arts 1F, 32 and 33(2).

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61 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 3 [10].

62 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 2 [6].

63 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4122.

The power to refuse or cancel a visa relying on Arts 1F, 32 and 33(2)

36 Section 500(1)(c) and the cognate provisions of ss 502 and 503 raise the question - where does the Migration Act provide the power for decisions to be made to refuse or cancel a protection visa in such a way as to rely upon one or other of Arts 1F, 32 and 33(2)? One approach to determining that question is to consider the ways in which such decisions could be made under the Act. Taking the words "rely on" in their dictionary sense of "rest upon with assurance"[64], a decision can be said to "rely on" one or more of the Articles in the following ways:

- the Article provides a statutory ground for the decision which is a ground adopted by the Migration Act and which is applied by the decision-maker;

- the Article embodies a criterion or standard which is congruent with a relevant (but not necessarily mandatory) factor in the exercise of the decision-making power and which the decision-maker applies in reaching the decision.

To give effect to ss 500, 502 and 503, the power to make such decisions must be found within existing grants of power under the Act or by implication from the terms of ss 500, 502 and 503.

37 In *NAGV*, in the joint judgment, reference was made to the "adoption by the Act" of Art 1F with operation both at the time of grant and later cancellation of protection visas[65]. That adoption is clear enough in relation to the grant of protection visas. Article 1F may be said to have been so "adopted" because it limits the reach of the definition of refugee in Art 1. It thereby gives content to the criterion in s 36(2)(a), which depends upon the subsistence of protection obligations owed by Australia under the Convention to the visa applicant. In a direct way therefore, a decision to refuse the grant of a protection visa by reason of the application of Art 1F can be described as a decision "to refuse to grant a visa relying on Art 1F".

38 As further appears from *NAGV*, and the earlier discussion of Arts 32 and 33 in these reasons, those Articles do not qualify the reach of Art 1 and therefore do not play a part in the application of the criterion in s 36(2)(a). There is no provision of the Migration Act which gives direct effect to those Articles as providing grounds for the refusal or cancellation of a protection visa. It is necessary, therefore, to turn to s 501 and the application of the character test to determine whether, and if so in what ways, decisions to refuse or cancel a

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64 *The Oxford English Dictionary*, 2nd ed (1989), vol XIII at 576, "rely" sense 5.

65 (2005) 222 CLR 161 at 179 [57].

protection visa made under that section may be said to rely on one or more of Arts 1F, 32 and 33(2).

39 If the criterion under s 36(2)(a) of the Migration Act and all other prescribed criteria are satisfied, the Minister is nevertheless required to refuse the grant of a protection visa if the visa applicant does not pass the character test in s 501[66]. The applicant would be treated as a person to whom Australia has protection obligations under the Convention but, being refused a visa, would be an unlawful non-citizen[67]. The applicant would continue to be entitled to the benefit of the non-refoulement obligation under Art 33 unless the condition in Art 33(2) were satisfied. In that case there would be nothing in the Convention to prevent his return to the country from which he came.

40 As noted earlier in these reasons, the defendants accepted that the disentitling criteria in Arts 32 and 33(2) which would lift Convention bars to the expulsion or refoulement of a refugee are subsumed within the character test. "National security or public order" is a ground for expulsion under Art 32. The existence of reasonable grounds for regarding the refugee as a danger to the security of the host country is a criterion for forfeiting the benefit of Art 33(1). Those criteria fall within the concept in s 501(6)(d)(v) of a person who would represent a danger to the Australian community or to a segment of that community.

41 The defendants argued, in submissions filed after the hearing, that when ss 500, 502 and 503 were enacted the Parliament was under the misapprehension, only dispelled by the decision of this Court in *NAGV*, that a protection visa could be refused for failure to meet the criterion in s 36(2) by reason of the disentitling conditions in Arts 32 and 33(2). The defendants submitted that those Articles have no part to play in the application of s 36(2) and that there is no other provision of the Migration Act authorising refusal of a protection visa in reliance upon them. That is to say ss 500, 502 and 503 were enacted upon a false premise. That submission should be rejected. The false premise which is asserted does not emerge with any clarity from the Explanatory Memorandum or the Second Reading Speech. As noted earlier, there are indications to the contrary. In any event, the task of a court construing a statutory provision is to give meaning to every word in the provision. It is a long-established rule of interpretation that "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other

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66 Migration Act, s 65(1)(a)(iii) which, read with s 65(1)(b), out of abundant caution requires the Minister to refuse to grant a visa if not satisfied that the grant of the visa is not prevented by s 501.

67 Migration Act, s 14(1).

construction they may all be made useful and pertinent"[68]. That task in this case directs attention to ss 36 and 501 of the Migration Act.

42 In relation to s 501, it is sufficient for present purposes to proceed on the basis, conceded by the defendants, that there is an overlap between the criteria in Arts 32 and 33(2) and the criteria in s 501(6)(d)(v) of the Migration Act. A Minister refusing a visa or cancelling a visa in reliance upon s 501(6)(d)(v) may do so on a basis which also satisfies the disentitling criteria under one or other of Arts 32 or 33(2). A cancellation decision may also be made in reliance upon criteria which would satisfy Art 1F.

43 A refusal or cancellation of a visa under s 501, based upon a finding that meets one or more of the disentitling criteria under Arts 1F, 32 or 33(2), will have consequences for Australia's obligations under the Convention and therefore for the application of other provisions of the Migration Act. This reflects the characterisation of the Migration Act in the *Offshore Processing Case* as containing provisions which are directed to the purpose of responding to Australia's international obligations under the Convention[69]. The consequences for Australia's Convention obligations of decisions relying upon one or more of Arts 1F, 32 or 33(2) include the following:

- a visa cancellation by reference to criteria in the character test which also satisfy Art 1F would have the result that the visa holder is no longer treated as within Art 1 and therefore no longer treated as a person to whom Australia owes protection obligations;

- the refusal to grant a visa by reference to the character test on grounds which also satisfy Art 33(2) would have the result that the visa applicant, although satisfying the requirements of Art 1, is no longer treated as a person who has the benefit of the non-refoulement obligation in Art 33(1);

- a cancellation of a visa by reference to criteria which also satisfy Arts 32 or 33(2) would have the result that the former visa holder, although satisfying the requirements of Art 1, may be treated as a person subject to expulsion pursuant to Art 32 or refoulement pursuant to Art 33(2) as the case may be.

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68 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, citing *R v Berchet* (1688) 1 Show KB 106 [89 ER 480], quoted in *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; [1905] HCA 11.

69 (2010) 243 CLR 319 at 339 [27].

44 Expulsion or refoulement following a decision to refuse or cancel a visa under s 501 can be effected by the mechanisms of the domestic law, which may include deportation under Div 9 of Pt 2 of the Migration Act or removal under Div 8 of Pt 2.

45 Save for cases in which the Minister has issued a certificate under s 502, a decision to refuse or cancel a visa on national security grounds congruent with the disentitling criteria in Arts 32 or 33(2) is subject to review by the AAT on the application of the person affected[70]. A decision of the AAT on such an application is subject to statutory "appeal" to the Federal Court exercising original jurisdiction on a question of law[71]. The decision of the Federal Court on the statutory appeal is subject to appeal to the Full Court of the Federal Court.

46 The defendants submitted that if the power to make decisions relying upon Arts 32 and 33 is to be located in s 501, s 500(1)(c), providing for review of such decisions, becomes largely redundant because s 500(1)(b) provides for review by the AAT of decisions of a delegate of the Minister made under s 501. Even if that were correct it would not be determinative. As Lord Macnaghten said in *Commissioners for Special Purposes of Income Tax v Pemsel*[72]:

> "Nor is surplusage or even tautology wholly unknown in the language of the Legislature."

In any event, the two provisions have different applications. Section 500(1)(b) provides for review by the AAT of decisions made by a delegate of the Minister under s 501. Section 500(1)(c) allows for review of decisions made to refuse a visa under s 36 by reason of Art 1F. It also applies to decisions made by the Minister personally under s 501, acting in reliance upon one or more of Arts 1F, 32 or 33(2), where the Minister does not declare the person affected to be an "excluded person" under s 502.

47 The plaintiff submitted, in the alternative, that the power to make decisions to refuse or cancel a visa relying on one or more of Arts 1F, 32 or 33(2) is to be implied from the terms of ss 500, 502 and 503. The plaintiff does not need to rely upon that alternative submission. Nevertheless, something should be said about it.

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70 Migration Act, s 500(1)(c).

71 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44(1).

72 [1891] AC 531 at 589.

48 Where a statute expressly confers upon a person or a body a power or function or a duty, any unexpressed ancillary power necessary to the exercise of the primary power or function, or discharge of the duty, may be implied[73].

49 The present case is not one requiring the implication of ancillary powers. Sections 500, 502 and 503 create a scheme relating to the review of certain classes of decisions. The scheme thus created is ancillary to the exercise of the power, which it assumes, to make the decisions to which those provisions refer. An analogous situation, but one which differs in important respects from the present, was considered in *Minister for Immigration and Ethnic Affairs v Mayer*[74]. That was a decision made prior to the introduction of the visa system in 1992. It was a condition of the grant of an entry permit under the former s 6A of the Migration Act that the Minister had determined, by instrument in writing, that the applicant had the status of a refugee. This Court held, by majority, that the section impliedly conferred upon the Minister the function of making a determination. The making of the determination was thereby "a decision under an enactment" for the purposes of the obligation to provide reasons pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

50 In drawing the implication which they did from s 6A of the Migration Act, Mason, Deane and Dawson JJ said that a legislative provision operating upon a specified determination of a Minister or other officer, could readily be construed as impliedly conferring upon the Minister or officer the statutory function of making the particular determination. Their Honours said[75]:

> "Such a construction is likely to be clearly warranted in a case where the determination upon which the legislative provision operates is a determination to be made for the purposes of the particular provision and at a time when and in the circumstances in which the provision is called upon to operate, where no other statutory source of obligation to consider whether the determination should be made or of authority to make it is apparent and where the legislative provision will be without effective content if no authority to make the requisite determination exists."

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73 *Fenton v Hampton* [1858] 11 Moo 347 at 360 [14 ER 727 at 732], cited in *The Trolly, Draymen and Carters Union of Sydney and Suburbs v The Master Carriers Association of New South Wales* (1905) 2 CLR 509 at 523 per O'Connor J; [1905] HCA 20; *Attorney-General v Great Eastern Railway Co* [1880] 5 App Cas 473 at 478 per Lord Selborne LC, 481 per Lord Blackburn; *Egan v Willis* (1998) 195 CLR 424 at 468 [83] per McHugh J; [1998] HCA 71.

74 (1985) 157 CLR 290; [1985] HCA 70.

75 (1985) 157 CLR 290 at 303.

51 The present case differs in two respects:

- There are identified statutory sources of power to make decisions to refuse or cancel visas relying on one or more of Arts 1F, 32 and 33.

- Section 6A, from which the implication in *Mayer* was drawn, conditioned the substantive power to grant a permit on the ministerial determination of refugee status. The condition embodied the power to make the determination. On the other hand ss 500, 502 and 503 are ancillary to, or consequential upon, the exercise of the power to make decisions of the class referred to in those provisions.

52 The question whether the prescription of public interest criterion 4002 is a valid exercise of the regulation-making power under the Migration Act directs attention to the source and scope of that power.

The regulation-making power

53 The regulation-making power under s 504 of the Migration Act authorises the Governor-General to make regulations, "not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." Section 504 does not in terms provide that the regulations may prescribe criteria for visas. Section 31(3) does that. Section 504 is nevertheless the source of the regulation-making power.

54 Regulations made under s 504 must be "not inconsistent with" the Migration Act. Even without that expressed constraint delegated legislation cannot be repugnant to the Act which confers the power to make it[76]. Repugnancy or inconsistency may be manifested in various ways[77]. An important consideration in judging inconsistency for present purposes is "the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned."[78] A grant of power to make regulations in terms conferred by s 504 does not authorise regulations which will "extend the scope or general operation of the enactment but [are] strictly

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76 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588 per Dixon J; [1929] HCA 36.

77 For an historical account of the concept of repugnancy in a variety of contexts see Leeming, *Resolving Conflicts of Laws*, (2011) at 84-139.

78 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; [1951] HCA 42.

ancillary."[79] In considering whether there has been a valid exercise of the regulation-making power "[t]he true nature and purpose of the power must be determined"[80].

55 The plaintiff relied upon those general propositions in support of his submission that public interest criterion 4002 is repugnant to the Migration Act and its scheme. Before considering the regulatory framework under which the criterion was prescribed it is necessary to say something about s 498 of the Migration Act.

56 Section 498(1) of the Migration Act provides:

> "The powers conferred by or under this Act shall be exercised in accordance with any applicable regulations under this Act."

That provision does not authorise the making of regulations which abrogate, modify or qualify the scope of the powers conferred by the Migration Act[81]. Nor does s 498 provide a gateway for construction of the Migration Act by reference to regulations made under it. Generally speaking an Act, which does not provide for its own modification by operation of regulations made under it, is not to be construed by reference to those regulations[82]. That would be a case of the tail wagging the dog. That general principle does not exclude the possibility that a regulatory scheme proposed and explained at the time that Parliament enacted the Act under which the scheme was to be made could constitute material relevant to

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79 *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ; [1957] HCA 4.

80 *Williams v City of Melbourne* (1933) 49 CLR 142 at 155 per Dixon J; [1933] HCA 56.

81 Some statutes provide for regulations of that character: eg *Extradition Act* 1988 (Cth), s 11 considered by this Court in *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 508-509 [30]-[31]; [2003] HCA 21; *Minister for Home Affairs (Cth) v Zentai* (2012) 289 ALR 644 at 649-650 [15]-[17] per French CJ, 661 [59] per Gummow, Crennan, Kiefel and Bell JJ; [2012] HCA 28. See also *O'Connell v Nixon* (2007) 16 VR 440 at 448 [32] per Nettle JA, Chernov and Redlich JJA agreeing, that Parliament, requiring by s 8AA of the *Police Regulation Act* 1958 (Vic) that an appeal be subject to the regulations, elevated the regulation-making powers under the Act to enable modification and restriction of what was otherwise provided for in unrestricted terms in the Act itself.

82 *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J; [1988] HCA 5.

determination of the statutory purpose. No occasion for reference to the Regulations in that way arises in this case.

Regulations - the public interest criteria

57 The Regulations provide for classes of visa which are set out in Sched 1 to the Regulations and are in addition to the classes of visa created by the Migration Act itself[83]. The criteria prescribed by the Regulations, for each class of visa, are in addition to those prescribed by the Act. They are to be found in Sched 2 to the Regulations[84]. Criteria in Sched 2 may incorporate by numerical reference criteria bearing the relevant numbers and set out in Scheds 3, 4 and 5[85].

58 Schedule 1 to the Regulations prescribes criteria, in Item 1401, for Protection (Class XA) visas and specifies as a subclass an "866 (Protection)" visa. The designation of that subclass identifies the part of Sched 2 that applies in relation to the Protection (Class XA) visa[86]. That is the part headed "Subclass 866 Protection". That part of Sched 2 sets out, in Div 866.2, primary criteria to be satisfied at the time of the application for a protection visa[87] and other primary criteria to be satisfied at the time of the decision[88]. Secondary criteria are set out in Div 866.3. One of the primary criteria is in cl 866.225, which provides:

> "The applicant:
>
> (a) satisfies public interest criteria 4001, 4002 and 4003A; and
>
> (b) if the applicant had turned 18 at the time of application - satisfies public interest criterion 4019."

Each number referred to in cl 866.225 refers to a criterion bearing that number in Sched 4.

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83 Regulations, reg 2.01.

84 Regulations, reg 2.03(1).

85 Regulations, reg 2.03(2).

86 Regulations, reg 2.02(2).

87 Regulations, Sched 2, Subdiv 866.21.

88 Regulations, Sched 2, Subdiv 866.22.

59 Schedule 4 to the Regulations is entitled "Public interest criteria and related provisions". Public interest criteria 4001 and 4002 are in the following terms:

> "4001 Either:
>
> (a) the person satisfies the Minister that the person passes the character test; or
>
> (b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the person would fail to satisfy the Minister that the person passes the character test; or
>
> (c) the Minister has decided not to refuse to grant a visa to the person despite reasonably suspecting that the person does not pass the character test; or
>
> (d) the Minister has decided not to refuse to grant a visa to the person despite not being satisfied that the person passes the character test.
>
> 4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

Public interest criterion 4003A is not material for present purposes. Public interest criterion 4002 does not create a mechanism, of the kind contemplated by s 505, for third party assessment informing the Minister's decision. It is itself a criterion. As a matter of construction, the term "is not assessed" in public interest criterion 4002 must be taken to refer to the absence of any current adverse assessment by ASIO that a person is directly or indirectly a risk to security. That is to say, if ASIO has made such an assessment at one time and thereafter made a fresh assessment that the applicant is not a risk to security, the applicant will, while that later assessment stands, satisfy the criterion in public interest criterion 4002.

60 Criteria similar, but not identical, to public interest criteria 4001 and 4002 were prescribed when the Regulations were first made in 1994. Public interest criterion 4002 then read:

> "The applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security."

That criterion was replaced with the present criterion in 2005[89]. The amendment substituted the words "competent Australian authorities" with "Australian Security Intelligence Organisation" in order to make it clear that ASIO was the only Australian authority able to provide security assessments to the Department[90]. The amendment also broadened the definition of "security" from "Australian national security" to security "within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*" such that[91]:

> "to prevent the grant of a visa, an assessment as a risk to security need not necessarily be restricted to Australian national security, but may relate to the carrying out of Australia's responsibilities to foreign countries in security-related matters."

61 An assessment made by ASIO for the purpose of public interest criterion 4002 is done in the exercise of a statutory function under the ASIO Act. It is necessary therefore, to look to the statutory framework within which such assessments are made.

Statutory framework - adverse security assessments

62 ASIO is continued in existence by the ASIO Act[92]. Its functions include furnishing Commonwealth agencies with "security assessments relevant to their functions and responsibilities."[93] The word "security" is defined broadly in s 4. It relevantly includes:

> "(a) the protection of, and of the people of, the Commonwealth and the several states and territories from:
>
> ...
>
> (iii) politically motivated violence;
>
> (iv) promotion of communal violence;

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89 Migration Amendment Regulations 2005 (No 10), Sched 3, Item [2].

90 Explanatory Statement, Migration Amendment Regulations 2005 (No 10), Attachment B, Sched 3, Item [1].

91 Explanatory Statement, Migration Amendment Regulations 2005 (No 10), Attachment B, Sched 3, Item [2].

92 ASIO Act, s 6.

93 ASIO Act, s 17(1)(c) read with s 37(1).

...

whether directed from, or committed within, Australia or not; and

...

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a)".

63 The term "security assessment" is defined in s 35(1) and means:

"a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for *prescribed administrative action* to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for *prescribed administrative action* to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question." (emphasis added)

"Prescribed administrative action" is also defined in s 35(1) and includes:

"(b) the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act".

The term "adverse security assessment" means[94]:

"a security assessment in respect of a person that contains:

(a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and

(b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person."

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94 ASIO Act, s 35(1).

64 Part IV of the ASIO Act makes provision for persons to be notified of assessments and for merits review of assessments by the AAT. However, merits review is precluded in relation to a security assessment provided in connection with the exercise of any power or the performance of any function in relation to a person under the Migration Act or the Regulations under that Act[95]. There are certain exclusions from that non-application which are not relevant for present purposes. In the result, merits review is not available in relation to an adverse security assessment made for the purposes of public interest criterion 4002.

Whether public interest criterion 4002 is invalid

65 The Migration Act creates a statutory scheme, the purpose of which is to give effect to Australia's obligations under the Convention and to provide for cases in which those obligations are limited or qualified. It provides, in ss 36 and 65, for the grant of protection visas to persons to whom Australia owes protection obligations. It provides for the refusal or cancellation of such visas in respect of persons to whom Australia owes obligations where:

- the person may nevertheless be expelled from the country for "compelling reasons of national security" pursuant to Art 32;

- the person may be removed from the country where "there are reasonable grounds for regarding [the person] as a danger to the security of the country in which [the person] is" pursuant to Art 33(2).

66 The Act provides procedural protection by way of merits review of decisions to refuse or cancel a visa relying on Arts 32 or 33(2). That protection is not available in those "national interest" cases in which the Minister makes a decision personally to refuse or cancel a visa pursuant to s 501 and issues a certificate under s 502. That is the statutory scheme by reference to which the validity of public interest criterion 4002 is to be judged.

67 Since at least 2005, the scope of the security concerns which may attract an adverse security assessment for the purposes of public interest criterion 4002 have extended to those concerns which relate to Australia's responsibilities to foreign countries in security-related matters. The extent to which such concerns may enliven the disentitling conditions of Arts 32 and 33(2) was considered by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*[96]. The Supreme Court recognised that "the security of one country

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95 ASIO Act, s 36 read with the definition of "prescribed administrative action" in s 35(1).

96 [2002] 1 SCR 3.

is often dependent on the security of other nations."[97] In so doing, the Court acknowledged that historically it had been argued that threats to the security of another State would not enliven the disentitling condition under Art 33[98]. The Court said, however[99]:

> "Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security".

68 As to the level of threat sufficient to lift the prohibition against refoulement, the Court said that[100]:

> "The threat must be 'serious', in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible."

A similar approach to the level of threat was adopted by the Supreme Court of New Zealand in *Zaoui v Attorney-General (No 2)*[101]. The word "security" as defined in the ASIO Act does not in terms set a threshold level of risk necessary to support an adverse assessment for the purposes of public interest criterion 4002.

69 The relationship between Art 33(2), s 500 and public interest criterion 4002 was considered in two single judge decisions of the Full Court of the Federal Court. Both of those decisions were made before the decision of this Court in *NAGV*. In *Director General Security v Sultan*[102], Sundberg J rejected a submission that public interest criterion 4002 should not be construed so as to detract from the jurisdiction conferred on the AAT by s 500 of the Migration Act. His Honour rejected that contention on the basis that s 500 and public interest criterion 4002 deal with different matters[103]. In *Kaddari v Minister for*

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97 [2002] 1 SCR 3 at 52 [90].

98 [2002] 1 SCR 3 at 49 [86].

99 [2002] 1 SCR 3 at 50 [87]

100 [2002] 1 SCR 3 at 51 [90].

101 [2006] 1 NZLR 289 at 310 [45].

102 (1998) 90 FCR 334.

103 (1998) 90 FCR 334 at 339.

Immigration and Multicultural Affairs[104], Tamberlin J, in the context of a challenge to the validity of public interest criterion 4002, expressed his agreement with that view[105]. In concluding that public interest criterion 4002 is valid, his Honour said[106]:

> "It cannot be said that the criterion attempts to add new and different means of carrying out the provisions of the Act or to depart from or vary an exclusive plan which the legislature has adopted."

70 In *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs*[107], a case concerning the validity of a public interest criterion relating to conviction for an offence punishable by at least 12 months imprisonment, similar reasoning was applied by the Full Court of the Federal Court to uphold the validity of that criterion.

71 Despite the support for the validity of public interest criterion 4002 which might be derived from the decisions of the Federal Court in *Sultan* and *Kaddari*, and analogical argument which might be derived from *VWOK*, the relationship between public interest criterion 4002 and the provisions of ss 500-503 of the Migration Act spells invalidating inconsistency. That is primarily because the condition sufficient to support the assessment referred to in public interest criterion 4002 subsumes the disentitling national security criteria in Art 32 and Art 33(2). It is wider in scope than those criteria and sets no threshold level of threat necessary to enliven its application. The public interest criterion requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon those Articles. It has the result that the effective decision-making power with respect to the disentitling condition which reposes in the Minister under the Act is shifted by cl 866.225 of the Regulations into the hands of ASIO. Further, and inconsistently with the scheme for merits review provided in s 500, no merits review is available in respect of an adverse security assessment under the ASIO Act made for the purposes of public interest criterion 4002. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Arts 32 and 33(2). It is inconsistent with that scheme. In my opinion cl 866.225 of the Regulations is invalid to the extent that it prescribes public interest criterion 4002.

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104 (2000) 98 FCR 597.

105 (2000) 98 FCR 597 at 601 [27].

106 (2000) 98 FCR 597 at 602 [31].

107 (2005) 147 FCR 135.

72 Because public interest criterion 4002 is invalid, the refusal of the plaintiff's application for a protection visa was affected by jurisdictional error. As a result there has, at this time, been no valid decision on the plaintiff's application for a protection visa. While that application is pending, the plaintiff can lawfully be detained pursuant to s 196 of the Migration Act. It is not necessary, for present purposes, to determine whether his detention can lawfully be continued if his application for a protection visa is refused and there is no other country to which he can be removed.

The procedural fairness question

73 It may be accepted that the requirements of procedural fairness are attracted to the making of a security assessment under the ASIO Act. The content of those requirements is not necessarily to be answered solely by reference to the terms of the ASIO Act and the potential effect of an assessment upon the interests of the person about whom it is made. A security assessment may be used for a variety of purposes involving the exercise of different statutory powers. Such an assessment may be relied upon for more than one purpose under the Migration Act. The content of procedural fairness will depend upon the part played by the assessment in the exercise of the power in which it is considered and the nature of that power. Whether or not procedural fairness was accorded in this case depends upon the way in which the assessment is used and upon the decision ultimately made. The question remains hypothetical unless, and until, the assessment is used to support a decision adverse to the plaintiff, other than a decision involving the application of public interest criterion 4002.

Conclusion

74 I would amend Question 2A and answer the reserved questions in the terms proposed by Hayne J[108].

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108 Reasons of Hayne J at [227].

75 GUMMOW J. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*[109] Lord Bingham of Cornhill described[110] the tension in domestic statute law which governs the administration of immigration control between, on the one hand, the powers of the sovereign state to admit, exclude and repel aliens, and, on the other hand, the humane practice, reflected in treaty obligations, to admit aliens, or some of them, seeking refuge from persecution elsewhere. His Lordship spoke of this tension with reference to a range of materials, including what had been said in this Court in *Applicant A v Minister for Immigration and Ethnic Affairs*[111] and *Minister for Immigration and Multicultural Affairs v Ibrahim*[112].

76 The plaintiff in this action in the original jurisdiction of the Court was born in 1976 and is a national of Sri Lanka. He entered Australia at the Territory of Christmas Island on 29 December 2009. Whilst detained as an unlawful non-citizen he applied for a protection visa. A delegate of the Minister found that the plaintiff had a well-founded fear of persecution in Sri Lanka on the basis of his race, or political opinion attributed to him as a former member of the LTTE (Liberation Tigers of Tamil Eelam). There is no dispute that the plaintiff satisfies that criterion for a protection visa which is stated in s 36(2)(a) of the *Migration Act* 1958 (Cth) ("the Act"), namely a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention. It also is accepted that the plaintiff has no present right to enter and remain in any country other than Sri Lanka.

77 The first defendant ("the Director-General") controls the Australian Security Intelligence Organisation ("ASIO") pursuant to s 8(1) of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). The tension of which Lord Bingham spoke is reflected in the structure of those provisions of the Act and the Migration Regulations 1994 (Cth) ("the Regulations") upon which turn the issues in the present action. Those issues are presented by the circumstance that, while the plaintiff is a non-citizen who is classified as a refugee, he is the subject of an adverse security assessment by ASIO. The

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109 [2005] 2 AC 1.

110 [2005] 2 AC 1 at 27-32. Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell agreed with the reasons of Lord Bingham on this issue.

111 (1997) 190 CLR 225 at 247-248, 273-274; [1997] HCA 4.

112 (2000) 204 CLR 1 at 45-46 [137]-[138]; [2000] HCA 55. See also *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15-17 [41]-[48]; [2002] HCA 14; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169-171 [13]-[21]; [2005] HCA 6.

absence of such an adverse assessment is a condition imposed by the Regulations upon the grant of a protection visa.

78 The plaintiff seeks an order quashing, for want of procedural fairness, the adverse security assessment. Further, and in any event, he seeks an order absolute for habeas corpus against the second defendant (the Officer in Charge, Melbourne Immigration Transit Accommodation) and the third defendant (the Secretary, Department of Immigration and Citizenship), supported by a declaration that the detention of the plaintiff at that Melbourne facility is unlawful[113]. The Minister is the fourth defendant and the Commonwealth is the fifth defendant.

79 Leave to intervene in support of the plaintiff was given first to the Australian Human Rights Commission and secondly to the plaintiff in another action pending in this Court whose circumstances resemble those of the present plaintiff.

General considerations

80 The Act was most recently amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth) but no issues respecting "regional processing" arise in this litigation.

81 The object of the Act is stated in s 4. This (as s 3A) was inserted by s 3 of the *Migration Reform Act* 1992 (Cth) and reflects the changes in the Act described in *Re Patterson; Ex parte Taylor*[114] whereby in its terms the Act was based no longer upon the immigration power (s 51(xxvii)) but upon the aliens power (s 51(xix)).

82 Section 4(1) specifies the object of the Act as the regulation, in the national interest, of the coming into and presence in Australia of non-citizens. The national interest thus extends to the regulation of the continuing presence in Australia of non-citizens. To advance the object stated in s 4(1), provision is made in the Act for the removal and deportation from Australia of non-citizens whose presence in the country is not permitted by the Act (s 4(4)).

83 Several points are to be made here, of significance for the issues in this case. The first is that the evident legislative design to base the Act upon the aliens power does not deny the support the legislation may receive in whole or

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113 The plaintiff also seeks injunctive relief in respect of the continuation of his alleged unauthorised detention, but this would be unnecessary if habeas corpus were to issue.

114 (2001) 207 CLR 391 at 443 [156]; [2001] HCA 51.

part from other heads of power[115]. A law dealing with the movement of persons between Australia and places physically external to Australia may be supported by the external affairs power (s 51(xxix)); this will be so independently of the implementation by that law of any treaty imposing obligations upon Australia respecting movement of non-citizens, and the power under that law to make delegated legislation, in turn, will take this character. So much follows from the joint reasons in *De L v Director-General, NSW Department of Community Services*[116]. Further, the decision in *Thomas v Mowbray*[117] shows that the defence power (s 51(vi)) extends to that aspect of the national interest which concerns matters relating to national security.

84 The upshot is that to conclude that in a particular operation the Act is not supported by one head of legislative power does not foreclose the operation of the Act on the strength supplied by other applicable heads of power. The issue is not one of legislative "intention", here as elsewhere a term apt to mislead, but of the engagement of a supporting head of power.

85 In the present case, some submissions by the plaintiff appeared to assume that it was the degree of support for the Act which is supplied by the engagement of that aspect of the external affairs power concerned with treaties which was essential to or alone critical for the operations of the Act and the Regulations with which the plaintiff is concerned.

86 Section 498 of the Act stipulates that powers conferred by or under the Act are to be exercised in accordance with any of the Regulations which are applicable. Section 504(1) requires that the Regulations not be "inconsistent with this Act". It should be noted immediately that the Act includes the object identified in s 4(1), which refers to "the national interest". Further, it is the strong term "inconsistent" in s 504(1) which controls the relationship between the statute and delegated legislation, not the need, if possible, to give an harmonious operation to a statute as a whole[118].

87 The plaintiff is detained as an unlawful non-citizen, in reliance upon s 196 of the Act, but disputes the continued application to him of that provision. This circumstance brings into play another principle of domestic law. Without judicial warrant, an officer of the Commonwealth who detains another person

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115 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 443-444 [157].

116 (1996) 187 CLR 640 at 649-650; [1996] HCA 5.

117 (2007) 233 CLR 307; [2007] HCA 33.

118 cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]; [1998] HCA 28.

may do so only to the extent that this conduct "is justified by clear statutory mandate"[119].

88 The issues which arise are not answered simply by a response to a rhetorical question asking how the plaintiff may claim release from detention in the absence of a "legal right" to be present in this country. Putting to one side the position of enemy aliens, the plaintiff, although an alien, has access to the Australian legal system. He is protected by the common law of tort against detention by or under the authority of officers of the Commonwealth, who must have statutory warrant for their actions. The plaintiff challenges the presence of that statutory authority.

Protection visas

89 Section 65(1)(a) of the Act obliges the Minister to grant to a non-citizen a protection visa (among other categories of visa for which the Act provides) if it has been sought by a valid application and if any health criteria, and other criteria prescribed by the Act or the Regulations, have been satisfied, and the grant is not prevented by, among other provisions, s 501 of the Act. This section empowers the Minister to refuse a visa if satisfied that the refusal "is in the national interest" and if the Minister reasonably suspects the applicant does not pass the "character test". A person does not pass the "character test" if, among other criteria, there is "a significant risk" that the person would engage in criminal conduct in Australia, or "represent a danger to the Australian community or to a segment of that community" (s 501(6)).

90 There is a class of visas to be known as protection visas. Section 36(1) of the Act so states. "A criterion" – not, it should be emphasised, "the criterion" – for the grant of such a visa is that the applicant is a non-citizen in Australia "to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol" ("the Convention") (s 36(2)(a)). The text and structure of the Act were held in *Plaintiff M61/2010E v The Commonwealth*[120] to:

> "proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to

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119 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528; see also at 523, 547; [1987] HCA 12.

120 (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41. See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 174-175 [44]; [2011] HCA 32.

a country where he or she has a well-founded fear of persecution for a Convention reason".

91 Sections 91R-91T of the Act explain what, for the purposes of the Act and the Regulations, is to be taken to be the meaning of certain expressions in Art 1 of the Convention, including "persecution" and "particular social group". Further, and significantly for the present litigation, s 31(3) is an express provision for the making of regulations. It provides for the prescription by the Regulations of criteria for visas of various classes, including that of protection visa. This power, however, is qualified by the requirement in s 504(1) that the Regulations not be "inconsistent with [the] Act".

92 Further provisions with respect to the grant of protection visas are made in Subclass 866 of Sched 2 to the Regulations. The criteria of which the Minister is to be satisfied at the time of decision include health requirements (cll 866.223, 866.224, 866.224A, 866.224B), satisfaction that the grant "is in the national interest" (cl 866.226) and satisfaction of "public interest criteria" identified by the numbers 4001, 4002 and 4003A (cl 866.225). These three criteria are set out in Sched 4 to the Regulations. Each is expressed in negative terms. Item 4001 is concerned with the "character test", defined in s 501(6) of the Act. Item 4003A stipulates that the applicant not be determined by the Foreign Minister to be a person whose presence in Australia "may be directly or indirectly associated with the proliferation of weapons of mass destruction".

93 It is the prescription of item 4002 which has been critical for the plaintiff. It requires that he not be assessed by ASIO to be directly or indirectly a risk to "security" within the meaning of the definition in s 4 of the ASIO Act. This so defines "security" as to include both the protection of the Commonwealth and its people from "politically motivated violence" and the carrying out of the "responsibilities" of Australia to any foreign country in relation to such violence. The expression "politically motivated violence" is defined in s 4 of the ASIO Act so as to encompass terrorism offences against the *Criminal Code* (Cth), and acts or threats of violence intended to achieve a political objective in Australia or elsewhere.

The Convention

94 Something more should be said here respecting certain provisions of the Convention. Article 1 is headed "DEFINITION OF THE TERM 'REFUGEE'" and comprises Sections A-F. Article 1A(2) sets out what often is spoken of as the criteria for a person such as the plaintiff to answer the description "refugee". Article 1C states six circumstances in which the Convention shall cease to apply to a person falling under Art 1A. Articles 1D, 1E and 1F specify circumstances in which the Convention "shall not apply" to certain persons. It will be necessary to refer later in these reasons to Art 1F. Article 32 is headed "EXPULSION". Article 32(1) reads:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

It thus applies to a refugee "lawfully" in the territory of a Contracting State. In *R (ST) v Secretary of State for the Home Department*[121] the United Kingdom Supreme Court construed "lawfully" as it appears in Art 32 as meaning "lawful according to the domestic laws of the contracting state". This construction should be accepted. The plaintiff has the status under the Act of an unlawful non-citizen in the absence, as described below, of a protection visa. He is not "lawfully" in Australia within the meaning of Art 32 and thus no question arises of whether, notwithstanding that status, he may, consistently with Art 32, be expelled on grounds of national security or public order.

95 It should be added that the plaintiff is not a refugee *sur place*, as a result of his own actions whilst lawfully in Australia, for example, on another category of visa[122]. In such a case, Art 32 of the Convention could have had an application to the plaintiff.

96 Article 33(1) obliges a Contracting State not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of Art 33(1) is denied by force of Art 33(2), if there are reasonable grounds for regarding the refugee "as a danger to the security of the country in which he is", or if the refugee, having been convicted by final judgment of "a particularly serious crime", is "a danger to the community" of that country. Section 91U of the Act gives detailed content to the expression "particularly serious crime" in Art 33(2); this is done by s 91U "[f]or the purposes of the application of [the] Act and the [R]egulations to a particular person".

The present situation of the plaintiff

97 On 9 May 2012, the Director-General issued an adverse security assessment with respect to the plaintiff. He was assessed to be directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act. This assessment engaged, against the plaintiff, public interest criterion 4002.

98 The result is that as matters stand, the plaintiff cannot be granted a protection visa because he does not satisfy that public interest criterion. The plaintiff remains an unlawful non-citizen. As an unlawful non-citizen, and as

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121 [2012] 2 WLR 735 at 750; [2012] 3 All ER 1037 at 1054.

122 See *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 661-663 [40]-[45]; [2009] HCA 40.

required by s 189 of the Act, he was detained after he landed at Christmas Island in 2009. Without the grant of a visa, the plaintiff remains the object of the obligation imposed by s 198 of the Act upon "an officer"[123] to remove him from Australia "as soon as reasonably practicable". What is immediately in dispute in this action is the operation of the distinct but concomitant provision in s 196 respecting the duration of the immigration detention of the plaintiff which began with his detention under s 189. Does this continue indefinitely until such time, if ever, that an officer removes the plaintiff from Australia in performance of the duty imposed by s 198?

99 The duty of removal carries with it, subject to any express qualification in the Act or the Regulations, the power of selection of the destination to be reached upon removal. However, it follows from determination by the Minister that the plaintiff is one to whom Australia owes protection obligations that it would not be a proper exercise of that power to return the plaintiff to Sri Lanka or to remove him to any other territory where his life or freedom would be threatened on account of his race or political opinion, within the meaning of Art 33(1) of the Convention.

100 The Convention has not been enacted as a whole or directly into Australian law. But s 36(2)(a) of the Act does so expressly to the extent described in these reasons. That circumstance removes the power of selection which is appended to the duty to remove under s 195 from the application of the ordinary rule[124] that unenacted international obligations are not mandatory relevant considerations in the exercise of statutory powers. There is, in any event, no threat by the Australian authorities to act otherwise than in accordance with Art 33(1). Their difficulty has been in locating any other country which will receive the plaintiff.

101 It was said by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[125] that the involuntary detention of a citizen in custody by the State "is penal or punitive in character" and that it "exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". Their Honours also

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123 The term "officer" is so defined in s 5(1) of the Act as to include any persons in a class authorised by the Minister as officers for the purposes of the Act.

124 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33-34 [101]-[102]; [2003] HCA 6.

125 (1992) 176 CLR 1 at 27; [1992] HCA 64.

affirmed, with reference to the writings of Dicey, that punishment is to be for breach of the law and for nothing else[126]. Mason CJ spoke to similar effect[127].

102 Deportation by the executive under legislative authority had earlier been held not to partake of the character of punishment[128]. But as explained later in these reasons, under the heading "Conclusions", there is no deportation in prospect here. In the joint reasons in *Lim* their Honours considered that the power of detention conferred by the legislation as it then stood was, by reference to two particular considerations, "reasonably capable of being seen as necessary for the purposes of deportation". First, there was a specific time limit (in terms of days) upon the period of detention, and, secondly, it lay within the power of the detainee to bring the detention to an end by requesting removal to another country[129]. Mason CJ was of like opinion[130].

103 Neither consideration applies to the position of the plaintiff. The Act prescribes no finite period such as that considered in *Lim*. There is no country except that from which the plaintiff is a refugee which is willing to receive him.

104 The plaintiff entered Australia as an "unlawful non-citizen" and because or by reason of this infringement by him of the Act, in the absence of a protection visa he was detained and remains in detention. Consistently with what was said in *Lim*[131] with respect to Ch III of the Constitution, may that detention continue solely by legislative fiat into a period in which the detention cannot reasonably be seen as necessary for the purposes of his deportation? Counsel for the second intervener, in particular, submitted that the answer to that question should be in the negative.

105 Consistently with Ch III of the Constitution, may a different answer be given solely on the ground that the unlawful non-citizen in question has an adverse security assessment? No party submitted that detention in such circumstances may be warranted other than as an incident to judicial adjudication and punishment of criminal guilt.

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126 (1992) 176 CLR 1 at 27-28.

127 (1992) 176 CLR 1 at 11-12.

128 *Chu Shao Hung v The Queen* (1953) 87 CLR 575 at 585, 589; [1953] HCA 33.

129 (1992) 176 CLR 1 at 33-34.

130 (1992) 176 CLR 1 at 11-12.

131 cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 585 [47], 658-659 [290]; [2004] HCA 37.

106 But does s 196, upon its proper construction, present any such issues? In particular, for the reasons to be given under the heading "The issue of statutory construction" the question which the second intervener would answer in the negative does not arise in the present case.

The questions reserved

107 There are five questions reserved to the Full Court on a Further Amended Special Case dated 20 June 2012 ("the Special Case"). Question 2A asks whether the prescription of public interest criterion 4002 in its application to the plaintiff is *ultra vires* the regulation making power conferred by s 31(3) of the Act. Question 1 concerns the alleged failure by the Director-General to comply with the requirements of procedural fairness, question 2 the operation of s 198 of the Act, question 3 the authority for the detention of the plaintiff and question 4 the costs of the Special Case.

Habeas corpus

108 Three points may be made immediately respecting the remedy of habeas corpus sought by the plaintiff to secure his release from what is said to be unauthorised detention. The first is that, subject to any relevant statutory procedures, there is applicable in Australia the proposition, recently affirmed by the Supreme Court of the United States[132], that habeas corpus is available to every individual detained in this country without legal justification[133]. Secondly, it has long been settled[134] that in a matter in which the Court is seized of original jurisdiction, the powers of the Court include the power conferred by s 33(1)(f) of the *Judiciary Act* 1903 (Cth) to direct the issue of a writ of habeas corpus. Thirdly, there may be attached to the writ conditions to be observed upon release, analogous to those attending release upon the provision of bail. Indeed, it was explained by the South Australian Full Court in *Tobin v Minister for Correctional Services*[135] and by the Supreme Court of New Zealand in *Zaoui v Attorney-General*[136], in each case with reference to historical material[137], that

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132 *Hamdi v Rumsfeld* 542 US 507 at 525 (2004); cf *Ruddock v Vadarlis* (2001) 110 FCR 491 at 521.

133 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-522.

134 *Jerger v Pearce* (1920) 28 CLR 588 at 590; [1920] HCA 42. Habeas corpus was sought by the plaintiff, an alien, who was in detention pending his deportation. See also *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 68 ALJR 668; 123 ALR 478; [1994] HCA 36.

135 (1980) 24 SASR 389 at 391-392.

136 [2005] 1 NZLR 577 at 643-646.

before the development of modern curial procedures for bail, habeas corpus was the principal method for the seeking of bail[138].

109 As Gleeson CJ indicated in *Al-Kateb v Godwin*[139], with particular reference to United States authority, a discharge upon habeas corpus from immigration detention may be made upon terms and conditions.

The issue of statutory construction

110 Part 2 (ss 13-274) of the Act is headed "Control of arrival and presence of non-citizens". Something first should be said respecting Div 9 (ss 200-206). This is headed "Deportation". Section 202(1) empowers the Minister to order under s 200 the deportation of certain non-citizens upon security grounds where the Minister has been furnished by ASIO with an adverse security assessment made for the purposes of s 202(1). Where the Minister has made a deportation order under s 200, then s 206 requires that the person shall be deported accordingly. There is no threat of deportation of the plaintiff in reliance upon the powers in Div 9 of the Act.

111 Of these deportation provisions in an earlier incarnation in the Act, this Court held in *Znaty v Minister for Immigration*[140] that the legislation disclosed the intention "that the authorities may select a place to which the deportee is to go and may then take steps designed to produce the result that he goes to that place". However, it later was emphasised that these powers may not be used to effect a collateral purpose such as an irregular extradition[141].

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137 See also *Sayre v The Earl of Rochford* (1777) 2 Black W 1165 at 1166 [96 ER 687 at 687]; the remarks of the New South Wales Full Court in *Ex parte Nicholls* (1845) Reserved and Equity Judgments of New South Wales 11 at 12; Clark, "Procedure vs Substance: Habeas Corpus Reform in New Zealand", (2009) 12 *Otago Law Review* 77 at 101-102; Sharpe, *The Law of Habeas Corpus*, 2nd ed (1989) at 134. In *Ex parte Hill* (1827) 3 C & P 225 [172 ER 397] Littledale J refused to attach a condition to the rule for habeas corpus that the prisoner be restrained from bringing any action for false imprisonment.

138 cf *United Mexican States v Cabal* (2001) 209 CLR 165 at 182-183 [44]; [2001] HCA 60.

139 (2004) 219 CLR 562 at 579-580 [27].

140 (1972) 126 CLR 1 at 9 per Walsh J; [1972] HCA 14.

141 *Barton v The Commonwealth* (1974) 131 CLR 477 at 483-484, 503-504; [1974] HCA 20; *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719 at 729-731.

112 It is Pt 2 Div 7 (ss 188-197AG) which is material. Division 7 is headed "Detention of unlawful non-citizens" and subdiv A (ss 188-197) is headed "General provisions" while subdiv B (ss 197AA-197AG) deals with what are called "Residence determinations", whereby the Minister may determine that a detainee may reside at a specific place "as if" this were detention under s 189. These residence determination provisions were added by the *Migration Amendment (Detention Arrangements) Act* 2005 (Cth).

113 The operation upon the plaintiff of the terms of ss 189, 196 and 198 of the Act may be succinctly restated. As an "unlawful non-citizen" he was required to be taken into immigration detention. He must be removed from Australia as soon as reasonably practicable and "until" that removal or deportation or grant of a visa he must be kept in "immigration detention". Among other places, this may be in a "detention centre" established under the Act or in a federal, State or Territory prison or remand centre (s 5(1)). If the Minister makes a "residence determination" under s 197AB the unlawful non-citizen with the benefit of this arrangement will be deemed still to be in immigration detention under s 189. No such determination has been made in respect of the plaintiff.

114 The effect of the construction given to the Act, as it then stood, by the majority in *Al-Kateb*[142] appears to have been to read the word "until" in s 196 as if it were "unless". The immigration detention required by the Act would continue indefinitely and for the term of the natural life of the detainee unless there occurred either the earlier removal of the detainee from Australia by way of deportation or the grant of a visa. It may be accepted that had the legislation been framed in these express terms then the result reached in *Al-Kateb* would have been the product of language which was "clear" and "unambiguous" and "intractable"[143].

115 Whether, if so, the legislation would survive an attack on its validity then would be another question, as indicated earlier in these reasons with reference to what was said in *Lim*[144].

116 But the Act does not provide in terms that an unlawful non-citizen is to be kept in immigration detention permanently or indefinitely. The Parliament has not squarely confronted what then becomes the primary issue of statutory construction in this case. Rather, the use in s 196 of the term "until" assumes the possibility of compliance with the requirement imposed by s 198 of removal as soon as reasonably practicable. The legislation then is susceptible of two

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142 (2004) 219 CLR 562.

143 (2004) 219 CLR 562 at 581 [33], 643 [241], 661 [298].

144 (1992) 176 CLR 1 at 11-12, 33-34.

interpretations to meet the situation where there is no practical possibility of meeting that requirement of removal.

117 These competing interpretations were identified by Gleeson CJ in his dissenting reasons in *Al-Kateb*[145]. The first interpretation is that, if it never becomes practicable to remove the detainee, the detainee must spend the remainder of his or her life in detention. The second is that if removal ceases to be a practical possibility, the detention must cease, at least for as long as that situation continues. That is to say, the duty of removal imposed upon an officer by s 198 may continue to subsist, although it is not at present practically available, without the continuing necessity of detention of the unlawful non-citizen. The first of the two constructions considered by Gleeson CJ does not appear with the "irresistible clearness" required by the authorities beginning with *Potter v Minahan*[146] and continuing with *Australian Crime Commission v Stoddart*[147].

118 Care is required in resolving the issue of statutory construction that is presented here by the invocation of legislative "intention". It has become better understood than it was when McHugh J, in *Al-Kateb*[148], used the term "intention" and cognate expressions, that they are indicative of the constitutional relationship between the arms of government respecting the making, interpretation and application of laws[149].

119 Further, two members of the majority in *Al-Kateb*, McHugh J and Callinan J, did not refer to what was then and has remained the doctrine of the Court which provides strongest guidance in resolving the issue of construction presented by the interaction between ss 189, 196 and 198 of the Act. This has been stated as follows in the joint reasons in *Coco v The Queen*[150]:

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145 (2004) 219 CLR 562 at 575 [14].

146 (1908) 7 CLR 277 at 304; [1908] HCA 63.

147 (2011) 244 CLR 554 at 622 [182]; [2011] HCA 47.

148 (2004) 219 CLR 562 at 581 [33].

149 *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52; *Dickson v The Queen* (2010) 241 CLR 491 at 506-507 [32]; [2010] HCA 30; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 984-985 [38]-[42], 1009 [146]; 280 ALR 211 at 239-241, 274; [2011] HCA 34.

150 (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15.

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights." (footnote omitted)

Further authorities adopting that passage recently were collected in *Lacey v Attorney-General (Qld)*[151].

120 The justification for not following an earlier decision of the Court construing a statute, particularly a decision reached by a majority, is that the earlier decision appears to have erred in a significant respect in the applicable principles of statutory construction[152]. It is the second construction identified by Gleeson CJ in *Al-Kateb* which better accommodates the basic right of personal liberty. The contrary construction adopted by the majority in that case should not be regarded as a precedent which in the present case forecloses further consideration of the matter.

121 Before returning to the construction of ss 189, 196 and 198 of the Act, attention should be given to two other issues, either of which, if decided favourably to the plaintiff, would be sufficient to obviate the necessity to deal with the larger issue of statutory construction. These concern the validity of the prescription of public interest criterion 4002 and the alleged denial of procedural fairness. On neither of these issues should the plaintiff succeed.

<u>The validity of the prescription of public interest criterion 4002 – inconsistency</u>

122 The first issue concerns the validity of the prescription of public interest criterion 4002 in its application to an applicant for a protection visa such as the plaintiff. In effect, the plaintiff submits that, first, additional criteria applicable to the grant of a protection visa, beyond satisfaction by the Minister of the existence

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151 (2011) 242 CLR 573 at 582 [17]; [2011] HCA 10. To these authorities may be added *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2.

152 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439-440; [1989] HCA 5.

of protection obligations under the Convention as provided in s 36(2) of the Act, will be "inconsistent" with the Act within the meaning of s 504(1) and thus invalid, if those additional criteria "undermine or negate the terms or scheme of the Act, or constraints imposed on states by the Convention". Secondly, the plaintiff points to the definition of "security" in s 4 of the ASIO Act (adopted in public interest criterion 4002) and to the acceptance by the defendants in oral argument that this is more widely expressed than the terms of Arts 32 and 33(2) of the Convention. Thirdly, the plaintiff submits that these Articles along with Art 1F are "picked up" by the medium of provisions including s 500(1)(c) of the Act as grounds for refusal to grant, or for the cancellation of, a protection visa. Finally, it is submitted that because these grounds of refusal are narrower in application than public interest criterion 4002, this criterion is "inconsistent" with s 500(1)(c) and so its prescription is *ultra vires* to that extent. The result then is said to be that there is no bar to the grant to the plaintiff of a protection visa.

123 For the reasons which follow these submissions should not be accepted. First, the plaintiff's submissions misconceive the extent to which the Convention is drawn by the Act into domestic law. The scheme of the Act does not provide for the enactment of the various obligations respecting domestic status and entitlement which are found in the Convention[153]. Rather, s 36(2) fixes upon the definition in Art 1A as a criterion for the operation of the visa protection system[154]. However, the phrase in s 36(2), "to whom Australia has protection obligations under [the Convention]", embraces and requires consideration of the whole of Art 1 of the Convention, not just the term "refugee" in Art 1A. It followed that the circumstance that Australia might not breach its international obligation under Art 33(1) by sending to Israel the appellants in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* did not deny the existence of protection obligations owed to them under s 36(2)(a) of the Act[155].

124 Article 1F excludes from the application of the Convention any person with respect to whom there are "serious reasons" for considering that this person has committed a crime against peace or against humanity or a war crime (par (a)), or "a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" (par (b)), or "has been guilty of acts contrary to the purposes and principles of the United Nations" (par (c)).

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153 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 225-226 [217]-[218].

154 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [44]-[45].

155 (2005) 222 CLR 161 at 173 [29], 176-178 [42]-[53].

125 Section 91T of the Act specifies a particular meaning to be given for the purposes of the Act and the Regulations to the expression "non-political crime" in par (b) of Art 1F; it also should be noted that the acts, practices and methods of terrorism, and its planning, financing and preparation, repeatedly have been declared by the General Assembly and Security Council to be contrary to the purposes and principles of the United Nations[156].

126 However, it is not contended that Art 1F applies to the plaintiff, and, as noted above, the plaintiff has been found to be a person to whom Australia has protection obligations. It also should be accepted that notwithstanding the range of acts contrary to the purposes and principles of the United Nations, public interest criterion 4002 has a broader scope because of the wide definition of "security" in s 4 of the ASIO Act.

127 To found his argument of inconsistency between the Act and public interest criterion 4002, the plaintiff contends that the provisions in Art 32(1) respecting expulsion on "grounds of national security or public order" and in Art 33(2) respecting danger to the security of the country of refuge have statutory force. This is said to be the effect of the provision in s 500(1)(c) that the Administrative Appeals Tribunal may review a decision "to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of ... Article 1F, 32 or 33(2) [of the Convention]", and of the provision in s 500(4)(c) to the effect that these decisions are not reviewable by the Migration Review Tribunal or the Refugee Review Tribunal. Further, s 503(1)(c) denies to persons the subject of such a refusal or cancellation any entitlement to enter Australia or be present at any time during the period determined by the Regulations. Finally, s 502 empowers the Minister, acting personally, and in deciding to refuse to grant or to cancel a protection visa by reliance on any one or more of Arts 1F, 32 or 33(2), to declare the person in question to be "an excluded person" and to include a certificate to that effect.

128 It will be observed that refusal and cancellation are treated together in these provisions. Something more should be said of the power of cancellation.

129 Section 116 of the Act confers upon the Minister power to cancel a visa if satisfied that "any circumstances which permitted the grant of the visa no longer exist" (sub-s (1)(a)), the presence in Australia of the visa holder is a risk to the health, safety or good order of Australia (sub-s (1)(e)), or a prescribed ground for cancellation applies (sub-s (1)(g)). One prescribed ground (reg 2.43(1)(b)) is an adverse security assessment by ASIO.

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156 Symes and Jorro, *Asylum Law and Practice*, 2nd ed (2010) at [8.27].

130 Further, in the case of the cancellation of a protection visa, in exercise of the power conferred by s 116(1)(a), the "circumstances" which permitted the grant of the visa but "no longer exist" could include circumstances which engaged Art 1 of the Convention and so supplied the criterion in s 36(2) of the Act with respect to the existence of protection obligations under the Convention.

131 The joint reasons in *NAGV*[157], after referring to the references to Arts 32 and 33(2), in addition to Art 1F, in the sections of the Act referred to above in the statement of the plaintiff's submissions, continued:

> "The special provisions made in Arts 32 and 33(2) with respect to expulsion 'on grounds of national security or public order' (Art 32) and to those who are a danger to security (Art 33(2)) attract comparison with the terms used in Art 1F to identify those to whom the Convention 'shall not apply'.
>
> The reference to Arts 32 and 33(2) may have been included by the legislation identified above for more abundant caution or as epexegetical of Art 1F in its adoption by the Act, with operation both at the time of grant and later cancellation of protection visas."

The construction of Art 1F may require attention to the text, scope and purpose of the Convention as a whole[158]. Further, Professor Gilbert writes that the relationship between Art 1F and Art 33(2) is confused in state practice, and that this is so although Art 1F excludes applicants from refugee status while Art 33(2) applies to those who would otherwise benefit from the *non-refoulement* protection of Art 33(1)[159].

132 It is unnecessary to pursue any further the place of Arts 32 and 33(2) in the scheme of the Act. This is because the point the plaintiff seeks to make good respecting "inconsistency" and thus invalidity is sufficiently founded in Art 1F. Article 1F has an immediate effect upon the existence of protection obligations engaging s 36(2) of the Act, and thus upon the grant (and cancellation) of protection visas.

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157 (2005) 222 CLR 161 at 179 [56]-[57].

158 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16-17 [46].

159 Gilbert, "Current issues in the application of the exclusion clauses", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law*, (2003) 425 at 457-459.

133 Of a provision[160] relevantly indistinguishable from s 504(1) of the Act, in *Morton v Union Steamship Co of New Zealand Ltd*[161] this Court said:

> "The ambit of [the regulation making] power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned."

The character of the Act, as indicated by s 4, includes the regulation, in the national interest, of the presence in Australia of aliens. The pursuit of that object is supported by heads of power including, but not with mutual exclusion, the aliens power, the external affairs power and the defence power.

134 The reference in *Morton* to "intention" is to be understood to pose the question whether upon its true construction the statute deals completely and thus exclusively with the subject matter of the regulation in question with the consequence that the regulation detracts from or impairs that operation of the statute[162].

135 The subject matter of public interest criterion 4002, by reference to the definition of "security" in s 4 of the ASIO Act[163], includes the protection of the Commonwealth and its people from "politically motivated violence". It also includes the carrying out of the "responsibilities" of Australia to any foreign country in relation to such violence; these responsibilities of the executive branch may arise from customary international law, treaties or statute, such as the *Diplomatic Privileges and Immunities Act* 1967 (Cth)[164].

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160 Section 164 of the *Excise Act* 1901 (Cth).

161 (1951) 83 CLR 402 at 410; [1951] HCA 42. See also *Harrington v Lowe* (1996) 190 CLR 311 at 324-325; [1996] HCA 8; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 328-329.

162 cf *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1028-1029 [261]; 280 ALR 221 at 300.

163 See [93].

164 See *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 313-314, 320-327.

136 It is plain from the terms of the section that s 36(2) of the Act does not purport to cover "completely and exclusively"[165] the criteria for the grant of a protection visa. Section 31(3) explicitly provides for the prescription by the Regulations of other criteria. It follows that an applicant to whom the Minister is satisfied Australia has protection obligations under the Convention yet may fail to qualify for a protection visa. An applicant to whom the disqualifying provisions of Art 1F do not apply nevertheless may have to meet criteria specified in the Regulations. The assessment of the plaintiff relevantly required by the Regulations is by Australia's specialised security intelligence agency. The role given to it by the Regulations is a manifestation of the national interest identified in s 4(1) of the Act, being the interest of a sovereign state to scrutinise those aliens seeking admission, even if they be persons to whom protection obligations are owed. The provisions in the Act dealing with the "character test", described above[166], are another example of the balance the legislature has sought to strike between the two interests identified by Lord Bingham of Cornhill in the passage referred to in the opening paragraph of these reasons.

137 Provisions in the Convention which are restrictive of the return and expulsion (Arts 32, 33) are qualified so as to deny protection from such return or expulsion upon security grounds of the state of refuge. But these provisions deal with a different subject matter. They do not deal with the criteria for the existence of refugee status. Article 1F does so. But it would be a large step to read the power of prescription of criteria conferred by s 31(3) of the Act as foreclosed by the place of Art 1F in the operation of the criterion for protection obligations which is found in s 36(2) of the Act.

138 For the reasons given above, and for those stated by Bell J, that step should not be taken. There is no "inconsistency" within the meaning of s 504(1) of the Act. The prescription of public interest criterion 4002 is valid in its application to the plaintiff.

Procedural fairness

139 In *Plaintiff S157/2002 v The Commonwealth*[167] Gleeson CJ remarked:

> "Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose

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165 *Cullis v Ahern* (1914) 18 CLR 540 at 543; [1914] HCA 59; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489-490; [1926] HCA 6; Leeming, *Resolving Conflicts of Laws*, (2011), §3.8.

166 At [89].

167 (2003) 211 CLR 476 at 494 [37].

> fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness."

The Director-General does not dispute that general proposition as applicable to the security assessment of the plaintiff issued 9 May 2012. But he relies upon the further point emphasised by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[168]:

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

Further, the procedure for the security assessment was inquisitorial rather than adversarial as that term is understood in a court of law hearing a prosecution[169].

140 For the reasons which follow the plaintiff suffered no denial of procedural fairness in the conduct of the security assessment issued 9 May 2012.

141 The Director-General provided to this Court evidence on affidavit. His security assessment was not based on any information about the plaintiff which had been received from other irregular maritime arrivals or detainees. Basing himself upon investigations which were made by ASIO the Director-General assessed that the plaintiff:

> "a. was a voluntary and active member of the Liberation Tigers of Tamil Eelam (LTTE) Intelligence Wing from 1996-1999, with responsibilities including identifying Sri Lankan Army collaborators, which he was aware likely led to extrajudicial killings, and maintained further involvement in intelligence activities on behalf of the LTTE from 1999-2006;
>
> b. deliberately withheld information regarding his activities of security concern and provided mendacious information throughout the security assessment process in order to conceal such activities; and
>
> c. remains supportive of the LTTE and its use of violence to achieve its political objectives, and will likely continue to support LTTE activities of security concern in and from Australia."

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168 (2003) 214 CLR 1 at 14 [37].

169 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76]; [2000] HCA 57.

142 The security assessment process referred to in (b) included an interview of the plaintiff (in the company of his legal adviser and a translator) by three ASIO officers. This commenced at 9.30am and concluded at 2.35pm. The transcript of what was said at the interview is a confidential attachment to the Special Case. It comprises 50 pages. There were breaks noted at page 17, page 28 (between 12 noon and 12.15pm), and page 38 (between 1.15pm and 1.40pm), during which the plaintiff was free to consult privately his legal adviser.

143 The transcript shows that the plaintiff was provided with the opportunity to provide information with respect to the matters which later fell within par (a) of the assessment by the Director-General. It also was put to the plaintiff on at least six occasions in the interview that he was changing his story, giving an incomplete account in important respects, and failing to explain discrepancies in various accounts he had given. The plaintiff was invited to respond to two specific inconsistencies in what he had said at the interview, was told that certain explanations could not be accepted, and shortly before the noon break was informed that at that stage his honesty in giving his answers was "not looking great".

144 There was no denial of procedural fairness.

Conclusions

145 There remains the issue of construction outlined earlier in these reasons[170]. As foreshadowed there, in my view the construction of s 198 which was preferred by Gleeson CJ in *Al-Kateb* should be accepted.

146 In the joint reasons in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[171] their Honours observed that:

> "Australia's power to remove non-citizens from its territory is confined by the practical necessity to find a state that will receive the person who is to be removed."

The difficulties which attend that practical necessity have caused the continued detention of the plaintiff.

147 The Special Case details efforts by the third and fourth defendants between August 2011 and May 2012 to arrange resettlement in third countries of persons who had entered Australia and had been found to be refugees but who also were the subject of adverse security assessments. There were negative

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170 At [97]-[106].

171 (2011) 244 CLR 144 at 190 [92].

responses from four countries and responses from four more countries remained outstanding. An officer of the Department of Immigration and Citizenship intended to raise the resettlement of refugees in the position of the plaintiff with counterparts from some additional countries on the margins of a meeting at Geneva in July 2012 of the Annual Tripartite Consultations on Resettlement.

148 This is a case where the requirement of removal as a matter of present practicability cannot be fulfilled for reasons unrelated to any shortcomings on the part of the detaining authority. For the reasons given by Gleeson CJ in *Al-Kateb*[172], the invalidation of the assumption of the availability of removal under s 198 suspends but does not permanently displace the obligation of detention imposed by s 196.

149 There then arises the nature of the relief which may be given a person in the position of the plaintiff. As indicated earlier in these reasons under the heading "Habeas corpus", it is consistent with the nature of that remedy that the order be made upon terms and conditions effecting the release of the plaintiff. The terms and conditions of that release would be a matter for the Justice disposing of the matter in this Court, or, if a remitter was made to another court, upon that remitter.

Orders

150 The questions in the Special Case should be answered as follows:

1. In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?

   No.

2. Does s 198 of the *Migration Act* 1958 (Cth) authorise the removal of the Plaintiff, being a non-citizen:

   2.1 to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

   2.2 whom ASIO has assessed poses a direct or indirect risk to security;

   to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention as amended by the Refugees Protocol?

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172 (2004) 219 CLR 562 at 578 [22].

Yes.

2A. If the answer to question 2 is "Yes" by reason of the plaintiff's failure to satisfy public interest criterion 4002 within the meaning of clause 866.225 of Schedule 2 of the Migration Regulations 1994, is that clause to that extent *ultra vires* the power conferred by section 31(3) of the *Migration Act* 1958 (Cth) and invalid?

No.

3. Do ss 189 and 196 of the *Migration Act* 1958 (Cth) authorise the Plaintiff's detention?

The continued detention of the plaintiff is not presently authorised.

4. Who should pay the costs of the special case?

The defendants.

151 HAYNE J. The plaintiff is a Sri Lankan national. In October 2009, he, with others, started a journey by boat from Indonesia to Australia. An Australian Customs vessel intercepted the boat and the plaintiff and others were taken by it to Indonesia.

152 In December 2009, the plaintiff was granted a special purpose visa that lasted long enough for him to be brought from Indonesia to the Territory of Christmas Island. Within an hour of the plaintiff landing in that Territory, the visa expired, and he was detained by an officer relying on s 189(3)[173] of the *Migration Act* 1958 (Cth) ("the Act").

153 While in immigration detention the plaintiff applied for a protection visa. A delegate of the fourth defendant, the Minister for Immigration and Citizenship ("the Minister"), found, as the United Nations High Commissioner for Refugees had earlier found, that there is a real chance that the plaintiff would be persecuted on account of his race and political opinions if he were returned to Sri Lanka. The delegate said:

> "[The plaintiff] has a well-founded fear of persecution from the Sri Lankan Government and/or paramilitary groups in Sri Lanka and or Tamil separatist groups on the basis of his race and political opinion. This political opinion is attributed to him by the agents of persecution because he is a former member of the LTTE [the Liberation Tigers of Tamil Eelam]. The well-founded fear from Tamil separatist groups can be attributed to the [plaintiff's] refusal to rejoin the LTTE. Country information indicates that former LTTE supporters or members are targeted by the Sri Lankan Government and or paramilitary groups in Sri Lanka. The [plaintiff] may be identified because of his ethnicity and because of his profile as a former member of the LTTE. *If identified the* [plaintiff] *risks persecution by way of abduction, torture or death*." (emphasis added)

The finding that the plaintiff is a refugee within the meaning of Art 1A of the Refugees Convention[174] is not disputed in these proceedings.

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173 Section 189(3) provides that: "If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person." The Territory of Christmas Island is an "excised offshore place" as defined in s 5(1). Because the plaintiff did not hold a visa that was in effect, he was an "unlawful non-citizen" as defined in s 14.

174 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together "the Convention").

154 Notwithstanding this finding that the plaintiff is a refugee, the Minister's delegate refused[175] to grant the plaintiff a protection visa. The delegate found that the plaintiff did not satisfy all of the criteria for the grant of a protection visa that are prescribed[176] by the Act and the Migration Regulations 1994 (Cth) ("the Regulations"). In particular, the delegate found that the plaintiff did not satisfy public interest criterion 4002[177] ("PIC 4002") because, in 2009, before the delegate made her decision, the Australian Security Intelligence Organisation ("ASIO") had provided to the Department of Immigration and Citizenship a security assessment which assessed the plaintiff to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). The text of the relevant part of s 4 of the ASIO Act is set out later in these reasons.

155 The plaintiff sought review of the delegate's decision by the Refugee Review Tribunal but the Tribunal also found that the plaintiff did not satisfy PIC 4002. The Tribunal therefore affirmed the delegate's decision to refuse to grant the plaintiff a protection visa.

156 The plaintiff brought proceedings in the Federal Court of Australia challenging the validity of ASIO's assessment. He alleged that he had not been accorded procedural fairness because he had been given no opportunity to say anything about whether an adverse assessment should be made and because he had not been told why an adverse security assessment had been made. The proceedings were settled before they were heard. It was agreed that a new security assessment would be made.

157 In November 2011, the plaintiff was interviewed by ASIO officers in the presence of his lawyer. In May 2012, ASIO provided a new security assessment to the Department of Immigration and Citizenship. The new assessment said again that ASIO assessed the plaintiff to be directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act.

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175 s 65(1)(b).

176 s 65(1)(a)(ii).

177 Sched 2, cl 866.225(a) of the Regulations provides, so far as presently relevant, that PIC 4002 is a criterion for the grant of a protection visa. PIC 4002 (set out in Sched 4, item 4002) provides:

> "The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

The present proceedings

158 The plaintiff commenced proceedings in the original jurisdiction of this Court, naming as defendants the Director-General of Security ("the Director"), the Officer in Charge of the Melbourne Immigration Transit Accommodation (where the plaintiff is being held in immigration detention), the Secretary of the Department of Immigration and Citizenship, the Minister and the Commonwealth. The plaintiff and the defendants agreed in stating, in the form of a special case for the opinion of a Full Court, questions of law that were said to arise in the matter. The plaintiff in another proceeding pending in this Court, Plaintiff S138/2012, sought, and was granted, leave to intervene in the hearing of the special case on the basis that his proceedings raise generally similar issues to those that fall for consideration in these. The Australian Human Rights Commission sought, and was granted, leave to intervene[178] in support of the plaintiff. The Attorney-General for the State of New South Wales intervened in support of the Commonwealth.

159 Initially, the plaintiff advanced two principal arguments. He challenged the validity of the 2012 security assessment on the basis that it was made without according him procedural fairness. If that challenge failed, he submitted that, having been found to be a refugee, he cannot lawfully be removed from Australia, and that his continued detention is therefore not lawful. In the course of oral argument, the plaintiff sought, and was granted, leave to amend his originating process to raise, for the first time, a challenge to the validity of prescribing PIC 4002 as a criterion for the grant of a protection visa. The plaintiff submitted that the power conferred by s 31(3) of the Act to prescribe criteria for a visa of the class provided by s 36 (protection visas) does not authorise the prescription of PIC 4002. The parties agreed upon a consequential amendment to the special case and the addition of a question of law asking about the validity of the prescription of PIC 4002 as a criterion for a protection visa.

160 These reasons will show that the prescription of PIC 4002 as a criterion for the grant of a protection visa is not authorised by s 31(3) of the Act and is invalid. The decisions by the Minister's delegate to refuse to grant the plaintiff a protection visa and by the Refugee Review Tribunal to affirm that refusal depended upon application of this criterion and were therefore attended by jurisdictional error. The plaintiff accepted that it followed that his application for a protection visa had not been finally determined and that his detention for the purposes of the determination of the application was lawful. The questions about the validity of the security assessment provided by ASIO in 2012 and about the lawfulness of the plaintiff being detained for the purposes of his removal from Australia need not be examined.

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178 *Australian Human Rights Commission Act* 1986 (Cth), s 11(1)(o).

161 The questions of law that have been stated by the parties should be answered accordingly. What relief the plaintiff should have will be a matter to be determined by a single Justice.

The validity of prescribing PIC 4002 – a question of statutory construction

162 The plaintiff submitted that to prescribe PIC 4002 as a criterion for the grant of a protection visa, as the Regulations do[179], goes beyond the power to prescribe visa criteria given by s 31(3) of the Act. Section 31(3) provides that:

> "The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A)."

Section 31(3) contains no express limitation upon the power it gives to prescribe "criteria for a visa or visas of a specified class". But s 504(1) expressly provides that regulations "which by this Act are required or permitted to be prescribed" must not be "inconsistent" with the Act. This explicitly recognises the fundamental proposition that the meaning of any statutory provision (here the regulation making power given by s 31(3)), and thus its range of operation, must be determined "by reference to the language of the instrument viewed as a whole"[180].

163 The Act refers[181] to, and provides[182] for special rights of review in respect of, decisions to refuse to grant or to cancel a protection visa "relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)". The plaintiff submitted that it follows that the Act, read as a whole, does not authorise the prescription of a criterion for a visa of the class provided for by s 36 (protection visas) which, on the one hand, would preclude the grant of a protection visa to a refugee on grounds of national security or public order but

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179 Sched 2, cl 866.225(a).

180 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; [1981] HCA 26; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

181 ss 500(1)(c), 500(4)(c), 502(1)(a)(iii), 503(1)(c). Sections 500(1)(c) and 500(4)(c) have now been amended by the *Migration Amendment (Complementary Protection) Act* 2011 (Cth). Nothing was said to turn on these amendments and it is convenient to refer, as the parties did, to the Act as it stood before these amendments.

182 ss 500(1)(c) and 500(4)(c).

which, on the other hand, would not be a decision of the kind identified in s 500(1)(c) of the Act: a decision to refuse to grant the protection visa "relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)". That is, the plaintiff submitted that s 31(3), when construed in the context of the whole Act, must be read as not authorising the prescription of a criterion for the grant of a protection visa that is inconsistent with the Act's identification of, and provision of special rights of review for, a decision of the kind described in s 500(1)(c).

164 This branch of the plaintiff's argument invoked a well-established[183] principle of statutory construction which directs attention to the way in which the Act is framed. It was not an argument that depended in any respect upon suggesting that there is some relevant limit to the Commonwealth's legislative power to provide for the expulsion or exclusion from Australia of persons who are found to be risks to national security. And the construction urged does not, in the end, depend upon limiting the operation of s 31(3), or the Act more generally, by reference to the international obligations Australia has under the Convention.

165 The defendants sought to meet the proposition that s 31(3) does not authorise the prescription of PIC 4002 by submitting that there is no tension between s 500(1)(c) and PIC 4002. They submitted that there is no tension between these provisions primarily because the Act does not provide for any decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2). They accepted that it would follow from this submission that the Act's several references to a decision to refuse to grant a protection visa relying on those Articles have no work to do.

166 The defendants accepted that the text of the relevant provisions must be read as assuming that there can be a decision to *refuse* to grant a protection visa relying on *any* of the identified Articles, but their argument was that the Act's repeated references to decisions to *refuse* to grant a protection visa relying on one or more of Arts 32 and 33(2) have *no* work to do in *any* circumstances. The defendants (correctly) did not submit that the text of s 500(1)(c) (and other provisions using the same language) could be given some distributive construction by which the reference to a decision to *refuse* to grant a protection visa connects only with Art 1F of the Convention and the reference to a decision to *cancel* a protection visa connects only with one or other of Arts 32 and 33(2). It is not possible to construe the relevant provisions as if they read "a decision to refuse to grant a protection visa relying on Article 1F of the Convention or a decision to cancel a protection visa relying on either Article 32 or Article 33(2) of the Convention". No such distributive construction of the relevant provisions

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183 See, for example, *Project Blue Sky* (1998) 194 CLR 355 at 381-382 [69]-[71].

is open. It is foreclosed by the phrase "relying on one or more of" the identified Articles.

The text of the relevant provisions

167 The text of s 31(3) has been set out earlier in these reasons. It is necessary to set out the text of s 500(1) and then the text of the three Articles of the Convention that are mentioned in s 500(1)(c). Section 500(1) provides:

> "Applications may be made to the Administrative Appeals Tribunal for review of:
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> (a) decisions of the Minister under section 200 because of circumstances specified in section 201; or
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> (b) decisions of a delegate of the Minister under section 501; or
>
> (c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);
>
> other than decisions to which a certificate under section 502 applies."

Decisions to refuse to grant a protection visa or to cancel a protection visa relying on one or more of those Articles of the Convention are also referred to in s 500(4)(c) (as decisions not reviewable under Pts 5 or 7 of the Act), s 502(1)(a)(iii) (as decisions in respect of which the Minister, acting personally, may, as part of the decision, include a certificate declaring the person to be an excluded person) and s 503(1)(c) (to identify persons who may be excluded from Australia for a period determined under the Regulations).

168 Article 1F excludes from the application of the Convention certain persons who have committed identified kinds of act. It provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The Minister's delegate found, and it has not since been disputed, that the plaintiff is not a person to whom Art 1F applies.

169 Articles 32 and 33(2) qualify the obligation undertaken by parties to the Convention not to expel from their territory a person who meets the definition of refugee set out in Art 1. These Articles make special provision for refugees who present security risks to the country of refuge. Article 32 deals with the expulsion of refugees. It provides:

"1. The Contracting States *shall not expel* a refugee lawfully in their territory *save on grounds of national security or public order*.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary." (emphasis added)

170 Article 33 contains one of the most important obligations in the Convention. It prohibits expulsion of a refugee to the frontiers of territories where the refugee fears persecution. It provides:

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is*, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." (emphasis added)

171 How should the Act be construed when, on the one hand, s 31(3) is expressed as a textually unbounded power to prescribe criteria for the grant of a protection visa (limited only by the reference in s 504(1) to the regulation not being inconsistent with the Act) and, on the other, there is repeated reference elsewhere in the Act to decisions to refuse to grant a protection visa relying on

one or more of the identified Articles of the Convention? It is necessary to begin by restating some relevant and long-standing principles of statutory construction.

Relevant principles

172 The Act must be construed in a way that gives due weight to two related considerations. First, as was said in *Project Blue Sky Inc v Australian Broadcasting Authority*[184]:

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[185]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, 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[186]."

Second, as was noted in *Project Blue Sky*[187], it is "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that *no clause, sentence, or word* shall prove superfluous, void, or insignificant, if by *any* other construction they may all be made useful and pertinent"[188] (emphasis added). This second point is of immediate relevance in this matter because the defendants urged a construction of the Act which they accepted[189] gave some elements of s 500(1)(c) no work to do.

173 The principles that have been identified begin from the premise, already noted, that the Act must be read as a whole. As in *Project Blue Sky*[190], if s 31(3)

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184 (1998) 194 CLR 355 at 381-382 [70].

185 *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J; [1979] HCA 29.

186 See *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135 at 161 per Cooper CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J.

187 (1998) 194 CLR 355 at 382 [71].

188 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414; [1905] HCA 11, citing *R v Berchet* (1688) 1 Show KB 106 [89 ER 480]. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13; [1992] HCA 64.

189 See, for example, [2012] HCATrans 149 at 5944-5953.

190 (1998) 194 CLR 355 at 385 [80].

were given its grammatical meaning, without regard to s 500(1)(c) and the other provisions which use the same language, it would authorise the prescription of a visa criterion that would give the Act's provisions for review of decisions to refuse to grant a protection visa relying on one or other of Arts 32 and 33(2) no work to do. But, as in *Project Blue Sky*, the express words of s 504(1) (that regulations be "not inconsistent with this Act") and consideration of the Act as a whole show that the grammatical meaning of s 31(3) is not its legal meaning.

174 As was pointed out in *Morton v Union Steamship Co of New Zealand Ltd*[191]:

> "Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, *but not regulations which vary or depart from the positive provisions made by the Act* or regulations which go outside the field of operation which the Act marks out for itself." (emphasis added)

Thus the notion of inconsistency embraced by the common form of regulation making power — to make regulations "not inconsistent with this Act" — is not sufficiently described by reference only to the metaphor of "covering the field" which has in the past been used in connection with s 109 of the Constitution[192]. Rather, as was said in the passage quoted from *Morton*[193], the question is whether the regulation in question varies or departs from (in other words alters, impairs or detracts from) the provisions of the Act.

175 Because the Act must be construed as a whole, consideration of the validity of prescribing PIC 4002 as a criterion for the grant of a protection visa must begin from an understanding of the general scheme for which the Act provides.

The Act – binary outcomes

176 Subject to some qualifications that are not immediately important, the Act has a binary structure in that its central provisions posit a choice between two outcomes. Non-citizens are divided[194] into "lawful non-citizens" and "unlawful

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191 (1951) 83 CLR 402 at 410; [1951] HCA 42.

192 *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1029-1030 [262]-[265]; 280 ALR 221 at 301-302; [2011] HCA 34.

193 See also *Grech v Bird* (1936) 56 CLR 228 at 239; [1936] HCA 59; *Harrington v Lowe* (1996) 190 CLR 311 at 324-325; [1996] HCA 8.

194 ss 13 and 14.

non-citizens" according to whether the non-citizen in question holds a valid visa. The Minister must decide to grant[195] or refuse to grant[196] a valid application for a visa according to whether the Minister is satisfied certain requirements are met.

177 The Act spells out the consequences that follow from being a lawful non-citizen or an unlawful non-citizen. Generally, an officer is bound[197] to detain a person whom the officer knows or reasonably suspects to be an unlawful non-citizen. Subject to the possibility of the Minister making a "residence determination" under s 197AB, s 196(1) requires that an unlawful non-citizen detained under s 189 of the Act "be kept in immigration detention until he or she is" removed from Australia, deported or granted a visa. An officer is bound[198] to remove "as soon as reasonably practicable" an unlawful non-citizen who has been detained, has not subsequently been immigration cleared, and has no valid application for a visa that has not yet been finally determined.

178 The Act provides no middle ground between being a lawful non-citizen (entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen, who may, usually must, be detained and who (assuming there is no pending consideration of a valid visa application) must be removed from Australia as soon as reasonably practicable. These consequences – remaining in Australia on the one hand and detention followed by removal from Australia on the other – follow once the central question has been answered: is the person a lawful non-citizen or an unlawful non-citizen? That question depends upon whether the Minister grants or refuses to grant a visa or, if a visa has previously been granted, whether that visa has since been cancelled.

The decision to grant or to refuse to grant a valid application

179 Section 65 of the Act governs the decision to grant or to refuse to grant a visa and is the provision which gives practical effect to the prescription of criteria under s 31(3). Section 65(1) provides:

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

(a) if satisfied that:

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195 s 65(1)(a).

196 s 65(1)(b).

197 s 189. An officer has a discretion whether to detain such a person who is in, or is seeking to enter, an "excised offshore place".

198 s 198(2).

(i) the health criteria for it (if any) have been satisfied; and

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

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

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

180 All the requirements of s 65(1) are important. It may be possible to refer, as the parties' arguments sometimes suggested, to some of them as positive (satisfying the health criteria) and others as negative (the grant "is not prevented" by certain considerations). But a distinction between positive and negative requirements or criteria is not helpful for present purposes. What is presently important is that s 65(1) directs attention to different requirements. Those requirements *cannot* be contradictory or otherwise inconsistent. So, for example, criteria prescribed by the Regulations cannot be inconsistent with criteria prescribed by the Act. And, of immediate relevance, criteria prescribed by the Regulations cannot be inconsistent with the operation of the special powers to refuse a visa that are given by s 501. The apparently general words of s 31(3) must be read as not authorising the making of such a criterion. So much follows from the express words of s 504(1) ("make regulations, not inconsistent with this Act") and from fundamental principles of statutory construction.

181 It is useful to note at once, and reject, one of the submissions the defendants made about inconsistency. The defendants observed that the Act has always contemplated that applicants for a protection visa must satisfy all prescribed criteria, not just the criterion in s 36(2) that the Minister be satisfied that Australia has protection obligations to the applicant, and that these criteria do not always engage the review provisions of s 500. Accordingly, the mere fact that an applicant is refused a protection visa relying on PIC 4002, where otherwise the applicant would have been granted a protection visa, reveals no inconsistency. So much may readily be assumed to be correct. Indeed it seems amply demonstrated by the text of s 65. But the submission is beside the point. Alleged inconsistency is not usefully identified (at least in this case) in terms of outcome – of what would occur but for the existence of PIC 4002 or any other criterion. The tension between PIC 4002 and the Act is found in the relationship

between PIC 4002, in its application to protection visas, and the special scheme of review provided for by s 500. Examination of that relationship reveals that the problem with PIC 4002 is not that it creates an additional hurdle to the grant of a protection visa but that it erects a hurdle that circumvents the special review provisions made by the Act.

182 It is necessary to examine more closely the operation of s 500(1)(c) and its intersection with other provisions of the Act.

Section 500(1)(c) – the decisions identified

183 Unlike PIC 4002, s 500(1)(c) does not, in its form, prescribe a criterion for the grant of a protection visa. As already noted, s 500(1)(c) provides for the review of certain kinds of decision. The decisions identified in s 500(1)(c) are described as decisions to refuse to grant a protection visa or to cancel a protection visa "relying on" one or more of Arts 1F, 32 and 33(2). By treating these decisions as a separate class, the Act not only assumes that a decision-maker considering a visa application can examine the questions presented by those Articles, it requires the decision-maker to do that. Any other construction of the provision would read its references to a decision "relying on" the relevant Articles out of the Act.

184 In its terms, s 500(1)(c) neither provides for the making of a decision "relying on" one or more of the relevant Articles nor identifies some other provision of the Act as founding a decision of the kind described. It is therefore necessary to identify what provision or provisions of the Act would yield a decision "relying on" one or more of the specified Articles. Two candidates were identified in argument: s 36(2) and s 501. Section 36(2) intersects with s 65 because it prescribes a criterion[199] for the grant of a protection visa. Section 501 intersects with s 65 because its operation may prevent[200] the grant of a visa. It is convenient to consider the relationship between ss 500(1)(c) and 36(2), and then the relationship between ss 500(1)(c) and 501.

Section 500(1)(c) and protection obligations

185 The legislative predecessor of s 500(1)(c) was first introduced[201] into the Act by the *Migration (Offences and Undesirable Persons) Amendment Act* 1992

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199 s 65(1)(a)(ii).

200 s 65(1)(a)(iii).

201 s 4(2)(b).

(Cth). The defendants submitted that extrinsic material[202] relating to the amendment showed that it was assumed that a person who could be expelled from Australia without breach of Art 32 or Art 33(2) was not a person to whom Australia owed protection obligations. On this view, if a person could be expelled without breach of Art 32 or Art 33(2), the Minister was to refuse to grant a protection visa for want of satisfaction of s 36(2) and this would be a decision "relying on" Art 32 or Art 33(2). The accuracy of these propositions need not be examined; it is sufficient to assume that they are right.

186 The defendants submitted that this understanding of s 36(2) has now been falsified by this Court's decision in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[203]. The Court held[204] in *NAGV* that the reference to "protection obligations" in what is now s 36(2)(a) should be understood as identifying a person who is a refugee within the meaning of Art 1 of the Convention. It followed, so the defendants' argument continued, that the application of s 36(2) could yield no decision to refuse to grant a protection visa "relying on" either Art 32 or Art 33(2). The defendants recognised, however, that *NAGV* establishes[205] that the application of s 36(2) can yield a decision to refuse to grant a protection visa "relying on" Art 1F. A person who meets the description given in Art 1F, they accepted, is a person to whom the Convention does not apply and thus a person to whom Australia does not owe protection obligations.

187 The defendants' submissions about the operation of s 36(2) may be accepted but their acceptance does not lead to the conclusion the defendants asserted – that there can be no decision to refuse to grant a protection visa relying on one or both of Arts 32 and 33(2). Too narrow a focus upon s 36(2) and *NAGV* diverts attention from, and does not take sufficient account of, two important considerations: the relationship between s 500(1)(c) and what is called (in s 65(1)(a)(iii)) the "special power to refuse or cancel" given by s 501, and the relationship between ss 501 and 65. It is to those subjects that these reasons now turn.

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202 Australia, Senate, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 3 [10].

203 (2005) 222 CLR 161 at 178-180 [54]-[59]; [2005] HCA 6.

204 (2005) 222 CLR 161 at 176 [42].

205 (2005) 222 CLR 161 at 176-180 [42]-[60].

Section 500(1)(c) and the character test

188 It will be recalled that one of the requirements stated in s 65(1) as a condition for the grant of a valid application for a visa is that the Minister is satisfied that the grant of the visa is not prevented by some identified provisions of the Act, including s 501. Section 501(1) of the Act empowers the Minister to refuse to grant any kind of visa to a person if that person does not satisfy the Minister that the person passes "the character test" identified in s 501(6).

189 It is necessary to notice that one of the public interest criteria that an applicant for a protection visa must satisfy (public interest criterion 4001 – "PIC 4001") expressly directs attention to that character test. One circumstance[206] in which PIC 4001 is met is if the applicant "satisfies the Minister that [he or she] passes the character test". No question about the validity or operation of PIC 4001 was considered in argument. It is therefore neither necessary nor desirable to examine that criterion. Instead, attention must be directed to the relationship between ss 500(1)(c) and 501.

190 In considering the relationship between these provisions it is necessary to refer only to decisions to refuse to grant a protection visa relying on one or both of Arts 32 and 33(2). As has been explained, Art 1F is properly taken into account in considering the application of the criterion prescribed by s 36(2).

191 Both Art 32 and Art 33(2) deal with threats to security. Article 32 refers to expelling a refugee on "grounds of national security or public order"; Art 33(2) refers to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is". There are several elements of the character test set out in s 501(6) that intersect with the references in Arts 32 and 33(2) to "national security" and "security of the country in which [the person] is". The provision of the character test of most obvious relevance to Arts 32 and 33(2) is s 501(6)(d)(v), which provides that a person does not pass the character test if:

> "(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
>
> ...
>
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in

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206 The Regulations, Sched 4, item 4001(a). Paragraphs (b)-(d) of PIC 4001 state other circumstances in which the criterion is met. The operation of these provisions need not be examined.

> violence threatening harm to, that community or segment, or in any other way."

This provision of the character test embraces considerations of the kind with which both Arts 32 and 33(2) deal by their references to "security".

192 Other elements of the character test in s 501(6) direct attention to many other kinds of consideration. Some, perhaps many, may fall within the reference in Art 32 to "public order", but it is not necessary to attempt to identify the extent to which the two overlap. It is enough to observe that the character test directs attention to the issues with which Arts 32 and 33(2) deal.

193 A decision to refuse to grant a protection visa because its grant is prevented by s 501 is thus capable of being a decision "relying on" Art 32 or Art 33(2) which would engage s 500(1)(c). That is, a decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2) is a particular species of case in which the grant of a protection visa is prevented[207] by s 501. This construction of the Act being open, there is no reason to construe s 500(1)(c) as if the reference there (and elsewhere in the Act) to a refusal to grant a visa relying on Art 32 or Art 33(2) were "superfluous, void, or insignificant"[208].

194 The reason for the Act marking off this class of decision for a special process of review is readily apparent. A decision of this kind will lead to the expulsion from Australia of a person who has been found to be a refugee within the meaning of Art 1 of the Convention. Marking off decisions of this kind for special review processes reflects a legislative recognition of important aspects of the international obligations Australia has undertaken. There is in these circumstances all the more reason to read s 500(1)(c) in a way that gives all of its elements work to do. Yet if, as the defendants submitted, a decision taken under s 65(1) to refuse a protection visa because its grant is prevented by s 501 cannot be a decision relying on Art 32 or Art 33(2), the reference to decisions of that kind in s 500(1)(c) is given no work at all.

195 Before dealing with the validity of prescribing PIC 4002, it is necessary to consider, and reject, two further submissions the defendants made about the relationship between ss 500(1)(c) and 501.

196 First, the defendants submitted that the reference in s 500(1)(c) to decisions to refuse to grant a protection visa relying on Art 32 or Art 33(2) has no more than a trivial operation if decisions of that kind are made on the basis of

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207 s 65(1)(a)(iii).

208 *Project Blue Sky* (1998) 194 CLR 355 at 382 [71], citing *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.

the character test prescribed by s 501. This conclusion was said to follow from s 500(1)(b), which provides for the review, by the Administrative Appeals Tribunal, of decisions made by a delegate of the Minister under s 501. The only possible separate field of operation for s 500(1)(c), different from that covered by s 500(1)(b), would be decisions of the kinds identified in s 500(1)(c) when they are made by the Minister personally. The defendants submitted that it is likely that there would be very few decisions of this kind and that it follows that s 500(1)(c) would "have little or no work to do".

197 The defendants' submission should be rejected. Whether or why decisions of the relevant kind would rarely be made by the Minister personally need not be examined. If the defendants are right, it is an observation that does not bear upon the proper construction of the Act.

198 Section 500(1) deals with three kinds of decision: decisions of the Minister to deport non-citizens in Australia for less than 10 years who are convicted of crimes, decisions of a delegate of the Minister under s 501 (the character test) and decisions to refuse to grant, or to cancel, a protection visa relying on one or more of Arts 1F, 32 and 33(2). As the defendants accepted, the first two categories of decision are identified by reference to both the *kind* of decision and the *decision-maker* (the Minister or a delegate). The third category is identified by reference only to the *kind* of decision, not who made it. Given these differences, reading s 500(1)(c) as marking off decisions relying upon the specified Articles of the Convention, whoever makes them, as a separate class of decision taken under s 501 does not render s 500(1)(c) superfluous.

199 The second of the submissions the defendants made about the relationship between ss 500(1)(c) and 501 was that the character test to be applied under s 501 requires proof to a lesser standard than would be necessary to engage Art 33(2). It followed, so they submitted, that a decision relying on Art 33(2) could not be made under s 501.

200 This submission should be rejected. There are at least two reasons to do so. First, the submission proceeded from the premise that it is necessary to begin by asking whether s 501 (and s 501(6)(d)(v) in particular) "embodies Australia's interpretation and implementation of Australia's obligations under Arts 32 and 33 of the Convention". That is, the defendants sought first to construe the Convention and then read the Act as if it gives effect to that construction. This inverts the proper order of enquiry. The Act must be construed[209] in the light of

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209 *NAGV* (2005) 222 CLR 161 at 178-180 [54]-[59]; *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*) (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*) (2011) 244 CLR 144 at 189 [90]; [2011] HCA 32.

its recognition of and references to Australia's international obligations but it is the Act and its text which controls.

201 The second reason to reject this submission is that it assumed, wrongly, that s 501 can be applied on the basis of unfounded suspicion or suggestion, without recognition of the consequences that flow from its application, whereas the application of Art 33(2) would require clear and cogent proof of a serious threat to national security. But a decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2), as a species of s 501 decision, cannot be made unless, in a case where security is at issue, the decision-maker is satisfied that the person concerned is a risk to national security. It is elementary that, as Dixon J said in *Briginshaw v Briginshaw*[210]:

> "reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The *seriousness of an allegation* made, the inherent unlikelihood of an occurrence of a given description, or *the gravity of the consequences* flowing from a particular finding *are considerations which must affect the answer* to the question whether the issue has been proved to the reasonable satisfaction of the tribunal." (emphasis added)

202 These are reasons enough to reject the defendants' submission. It is, therefore, not necessary to examine how the submission, framed by reference only to Art 33(2), spoke at all to the Act's references to decisions relying on Art 32. Nor is it necessary to consider how or why different fields of operation for either or both of Arts 32 and 33(2) on the one hand, and s 501 on the other, could be marked off by reference to the application of differing standards of proof when the subject matter dealt with by s 501 includes the subject matter dealt with by the two Articles.

Inconsistency between prescribing PIC 4002 and s 500(1)(c)

203 PIC 4002 hinges upon the absence of an assessment by ASIO that the applicant for a protection visa is directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act. Section 4 defines "security" as:

> "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
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> (i) espionage;
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> (ii) sabotage;

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210 (1938) 60 CLR 336 at 362; [1938] HCA 34.

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa)."

Paragraphs (a) and (aa) of the definition focus upon threats to Australia; par (b) looks to Australia's performance of its responsibilities to foreign countries.

204 It is clear that some of the matters to be considered in applying this definition of "security" would be considered in applying either Art 32 or Art 33(2) and the character test in s 501 (especially s 501(6)(d)(v)). But as the defendants correctly accepted, par (b) of the definition directs attention to matters that do not fall within the reference in Art 32 to "grounds of national security or public order" or the reference in Art 33(2) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is". And the issues with which par (b) of the ASIO Act definition deals, namely, Australia's responsibilities to foreign countries, are not matters raised by the character test. It follows that an assessment made for the purposes of PIC 4002 may rely upon matters that are irrelevant to those that would be relevant if the decision-maker refused to grant a protection visa by applying s 501 and relying on either or both of Arts 32 and 33(2).

205 Section 500(1)(c) provides for the review of a decision refusing to grant a protection visa under s 501 that is a decision relying on Art 32 or Art 33(2). Decisions of that kind are to be reviewed by the Administrative Appeals Tribunal, not by the Refugee Review Tribunal. By contrast, a decision to refuse to grant a protection visa relying on PIC 4002 is reviewed[211] by the Refugee Review Tribunal. Not only is the identity of the reviewing body different, the issues that would arise in the two avenues for review are radically different. In the first case, the question would be whether grounds of the kind described in

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211 s 411(1)(c).

Art 32 or Art 33(2) were established. That would require consideration of the facts and circumstances that underpinned any conclusion about risks to Australia's security. No doubt it would permit reference to any view that was expressed by or on behalf of ASIO and it would ordinarily be expected that ASIO's views would be sought and be influential. But ASIO's expression of opinion would not, of itself, be conclusive of the enquiry. By contrast, in a review of a decision to refuse to grant a protection visa relying on PIC 4002, the only issue would be whether ASIO had made an adverse security assessment. There would be no issue about whether that assessment was well-founded.

206 Because there are these differences between review of a decision relying on either or both of Arts 32 and 33(2) and a decision relying on PIC 4002 the *outcome* of an application for a protection visa may differ according to which of the provisions is relied on. More importantly, whenever ASIO concludes that a person is a risk to security (as defined in the ASIO Act) a decision to refuse to grant the person a protection visa may *always* be made relying on PIC 4002, and not relying on Art 32 or Art 33(2) and applying s 501. That follows because the matters that may be considered by ASIO in making a security assessment for the purposes of PIC 4002 include, but are not limited to, the matters that engage either or both of Arts 32 and 33(2). Thus, as the defendants accepted, if the prescription of PIC 4002 is valid, the Act can be administered in a way that gives s 500(1)(c) no work to do. Such a construction of the Act should not be adopted "if by any other construction [all of the elements of s 500(1)(c)] may ... be made useful and pertinent"[212]. The preferable construction of the Act reveals the inconsistency of prescribing PIC 4002 as a criterion for the grant of a protection visa with a statutory scheme in which all of the elements of s 500(1)(c) are given work to do.

207 As pointed out earlier in these reasons, in considering the operation of s 65, it is not to be doubted that the Act may provide for a series of criteria for the grant of a visa in such a way that failure to satisfy any one of those criteria would permit or require refusal of an application for the grant of a visa of that type. That is, it may readily be accepted that the Act may provide a decision-maker with alternative paths to the one result. But this observation is beside the point.

208 The question in this case is whether the Regulations may validly prescribe satisfaction of PIC 4002 as a criterion for the grant of a protection visa when the Act itself deals with the same subject matter and provides for a different and special mechanism for review of decisions of the kind identified by the Act. Observing that an application for a protection visa could be refused relying on

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212 *Project Blue Sky* (1998) 194 CLR 355 at 382 [71], citing *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.

Art 32 or Art 33(2) and that, if the prescription of PIC 4002 is valid, it could also be refused for want of satisfaction of the latter criterion presents the relevant question. It does not answer it.

The defendants' construction

209 As noted earlier in these reasons, the defendants sought to meet the proposition that s 31(3) does not authorise the prescription of PIC 4002 by placing the chief weight of their submissions on the proposition that there *can* be no decision to refuse to grant a protection visa "relying on" either Art 32 or Art 33(2). They sought to support this central proposition in several ways. But before considering those arguments it is necessary to deal with a further and apparently more fundamental submission that the defendants made.

210 They submitted that any tension or apparent incongruity between s 31(3) and PIC 4002 on the one hand, and the Act's references to decisions to refuse to grant a protection visa relying on Art 32 or Art 33(2) on the other, should be resolved by treating s 31(3) as the leading provision of the Act and the provisions referring to decisions relying on the identified Articles as subsidiary provisions. It followed, so the defendants submitted, that any inconsistency between the two should be resolved by giving effect to s 31(3) and thus the prescription of PIC 4002. This submission should be rejected.

211 In *Project Blue Sky* it was said[213] that reconciling competing provisions of a statute often requires the court to determine which is the leading provision and which the subordinate, and which must give way to the other. So much may readily be accepted. But in this case, the competition to be resolved is between a visa criterion specified by regulation and express provisions of the Act itself. The proposition that is engaged in this case is that the power given by s 31(3) to prescribe visa criteria cannot be exercised to prescribe a criterion that is inconsistent with or repugnant to the Act. This is not a proposition that depends upon attaching the terms "leading" or "subordinate" to any provision of the Act. It is no more than a reflection of the express words of s 504(1) and the basic proposition that any provision of any Act must always be construed in the context of the whole Act. And, contrary to the defendants' submissions, pointing to how often the power conferred by s 31(3) has been exercised, or even how it was intended to be exercised, does not establish it to be in any relevant sense the leading provision of the Act.

212 It is necessary now to deal with the several different ways in which the defendants sought to support their central proposition – that because there can be

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213 (1998) 194 CLR 355 at 382 [70], citing *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 per Lord Herschell LC.

no decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2), there is no tension between the prescription of PIC 4002 and the provisions of the Act which refer to decisions of that kind.

213 First, the defendants submitted that s 500(1)(c) provides for rights of review and does not prescribe any criterion for the grant of a protection visa. This is correct as a matter of form but it is beside the point. Section 500(1)(c) assumes that there can be decisions of the kind described. Those decisions can be identified as a species of decision made under the s 501 character test. It is from *this* starting point – that there *is* a class of decision under the Act to which s 500(1)(c) refers – that inconsistency between prescribing PIC 4002 and the Act as a whole is to be considered.

214 Second, the defendants submitted that, although the contrary view may have been available at the time of the first enactment of what became s 500(1)(c), the reference in s 36(2)(a) to "a non-citizen in Australia to whom ... Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol" turns on Art 1 of the Convention and not on Arts 32 and 33(2). Again, so much may be accepted. But once the relationship between ss 500(1)(c) and 501 is identified as it has been in these reasons, the observation the defendants make is again beside the point.

215 Third, the defendants submitted that there can be no decision to refuse to grant a protection visa relying on Art 32 because that Article does not apply unless the refugee is "lawfully in" the territory of the relevant State and the plaintiff, they submitted, is not. This submission requires separate consideration.

Article 32 and "lawfully in" the territory

216 In the course of their arguments directed to the lawfulness of the plaintiff's detention (if, as they submitted, PIC 4002 is validly prescribed) the defendants submitted that Art 32 could never found a decision to refuse to grant a protection visa because Art 32 applies only to refugees lawfully in the territory of the State in question and an applicant for a protection visa is not lawfully in Australia. Although not expressly deployed in connection with the argument about the validity of prescribing PIC 4002, it is as well to consider the point, if only because, on its face, it was another and more particular aspect of the defendants' central argument that there can be no decision to refuse to grant a protection visa relying on Art 32 or Art 33(2).

217 The defendants pointed to decisions of the Supreme Court of the United Kingdom[214] and United States courts[215] which, they said, demonstrate that, when used in Art 32, the expression "lawfully in [the] territory" of a State should be read as meaning that "the refugee has been granted the right to live in that State under the domestic law of that State". It may be assumed, for the purposes of this case, that this is the better construction of the expression. The defendants' submissions fastened upon this construction of the expression as denying the possibility of a decision to refuse to grant a protection visa relying on Art 32. On that approach, there could *never* be a decision to refuse to grant a protection visa relying on Art 32 because, by hypothesis, the visa applicant has no right to live in Australia. That must be the hypothesis because, if a person has a right to live in Australia, there is no occasion for that person to seek a protection visa. And it is not to be supposed that the Act, in its references to decisions relying on Art 32, deals separately and only with protection visa applicants who hold some other visa, like a bridging, student or tourist visa, permitting the person to remain in Australia for a limited time or purpose. To read the Act's references to decisions relying on Art 32 as applying only to persons of that class would have the Act's operation depend upon the capricious happenstance of whether the decision to refuse a protection visa was made during the currency of the relevant temporary visa. But contrary to the defendants' submissions, it by no means follows that the Act's references to a decision to refuse to grant a protection visa relying on Art 32 can be ignored or treated as a mistaken reference having no useful work to do.

218 It is important to recognise that Art 32 has two relevant elements. First, it refers to a refugee lawfully in the territory, but second, it specifies criteria that must be satisfied before such a person may be expelled. The Act's references to decisions "relying on" Art 32 must be read as directing attention to the *criteria* that are to be satisfied before a refugee may be expelled. And those criteria may then be engaged to yield a decision to refuse to grant a protection visa by the combined operation of ss 65 and 501 of the Act in the manner described earlier in these reasons. Only this construction avoids the circular and capricious application of the Act that would follow from fastening, as the defendants did, upon the first element of Art 32.

219 These are reasons enough to reject the defendants' submission. It is to be noted, however, that the context in which the Act refers to Art 32 also points

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214 *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735 at 748 [33]; [2012] 3 All ER 1037 at 1052. See also *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514 at 526.

215 *Kan Kam Lin v Rinaldi* 361 F Supp 177 at 185-186 (1973); *Chim Ming v Marks* 505 F 2d 1170 at 1172 (1974).

firmly in the direction of understanding the Act to be referring to the second, and not the first, element of Art 32. The Act refers to Art 32 as a ground for refusing to *grant* a protection visa. It thus assumes that Art 32 can found a decision to refuse to grant a protection visa. It also refers to the Article in identifying which decisions are to be subject to review by the Administrative Appeals Tribunal. There is an evident connection between that reference and the provision in Art 32(2) that a refugee be "allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority".

220 The reference in Art 32 to a refugee being "lawfully in" the territory of a State has no bearing upon the present matter or upon the construction of the relevant provisions of the Act. An applicant for a protection visa can have his or her application for a protection visa refused relying on Art 32. It is irrelevant to the application of the Act whether, for the purposes of the Convention, the applicant is or is not "lawfully in" Australia.

Conclusion and answers

221 The defendants' submissions that there can be no decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2) should be rejected. Section 500(1)(c) can and should be construed as having useful work to do. It follows that the prescription by cl 866.225(a) of Sched 2 to the Regulations of PIC 4002 as a criterion for the grant of a protection visa is not valid. Its making is inconsistent with the express provisions of the Act and s 31(3) does not authorise the specification of a criterion inconsistent with the Act. No party suggested that PIC 4002 could be read down.

222 This Court has pointed out, more than once[216], that the text and structure of the Act proceed on the basis that the Act enables Australia to respond to the international obligations that Australia undertook when it acceded to the Convention. The construction of the Act that has been identified is consistent with those obligations. But it will be observed that the reasons given for adopting that construction stem almost entirely from consideration of the text and structure of the Act and do not direct particular attention to the content of the international obligations Australia has under the Convention. Something more should be said, however, about two aspects of the parties' arguments about the operation of the Act and the Convention.

223 The plaintiff placed the notion of "protection obligations" and s 36 at the forefront of his argument. Though expressed in a number of different ways, a

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216 *NAGV* (2005) 222 CLR 161 at 178-180 [54]-[59]; *Offshore Processing Case* (2010) 243 CLR 319 at 339 [27]; *Malaysian Declaration Case* (2011) 244 CLR 144 at 189 [90].

constant thread in many of the submissions advanced on behalf of the plaintiff was that, having been found to be a refugee, he is a person to whom Australia owes protection obligations and he cannot be removed from Australia otherwise than in accordance with Arts 32 and 33(2) of the Convention. Expressed in this way, not only is the argument too broad, it does not engage, as it must, with the text of the Act.

224 The defendants, on the other hand, sought to treat the Court's decisions in *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*)[217] and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*)[218] as establishing that the Act permits and requires expulsion from Australia of a person found to be a refugee whenever the expulsion would not breach Australia's international obligations. This argument appeared to proceed from the premise that the Act should be construed by first construing the Convention and then reading the Act as if it gives effect to that construction. As noted earlier in these reasons, this inverts the proper order of enquiry. The Act should be construed in the light of its recognition of and references to Australia's international obligations but it is the Act and its text which controls.

225 The decisions that have been made to refuse to grant the plaintiff a protection visa have applied a criterion that was not validly made and it follows that the plaintiff's application for a protection visa has not validly been determined. Because that is so, he may lawfully be detained for the purposes of the determination of his application for a protection visa. If that application were to be refused relying on either Art 32 or Art 33(2), because the Minister or the Minister's delegate decided that the plaintiff is a risk to Australia's security, the plaintiff would be entitled (unless s 502(1) were to apply) to seek review of that decision by the Administrative Appeals Tribunal.

226 Other questions that were canvassed in the course of argument are not reached. Whether ASIO failed to accord the plaintiff procedural fairness in making its security assessment need not be considered. The prescription of PIC 4002 as a criterion for the grant of a protection visa being invalid, the assessment that was made does not affect the plaintiff's rights or interests. No question now arises about whether the plaintiff may lawfully be detained for the purposes of his removal. It follows that the arguments advanced by the parties about overruling or distinguishing the decision in *Al-Kateb v Godwin*[219] and about the constitutional limits of the power to detain unlawful non-citizens need not be examined.

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217 (2010) 243 CLR 319.

218 (2011) 244 CLR 144.

219 (2004) 219 CLR 562; [2004] HCA 37.

227 The questions asked by the parties and referred for consideration by the Full Court should be answered as follows:

Question 1

> In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?

Answer

> It is not necessary to answer this question.

Question 2

> Does s 198 of the *Migration Act* 1958 (Cth) authorise the removal of the Plaintiff, being a non-citizen:
>
> 2.1 to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and
>
> 2.2 whom ASIO has assessed poses a direct or indirect risk to security;
>
> to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention as amended by the Refugees Protocol?

Answer

> It is not necessary to answer this question.

Question 2A should be amended to read:

> If the plaintiff's application for a protection visa is refused by reason of the plaintiff's failure to satisfy public interest criterion 4002 within the meaning of clause 866.225 of Schedule 2 of the Migration Regulations 1994, is that clause to that extent ultra vires the power conferred by section 31(3) of the *Migration Act* 1958 (Cth) and invalid?

and answered

> The prescription of public interest criterion 4002 as a criterion for the grant of a protection visa is beyond the power conferred by s 31(3) of the Act and is invalid.

Question 3

Do ss 189 and 196 of the *Migration Act* 1958 (Cth) authorise the Plaintiff's detention?

Answer

The plaintiff is validly detained for the purposes of the determination of his application for a protection visa.

Question 4

Who should pay the costs of the special case?

Answer

The defendants.

228 HEYDON J. During oral argument in *Al-Kateb v Godwin*, McHugh J asked counsel for the appellant[220]: "How can you claim a right of release into the country when you have no legal right to be here?" Most of the plaintiff's arguments in this case were directed to that penetrating question. The plaintiff denied its premise, and denied the answer which the question expected.

The factual background

229 The plaintiff is a national of Sri Lanka. He began a journey by boat from Indonesia with other persons wishing to claim asylum in Australia. The boat was intercepted. The plaintiff was transferred to a detention centre in Indonesia. In December 2009, he entered Australia at Christmas Island pursuant to a special purpose visa. That visa expired 50 minutes after his arrival. The plaintiff has not since possessed a visa. He has not been "immigration cleared". When his visa expired he was detained pursuant to s 189(3) of the *Migration Act* 1958 (Cth) ("the Act")[221]. That was because he was known or reasonably suspected to be an unlawful non-citizen in an excised offshore place, namely Christmas Island[222]. The plaintiff has since been transferred to a detention centre on the Australian mainland. There he is detained pursuant to ss 189(1) and 196(1) of the Act[223]. That is because he is known or reasonably suspected to be an unlawful non-citizen in the migration zone (that is, in a part of Australia other than an excised offshore place)[224].

230 In 2009, the Australian Security Intelligence Organisation ("ASIO") made an adverse security assessment of the plaintiff ("the 2009 assessment"). The 2009 assessment was that the plaintiff was directly or indirectly a risk to Australia's security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act")[225]. ASIO forwarded this adverse security assessment to the Department of Immigration and Citizenship.

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220 (2004) 219 CLR 562 at 565; [2004] HCA 37.

221 See above at [152] n 173.

222 *Migration Act* 1958 (Cth), ss 5(1) (definition of "excised offshore place") and 14 (definition of "unlawful non-citizen").

223 See above at [177].

224 *Migration Act* 1958 (Cth), s 5(1) (definition of "migration zone").

225 See above at [203].

231 A delegate of the Minister for Immigration and Citizenship then refused to grant the plaintiff a protection visa. That refusal was based on public interest criterion 4002 in Sched 4 of the Migration Regulations 1994 (Cth) ("the Regulations"). Public interest criterion 4002 is:

> "The applicant is not assessed by [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]."

As the plaintiff did not satisfy this criterion, the delegate found that the plaintiff did not meet the requirements of cl 866.225(a) of Sched 2 of the Regulations. Under that clause, an applicant cannot be granted a protection visa unless the applicant satisfies public interest criteria 4001, 4002 and 4003A.

232 However, the delegate found that the plaintiff had a well-founded fear of persecution in Sri Lanka by reason of his race and the political opinions imputed to him. The delegate also found that were the plaintiff to return to Sri Lanka there was a real chance that he would be persecuted by being abducted, tortured or killed. The Refugee Review Tribunal affirmed the delegate's decision.

233 The plaintiff has no right to enter and remain in any country (other than Sri Lanka). He thus has no right to enter and remain in any safe third country within the meaning of s 91D of the Act.

234 The plaintiff was dissatisfied with the interview that led to the 2009 assessment. In 2011, ASIO officers interviewed the plaintiff for the purpose of making a new security assessment. The plaintiff's lawyer was present. On 9 May 2012, the Director-General of Security issued another adverse security assessment ("the 2012 assessment"). On the same day, ASIO furnished the Department of Immigration and Citizenship with it. The 2012 assessment concluded that the plaintiff was directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act. In consequence, the plaintiff remained unable to satisfy public interest criterion 4002 and cl 866.225(a) of Sched 2 of the Regulations.

235 The plaintiff concedes that he is being detained for the purpose of removal from Australia. The Department of Immigration and Citizenship does not intend to remove the plaintiff to Sri Lanka. The Commonwealth Executive has made efforts to find a safe third country to which the plaintiff can be removed. Some efforts have not succeeded. The success of others remains in suspense. The Executive plans to continue those efforts.

The controversy in outline

236 The defendants – the Director-General of Security; the Officer in Charge, Melbourne Immigration Transit Accommodation; the Secretary, Department of Immigration and Citizenship; the Minister for Immigration and Citizenship; and

the Commonwealth of Australia – will be referred to collectively as "the Commonwealth".

237 The Commonwealth advanced two key arguments. The first was that s 198(2) of the Act creates a duty to "remove" the plaintiff "as soon as reasonably practicable" because he is an "unlawful non-citizen" of the kind described in s 198(2)[226]. Although Australia owes him protection obligations, he is an unlawful non-citizen because he has been refused a visa for failure to satisfy public interest criterion 4002. The second was that s 196(1) makes it lawful to keep the plaintiff in immigration detention until removal can be effected under s 198(2)[227].

238 Under the refining pressure of oral debate, the plaintiff's attack on the Commonwealth's position came to rest on four arguments.

239 The first argument was that ASIO's decision to issue a second adverse security assessment had been vitiated by a failure to accord the plaintiff procedural fairness. He submitted that the critical issues on which the decision turned had not been put to him during his interview with the ASIO officers.

240 The second argument was that s 198(2) does not apply to the plaintiff. The Minister's delegate and the Refugee Review Tribunal concluded that the plaintiff had a well-founded fear of persecution for a Convention reason. Hence Australia owes him protection obligations under the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees ("the Convention"), as embodied in the Act. The plaintiff submitted that s 198(2) should be read down to "facilitate and reflect" Australia's Convention obligations as embodied in the Act. If s 198(2) is read down in that way, he argued, it does not apply to him. The plaintiff submitted that because he is owed protection obligations he cannot be removed from Australia pursuant to s 198(2). Accordingly, the Commonwealth cannot expel him for non-compliance with public interest criterion 4002 unless it complies with the procedure established by s 500(1)(c) of the Act.

241 The third argument was put in the alternative to the second. If the second submission were wrong, the plaintiff submitted that he could not be removed from Australia for non-satisfaction of public interest criterion 4002 because that criterion is ultra vires the Act. If either the second or the third arguments succeeded, the plaintiff submitted that his continued detention is unlawful. The plaintiff is detained under s 196(1) so as to enable his removal pursuant to

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226 See above at [177].

227 See above at [177].

s 198(2). In the plaintiff's submission, if the Act confers no power to remove him, his detention has no statutory basis.

242 In the event that the first three arguments failed, the plaintiff put a fourth argument. It was that it could be inferred from the failed efforts of the Department of Immigration and Citizenship to remove him that it was not reasonably practicable to do so. His continued detention would therefore be detention for an unlimited period. The plaintiff submitted that this is unlawful. This argument depended on distinguishing or overruling *Al-Kateb v Godwin*[228].

243 It is convenient to deal with these issues in that order. Each should be resolved in favour of the Commonwealth.

Question 1 in the Further Amended Special Case: procedural fairness

244 Question 1 in the Further Amended Special Case is: "In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?"

245 The first defendant, the Director-General of Security, swore an affidavit in these proceedings. In that affidavit he said:

> "Based on ASIO's investigations, I assessed that the plaintiff:
>
> a. was a voluntary and active member of the Liberation Tigers of Tamil Eelam (LTTE) Intelligence Wing from 1996-1999, with responsibilities including identifying Sri Lankan Army collaborators, which he was aware likely led to extrajudicial killings, and maintained further involvement in intelligence activities on behalf of the LTTE from 1999-2006;
>
> b. deliberately withheld information regarding his activities of security concern and provided mendacious information throughout the security assessment process in order to conceal such activities; and
>
> c. remains supportive of the LTTE and its use of violence to achieve its political objectives, and will likely continue to support LTTE activities of security concern in and from Australia."

The affidavit continues: "I assessed the plaintiff to be directly or indirectly a risk to Australia's security, within the meaning of section 4 of the ASIO Act."

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228 (2004) 219 CLR 562.

246 Like the 2009 assessment, the 2012 assessment caused the plaintiff not to satisfy public interest criterion 4002. It thus had a dramatic effect on the plaintiff's liberty. For that reason, the Commonwealth conceded that ASIO owed the plaintiff an obligation of procedural fairness in the making of the 2012 assessment. The question in these proceedings is whether that obligation was breached.

247 The plaintiff's written submissions centred on a contention that the obligation was breached because the ASIO officers failed to disclose the following allegations:

> "(a) that the plaintiff maintained further involvement with LTTE Intelligence activities from 1999-2006;
>
> (b) that the plaintiff remains supportive of the LTTE's use of violence to achieve political objectives; and
>
> (c) that the plaintiff is likely to continue to support the LTTE activities of security concern in and from Australia."

The plaintiff submitted that the ASIO officers mistakenly assumed that he bore the "evidentiary onus" of satisfying them that he was not a threat to national security. This, according to the plaintiff, caused the ASIO officers not to put the three allegations to him.

248 In oral argument, the plaintiff did not press his claim that procedural fairness was denied in relation to pars (a) and (b) of the Director-General's affidavit. There was in truth copious questioning on those subjects. The plaintiff was asked whether he was a voluntary and active member of the LTTE Intelligence Wing from 1996 to 1999. He was asked whether his responsibilities included identifying Sri Lankan Army collaborators. He was asked whether he was aware that his identifications of Sri Lankan Army collaborators had probably led to extrajudicial killings. He was asked whether he maintained further involvement in intelligence activities on behalf of the LTTE from 1999 to 2006. He was asked whether he had deliberately withheld information regarding his activities of security concern during the interview. He was asked whether he had provided mendacious information during the interview. He was asked whether his purpose in withholding information and providing mendacious information was to conceal his activities with the LTTE.

249 In oral argument, counsel for the plaintiff accepted that the only important matter which the ASIO officers had not raised with the plaintiff was the material in par (c) of the quotation from the Director-General's affidavit set out above. Paragraph (c) related to the extent to which the plaintiff remained supportive of LTTE violence.

250 The plaintiff accepted that national security considerations might legitimately result in ASIO officers not fully raising matters with a person in his position[229]. But he submitted that there was no evidence that national security considerations had been applied to this effect in his case.

251 There is a concrete difficulty in the plaintiff's position. Counsel for the plaintiff submitted that if the allegation in par (c) had been put to him, he might have disputed its truth. He might have said that "he was not [sic] and would not continue to support the activities in Australia, that things had fundamentally changed in Sri Lanka, that the context was fundamentally different in the context of the civil war which had now finished and that in a different environment things were completely different, including the disbandment of the LTTE." There was no evidence before the Court to this effect. No agreed fact supported the submission. The debate thus took on an abstract air.

252 The interview was largely directed to the plaintiff's dealings with the LTTE. The plaintiff was accompanied by his lawyer. The interview ran from 9.30am to 2.35pm. There were three breaks in the interview – from 10.35-10.45am, 12.00-12.15pm and 1.15-1.40pm. The plaintiff could have consulted her during those breaks. The plaintiff was offered a break at any time he desired. The plaintiff was given a number of opportunities to explain obscurities, or inconsistencies between what he was saying and what he had said on earlier occasions or earlier in the interview. One interviewer told the plaintiff: "I would like to understand your activities and your involvement with the LTTE, this is your opportunity to talk, to tell us about that and to tell us what you think we should know about that." A full answer to that request would have dealt not only with the plaintiff's past activities, but also with his present relationship with the LTTE. The interviewers repeatedly made it plain that it was incumbent on the plaintiff to answer their questions fully and honestly. They also made it plain that they did not believe the plaintiff's assertions that he had been pressed into service with the LTTE and that he had not supported it. The interviewers identified reasons for their disbelief – for example, inconsistencies and belated explanations. The plaintiff was thus on notice that his account of involuntary service with the LTTE was not being accepted. The contrary of involuntary service is voluntary service. In the circumstances, the interviewers' statements of disbelief in the plaintiff's claim of involuntary service were not to be understood as assertions that their minds were in a state of sceptical equipoise. They were to be understood as assertions that the interviewers were inferring voluntary service.

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229 The ASIO Act owes its origins to the Reports of a Royal Commission presided over by Mr Justice Hope. Section 36(b) of the ASIO Act reflects the observation of the Commission's Second Report at [134]: "The understandable desire of individuals to have all the rules of natural justice applied to security appeals must be denied to some extent, unfortunate though this may be."

253 It is highly unlikely that the plaintiff's position would be different if the interviewers had stated the par (c) allegation and said: "We may reach that conclusion. What do you say to that?" That question would have rested on the premise that the plaintiff had once supported the LTTE. The plaintiff had persistently denied that premise. There was no obligation on the interviewers to ask the plaintiff: "We know you deny ever having supported the LTTE. But in case we disbelieve you on that and believe that you did support the LTTE in the past, do you remain supportive?" The Commonwealth correctly submitted that questioning of that kind would have been "futile", "utterly pointless" and "farcical". It follows that the interviewers did not in substance deny the plaintiff procedural fairness in the manner alleged.

Question 2 in the Further Amended Special Case: does s 198 authorise the plaintiff's removal?

254 Question 2 is:

> "Does s 198 of the [Act] authorise the removal of the Plaintiff, being a non-citizen:
>
> 2.1 to whom Australia owes protection obligations under the [Convention]; and
>
> 2.2 whom ASIO has assessed poses a direct or indirect risk to security;
>
> to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the [Convention]?"

255 This question assumes that public interest criterion 4002 is valid. If question 2 were answered "Yes", question 2A arises. It concerns the validity of public interest criterion 4002.

256 *The relevant Articles of the Convention.* It is useful at the outset to set out the three Articles of the Convention which are relevant to this question. Article 1F provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Article 32 provides:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

And Art 33 provides:

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

257 *The plaintiff's case.* The plaintiff's case relied on the finding of the delegate and of the Refugee Review Tribunal that he was a "refugee" within Art 1A(2) of the Convention. That is, their finding was that he was a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

Because of that finding, the plaintiff satisfied the criterion for a protection visa stated in s 36(2)(a) of the Act[230], namely that the Minister be satisfied that Australia has "protection obligations" under the Convention in respect of him.

258 The plaintiff pointed out that s 500(1) of the Act makes special provision for review of certain decisions by the Administrative Appeals Tribunal ("the AAT"):

> "(1) Applications may be made to the [AAT] for review of:
>
> ...
>
> (b) decisions of a delegate of the Minister under section 501; or
>
> (c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the ... Convention, namely, Article 1F, 32 or 33(2)".

259 The plaintiff argued that s 198 is directed only to "unlawful non-citizens". An "unlawful non-citizen" is a non-citizen in the migration zone who does not hold a visa: s 14 of the Act. He argued that a person cannot be both a person to whom Australia owes protection obligations under s 36(2)(a) *and* an unlawful non-citizen within the meaning of s 14 *unless* a decision under the Act to refuse to grant or to cancel a protection visa has been made. He contended that the only Articles in the Convention permitting expulsion of persons to whom Australia owes protection obligations are Arts 32 and 33(2). He argued that s 500(1)(c) creates a special regime that applies to decisions to refuse or cancel protection visas in reliance on those Articles.

260 In the plaintiff's submission, if the route that s 500(1)(c) provides for is employed, a person to whom Australia owes protection obligations can validly be removed under s 198. But if it is not employed, there is no power to remove the person. In short, the plaintiff submitted that the general power of removal under s 198(2) is not triggered by a decision to refuse a protection visa to an unlawful non-citizen to whom Australia owes protection obligations without going through the special kind of process and review that s 500(1)(c) contemplates. He argued that the decision refusing to grant him a protection visa on the ground of non-compliance with public interest criterion 4002 was not a decision "relying on" Arts 32 or 33(2). The Minister's delegate made two relevant findings. The first was that Art 1F had no application. The second was that the 2009 assessment was not of itself sufficient to bring Art 33(2) into play. The Refugee Review Tribunal accepted both these findings as correct. The Commonwealth expressly

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230 See below at [264].

accepted that the second finding was correct. The plaintiff argued that in the absence of a decision "relying on" Arts 32 or 33(2), s 198 does not apply.

261 *The distinction between refugee status and the entitlement to a visa.* The Commonwealth correctly submitted that the plaintiff's argument was afflicted by a fatal flaw. The argument did not deal with a crucial distinction between two states of affairs. The first state of affairs is a person's well-founded fear of persecution within the meaning of Art 1A(2). The second state of affairs is the entitlement of that person to a visa permitting residence in Australia. The first state of affairs gives the person refugee status, and from it there flow various obligations which Australia owes to other parties to the Convention. Two of these are the obligations that Arts 32 and 33 of the Convention create. But it does not follow from the first state of affairs, or from Australia's international obligations to the other parties to the Convention, that the relevant person has any entitlement to a visa. That person's entitlement to a visa depends on the Act alone. In the absence of legislation, the Convention has no effect on the rights and duties of individuals or of the Commonwealth under Australian municipal law.

262 The plaintiff relied on statements in this Court that the Act proceeds on the assumption that Australia has protection obligations to individuals. He also relied on statements in this Court that the Act contains an elaborate and interconnected set of provisions directed to meeting those obligations, in particular, by not returning those individuals to countries in relation to which they have a well-founded fear of persecution for a Convention reason[231]. The plaintiff submitted that the Act should be construed in a way that facilitates Australia's compliance with its Convention obligations, to the extent that the text and context of the relevant provisions permit[232].

263 Those submissions may be accepted for the purpose of the proceedings. However, the legislature may well decide not to adopt the whole of a treaty that the Executive has entered. "[T]he purposes of international instruments are not necessarily to be pursued at all costs."[233] "The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of differing viewpoints, the desire for limited achievement of objectives, or the constraints

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231 The plaintiff relied on *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 174 [44] and 189 [90]; [2011] HCA 32.

232 The plaintiff relied on *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 192 [98].

233 *Western Australia v Ward* (2002) 213 CLR 1 at 283 n 833 per Callinan J; [2002] HCA 28.

imposed by limited resources."[234] The authorities which the plaintiff relied on did not state that the Act gives effect to the whole of the Convention. It is notorious that it does not. The relevant question is what the Act provides, not the Convention.

264 *The visa regime under the Act.* What regime, then, does the Act create in relation to visas? Section 4(1) of the Act provides:

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

Section 4(2) provides:

> "To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter [sic] or remain."

The visa category that is relevant to the plaintiff is protection visas. Section 36(2) relevantly provides:

> "*A criterion* for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the ... Convention". (emphasis added)

Hence the existence of protection obligations on the part of Australia is a necessary but not a sufficient condition for the grant of a protection visa. Section 31(3) provides:

> "The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section ... 36 ...)."

Section 65(1) provides:

> "After considering a valid application for a visa, the Minister:
>
> (a) if satisfied that:
>
> (i) the health criteria for it (if any) have been satisfied; and

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234 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 per Dawson J; [1997] HCA 4.

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

(iii) the grant of the visa is not prevented by section 40 ..., 500A ..., 501 ... or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

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

The criteria the Regulations prescribe will be likely to extend beyond the criterion of being a person to whom Australia has protection obligations. Otherwise the grant by s 31(3) of regulation-making power in relation to protection visas would be pointless.

265 The s 31(3) regulation-making power was used to introduce regulations at the same time as the *Migration Reform Act* 1992 (Cth) came into force in 1994. Those regulations listed various criteria of which the Minister had to be satisfied when making the decision to grant a visa. The form of those criteria has often changed, but their substance survives. One criterion was that the applicant was a person to whom Australia owed protection obligations under the Convention: Migration Regulations 1994, Sched 2, cl 866.221. Another was that a Commonwealth medical officer had examined the applicant: cl 866.223. Another was that the applicant had undergone a chest x-ray examination: cl 866.224. Another was that the grant of the visa be in the national interest: cl 866.226. And another was that the applicant satisfied public interest criteria 4001-4004: cl 866.225.

266 Public interest criterion 4001 required satisfaction that nothing in s 501 of the Act (the character test) justified a decision to refuse to grant a visa. Public interest criterion 4002 was not then identical to its present form[235] but it also related to security. Public interest criterion 4003 related to persons whose presence in Australia would prejudice foreign relations. And public interest criterion 4004 related to indebtedness to the Commonwealth. None of these public interest criteria related or relate to whether the applicant was or is owed protection obligations. And none relate in terms to whether the applicant falls

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235 For its present form, see above at [231]. Its original form was: "The applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security."

within Arts 1F, 32 or 33 of the Convention, save that there is an overlap between those Articles and parts of the character test[236].

267 The regulations just described go to the question of whether the applicant is to receive a visa. They do not go to the question of Australia's compliance with its international obligations.

268 Whatever international obligations Australia owed to other parties to the Convention in respect of the plaintiff, the plaintiff had no entitlement to remain in Australia without a visa. The Commonwealth correctly contended that one criterion referred to in s 65(1)(a)(ii) was the Minister's satisfaction that cl 866.225(a) of Sched 2 of the Regulations, read with public interest criterion 4002 of Sched 4 of the Regulations, was met. The plaintiff did not meet that criterion. The Minister refused to grant him a visa. Since the plaintiff had no visa, the Act imposes a duty under s 189(1) to detain him. It imposes a duty under s 196 to keep him in detention until he is removed, deported or granted a visa. And it imposes a duty under s 198 to remove him as soon as reasonably practicable.

269 Sections 31(3), 36(2) and 65(1) of the Act all had counterparts in the *Migration Reform Act* 1992 (Cth). So did the other provisions central to this case – ss 189, 196 and 198 of the Act. The scheme these provisions create is exhaustive in that it leaves no room for an unlawful non-citizen – a non-citizen without a visa – to be entitled to remain. The exhaustive character of the scheme is supported by many parts of the Explanatory Memorandum to the Migration Reform Bill 1992. Those parts can be summarised in the following two passages. The first states that the "general principle" of the legislation was "that the visa should be the basis of a non-citizen's right to remain in Australia lawfully."[237] The second passage states that the aim of the legislation was "to simplify the removal process so that all persons unlawfully in Australia will be subject to removal from the country."[238] In *Al-Kateb v Godwin*, the scheme so

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236 The extent of the overlap depends on the nature of the applicant's criminal record and on s 501(6)(d)(v) of the Act. See below at [301]. In some respects, s 501(6)(d)(v) may be wider than Arts 32 and 33, because it refers not only to a danger to the Australian community, but to danger to a "segment" of it. This may contrast with "national security or public order" (Art 32(1)) or "a danger to the security of the country ... or ... a danger to the community of that country" (Art 33(2)).

237 Australia, House of Representatives, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, Explanatory Memorandum at 18 [27].

238 Australia, House of Representatives, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, Explanatory Memorandum at 10 [55].

(Footnote continues on next page)

created was described as effecting "a radical change"[239] in Australia's approach to asylum seekers. That change was summarised thus[240]:

> "These provisions for the mandatory detention of unlawful non-citizens applied regardless of whether the person concerned was seeking permission to remain in Australia (whether as a refugee or otherwise). *They applied even if the person concerned had entered Australia with permission but that permission had later terminated.* All who did not have a valid permission to enter and remain in Australia were 'unlawful non-citizens' and were to be detained." (emphasis added)

The plaintiff's argument that some unlawful non-citizens cannot lawfully be detained or removed would leave a hole in the statutory scheme. Yet the Explanatory Memorandum explained that the scheme precluded that possibility.

270 One problem for the plaintiff is that he could not point to a specified statutory exception creating a hole of that kind in his favour. Another problem for the plaintiff is that the Act requires him to have a visa. That in turn calls on him to satisfy all necessary criteria for the grant of a visa. Satisfaction of one of them, the s 36(2) criterion, is not enough. A third problem lies in dicta that even if a non-citizen is found to be a refugee, removal of that person under s 198(2) is possible provided, as the Commonwealth conceded, Arts 32 and 33(2) are complied with[241].

271 *The High Court authorities.* The Commonwealth submitted that it is one thing to meet the definition of "refugee" in Art 1A(2) of the Convention, but it is another thing to be received as a refugee by a party to the Convention. There is ample authority in this Court and in the Federal Court of Australia to support that submission.

See also at 2 [8], 3 [12], 4 [15]-[18], 9 [48], 10 [54] and 18 [25]. Two other parts are quoted in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 175-176 [40]; [2005] HCA 6. That case traces the history of how refugee status was determined, from the pre-1980 position to the present position which came into effect in 1994: see at 174-176 [35]-[41].

239 (2004) 219 CLR 562 at 633 [204] per Hayne J.

240 (2004) 219 CLR 562 at 633-634 [207].

241 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 178 [54], 189 [89], 190 [91] and 190-191 [94].

272 This Court has described the position before the Convention was made as follows. In *Minister for Immigration and Multicultural Affairs v Ibrahim*, Gummow J (with whom Gleeson CJ and Hayne J agreed) said[242]:

> "[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national. The proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of this Court."[243]

273 Gummow J described the position in relation to the Convention in *Applicant A v Minister for Immigration and Ethnic Affairs*. That oft-cited analysis has never been doubted in this Court. He said[244]: "[D]ecisions to admit persons as refugees to the territory of member states are left to those states." Gummow J then pointed out that this state of affairs was accepted in recommendation D of the Final Act of the United Nations Conference at Geneva in 1951. That Conference agreed on the Convention. Recommendation D stated:

> "Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement."

This was not a recommendation that refugees necessarily find asylum and resettlement in the territories in which they are received. Gummow J approved the following statement of Lord Mustill in *T v Home Secretary*[245]:

> "[A]lthough it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries."

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242 (2000) 204 CLR 1 at 45 [137]; [2000] HCA 55. See, to the same effect, *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [14].

243 *Robtelmes v Brenan* (1906) 4 CLR 395; [1906] HCA 58.

244 (1997) 190 CLR 225 at 273 citing *Sale v Haitian Centers Council* 509 US 155 (1993) and *T v Home Secretary* [1996] AC 742.

245 [1996] AC 742 at 754: see (1997) 190 CLR 225 at 273-274.

The last sentence demonstrates the need to inquire what restraint on executive discretion the Act creates. Gummow J continued[246]:

> "The Convention resolves in a limited fashion the tension between humanitarian concerns for the individual and that aspect of state sovereignty which is concerned with exclusion of entry by non-citizens, '[e]very society [possessing] the undoubted right to determine who shall compose its members'[247]."

Gummow J then quoted with approval the following observation of Lord Goff of Chieveley and Lord Hoffmann[248]:

> "Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any contracting state. It is always a status relative to a particular country or countries."

And Gummow J quoted the following remarks of a commentator with approval[249]:

> "[The] framers [of the Convention] sought to guard the sovereign right to determine who should be allowed to enter a State's territory and the instrument was designed to deal with refugees already in third States' territories as a result of World War II and its aftermath. The Convention only obliges State parties to guarantee *non-refoulement* or non return to the place of persecution. It does not guarantee asylum in the sense of permanent residence or full membership of the community, nor does it guarantee admission to potential countries of asylum. Rather, the Convention establishes a regime of temporary or interim protection."

274 Thus the Convention does not detract "from the right of a Contracting State to determine who should be allowed to enter its territory."[250] In Australian

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246 (1997) 190 CLR 225 at 274.

247 *Robtelmes v Brenan* (1906) 4 CLR 395 at 413.

248 *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68 at 79: see (1997) 190 CLR 225 at 274.

249 Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia", (1994) 15 *Australian Year Book of International Law* 35 at 54-55: see (1997) 190 CLR 225 at 274.

law, "absent some authority conferred by statute, aliens have no right to enter or reside in Australia"[251]. The relevant statute is the Act. It controls entry by a visa regime. Section 65 regulates the grant of visas. Section 65 creates requirements additional to refugee status before a person can be granted a protection visa. Recognition by a delegate of the Minister and by the Refugee Review Tribunal of a person as a refugee does not in Australia confer a right to asylum in the sense that that person is permitted to live and work in Australia. It confers a right of refuge. That right of refuge may be temporary.

275 McHugh and Gummow JJ confirmed what was said in *Applicant A v Minister for Immigration and Ethnic Affairs* in *Minister for Immigration and Multicultural Affairs v Khawar*. Their Honours said[252]:

> "The term 'asylum' does not appear in the main body of the text of the Convention; the Convention does not impose an obligation upon Contracting States to grant asylum or a right to settle in those States to refugees arriving at their borders." (footnote omitted)

Their Honours approved the following statement of a commentator[253]:

> "States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum.
>
> Today, the generally accepted position would appear to be as follows: States consistently refuse to accept binding obligations to grant to persons, not their nationals, any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that

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250 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 170 [16] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

251 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 613 [139] per Gummow J, citing *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 81-82; [1925] HCA 53.

252 (2002) 210 CLR 1 at 15 [42]; [2002] HCA 14.

253 Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum", (1986) 60 *Australian Law Journal* 148 at 153: see (2002) 210 CLR 1 at 16 [44].

> the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself." (footnotes omitted)

And their Honours said[254]:

> "the Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower."

276 The passage lastly quoted from *Minister for Immigration and Multicultural Affairs v Khawar* was also quoted by the majority in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[255]. The majority added[256]:

> "Section 36, like the Convention itself, is not concerned with permanent residence in Australia or any other asylum country, or indeed entitlements to residence for any particular period at all."

This rests on a distinction between a person who has refugee status and a person who has a right to residence in Australia by virtue of a visa. The majority then rejected an argument which is very similar to the plaintiff's argument in this case[257]:

> "The first respondent argued ... that once he has been accepted as a refugee he must be taken to be a refugee for all times and purposes, stressing that Chs II, III and IV which are concerned with juridical status, employment and welfare in the country of asylum, and which confer upon a refugee many of the other conventional benefits of citizenship, including rights to hold property (albeit as an alien) (Art 13), of association (Art 15), access to the courts (Art 16), to work for remuneration [Art 17], and to welfare (Arts 20-24), imply that a person, once recognised as being entitled to protection, effectively ceases to be a refugee, acquires a 'status' as an ordinary citizen, and may not be treated otherwise, or removed from Australia, or at least not removed unless and until the [Minister] establish relevantly changed circumstances in the first respondent's own or former country of residence." (footnote omitted)

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254 (2002) 210 CLR 1 at 16 [45].

255 (2006) 231 CLR 1 at 14-15 [34]; [2006] HCA 53.

256 (2006) 231 CLR 1 at 16 [36] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

257 (2006) 231 CLR 1 at 19 [47].

The argument was rejected for the following reasons[258]:

> "The argument would fail even if the Act left open unqualified recourse to the articles upon which the first respondent seeks to rely for the implication. Those articles do not purport to define a refugee either for all times or purposes or at all. Nor do they touch upon how a refugee is to be defined or accorded recognition as such, or to be entitled to continue to avail himself of protection. These matters are expressly and exhaustively the subject of Art 1 of Ch I. Such consequential rights as flow from recognition as a refugee and give effect to the extent that they do to the Convention, are the subject, in part at least, of the Act under which conditions of residence can be imposed, and of other legislation, including social security and industrial legislation enacted from time to time."

277 The Act did not incorporate into Australian municipal law the protection obligations contained in Chs II, III and IV of the Convention. It is therefore not open to the plaintiff to claim through that route, as a matter of personal rights in Australian law, rights of "free access to the courts of law" (Art 16), rights of gainful employment (Ch III) and rights to welfare (Ch IV). There are other statutory provisions which give the plaintiff rights of "free access to the courts". Even if Australian legislation had incorporated the rights in Chs III and IV, they would be available to the plaintiff only to a limited extent. The rights in Ch III extend only to refugees "lawfully" in Australia. The same is true of the rights in Arts 21, 23 and 24. The plaintiff is not "lawfully" in Australia[259]. It is not Convention rights which create lawful status. It is lawful status – the possession of a visa – which creates rights. And the rights it creates are only those rights which are recognised in municipal law.

278 *The Federal Court authorities.* The state of authority in the Federal Court of Australia is consistent with that established by this Court.

279 In *SZ v Minister for Immigration and Multicultural Affairs*[260], the Full Court of the Federal Court of Australia took the same view as Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs*. Branson J, with whom Beaumont and Lehane JJ agreed, said[261]:

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258 (2006) 231 CLR 1 at 19 [48].

259 See below at [284]-[293].

260 (2000) 101 FCR 342.

261 (2000) 101 FCR 342 at 345 [14].

> "The contentions of the applicant were unequivocally based on the assumption that if he is a person to whom Australia has protection obligations under the ... Convention he has a right of asylum in Australia. This assumption is not well founded. The ... Convention provides a definition of the term 'refugee' in Art 1, but does not create any general right in a refugee to enter and remain in the territory of a Contracting State."

Her Honour then quoted the passage from Lord Mustill's speech in *T v Immigration Officer* which was quoted above[262]. Branson J continued[263]:

> "The position is the same in Australia under both international law and municipal law. The position under the ... Convention is mentioned above. As is explained below, the Act does not give to a person who falls within the definition of 'refugee' in the ... Convention any right to enter or remain in Australia."

Later, her Honour said[264]:

> "As I have already mentioned, the assumption made by the applicant that s 36 of the Act gives an unqualified right to remain in Australia to every person to whom Australia has protection obligations under the ... Convention is unsustainable. The assumption would be unsustainable even were it the case that such a right exists under international law."

Branson J then referred to a submission that the Convention had been incorporated into Australian municipal law by s 36 of the Act. Her Honour noted[265]:

> "For the purpose of considering the validity of these contentions I will assume, contrary to the fact, that the ... Convention creates a general right in a refugee to enter and remain in the territory of a Contracting State."

She continued[266]:

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262 See above at [273].

263 (2000) 101 FCR 342 at 346 [15].

264 (2000) 101 FCR 342 at 347 [23].

265 (2000) 101 FCR 342 at 347 [25].

266 (2000) 101 FCR 342 at 348 [28]-[29].

> "What s 36 of the Act does do is to make it clear that protection visas are intended to be available only to persons to whom Australia has, as a matter of international law, protection obligations under the ... Convention. That is, s 36 refers to the ... Convention for the purpose of defining by reference to its terms a criterion for the grant of a protection visa under the Act.
>
> However, reference in s 36(2) to '[a] criterion' implicitly recognises the possibility of additional criteria being prescribed for protection visas (see s 31(3)). Nothing in the Act limits the criteria which may be prescribed pursuant [to] s 31(3) to criteria which are consistent with Australia's international obligations under the ... Convention."

Of s 65(1), Branson J said[267]:

> "it specifies matters additional to the prescribed criteria concerning which the Minister must be satisfied before he or she grants any visa. Not surprisingly, as the subsection is of general application, these matters are not derived from the ... Convention."

Her Honour went on[268]:

> "Section 36 of the Act does not give an entitlement to a protection visa to every 'non-citizen in Australia to whom Australia has protection obligations under the [Convention]'. ... [A]ll entitlements to visas under the Act are dependent upon Ministerial satisfaction (s 65(1)). ... Section 189 of the Act places an obligation on every officer ... who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen to detain that person. A person detained under s 189 must be kept in immigration detention until he or she is removed from Australia, deported or granted a visa (s 196(1)). That is, as the grant of a visa is the grant of an authority to enter and remain lawfully in Australia, in the absence of a grant of a visa, a non-citizen cannot lawfully enter or remain in Australia."

280 This reasoning has been consistently applied in the Federal Court of Australia. Thus in *Patto v Minister for Immigration and Multicultural Affairs*, French J said[269]:

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267 (2000) 101 FCR 342 at 348 [30].

268 (2000) 101 FCR 342 at 349 [32].

269 (2000) 106 FCR 119 at 127-128 [27].

> "There is no right of asylum conferred by the ... Convention ... Whatever the true position at international law generally, the relevant municipal law of Australia gives effect only to protection obligations assumed by Australia as a contracting party to the ... Convention. The primary obligation arises out of the prohibition against refoulement in Art 33."

In *Ruddock v Vadarlis*[270] French J said: "Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not." And in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, Goldberg, Weinberg and Kenny JJ said[271]:

> "The ... Convention does not purport to confer a right of asylum on a refugee in a contracting state ... A refugee within the meaning of Art 1 of the ... Convention has no right under international law to insist on being received by a country of refuge".

281 *"Surrogate protection" under the Act.* The following argument illustrates the confusion underlying the plaintiff's submission:

> "The 'protection obligations' in s 36(2) are best understood as a general expression of the precept to which the Convention gives effect – that is, that States parties are to offer surrogate protection in place of the protection of the country of nationality of which the applicant is unwilling to avail herself or himself. Quite apart from article 33, it encapsulates a range of other obligations imposed by the Convention, including articles 3, 4, 16(1), 17(1), 26 and 32 (each of which may also fairly be characterised as 'protection obligations').[272]"

The examples of protection obligations given in the first of the cases the plaintiff cited, the *NAGV* case, were Art 4 (religious freedom), Art 11 (temporary admission to refugee seamen) and Art 16(1) (free access to courts of law). The examples of protection obligations given in the second of the cases the plaintiff cited, the *Plaintiff M70* case, were Arts 3 (to apply the Convention to refugees without discrimination as to race, religion or country of origin), 4, 16(1), 17(1)

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270 (2001) 110 FCR 491 at 542 [192].

271 (2003) 131 FCR 146 at 157 [34].

272 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 173 [31] and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 195-197 [117]-[119].

(right to engage in employment), 22(1) (right to elementary education) and 26 (right to choose residence and right of free movement). The plaintiff gave the additional example of Art 32. Many of these obligations would find support in Australian municipal law (for example, Arts 3, 4 and 16(1)). But some, such as Art 17(1), would not. Article 17(1) creates an obligation owed to other parties to the Convention in relation to refugees "lawfully" in Australia. It does not create any obligation which Australia owes to refugees in municipal law. The submission that the expression "protection obligations" in s 36(2) requires Australia to give "surrogate protection" to refugee claimants is inconsistent with the authorities examined above[273]. A fortiori, the Act does not so require.

282 *The essential flaw in the plaintiff's construction.* The flaw in the plaintiff's construction of the Act is that it assumes that ss 500(1)(c) and 501 are the only lawful bases on which a person who satisfies the criterion in s 36(2)(a) may be removed from Australia. Sections 500(1)(c) and 501 do not so provide. And s 65(1)(a)(ii) contemplates that regulations may be made creating criteria additional to the applicant having refugee status. Section 65(1)(a)(ii) provides that the Minister, if not satisfied that the applicant meets the regulations prescribed, is obliged to refuse the visa. The plaintiff submitted that public interest criterion 4002:

> "is no different from any other criterion that the Executive, via Regulation, may impose, non satisfaction of which disentitles a visa applicant to be granted the visa but without intersecting with the protection obligations that the Act jealously guards." (footnote omitted)

The argument raises a question. How does the criterion that Australia owes an applicant "protection obligations", which is among the s 65(1)(a)(ii) criteria, prevail over the other criteria? The correspondence or non-correspondence of Arts 32 and 33 with public interest criterion 4002 is a question which may have consequences for the validity of public interest criterion 4002. But it has no significance in respect of question 2 in the Further Amended Special Case. It is incorrect to say that the Act employs "protection obligations" to do anything more than specify one of the several criteria which must be satisfied before the Minister is obliged to grant a protection visa under s 65.

283 Section 36(2)(a) creates "*a*" criterion for the grant of a protection visa. The provisions of s 65(1)(a)(ii) and (iii) assume or provide that there are others. And s 31(3) gives power to create still others by regulation. The Act contemplates that it is possible to satisfy the s 36(2)(a) criterion while not satisfying one of the other criteria. The s 36(2)(a) criterion does not trump, or negate the need to satisfy, the other criteria. In the same way, the criteria which

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273 See above at [273]-[280].

prevent the grant of a protection visa other than those specified in ss 500(1)(c) and 501 are neither subordinate to nor subject to satisfaction of the criteria in ss 500(1)(c) and 501.

284 *Is the plaintiff "lawfully" in Australia for the purposes of Art 32?* The plaintiff submitted that he was "lawfully" in Australia within the meaning of the Convention. There is authority that in the Convention "lawful" refers to what is "lawful according to the domestic laws of the contracting state"[274]. It is immaterial that some of this authority was decided in jurisdictions with refugee law structured differently from the Act. The issue is what Art 32 means as a matter of international law. If a construction of the Convention is available that conforms to any generally accepted construction in the courts of parties to the Convention, this Court will seek to adopt it[275]. The authorities in question are correct for the following reasons.

285 The words "lawfully in" mean more than "in". They require more than mere presence, or tolerated presence. They require presence which is lawful according to the municipal law of the State in which the refugee is present[276].

286 Article 31(1) provides:

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274 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 750 [40]; [2012] 3 All ER 1037 at 1054 per Lord Hope of Craighead DPSC (Baroness Hale of Richmond and Lords Brown of Eaton-under-Heywood, Mance, Kerr of Tonaghmore and Clarke of Stone-cum-Ebony JJSC concurring) (affirming the unanimous decision of the Court of Appeal (*R (ST) v Home Secretary* [2010] 1 WLR 2858; [2010] 4 All ER 314 and the decision of the House of Lords in *R v Home Secretary; Ex parte Bugdaycay* [1987] AC 514 at 526). See also *Simsek v Macphee* (1982) 148 CLR 636 at 644-645; [1982] HCA 7; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [21]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 19 [49]; *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 557 (this point was not disturbed on appeal in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343; [2000] HCA 9); *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526 at 530-531; *Kan Kam Lin v Rinaldi* 361 F Supp 177 (1973, USDCDNJ), affirmed 493 F 2d 1229 (1974, 3rd Cir CA); *Chim Ming v Marks* 367 F Supp 673 (1973, USDCSDNY), affirmed 505 F 2d 1170 (1974, 2nd Cir CA).

275 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34].

276 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 747-748 [31]-[32]; [2012] 3 All ER 1037 at 1051-1052.

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

In that Article, "illegal" and "without authorization" refer to illegality in domestic law. That suggests that "lawfully" in Art 32(1) refers to legality in domestic law as well[277].

287 Further, Art 32 of the Convention uses the same language as Art 31 of the Stateless Persons Convention. The latter obliges parties not to "expel a stateless person lawfully in their territory save on grounds of national security or public order." In *Al-Kateb v Godwin*[278], Gummow J held that Art 31 was of no assistance to the appellant in that case. He had arrived in Australia without a visa and had never received a visa. The meaning of "lawfully" is likely to be the same in both Art 31 of the Stateless Persons Convention and Art 32 of the Convention.

288 A State party is only obligated to afford refugees various Convention rights if those refugees are "lawfully in" its territory. That suggests that the test is lawfulness by that State's municipal law. Thus, for example, Art 26 compels a Contracting State to accord to refugees "lawfully in" its territory the right to choose their place of residence and the right to move freely. As Lord Hope of Craighead DPSC has observed (Baroness Hale of Richmond and Lords Brown of Eaton-under-Heywood, Mance, Kerr of Tonaghmore and Clarke of Stone-cum-Ebony JJSC concurring)[279]:

> "It seems unlikely that the contracting states would have agreed to grant to refugees the freedom to choose their place of residence and to move freely within their territory before they themselves had decided, according to their own domestic laws, whether or not to admit them to the territory in the first place."

289 The Ad Hoc Committee on Statelessness and Related Problems, which drafted Art 32, twice stated that the words "lawfully within their territory" exclude persons who were lawfully admitted but who had overstayed the period

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277 *Chim Ming v Marks* 505 F 2d 1170 (1974, 2nd Cir CA).

278 (2004) 219 CLR 562 at 603 [106].

279 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 750 [37]; [2012] 3 All ER 1037 at 1054.

they were permitted to remain[280]. There was a dispute as to whether the lawful presence necessary to attract Art 32 could be brief or should be longer. It was contended, as the plaintiff submitted, that lawful presence should bear a wide meaning. But in the result it was common ground that though Art 32 "was meant to be broad", some presence which was lawful in municipal law was necessary[281]. The Supreme Court of the United Kingdom concluded that nothing in the travaux préparatoires indicated that the States framing the Convention wished to surrender control over those seeking to enter their territories to the extent that the plaintiff's interpretation of Art 32 requires[282].

290 To construe Art 32 as applying only in favour of those who are present in accordance with the requirements of municipal law is not to leave the Convention a nullity. Article 32(2) gives the persons referred to in Art 32(1) rights despite their illegal presence. Article 33 protects those illegally present as well as those legally present[283].

291 The Commonwealth relied on the opinion of the United Nations Human Rights Commissioner to the effect that the lawfulness of a refugee's stay in a Contracting State is to be judged by reference to that State's municipal law[284]. However, the United Nations Human Rights Committee later said[285]:

> "The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations."

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280 See *Chim Ming v Marks* 367 F Supp 673 at 677 (1973, USDCSDNY); *Kan Kam Lin v Rinaldi* 361 F Supp 177 at 185-186 (1973, USDCDNJ).

281 Davy, "Article 32: Expulsion", in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (2011) 1277 at 1285-1287 and 1301-1302.

282 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 748 [33]; [2012] 3 All ER 1037 at 1052.

283 *Chim Ming v Marks* 505 F 2d 1170 at 1172 (1974, 2nd Cir CA).

284 United Nations High Commissioner for Refugees, "'Lawfully Staying' – A Note on Interpretation", (1988), cited in *R (ST) v Home Secretary* [2012] 2 WLR 735 at 748 [33]; [2012] 3 All ER 1037 at 1053.

285 "General Comment No 27: Freedom of Movement", (1999) UN Doc HRI/GEN/1/Rev 7, 12 May 2004, at 174 [4], quoted by Hathaway, *The Rights of Refugees Under International Law*, (2005) at 177 n 116.

These last words lead the analysis back to Art 32, and to the question of what international obligations that Article creates.

292 The plaintiff adopted various arguments that Professor James Hathaway has propounded to support the view that his presence in Australia was lawful. First, he submitted that Art 32 has what he called "an autonomous, international meaning". According to the plaintiff, it has this meaning so as to overcome a problem Hathaway has described thus[286]:

> "the logic of deference to national legal understandings of lawful presence is clearly sensible. ... Yet there is no indication that this deference was intended [by the drafters] to be absolute, a proposition which – if carried to its logical conclusion – could result in refugees never being in a position to secure [Art 32] rights ... That is, a state's general right to define lawful presence is constrained by the impermissibility of deeming presence to be unlawful in circumstances when the ... Convention – and by logical extension, other binding norms of international law – deem presence to be lawful. While this is in most cases a minimalist constraint on the scope of domestic discretion, it is nonetheless one that is important to ensuring the workability of a treaty intended to set a common international standard." (footnotes omitted)

The answer to these arguments is that a State party to the Convention which behaved in the manner described in the penultimate sentence would be in peril of contravening its Convention obligations. In any event, the opinions of commentators are divided[287]. Lord Hope of Craighead put the matter courteously when he drew attention to the problem of velleity. It is a problem common among commentators in all legal fields. But it is very common among commentators on international law. His Lordship said[288]:

> "[o]ne should bear in mind ... that there may be a profound gap between what commentators, however respected, would like the article to mean, and what it has actually been taken to mean in practice".

293 Secondly, the plaintiff submitted:

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286 Hathaway, *The Rights of Refugees Under International Law*, (2005) at 177.

287 Dissent from Hathaway's views may be found in, for example, Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 524-525.

288 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 751 [41]; see also at 758 [63] per Lord Dyson JSC; [2012] 3 All ER 1037 at 1055 and 1062.

> "The plaintiff entered Australia lawfully, with a special purpose visa ... He has remained in Australia while waiting for determination of his protection visa application and while seeking review in respect of the decision on that application ... He remains a person 'lawfully present in [Australia's] territory' for the purposes of article 32(1) in those circumstances. As Hathaway observed[289]:
>
> > ... the stage between 'irregular' presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews is also a form of 'lawful presence' ...
>
> A fortiori here, where the plaintiff's presence was 'regular' at the time of entry and the plaintiff has been found to be a person to whom Australia owes protection obligations."

In a footnote to the passage the plaintiff relied on, Hathaway quoted the following words from von Doussa, O'Loughlin and Finn JJ's judgment in *Rajendran v Minister for Immigration and Multicultural Affairs*[290]:

> "In the present case Mr Rajendran entered the country on a visitor's visa. He now holds a bridging visa. If his application for a [refugee status-based] protection visa is ultimately unsuccessful ... that visa will cease to have effect at the time stipulated in the [Regulations] ... whereupon he will cease both to be lawfully in Australia and to be able to invoke, Art 32."

Mr Rajendran's position was radically different from that of the plaintiff. The plaintiff was lawfully in Australia for 50 minutes only. He arrived at 11.10pm on a special purpose visa. It expired at midnight. He has never held any other visa. He has not been lawfully present in Australia since the special purpose visa expired. If he had arrived without a visa, he would not have been "lawfully" in Australia. The fact that he arrived with a visa which quickly expired does not alter the fact that since then he has not been "lawfully" in Australia.

294 *Conclusion.* If public interest criterion 4002 is valid, the answer to question 2 of the Further Amended Special Case is "Yes". Because of the terms of the question, no problem arises under Art 33. In any event, the Commonwealth does not intend to contravene Art 33. It concedes that s 198 does not authorise removals in breach of Art 33[291]. Even if s 198 were construed

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289 Hathaway, *The Rights of Refugees Under International Law*, (2005) at 175.

290 (1998) 86 FCR 526 at 530-531.

291 The concession was based on *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90], 190 [91] and 190-191 [94]-[95].

as not authorising removals in breach of Art 32, Art 32 does not apply: the plaintiff is not "lawfully" in Australian territory.

Question 2A in the Further Amended Special Case: the validity of public interest criterion 4002

295 The answer to question 2 is "Yes". It thus becomes necessary to deal with question 2A.

296 Question 2A is:

> "If the answer to question 2 is 'Yes' by reason of the plaintiff's failure to satisfy public interest criterion 4002 within the meaning of clause 866.225 of Schedule 2 of the Migration Regulations 1994, is that clause to that extent *ultra vires* the power conferred by section 31(3) of the [Act] and invalid?"

297 *The plaintiff's argument.* One reason why the answer to question 2 was unfavourable to the plaintiff is that the Act provides that if an application for a visa is refused because of public interest criterion 4002, the applicant can be deported and be detained pending that deportation. That is because, if the applicant does not fall within a limited category of exceptions, ss 189, 196 and 198 make deportation mandatory. The plaintiff argued that in that eventuality public interest criterion 4002 is void because it is beyond the regulation-making power conferred by s 31(3). The plaintiff's submissions were seeking to invalidate a regulation which has been in force, in its present form or a similar form, for 18 years, and has no doubt been acted on repeatedly. The submissions are none the worse for this.

298 The plaintiff's submissions depended on viewing the Act as creating a particular scheme.

299 One particular aspect of the scheme lay in s 36. Section 36(1) creates a class of visas to be known as protection visas. As discussed above[292], s 36(2) provides that one criterion for a protection visa is that the applicant be a non-citizen to whom the Minister is satisfied Australia owes protection obligations under the Convention. Section 36(2) thus adopts Art 1A(2) of the Convention.

300 Section 65 requires the Minister to grant a visa if satisfied of various conditions. One is that criteria prescribed by the Act or the Regulations had been satisfied. Another is that s 501 did not prevent the grant of the visa.

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292 See above at [264].

301 Section 501 provides that the Minister may refuse to grant a visa to a person, or may cancel a visa granted to a person, if the person does not satisfy the Minister that he or she passes the character test. Section 501(6) sets out the circumstances in which a person does not pass the character test. One circumstance is that the person has a particular type of criminal record. Another is that the person has associated with persons reasonably suspected to have been or to be involved in criminal conduct. Another is that the person is not of good character. Another is that there is a significant risk that the person would engage in particular misconduct. Section 501(6)(d)(v) describes one of those types of misconduct as being to:

> "represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way."

302 The plaintiff contended that s 501 empowered the Minister to refuse to grant, or cancel, a visa "relying on" Arts 32 or 33(2). He submitted that that was so because although s 501 does not refer in terms to Arts 32 or 33(2), conduct within Arts 32 or 33(2) will always fall within the terms of s 501(6)(d)(v).

303 The plaintiff then observed that s 500(4)(c) provided that decisions "relying on" Arts 32 or 33(2) were not reviewable under Pt 5 (which deals with the Migration Review Tribunal) or Pt 7 (which deals with the Refugee Review Tribunal). But the AAT could review those decisions under s 500(1), read with s 25(1) and (4) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). The plaintiff pointed out that the AAT has been described by the Full Court of the Federal Court of Australia, eschewing false modesty, as a "high ranking review tribunal, the President of which is a judge of this Court."[293] In undertaking the review the AAT may exercise all the powers and discretions of the decision-maker: s 43(1) of the AAT Act. In addition, s 35(2) of the AAT Act confers power on the Tribunal to conduct hearings in private, to prohibit the publication of witnesses' names and addresses, to prohibit the publication of evidence, and prohibit disclosure of evidence to some or all of the parties. Sections 36, 36A and 36D of the AAT Act also contain provisions directed to protecting disclosure of material contrary to the public interest because it would (among other things) prejudice Australia's security, defence or international relations. The Federal Court of Australia has original jurisdiction in relation to decisions of the AAT under s 500: s 476A(1)(b) of the Act.

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293 *Daher v Minister for Immigration and Ethnic Affairs* (1997) 77 FCR 107 at 110 per Davies, Hill and Heerey JJ.

304 The plaintiff submitted that a s 501 decision to deny a protection visa on grounds of national security is a decision "relying on" Arts 32 and 33(2). The procedural constraints Arts 32(1) and 33(2) impose are satisfied by s 501. The plaintiff submitted that s 501(6)(d)(v) deals specifically with whether an applicant represents a danger to the Australian community in any way. He submitted that cl 866.225(a) of Sched 2 of the Regulations and public interest criterion 4002 deal with that question in a different way. And he submitted: "Section 500(1)(c) is the lead or dominant provision; and the regulation-making power in s 504 (read with s 31(3)) is the subordinate provision." (footnote omitted)

305 The plaintiff accepted that criteria for the grant of protection visas additional to those found in the Act could be imposed by regulation. But he submitted that those additional criteria could not be imposed if they undermined or negated the terms or scheme of the Act. The plaintiff submitted that public interest criterion 4002 deals with the topic of whether a person represents a danger to the Australian community in a manner different from the approach in ss 501(6)(d)(v) and 500(1)(c) in four respects.

306 The first was that public interest criterion 4002 permits the refusal or cancellation of a protection visa in a wider set of circumstances than ss 501(6)(d)(v) and 500(1)(c). "[S]ecurity" in s 4 of the ASIO Act is an expression "wider than that employed in articles 32 and 33(2), as picked up by s 500(1)(c) ... Thus [public interest criterion] 4002 erects a barrier to entry on the same topic as s 501(6)(d)(v) (and articles 32 and 33(2) ...) but is broader in reach. It imposes a different test in relation to the same subject matter. Indeed, in pointing to 'the risk [such] a person may pose to an ally' ... the Defendants appear to contemplate that one might, in the current case, have regard under [public interest criterion] 4002 to such a 'risk' [*vis-à-vis*] Sri Lanka. That is self evidently foreign to the whole rationale of the Convention."

307 Secondly, the plaintiff submitted that public interest criterion 4002 "interposes a different decision maker (namely, ASIO) from the repository of power contemplated by the Act (namely, the Minister or her or his delegate). The possibility of disconformity of views between different arms of the Executive on the same subject matter arises in those circumstances."

308 The third difference that the plaintiff relied on is that public interest criterion "4002, although expressed as requiring the satisfaction of the decision-maker, does not require that the decision-maker be satisfied as to the substantive content of the security assessment. In contrast, s 501 requires the decision-maker to be satisfied that the person in question as a matter of substance passes the character test (which reflects, in part, articles 32 and 33(1) of the Convention)."

309 Finally, the plaintiff accepted that "s 500 provides for a special process of review of decisions based on articles 32 or 33(2) ...; whereas [public interest

criterion] 4002 permits the circumvention or negation of that special process, potentially rendering it nugatory. Indeed, it relocates the security issue such that it comes to fall for consideration in a scheme without merits review, and with the most limited of judicial review." (footnote omitted)

310 That fourth difference is closely related to another submission of the plaintiff. That submission was that criteria additional to those found in the Act cannot be imposed if they undermine or negate "constraints imposed on states by the Convention – unless and until parliament expressly and clearly evinces an intention to disavow the obligations Australia has under the Convention and to reduce the protections the Convention (and the Act in its present form) offers a refugee by not permitting expulsion [except] in very specific circumstances." This is a complaint that public interest criterion 4002 negates the procedural constraints Arts 32 and 33 impose.

311 *Some preliminary questions.* Before dealing with the plaintiff's arguments that public interest criterion 4002 is ultra vires, it is desirable to examine some preliminary questions. The plaintiff wavered about the source of the power being used against him. At times he identified it as s 501, in particular s 501(6)(d)(v). At other times he identified it as the Articles referred to in s 500(1)(c). Sometimes the plaintiff treated them as different. Sometimes the plaintiff treated them as identical, as when counsel for the plaintiff submitted that the decision to deny a protection visa on grounds of national security was a decision under s 501 "relying on" Arts 32 and 33(2). The plaintiff seemed to have been attracted to s 501 because of s 501(6)(d)(v) and its overlap with the considerations described in Arts 32 and 33(2). And the plaintiff seemed to have been attracted to s 500(1)(c) because it enabled him to appeal to a conception of the Act as carrying out the totality of Australia's Convention obligations.

312 The Act itself draws a distinction between s 501 and the Articles referred to in s 500(1)(c). Section 500(1) provides that applications can be made to the AAT to review certain decisions. One class comprises decisions of a delegate of the Minister under s 501: s 500(1)(b). Another class comprises decisions to refuse to grant or cancel a protection visa "relying on" Arts 32 or 33(2): s 500(1)(c). Section 500(1)(c) does not say: "decisions of the Minister (as opposed to the Minister's delegate) under s 501". The Act thus speaks of decisions under s 501 as though they were distinct from decisions "relying on" Arts 32 and 33(2). This points against viewing s 501 decisions as being decisions "relying on" Arts 32 and 33(2) exclusively. The same distinction between "decisions of a delegate of the Minister under section 501" and decisions to refuse to grant, or cancel, a protection visa "relying on" Arts 32 and 33(2) is drawn in ss 500(4)(b) and (c) and 503(1)(b) and (c). It would therefore seem to follow that s 501 is one source of power to refuse a visa.

313 The plaintiff submitted that a distinct power to refuse or cancel a visa on Arts 32 or 33(2) grounds can be implied from s 500(1)(c) itself[294]. It is possible that that submission is correct. It will henceforth be assumed that it is correct. On that assumption, the criteria in Arts 32 and 33(2), which are stated in the Convention as conditions to be satisfied before expulsion, are given an additional role – the role of criteria for refusal of a protection visa before the consequential process of expulsion is undertaken. A decision to refuse to grant a protection visa because its grant is prevented by s 501 differs from a decision to refuse to grant it because its grant is prevented by the power implied from s 500(1)(c). A s 501 decision may be based on the same or similar matters of fact as those described in Arts 32 and 33(2). Those matters of fact would be relevant to a decision based on the power implied from s 500(1)(c). But a s 501 decision is not strictly speaking a decision "relying on" Arts 32 or 33(2). A s 501 decision is based on s 501(6) criteria. A decision based on the power implied from s 500(1)(c) rests on criteria which have a different source and different modes of expression. On the other hand, the process of expelling a refugee by reason of a decision to refuse to grant a protection visa because s 501 prevents its grant (or indeed by reason of the fact that the power implied from s 500(1)(c) prevents its grant) could not be carried out unless the matters of fact described in Arts 32 or 33(2) exist.

314 It may not matter, in assessing the validity of public interest criterion 4002, whether it is compared with the power in s 501 or the power implied from s 500(1)(c). The plaintiff's other submissions remain equally good or bad. The Commonwealth submitted that the legislature erred in assuming that a protection visa could be refused "relying on" Arts 32 or 33(2). It is not necessary to decide whether that submission is correct. It has some force because Art 32 strictly speaking does not purport to give a power to expel. Article 32(1) forbids expulsion except on two grounds. Article 32(2) assumes that there will be some power in municipal law to expel which must comply with the requirements of Art 32(2). On this reasoning, Art 33(2) does not itself give a power to expel either. Article 33(1) creates a limitation on expulsion or return (in the sense of refoulement), and assumes a power to expel or return subject to that limitation. Article 33(2) denies the limitation in the case of refugees of the kind described in that Article. On the other hand, the Commonwealth submission faces a major obstacle in that its construction gives s 500(1)(c) no potential field of operation. It is convenient to proceed by assuming, without deciding, that the Commonwealth's submission is wrong.

315 *The plaintiff's submissions rejected.* The plaintiff's submissions on public interest criterion 4002 must be rejected for the following reasons.

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294 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-303; [1985] HCA 70.

316 The regulation-making power conferred by s 31(3) is to be contrasted with the more general regulation-making power conferred by s 504. If s 31(3) did not exist there would be force in the view that public interest criterion 4002 was beyond the power conferred by s 504. Section 504 is characteristic of regulation-making powers conferred at the end of long and complex legislation. It deals with many matters which, though no doubt of day-to-day importance, are mechanical in character. That is not the character of the regulations that s 31(3) contemplates. Section 31(3) appears in the middle of a provision dealing with visas, a topic central to the entire scheme of the Act. The balance of s 31 provides:

> "(1) There are to be prescribed classes of visas.
>
> (2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.
>
> ...
>
> (4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.
>
> (5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class."

Section 31 is the third substantive provision in Pt 2 Div 3 subdiv A. That subdivision contains the first major set of substantive provisions in the Act. The position of s 31(3) in the Act suggests that the power it grants to make regulations about visa criteria is of equal significance to provisions that prescribe visa criteria in the Act itself. It does not suggest that s 501 and the power to be implied from s 500(1)(c) are the "leading" provisions and s 31(3) only a "subordinate"[295] provision. Rather, they set up equally important criteria for the grant of protection visas.

317 As Crennan J said in *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs*[296]:

> "[t]here is nothing clearly inconsistent or clearly lacking in harmony in the coexistence of a power to refuse a particular class of visa for failure to satisfy certain criteria set out in subordinate legislation and a power to refuse to grant a visa on character grounds under the Act."

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295 The terminology derives from *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]; [1998] HCA 28.

296 [2005] FCA 336 at [33].

On appeal, Heerey, Finkelstein and Allsop JJ endorsed that conclusion, and said[297]:

> "The structure of the [Act] is such as to give a central role to the prescription by the Executive [pursuant to regulations] of criteria necessary to be satisfied for the grant of a visa. Sections 31 and 65 reflect that."

318 Public interest criterion 4002 is not expressly repugnant to either the power conferred by s 501, or the power implied from s 500(1)(c), in the sense that the provisions contain "conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations."[298] They create different "sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different circumstances, to similar practical consequences."[299] There would be repugnancy if "by reason of the apparent exhaustiveness with which one provision, or group of provisions, dealt with the position of a person such as the respondent, there were an incompatibility of a kind that required a conclusion that only one provision or group of provisions was intended to apply"[300]. And there would be repugnancy "if one provision, or group of provisions, were directed with particularity to the case of a person such as the respondent, and the other were merely of general application"[301]. But neither of these types of repugnancy exist in this case.

319 Public interest criterion 4002 does not contradict the power in s 501 or the power implied from s 500(1)(c). It does not cut down either of those powers. It does stipulate grounds for refusing to grant a protection visa of the kind referred to in s 501(6)(d)(v), the "national security or public order" grounds in Art 32(1) and the grounds referred to in Art 33(2). But the public interest criterion 4002 grounds go beyond them to some extent. First, Art 33(2) is limited to "national security". But public interest criterion 4002 goes further in encompassing

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297 *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 135 at 141 [20].

298 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571 [2] per Gleeson CJ; [2006] HCA 50.

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

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

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

security in relation to foreign countries. That is because of par (b) of the definition of "security" in s 4 of the ASIO Act. As the relevant Explanatory Statement stated, for public interest criterion 4002 "to prevent the grant of a visa, an assessment as a risk to security need not necessarily be restricted to Australian national security, but may relate to the carrying out of Australia's responsibilities to foreign countries in security-related matters."[302] Secondly, for the same reasons, public interest criterion 4002 is also wider than Art 32. Article 32 relates to "national security" – ie, Australia's national security. Thirdly, the grounds stipulated by public interest criterion 4002 also go beyond Art 33(2). That is because, in light of the serious consequences of returning a refugee to a place in relation to which he or she has a well-founded fear of persecution for a Convention reason, it would be incumbent on the decision-maker to reach a higher level of satisfaction about the matters listed in Art 33(2) than about the matters in an adverse security assessment, where the outcome is not refoulement. In other jurisdictions, that circumstance has led courts to construe Art 33(2) as requiring a belief on objectively reasonable grounds that the refugee poses "a serious threat to [national] security", and that the threatened harm is substantial[303]. The standard of satisfaction that operates in relation to the fact described in public interest criterion 4002 – "directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]" – is no doubt high, because of the seriousness of the finding and of its consequences. But the consequences of an Art 33(2) finding are much more serious, and the standard is correspondingly higher.

320 In one respect, however, public interest criterion 4002 has a narrower scope of application. It applies only to some visa classes, whereas s 501(6)(d)(v) applies to all visa classes.

321 It is generally wrong to construe legislation in such a way that some of its language has no potential operation. However, that rule of statutory interpretation does not apply where legislation gives the Executive a number of paths through which to effect the same outcome, and where though any of those paths could be used, some of those paths are likelier to be used more often than not. Contrary to one of the plaintiff's submissions, the fact that the relevant officials might choose to deal with a particular class of visa applicant by relying on public interest criterion 4002, rather than s 501 or the power to be implied from s 500(1)(c), does not demonstrate that public interest criterion 4002 is

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302 Explanatory Statement, Select Legislative Instrument 2005 No 275, Attachment B at 7.

303 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at 310 [45] and 312 [52], discussing *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 51 [90].

invalid. Very widespread reliance on public interest criterion 4002 would still leave s 501 and the power to be implied from s 500(1)(c) with a potential field of operation. At any time, the relevant officials could choose to employ them.

322 There is no repugnancy between the Art 32 and Art 33(2) criteria employed when exercising the power implied from s 500(1)(c) and a criterion like public interest criterion 4002 that has different limits and deals with broader risks to security. The Act deals with the exclusion of non-citizens. States have a sovereign right to control the entry of non-citizens. That right extends particularly to preventing their entry on security grounds. It would be a large step to read s 31(3) as conferring a regulation-making power so narrow that regulations to prevent a person's entry on security grounds cannot be made, merely because other provisions in the Act deal with related and partly overlapping grounds. It would be a particularly large step where the Commonwealth has conceded that the Act is to be read as permitting removal of unlawful non-citizens only in accordance with Australia's obligations under Arts 32 and 33 of the Convention.

323 The plaintiff's arguments on AAT review and procedural protection are not persuasive. Article 33 creates no procedural protections. Sub-Articles (2) and (3) of Art 32 create procedural protections, but the procedures that apply when public interest criterion 4002 is relied on do not negate them. Even if, in a decision to refuse a protection visa because of public interest criterion 4002, the only relevant question is whether ASIO has made an adverse security assessment, as distinct from whether the decision-maker agrees with the assessment, it is not the case that the accuracy of the assessment is immaterial. An adverse security assessment is open to judicial review in the Federal Court of Australia pursuant to s 39B of the *Judiciary Act* 1903 (Cth). It is wrong to describe that, as the plaintiff did, as the most limited judicial review. Further, an adverse decision by the Minister or the Minister's delegate may be based on failure to satisfy other criteria. A visa claimant adversely affected by a criterion other than public interest criterion 4002 can obtain merits review in the Refugee Review Tribunal and judicial review through the Federal Magistrates Court, with an appeal to the Federal Court of Australia. Given that these procedures are available, a refugee expelled under Art 32 can, within the meaning of Art 32(2), be said to have had "due process of law", an opportunity "to submit evidence to clear himself", and an opportunity "to appeal to and be represented" before a competent authority.

324 Finally, public interest criterion 4002 is not repugnant to the Act because it was introduced as part of the Regulations when the amendments to the Act that

introduced protection visas entered into force in 1994. If possible, the Act is to be construed harmoniously with these contemporaneous regulations[304].

325 Contrary to the plaintiff's submissions, these differences between the grounds applicable in relation to public interest criterion 4002 and the grounds applicable under Arts 32 and 33 do not reveal repugnancy. The plaintiff contends that, if public interest criterion 4002 permits ASIO to take into account the risk which the visa claimant may pose to the country in relation to which he or she fears persecution, that would be foreign to the whole rationale of the Convention. The submission does not follow. It would be foreign to it if the consequence was refoulement. But that is not the consequence.

326 Repugnancy cannot be inferred from the fact that when public interest criterion 4002 is relied on, the operative decision-maker is an ASIO officer, not the Minister or the Minister's delegate. Potential "disconformity of views" about the facts is nothing more than the price that must be paid for employing a more specialised officer of the Executive to deal with a specialised problem. As explained earlier[305], public interest criterion 4002, a regulation made under s 31(3) of the Act, on the one hand, and the express power in s 501 and the power implied from s 500(1)(c), on the other, are of equal significance.

327 Hence, public interest criterion 4002 and cl 866.225(a) of Sched 2 of the Regulations are not ultra vires s 31(3) on grounds of repugnancy with the power implied from s 500(1)(c)[306]. They are not ultra vires on grounds of repugnancy with s 501 either. The answer to question 2A in the Further Amended Special Case is: "No".

Question 3 in the Further Amended Special Case: the application and correctness of *Al-Kateb v Godwin*

328 Question 3 is: "Do ss 189 and 196 of the [Act] authorise the Plaintiff's detention?"

329 The plaintiff submitted that in view of the fact that the Commonwealth Executive had so far, despite considerable effort, failed to find a country other

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304 *Hanlon v The Law Society* [1981] AC 124 at 194; *Australian Steel Company (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33 at 45 [41]; *Migration Agents Registration Authority v Goldsmith* (2001) 113 FCR 18 at 29 [54].

305 See above at [316].

306 See *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597 at 601-602 [23]-[32].

than Sri Lanka to which he could be removed, there was no reasonable prospect of removing him in the future.

330 The majority in *Al-Kateb v Godwin*[307] held that ss 196 and 198 authorised the detention of an unlawful non-citizen until removal to another country became reasonably practicable, even if there was no real likelihood or prospect of effecting removal in the reasonably foreseeable future.

331 *Is Al-Kateb v Godwin distinguishable?* The plaintiff relied on the fact that the appellant in *Al-Kateb v Godwin* had not been held to fall within s 36(2), while the plaintiff had. Counsel for the plaintiff took the Court to passages in that case referring to persons who could not establish their entitlement to refugee status[308]. He suggested that accordingly the reasoning in *Al-Kateb v Godwin* could not apply to the plaintiff. This is a distinction without a difference. Like the plaintiff, the appellant in *Al-Kateb v Godwin* was in detention with no immediate prospect of being removed to another country. As the Commonwealth submitted, because Art 33 prevents the plaintiff being removed to his country of citizenship, Sri Lanka, he is "in functionally the same position as a stateless person" like the appellant in *Al-Kateb v Godwin*: he has no home country to which he can be removed. In *Al-Kateb v Godwin* and in the present case, the non-compellable power of the Minister to grant a visa under s 417 existed, but had not been exercised. It is true that since *Al-Kateb v Godwin* the Minister has been given a power to make a residence determination under Pt 2 Div 7 subdiv B of the Act[309]. But the Minister has no duty to consider whether to exercise it: s 197AE. Hence, the plaintiff's position does not differ from that of the appellant in *Al-Kateb v Godwin*.

332 *Should Al-Kateb v Godwin be overruled? General.* The plaintiff submitted (as did Plaintiff S138 more briefly) that *Al-Kateb v Godwin* was wrongly decided and should be overruled. He submitted that the language of the Act was not sufficiently clear to justify curtailing the plaintiff's fundamental right to liberty under the general law. The Act should be construed so as not to interfere with that right unless no alternative construction is available. The plaintiff's preferred construction was that the period of detention provided for under s 196 was limited to the period during which removal under s 198 was reasonably practicable. If removal was not reasonably practicable, the detention was unauthorised, and the statutory power to detain was "suspended". In support of this submission, the plaintiff relied on the dissentients' arguments in *Al-Kateb v Godwin*.

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307 (2004) 219 CLR 562 at 581 [33], 640 [231] and 658-659 [290].

308 For example, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 658 [289] and 662 [301].

309 See below at [333].

333 *Should Al-Kateb v Godwin be overruled? Aspects of the detention regime.* The plaintiff also relied on what he called "the changes to detention regime since *Al-Kateb*." *Al-Kateb v Godwin* turned on s 196(1). It provided and provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed under s 198 or s 199, deported under s 200, or granted a visa. The plaintiff relied on three provisions which he submitted revealed that the events identified in s 196 "are not the universe of the circumstances in which immigration detention can come to an end."[310] One provision was s 198A, which gives power to release an offshore entry person from detention in Australia for the purpose of offshore processing in a declared country. Secondly, the plaintiff referred to s 189(3), which provides that an officer *may* detain an unlawful non-citizen in an excised offshore place. The plaintiff submitted that "there is a discretionary detention in the Act now at [s] 189(3) which enables an officer to exercise a discretion in relation to the detention [in] an excised offshore place." Thirdly, the plaintiff referred to the availability of residence determinations. Part 2 Div 7 subdiv B provides that the Minister may make a determination permitting residence at a specified place instead of detention, if he or she thinks it is in the public interest to do so. The plaintiff submitted that it was no longer true to say that the Act evinces the "imperative"[311] that an unlawful non-citizen be detained until removed, deported or granted a visa. In consequence, the Act no longer treated detention as a "hermetically sealed system", terminable only on the occurrence of one of the three events specified in s 196.

334 These submissions gave the impression, no doubt without intending to do so, that all three of these aspects of the detention regime were enacted after 2004, when *Al-Kateb v Godwin* was decided. That impression is misleading. Both ss 189(3) and 198A entered the Act in 2001. Only the amendment introducing Pt 2 Div 7 subdiv B was made after 2004 – in 2005. In evaluating the significance for the plaintiff's arguments of that amendment, the following factors are relevant. The Act is often amended, usually without significant parliamentary opposition. *Al-Kateb v Godwin* is a decision on key provisions of the Act. From the day it was handed down, it became a very well-known decision. It also became a widely criticised decision because of its impact on liberty. These considerations point against Pt 2 Div 7 subdiv B as having the function of overturning *Al-Kateb v Godwin*. Part 2 Div 7 subdiv B appears just after s 196 and just before s 198. Legislative reversal of *Al-Kateb v Godwin* would have dealt with those two provisions directly. It would have taken a much more explicit, direct and blunt form.

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310 For s 196, see above at [177].

311 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 576 [17] per Gleeson CJ.

335 The other provisions on which the plaintiff relied – ss 189(3) and 198A, with which may be coupled another provision he referred to in oral argument, s 417 (giving the Minister discretionary power to grant visas) – existed before 2004. They were not referred to in *Al-Kateb v Godwin*. It is legitimate to contend that a case should be overruled because it was decided per incuriam. If the plaintiff's criticism is that the majority in *Al-Kateb v Godwin* were in a relevant sense ignorant of ss 189(3), 198A and 417, it is a charge which must be levelled at the minority too. The minority's reasoning did not depend on those provisions. And those provisions did not bulk large, if at all, in the submissions of the appellant in that case.

336 The truth is that ss 189(3), 198A and 417, like the provisions relating to residence determinations, would not have assisted the appellant in *Al-Kateb v Godwin* and do not assist the plaintiff in this case. Failure to take them into account was not to act per incuriam. That is because they are immaterial. They are exceptions to the scheme that ss 189(1)-(2), 196 and 198 establish. They are limited to their own specific fields of operation. It is not inconsistent with the generality of the statutory scheme on which the Commonwealth relied that there should be particular statutory exceptions of these kinds. These exceptions are available to be invoked by detainees. But they do not destroy the majority reasoning in *Al-Kateb v Godwin* nor assist the minority reasoning. Both sets of reasoning represent different constructional responses to ss 189(1), 196 and 198.

337 *Should Al-Kateb v Godwin be overruled? A "constitutional argument".* The plaintiff also supported his preferred construction of ss 196 and 198 with a "constitutional argument". The argument focused on the fact that the legislature's power to enact ss 196 and 198 is subject to Ch III of the Constitution. The separation of powers effected by Ch III provides a guarantee of liberty. Subject to limited exceptions, the State may only detain a person involuntarily as a consequential step in a process by which the judiciary determines that person's criminal guilt for past acts – arrest and detention pending trial or punishment after trial. The limited exceptions referred to relate to detaining those who are mentally ill, or who suffer from an infectious disease, or who need protection for their own welfare[312]. The plaintiff submitted that in choosing between his construction and that advocated by the Commonwealth, his was to be preferred because it avoided the *risk* of constitutional invalidity.

338 The process of reasoning the plaintiff invoked does not, however, rest on the need to avoid the *risk* of constitutional invalidity. It rests on the need to avoid the *reality* of constitutional invalidity. In the *Work Choices* case, the

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312 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 657 [287].

majority said[313]: "[S]o far as different constructions ... are available, a construction is to be selected which, so far as the language ... permits, would avoid, rather than result in, a conclusion that the [provision] is invalid". That passage uses the word "conclusion", not "risk". The plaintiff contended, however, that it was enough to reject one construction and favour another if "serious questions respecting validity" arise. He cited the following words of Gummow J in *Re Woolley; Ex parte Applicants M276/2003*[314]: "Were a contrary view to that above to be taken on the matter of construction, then serious questions respecting validity could have arisen." But Gummow J – one of the majority in the *Work Choices* case – was not applying the test the plaintiff advocated. His Honour did not prefer one construction to another on the ground that the latter raised "serious questions respecting validity". His Honour arrived at the construction he preferred because that was how he read the relevant language. His Honour had reached that construction before he made the observation quoted above. Gummow J was not using the existence of "serious questions" as a factor favouring his Honour's preferred construction.

339 The plaintiff also relied on the fact that after the passage quoted above from the *Work Choices* case, the majority spoke of the meaning they did not favour as one which "would put [the provision] in peril of being invalid". Read in context, those words mean "would render [the provision] invalid". That is the approach adopted in the authorities the majority cited in the *Work Choices* case. Thus in *Attorney-General (Vict) v The Commonwealth*, Dixon J said[315]:

> "In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred upon the Parliament as ample an application as the expressed intention and the recognized implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within the application of those powers and we should not, unless the intention is clear, read it as exceeding them."

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Mason CJ said[316]: "The interpretation which I would give ... is supported by the presumption in favour of validity." His Honour quoted the passage just

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313 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 161 [355] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

314 (2004) 225 CLR 1 at 52 [135]; [2004] HCA 49.

315 (1945) 71 CLR 237 at 267; [1945] HCA 30.

316 (1992) 176 CLR 1 at 14; [1992] HCA 64.

quoted from Dixon J in *Attorney-General (Vict) v The Commonwealth*. His Honour also quoted the following words of Isaacs J in *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation*[317]:

> "There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail."

And in *Plaintiff S157/2002 v The Commonwealth*[318], Gaudron, McHugh, Gummow, Kirby and Hayne JJ said, quoting Dixon J in *R v Hickman; Ex parte Fox and Clinton*[319] and citing many other authorities, that a basic rule of construction that applies to the interpretation of privative clauses in Commonwealth legislation "is that 'if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open'."

340 Since the *Work Choices* case, the words "would put [the provision] in peril of being invalid" have been read as meaning "would render [the provision] invalid". Thus in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, in a passage the plaintiff relied on, the plurality cited the passage from the *Work Choices* case[320] and said: "So far as different constructions appear to be available, a construction is to be selected which would avoid rather than lead to a *conclusion* of constitutional invalidity." (emphasis added; footnote omitted) And in a passage the plaintiff relied on from *K-Generation Pty Ltd v Liquor Licensing Court*[321], French CJ cited four of the five authorities just quoted and said: "Interpretation is ... to be informed by the principle that the Parliament, whether of the State or the Commonwealth, did not intend its statute to exceed constitutional limits" (footnote omitted).

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317 (1926) 38 CLR 153 at 180; [1926] HCA 58.

318 (2003) 211 CLR 476 at 504 [71]; [2003] HCA 2.

319 (1945) 70 CLR 598 at 616; [1945] HCA 53.

320 (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

321 (2009) 237 CLR 501 at 519 [46]; [2009] HCA 4. See also *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 86 ALJR 862 at 868 [16], 876 [64] and 881 [87]; 289 ALR 1 at 6, 18 and 24; [2012] HCA 25.

341 There is a final consideration suggesting that the construction of legislation is not affected by considerations of the *risk* of constitutional invalidity as distinct from the *reality* of it. Questions of statutory construction should obviously be resolved, as far as possible, uniformly. Grave uncertainty will otherwise flow. Some aspects of constitutional law are uncertain, at least in their application; but the chance that minds will differ widely about the *risk* of constitutional invalidity is much greater than that minds will differ widely about the *reality* of constitutional invalidity. There is also a prospect of interminable disputes about the extent of the relevant risk.

342 The principle, then, is that a court will favour a construction resulting in constitutional validity over one which results in constitutional invalidity.

343 The plaintiff cannot take advantage of that principle in this case. He did not demonstrate that the construction that the majority gave ss 196 and 198 in *Al-Kateb v Godwin* resulted in constitutional invalidity. The appellant in that case put that submission. It was not accepted as a ground for decision by any member of the minority. Rather, the paths to decision that each member of the minority selected rested on construing the statutory language without the aid of the reasoning employed in the *Work Choices* case. It is true, however, that there are dicta of Gummow J supporting the appellant's submission[322]. On the other hand, three members of the majority disagreed with the appellant's submission[323], and a fourth said "[i]t may be the case" that the appellant's submission was wrong, though his Honour did not decide the point[324].

344 *Should Al-Kateb v Godwin be overruled? Non-judicial power to detain.* The plaintiff advanced various arguments against the soundness of the opinions rejecting the appellant's submission in *Al-Kateb v Godwin*. One was that those opinions rested on McHugh J's acceptance in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[325] of United States authority which, the plaintiff submitted, was artificial, extensively criticised and inapposite in the context of Ch III. Another was that those opinions rested on a doctrine of "exclusion" of aliens, which meant "expulsion" only and did not extend to "segregation". A third was that even if a power of "exclusion" extended to "segregation", that would not answer the question of whether Ch III was

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322 (2004) 219 CLR 562 at 609-614 [126]-[140].

323 (2004) 219 CLR 562 at 584 [45], 586 [49], 648-650 [255]-[263], 651 [267] and 662-663 [303]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 31 [72], 46-47 [115], 75-76 [222]-[223] and 87 [270].

324 (2004) 219 CLR 562 at 658 [289].

325 (1992) 176 CLR 1 at 71 n 56.

infringed. A fourth was that "exclusion from the Australian community" was too vague a concept to play a part in determining the limits of the aliens power in s 51(xix) of the Constitution or the constraints Ch III applies to it.

345 The difficulty with these submissions is that they do not squarely face the problem which the plaintiff's position throws up. That problem concerns the constitutionality of legislation permitting detention of an alien who, unlike the appellant in *Al-Kateb v Godwin*, has been assessed by ASIO as posing a risk to Australia's security. The Commonwealth submitted that the plaintiff's argument rested on a premise stated thus by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[326]:

> "putting to one side ... exceptional cases ..., the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Gaudron J doubted that premise[327]. In *Kruger v The Commonwealth*, she challenged it[328]:

> "it cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions. I say clear exceptions because it is difficult to assert exclusivity except within a defined area and, if the area is to be defined by reference to exceptions, the exceptions should be clear or should fall within precise and confined categories.
>
> The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. For example, the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and *for the safety or welfare of the community*. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to *the safety or welfare of the community*.
>
> Once exceptions are expressed in terms involving the *welfare* of the individual or that *of the community*, it is not possible to say that they are clear or fall within precise and confined categories. More to the point, it is not possible to say that, subject to clear exceptions, the power to authorise

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326 (1992) 176 CLR 1 at 27.

327 (1992) 176 CLR 1 at 55.

328 (1997) 190 CLR 1 at 110; [1997] HCA 27.

> detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III." (emphasis added; footnote omitted)

Her Honour's reasoning has been cited with approval in other cases[329], and expressed in similar terms elsewhere[330]. The Commonwealth submitted that Gaudron J's approach should be preferred to that of Brennan, Deane and Dawson JJ.

346 It is not necessary to decide that question. It is sufficient to decide that, since the exceptions to the principle Brennan, Deane and Dawson JJ stated are not closed, another should be added: the detention of unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia's security. If it is possible to detain a diseased person because that person is a threat to the public health, why is it not possible to detain a person assessed to be a risk to Australia's security because that person is a threat to public health in a different way? The plaintiff did not advance any argument suggesting that that exception did not exist.

347 *Should Al-Kateb v Godwin be overruled? Proportionality.* The plaintiff and the Australian Human Rights Commission instead argued that whether any exception should be recognised depends on assessing whether there is a "proportionate" relationship between the legitimate end to be served and the means by which the Act serves that end. That submission was not directed to the specific exception just identified.

348 The plaintiff relied on an assertion by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*. Their Honours said that the precursors to ss 189 and 196 were "valid laws if the detention which they require[d] and authorize[d] [was] limited to what [was] reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."[331] Assuming that that assertion is correct[332], the test is met. A

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329 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [258] and 662-663 [303]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-27 [57]-[62]; *South Australia v Totani* (2010) 242 CLR 1 at 146-147 [382]-[383]; [2010] HCA 39.

330 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 84.

331 (1992) 176 CLR 1 at 33.

332 Cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 583-584 [40]-[46] and 647-649 [252]-[258].

sovereign government may prevent the entry of aliens, subject to its international obligations and the obligations that its municipal law imposes. If aliens enter, they may be deported. In *O'Keefe v Calwell*, Latham CJ said[333]:

> "Deportation is not necessarily punishment for an offence. The Government of a country may prevent aliens entering, or may deport aliens ... Exclusion in such a case is not a punishment for any offence. Neither is deportation ... The deportation of an unwanted immigrant (who could have been excluded altogether without any infringement of right) is an act of the same character: it is a measure of protection of the community from undesired infiltration and is not punishment for any offence."

If the plaintiff had applied for entry to Australia while in Indonesia, he could have been excluded without any infringement of right. Australia is not obliged to accept persons who pose a risk to its security. Equally, the plaintiff can now be deported. As the Commonwealth conceded, deportation must be consistent with Art 33(1). That is one of many factors making deporting the plaintiff difficult for the Commonwealth. Deportation may be impossible to achieve quickly. But the end is deportation. The means – detention until deportation is reasonably practicable – is reasonably proportionate to that end.

349 However, with respect to those who hold a contrary view, there is no proportionality test to be applied. Section 51(xix) of the Constitution grants the Commonwealth legislative power with respect to "naturalization and aliens". Pursuant to s 51(xix), Parliament may enact legislation empowering the Executive to detain aliens in custody with a view to either admitting or deporting them. Legislation granting that power to detain is not punitive in nature. The power is properly conferred on the Executive. It is not part of the judicial power of the Commonwealth[334]. A law conferring a power to detain pending deportation is not a law that is merely incidental to the aliens power. It is a law which deals "with the very subject of aliens. [It is] at the centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power."[335] Accordingly, the plaintiff has not demonstrated that the construction of ss 196 and 198 that the Commonwealth advocated, as applied to the circumstances of this case, should be rejected because of Ch III of the Constitution.

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333 (1949) 77 CLR 261 at 278; [1949] HCA 6, quoted with approval by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45].

334 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 582 [36].

335 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 582-583 [39].

350 *Should Al-Kateb v Godwin be overruled? Relevant factors.* This Court has in the past been divided on the question whether a party who wishes to contend that one of its earlier decisions be overruled must obtain leave before embarking on that course. In this case it is convenient to pass by that division and refer to the factors which the Court takes into account in deciding whether to overrule an earlier decision. It is not enough that members of the later Court believe that the earlier decision is wrong. What more is needed? Four factors were specified in *John v Federal Commissioner of Taxation*[336]:

> "The first [is] that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second [is] a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third [is] that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth [is] that the earlier decisions had not been independently acted on in a manner which militated against reconsideration".

Satisfaction of one of these criteria will not necessarily lead to overruling. There are other criteria that matter. One group of them concerns the adequacy or thoroughness with which the impugned authority was argued and considered. The question of overruling a decision thought to be wrong is one of judgment. However, it is reasonable to bear in mind what Kirby J said in *K-Generation Pty Ltd v Liquor Licensing Court*[337]: "care should be taken to avoid (especially within a very short interval) the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances." In any event, the factors relevant to the question of overruling only arise if the decision is thought to be wrong.

351 The question whether *Al-Kateb v Godwin* is wrong is a question of construction. It is notorious that reasonable minds can differ on issues of construction. The plaintiff supported the minority's construction in *Al-Kateb v Godwin*, the Commonwealth supported the majority's construction – in each case without significant divergence from the arguments put in *Al-Kateb v Godwin*, save as indicated above. Those respective arguments are stated in *Al-Kateb v Godwin*. They speak for themselves. While, with respect, the dissentients' arguments have obvious force, the plaintiff's submission that they represent the better view must fail for the reasons Hayne J gave in *Al-Kateb v Godwin*. It is

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336 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5, referring to *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58; [1982] HCA 13.

337 (2009) 237 CLR 501 at 569 [246].

unnecessary for present purposes to analyse either those arguments or those which appealed to the majority. *Al-Kateb v Godwin* should not be overruled.

352 *Should Al-Kateb v Godwin be overruled? A missing factual premise.* There is another reason for not overruling *Al-Kateb v Godwin*. The Court "should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so."[338] This case could only afford an occasion for overruling *Al-Kateb v Godwin* if the crucial factual premise of that case existed in this. That factual premise was von Doussa J's finding that removal from Australia "[was] not reasonably practicable ... as there [was] no real likelihood or prospect of removal in the reasonably foreseeable future."[339] That factual premise does not exist here.

353 That is so for the following reasons. The Commonwealth Executive has made active efforts to remove the plaintiff from Australia. Some of those efforts have failed. At the time of the hearing, the success of others remained unclear while certain foreign governments considered requests by Australia for assistance in resettling persons who include the plaintiff. At the time of the hearing, it was also the intention of an officer of the Executive to travel to the Annual Tripartite Consultations on Resettlement in Geneva with a view to resettling the plaintiff and others in his position. The evidentiary underpinning of von Doussa J's factual finding was that the Executive was "unable to identify another country to which the appellant might be removed."[340] There is no equivalent evidentiary underpinning here. Von Doussa J distinguished between a "possibility" of removal, which existed, and a "real likelihood or prospect of removal", which did not exist. His Honour made that finding after a trial involving contested evidence[341].

354 Hence the approach of the minority in *Al-Kateb v Godwin* was that "the prospects of removal to another country are so remote that continued detention cannot be for the purpose of removal."[342] The plaintiff's arguments assume that at one point ss 189 and 196 validly authorised his detention. By this assumption, the plaintiff accepts, correctly, that he bears a burden of persuasion that a real likelihood or prospect of removal does not exist. There is no agreed fact to that

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338 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473 [249] per Gummow and Hayne JJ; [2001] HCA 51.

339 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [105].

340 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [104] per Gummow J.

341 *SHFB v Goodwin* [2003] FCA 294 at [17]-[19].

342 (2004) 219 CLR 562 at 601 [98] per Gummow J.

effect, and no trial has taken place at which the plaintiff has successfully borne that burden. Nor, contrary to the plaintiff's submission, is it possible to draw an inference that there is no real likelihood of removal from the facts agreed in the Further Amended Special Case.

355 In *Al-Kateb v Godwin*, Callinan J said[343]:

> "Who knows, as Kennedy J in *Zadvydas* [*v Davis*] points out[344], what the outcome of sensitive negotiations between governments taking place from time to time may be. So too, conditions and attitudes may change rapidly or unexpectedly in those countries which an alien has left or which may formerly have rejected him or her."

Kennedy J's judgment in *Zadvydas v Davis*, to which Callinan J referred, is a judgment that Rehnquist CJ joined. The passage referred to is one that Scalia and Thomas JJ endorsed. Callinan J also said that "accurate predictions as to the period of immigration detention are simply not possible" because of "the difficulties necessarily attendant upon unlawful entry, changing attitudes in other countries, and international negotiations"[345]. His Honour went on[346]:

> "The fact that deportation may not be imminent, or even that no current prediction as to a date and place of it can be made, does not mean that the purpose of the detention, deportation, has been or should be regarded as abandoned. The sensitivity of international relations, the unsettled political situation in many countries, and the role and capacity of the United Nations, all contribute to the inevitable uncertainties attaching to the identification of national refuges for people who have come to this country unlawfully and who have been shown to be people to whom protection obligations are not owed."

It is true that the plaintiff here satisfies s 36(2). However, his adverse security assessment creates the same difficulties for him as those which Callinan J described. As the Commonwealth submitted, the "nature of international negotiations is such that judicial assessment of their prospects is problematic, but there is nothing to suggest that those negotiations are so unlikely to succeed that

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343 (2004) 219 CLR 562 at 658-659 [290].

344 533 US 678 at 708-709 (2001).

345 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 660 [292].

346 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 660 [295].

the Plaintiff's prospects of removal could be found to be 'so remote that continued detention cannot be for the purposes of removal'[347]."

356 *Should Al-Kateb v Godwin be overruled? The Communist Party case.* There is one final question to be answered in this case. It is: does the "doctrine in the *Australian Communist Party* case" require *Al-Kateb v Godwin* to be overruled? The plaintiff contended that on the Commonwealth's construction of the Act the Executive's power to detain depends solely on its own perception of when it would be reasonably practicable for removal to occur (unless the Minister's view of the public interest results in exercise of the discretion conferred by ss 195A or 417). The plaintiff submitted that this was offensive to Ch III of the Constitution. Invalidity was said to flow from the fact that the operation of the legislation depended on a fact which could not be falsified in proceedings under Ch III. The plaintiff relied on the following passage in Gummow J's judgment in *Al-Kateb v Godwin*[348] to support his submission:

> "The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the Constitution or involving its interpretation, hence the present significance of the *Communist Party Case*. Nor can there be sustained laws for the segregation by incarceration of aliens without their commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission or deportation of aliens." (footnote omitted)

His Honour's reference to *Australian Communist Party v The Commonwealth*[349] takes up an earlier passage in his reasons for judgment[350]:

> "That case is authority for the basic proposition that the validity of a law or of an act of the executive branch done under a law cannot depend upon the view of the legislature or executive officer that the conditions requisite for validity have been satisfied."

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347 Cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 601 [98] per Gummow J.

348 (2004) 219 CLR 562 at 613 [140].

349 (1951) 83 CLR 1; [1951] HCA 5.

350 (2004) 219 CLR 562 at 599 [88].

357 One of the interveners, Plaintiff S138, who is in the same position as the plaintiff, advanced a further argument to the same effect. It concentrated not on whether removal was foreseeable, but on the adverse security assessment. The argument began with the assumption that the plaintiff had not received procedural fairness in that he had not been informed of the substance of the allegations against him or of ASIO's grounds of concern. Plaintiff S138 submitted that the exception to the general principle that the power to detain is part of the judicial power of the Commonwealth that enables detention for immigration purposes is subject to a limitation. The limitation is that the exception "does not extend to [permit] indefinite detention where a condition precedent to detention is, in substance, unreviewable, including where the person has not been provided [with] a substantial and meaningful opportunity to be heard." Here, the condition precedent to detention is the adverse security assessment. If the person assessed is not made aware of the basis for the decision, that person cannot gauge whether ASIO has fallen into jurisdictional error. Accordingly, the person has no meaningful opportunity to seek judicial review. It was submitted that to deny the existence of the limitation was to contravene the principle identified in the *Communist Party* case. Whether the security assessment is correct is what Plaintiff S138 called a "constitutional fact". The validity of the plaintiff's detention, Plaintiff S138 argued, depends on the view of the executive officers responsible for his detention that the condition requisite for its validity, namely that the 2012 assessment was correct, was satisfied. Plaintiff S138 submitted that for the provisions authorising detention to be constitutionally valid there must be a high degree of judicial oversight and control. This was because of the interference with human liberty which immigration detention involves.

358 There are four problems with Plaintiff S138's submission.

359 The first problem relates to procedural fairness. The submission assumes that the plaintiff did not receive procedural fairness at the hands of the ASIO officers who interviewed him. That assumption was rejected above[351]. Plaintiff S138 did submit: "The constitutional difficulties ... arise even if procedural fairness has been provided in the particular case of [the plaintiff]." However, it is undesirable to debate constitutional difficulties said to arise if procedural fairness is not given in a case in which procedural fairness was given.

360 The second problem with Plaintiff S138's submission also relates to procedural fairness. The submission assumes that national security considerations will have reduced the content of procedural fairness so much that an unlawful non-citizen would not know enough to challenge an adverse security assessment by way of judicial review. But the plaintiff did not submit that his

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351 See above at [244]-[253].

adverse security assessment was flawed because national security considerations prevented its being reviewed. The plaintiff suggested that that might be Plaintiff S138's difficulty, although Plaintiff S138 did not *himself* claim that he was affected by it. The plaintiff's submission was that the ASIO officers who interviewed him had failed to make clear what the security concern which eventually led to the adverse security assessment was.

361 The third problem is that the *Communist Party* case is concerned with instances where the personal opinion of an officer of the Executive that a state of affairs exists is the condition for validity of an executive act. The present case is not among those instances. The duty to detain under ss 189(1) and 196(1) depends on an officer knowing or reasonably suspecting that a person is an unlawful non-citizen. The duty to detain under s 196 does not continue until an officer thinks fit to end the detention. It continues only until the unlawful non-citizen is removed, deported or granted a visa. The knowledge, or reasonable suspicion, that a person is an unlawful non-citizen possessed by an officer of the Executive is not conclusive. It can be challenged. A person's status as an unlawful non-citizen depends on that person's lack of a visa. A decision not to grant a visa can be challenged on the merits and thereafter by judicial review[352]. It is true that in proceedings under s 39B of the *Judiciary Act* 1903 (Cth) in the Federal Court of Australia, an application for preliminary discovery to establish the basis on which the assessment was made may sometimes be met by a successful claim for public interest immunity restricting the applicant from inspecting the documents which are the subject of that successful claim[353]. That will be so if the Court considers that the public interest in national security outweighs the public interest in the disclosure of information to the applicant. But those restraints are "self-imposed restraints which courts have adopted when undertaking the judicial review of security decisions" and are not "incompatible with the rule of law."[354] As Mason J said in *Church of Scientology Inc v Woodward*[355]:

> "The fact that a successful claim for [public interest immunity] handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials."

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352 See above at [323].

353 *O'Sullivan v Parkin* (2008) 169 FCR 283.

354 *Sagar v O'Sullivan* (2011) 193 FCR 311 at 325 [82] per Tracey J.

355 (1982) 154 CLR 25 at 61; [1982] HCA 78, quoted with approval in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 556 [24].

So far as these circumstances hamper review by the courts, they are not generated by the Act. The process is not left in the hands of the Executive, but in the hands of the courts. The Executive is not in a position to dictate to the courts[356]. There is no collision with Ch III of the Constitution of the kind which the *Communist Party* case doctrine contemplates. That case was directed to instances where bodies other than courts are empowered to make conclusive judgments as to the validity of executive action. This case concerns the powers of the courts. Among those powers is the power to determine validity.

362 The final problem with Plaintiff S138's argument is seen in his submission that the *Communist Party* principle would not be:

> "infringed if ss 189 and 196 ... are read down so as not to permit detention in circumstances where an application for a visa or release has been denied and avenues for challenge practically exhausted, the person is detained, there is no reasonably foreseeable prospect of removal, and the decision to deny the visa was made upon secret information where the person was not informed of the substance of the allegations and grounds which founded the decision."

That is not "reading down". It is radical reconstruction. This Court is not empowered to do it.

363 The answer to question 3 in the Further Amended Special Case is: "Yes".

Question 4 in the Further Amended Special Case: costs

364 Question 4 in the Further Amended Special Case is: "Who should pay the costs of the special case?" In view of the fact that questions 1, 2, 2A and 3 have been answered adversely to the plaintiff, the answer must be: "The plaintiff".

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356 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 559 [36], 596 [183] and 597 [189]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 542-543 [144]-[149].

365 CRENNAN J. The plaintiff is a national of Sri Lanka. He is also a refugee. As a Tamil, and a former member of the Liberation Tigers of Tamil Eelam ("the LTTE"), the plaintiff has a well-founded fear of persecution in Sri Lanka for reasons of his race and imputed political opinion. If returned to Sri Lanka, there is a real chance the plaintiff would face abduction, torture or death.

366 On 18 October 2009, the plaintiff was one of approximately 80 asylum seekers on board a boat intercepted by the Australian Customs Vessel *Oceanic Viking*. The asylum seekers – including the plaintiff – were taken to Indonesia, where the plaintiff remained until December 2009.

367 On 11 December 2009, the Australian Security Intelligence Organisation ("ASIO") provided the Department of Immigration and Citizenship ("DIAC") with a security assessment in relation to the plaintiff ("the 2009 assessment"). The 2009 assessment stated that the plaintiff was directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act").

368 The first defendant, the Director-General of Security, controls ASIO pursuant to s 8(1) of the ASIO Act. The second defendant, the officer in charge of the Melbourne Immigration Transit Accommodation ("the MITA"), is an officer of DIAC. The third defendant is the Secretary of DIAC, and the fourth defendant is the Minister for Immigration and Citizenship.

Relevant facts

369 The plaintiff entered Australia at Christmas Island on 29 December 2009 as the holder of a special purpose visa[357]. As a result of the expiration of that visa at midnight on that day, the plaintiff was not immigration cleared on his arrival in Australia, and was detained by an officer of DIAC under s 189 of the Migration Act in the Christmas Island Detention Centre[358].

370 On 25 June 2010, the plaintiff made a valid application for a Protection (Class XA) (Subclass 866) visa. On 18 February 2011, a delegate of the fourth defendant refused to grant a protection visa to the plaintiff.

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357 The import of the special purpose visa is that, on his arrival in Australia, the plaintiff was a "lawful non-citizen": *Migration Act* 1958 (Cth) ("Migration Act"), s 13(1).

358 Following the expiration of the special purpose visa, the plaintiff was subject to mandatory detention as an "unlawful non-citizen": Migration Act, ss 14(1) and 189.

371 The delegate found that the plaintiff is a person to whom Australia has protection obligations under the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (together, "the Convention"), within the meaning of s 36(2)(a) of the Migration Act. The delegate noted that the plaintiff had been a member of the LTTE, but stated that she did not have serious reasons for considering that the plaintiff should be excluded from protection under Art 1F of the Convention. However, because of the 2009 assessment, the delegate found that the plaintiff did not meet the requirements of cl 866.225 of Sched 2 to the Migration Regulations 1994 (Cth) ("the Migration Regulations") as he did not satisfy public interest criterion 4002 ("PIC 4002").

372 On 25 May 2011, the Refugee Review Tribunal affirmed the delegate's decision to refuse to grant a protection visa to the plaintiff.

373 On 4 November 2011, following a challenge by the plaintiff to the validity of the 2009 assessment, officers of ASIO interviewed the plaintiff, in the presence of his lawyer, for the purpose of making a new security assessment. On 9 May 2012, ASIO provided DIAC with a new adverse security assessment in relation to the plaintiff ("the 2012 assessment"). The 2012 assessment superseded the 2009 assessment, so that the 2009 assessment was no longer operative.

374 The plaintiff has been held in immigration detention in Australia continuously since December 2009: first in the Christmas Island Detention Centre and, since September 2011, in the MITA.

375 The plaintiff has no present right to enter and remain in any country other than Sri Lanka. The defendants do not propose or intend to remove the plaintiff to Sri Lanka. The third and fourth defendants have taken, and continue to take, steps for the purpose of identifying a country to which to remove the plaintiff pursuant to s 198 of the Migration Act[359]. At the time of the hearing, responses from four countries to requests from DIAC to consider resettling the plaintiff were outstanding.

Issues

376 By proceedings commenced in the original jurisdiction of this Court pursuant to s 75(v) of the Constitution, the plaintiff sought, among other things, an order absolute for a writ of certiorari setting aside or quashing, for want of procedural fairness, the decision of the first defendant to issue the 2012

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359 Migration Act, s 198(2) provides for the removal "as soon as reasonably practicable" of an "unlawful non-citizen" whose application for a visa "has been finally determined".

assessment, and an order absolute for a writ of habeas corpus directed to the second and third defendants. On 6 June 2012, Hayne J referred the following questions of law reserved on a Special Case for the opinion of the Full Court:

> "1. In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?
>
> 2. Does s 198 of [the Migration Act] authorise the removal of the Plaintiff, being a non-citizen:
>
> 2.1 to whom Australia owes protection obligations under [the Convention]; and
>
> 2.2 whom ASIO has assessed poses a direct or indirect risk to security;
>
> to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of [the Convention]?
>
> 3. Do ss 189 and 196 of [the Migration Act] authorise the Plaintiff's detention?
>
> 4. Who should pay the costs of the special case?"

377 During the course of oral argument, the plaintiff sought, and was granted, leave to amend the Special Case to include the following question concerning the validity of PIC 4002:

> "2A. If the answer to question 2 is 'Yes' by reason of the plaintiff's failure to satisfy [PIC 4002] within the meaning of clause 866.225 of Schedule 2 of [the Migration Regulations], is that clause to that extent *ultra vires* the power conferred by section 31(3) of [the Migration Act] and invalid[?]"

The parties agreed facts for the purposes of the Special Case.

Question 1 – was procedural fairness afforded?

378 The plaintiff submitted that, given the effect of the 2012 assessment on his liberty, the exercise of ASIO's power to issue the 2012 assessment was conditioned on a requirement to afford procedural fairness. The plaintiff contended that this requirement was not discharged because the specific allegations and material upon which the 2012 assessment was based were not fully disclosed to him.

379 The defendants agreed that the exercise of power to issue an assessment under the ASIO Act was conditioned on a requirement to afford procedural

fairness, the content of which was to be discerned by reference to that Act. The defendants contended that the plaintiff had been afforded procedural fairness because, in a lengthy interview at which he was legally represented, the plaintiff was informed that he was being assessed for security purposes and that ASIO was concerned with his association with the LTTE, and the plaintiff was given ample opportunity to respond to that issue of concern.

380 For the reasons given by Kiefel J, I agree that there was no denial of procedural fairness in the interview of the plaintiff conducted by officers of ASIO.

Question 2A – is cl 866.225 invalid?

381 The relevant provisions of the ASIO Act, the Migration Act, the Migration Regulations and the Convention are described in the reasons of others. They will only be repeated as necessary to make these reasons clear. Read as a whole, the Migration Act contains a complex and interconnected set of provisions "directed to the purpose of responding to the international obligations which Australia has undertaken" in the Convention[360]. The relationship between the Convention and the Migration Act, and the legislative history of ss 500-503, are discussed in the reasons of the Chief Justice[361]. For the reasons set out below, cl 866.225 of Sched 2 to the Migration Regulations is invalid to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa, as it is beyond the power conferred by s 31(3) of the Migration Act.

Decisions relying on PIC 4002

382 Section 504(1) of the Migration Act authorises the Governor-General to "make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed". It is settled that a provision in such terms precludes the making of regulations which vary or depart from positive provisions made by the relevant Act[362]. Section 31(3) of the

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360 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41.

361 Reasons of the Chief Justice at [12]-[14], [33]-[35].

362 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; [1951] HCA 42; *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381 at 406-407 per Fullagar J; [1953] HCA 67; *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ; [1957] HCA 4; *Peppers Self Service Stores Pty Ltd v Scott* (1958) 98 CLR 606 at 610 per Dixon CJ and Taylor J; [1958] HCA 39; *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629 at 640; *Willocks v Anderson* (1971) 124 CLR 293 at 298-299 per Barwick CJ, Menzies, Windeyer, Owen, Walsh and Gibbs JJ; [1971] HCA 28;

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Migration Act provides that "[t]he regulations may prescribe criteria for a visa or visas of a specified class", including protection visas. It is also well established that any conflict between the language of particular provisions may be resolved "by reference to the language of the instrument viewed as a whole"[363]. Applying relevant principles, the power in s 31(3), which is expressed generally, is a power to prescribe criteria which are not inconsistent with the Migration Act.

383 Clause 866.225(a) of Sched 2 to the Migration Regulations prescribes as a criterion for the grant of a protection visa that the applicant "satisfies public interest criteria 4001, 4002 and 4003A". PIC 4002 provides as follows:

> "The applicant is not assessed by [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of [the ASIO Act]."

384 If, after considering a valid application for a visa, the Minister is not satisfied that the criteria prescribed for it by the Migration Act or the Migration Regulations have been satisfied, s 65(1) of the Migration Act requires the Minister to refuse to grant the visa.

385 Part IV of the ASIO Act governs ASIO's role in relation to the provision of security assessments. Subject to certain exceptions which are not presently relevant[364], a security assessment provided by ASIO in relation to the exercise of any power, or the performance of any function, in relation to a person under the Migration Act is not subject to a requirement to state the grounds upon which such an assessment has been made, or to review by the Administrative Appeals Tribunal ("the AAT") on an application under s 54 of the ASIO Act[365].

Harrington v Lowe (1996) 190 CLR 311 at 324-325 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 8. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 380 [61] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28. See also *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 577-578 per Gummow J.

363 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ, citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ; [1981] HCA 26. See also *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27.

364 See ASIO Act, s 36(b); Migration Act, s 202.

365 ASIO Act, ss 36 and 37, and par (b) of the definition of "prescribed administrative action" in s 35(1).

386 A decision to refuse to grant a protection visa relying on PIC 4002 may be subject to review by the Refugee Review Tribunal ("the RRT") under Pt 7 of the Migration Act[366]. The decision of the delegate of the Minister to refuse to grant the plaintiff a protection visa was reviewed in this way. However, the only relevant matter for the RRT to consider on such a review is whether the applicant for review has or has not been "assessed by [ASIO] to be directly or indirectly a risk to security". As the RRT correctly observed in its reasons for affirming the delegate's decision to refuse to grant the plaintiff a protection visa, the RRT "does not have the power to go behind or examine the validity of the ASIO assessment" in the course of such a review.

Decisions relying on Art 1F, 32 or 33(2) of the Convention

387 The power to refuse to grant a protection visa to a refugee who constitutes a threat to national security is part of a wider legislative "scheme to exclude persons whose presence in Australia is undesirable"[367]; ss 500-503 of the Migration Act deal specifically and in detail with that subject matter.

388 Section 500(1) of the Migration Act provides that applications may be made to the AAT for review of specified categories of decisions under the Migration Act[368]. Read together, ss 500(1)(c) and 500(4)(c) give the AAT jurisdiction to review any decision under the Migration Act "to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of [the Convention], namely, Article 1F, 32 or 33(2)", other than a decision to which a certificate under s 502 applies.

389 As explained by the Chief Justice and Hayne J[369], a decision under s 501 of the Migration Act to refuse to grant a protection visa invoking the aspect of the character test set out in s 501(6)(d)(v) could be a decision which meets this description[370]. Other types of decision under the Migration Act might also meet

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366 See Migration Act, ss 411, 412.

367 Australia, Senate, Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth), Explanatory Memorandum at 1.

368 The AAT does not have general review powers. Instead, the AAT's power to review a decision depends upon an application being made to it under an enactment: *Administrative Appeals Tribunal Act* 1975 (Cth) ("AAT Act"), ss 25(1) and (4).

369 Reasons of the Chief Justice at [36]-[45]; reasons of Hayne J at [188]-[194].

370 The Explanatory Memorandum to the Bill which introduced the character test provisions states that the phrase "represent a danger" (which occurs in s 501(6)(d)(v)) includes "an assessment that a person is a risk to Australia's

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this description[371]. For example, a decision under s 501(3) to refuse to grant, or to cancel, a protection visa in the "national interest" invoking the aspect of the character test set out in s 501(6)(c)(ii) (that is, that "having regard to ... the person's past and present general conduct ... the person is not of good character") might qualify as a decision covered by s 500(1)(c)[372]. It can also be noted that a decision to cancel a visa relying on Arts 32 and 33(2) might conceivably be made otherwise than under s 501. For example, a decision under s 116(1)(e) to cancel a protection visa on the basis that "the presence of its holder in Australia is, or would be, a risk to the ... safety or good order of the Australian community" might also qualify as a decision covered by s 500(1)(c)[373].

390 Whether a particular decision under the Migration Act is a decision "to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of [the Convention], namely, Article 1F, 32 or 33(2)" will be a matter which the AAT will have jurisdiction to decide as an essential preliminary to the exercise of its substantive jurisdiction on an application for review under s 500(1)(c)[374].

391 One question which might arise in this context is whether Arts 32 and 33(2) of the Convention can apply to a decision to refuse to grant a protection visa. Article 32(1) of the Convention prohibits the expulsion of a refugee

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national security": Australia, Senate, Migration (Offences and Undesirable Persons) Amendment Bill 1992 (Cth), Explanatory Memorandum at 4 [16].

371 No party sought to challenge *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 6, and all proceeded on the basis that the Minister cannot rely on Arts 32 and 33(2) of the Convention to find under s 36(2) of the Migration Act that a person is not a person to whom Australia has protection obligations under the Convention.

372 A decision to refuse to grant a visa relying on the "national interest" is one to which the rules of natural justice are said not to apply: Migration Act, s 501(5). It can be noted that Art 32(2) of the Convention requires a decision as to expulsion to be made "in accordance with due process of law" but that requirement may be modified for "compelling reasons of national security".

373 See Convention, Art 32(1), which allows a state to expel a refugee on grounds of "public order".

374 See AAT Act, ss 25(1) and (4). See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862 at 871 [31] per French CJ, 874-875 [55]-[57] per Gummow, Hayne, Crennan, Kiefel and Bell JJ, 882 [91] per Heydon J; 289 ALR 1 at 10, 15-16, 25; [2012] HCA 25.

"lawfully in" a state's territory. As an "unlawful non-citizen"[375] the plaintiff is not an "outlaw"[376], and he has access to the Australian legal system. However, in any event, for the reasons given by Kiefel J[377], a literal application of the text of Arts 32 and 33(2) is neither necessary nor appropriate in construing s 500(1)(c).

392 The form and conduct of the review undertaken by the AAT on an application under s 500(1)(c) will be determined by the provisions of the AAT Act, as modified by sub-ss (5A)-(8) of s 500 of the Migration Act. Section 500(5) of the Migration Act contains directions to the President of the AAT as to the constitution of the AAT for the purposes of a review on an application under s 500(1), including a direction that the President must have regard to the degree to which matters to which the proceeding relates concern the security of Australia[378]. Review by the AAT on an application under s 500(1) is a form of merits review[379]. A decision of the AAT on such a review may be appealed to the Federal Court of Australia on a question of law[380].

393 Under s 502 of the Migration Act, if the Minister intends to make a decision to refuse to grant, or to cancel, a protection visa relying on Arts 1F, 32 or 33(2) of the Convention in relation to a person, and the Minister decides that it is in the "national interest" that the person be declared to be an excluded person, the Minister may, as part of the decision, issue a certificate to that effect. The Minister must make such a decision personally, and must cause notice of the making of the decision to be laid before both Houses of Parliament within 15 sitting days of making the decision. A decision to which a certificate under s 502 applies cannot be reviewed by the AAT. The provisions of s 502 are consonant with Art 32(2) of the Convention to the extent that "compelling reasons of national security" may have the result that no appeal is available from a decision relying on that Article.

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375 Migration Act, s 14(1).

376 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 611-612 [78] per Gummow J; [2004] HCA 46. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Chu Kheng Lim*") (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ; [1992] HCA 64.

377 Reasons of Kiefel J at [449]-[452]. Cf *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735; [2012] 3 All ER 1037.

378 Migration Act, s 500(5)(c).

379 AAT Act, s 43(1).

380 AAT Act, s 44(1).

Submissions

394 In relation to Question 2A, the plaintiff submitted that PIC 4002 is inconsistent with, or repugnant to, the scheme of the Migration Act concerning the right of a state to expel or return a refugee who constitutes a threat to national security, a subject covered by Arts 32 and 33(2) of the Convention. The inconsistency was said to arise because the criterion imposed by PIC 4002 undermined or negated the scheme of the Migration Act to be found in ss 500-503. The plaintiff contrasted the circumstance that a decision-maker who invoked PIC 4002 to refuse to grant a protection visa was only required to be satisfied of the existence of an adverse security assessment with the requirement for substantive consideration under ss 501 and 502, and the availability of substantive review under s 500(1)(c).

395 The defendants responded by contending that s 31(3) of the Migration Act, which provides that "[t]he regulations may prescribe criteria for a visa or visas of a specified class", was the "leading" provision[381] in respect of any conflict between s 31(3) and s 500(1)(c). The defendants further argued that, even if s 501 of the Migration Act could be said to encompass a power to make a decision relying on Arts 32 and 33(2) of the Convention, differences in scope between PIC 4002 and Arts 32 and 33(2) of the Convention meant that there was no inconsistency between PIC 4002 and the scheme of the Migration Act set out in ss 500-503.

Inconsistency

396 A decision to refuse to grant a protection visa relying on PIC 4002 effectively reposes the power of determining the application for a protection visa in the hands of an officer of ASIO. The scheme under the Migration Act for refusing such an application relying on Arts 32 and 33(2) reposes the power of determining the application in the Minister personally or in the Minister's delegate.

397 With some exceptions which are not presently relevant, an officer of ASIO is not required to state the grounds for issuing a security assessment for the purposes of the Migration Act. A decision by the Minister personally under s 502 of the Migration Act is subject to parliamentary scrutiny. A decision under s 501 of the Migration Act requires the Minister (or, in the case of a decision under s 501(1), a delegate of the Minister) to reach specific states of satisfaction as to whether the applicant for a visa "passes the character test", or whether the refusal of a visa is "in the national interest".

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381 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

398 A decision to refuse an application for a protection visa relying on PIC 4002 is subject to review under Pt 7 of the Migration Act. However, as explained above, neither the substance nor the making of the security assessment is relevantly subject to merits review. By comparison, a decision by the Minister, or the Minister's delegate, relying on Arts 32 and 33(2) (other than a decision to which a certificate under s 502 applies) is reviewable on the merits by the AAT.

399 These differences support the plaintiff's essential contention that the prescription of PIC 4002 as a criterion for the grant of a protection visa departs from and undermines the specific provisions of the Migration Act which apply to a decision to refuse, or to cancel, a protection visa relying on Arts 32 and 33(2) of the Convention. The differences in scope between PIC 4002, s 4 of the ASIO Act and Arts 32 and 33(2) of the Convention, which were noted in submissions, do not ameliorate that inconsistency. This leads to the conclusion, which answers Question 2A, that cl 866.225 of Sched 2 to the Migration Regulations is, to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa, beyond the power conferred by s 31(3) of the Migration Act.

400 It should be noted that a decision to refuse to grant a protection visa to a refugee relying on Arts 32 and 33(2) of the Convention which is finally determined (and therefore engages s 198 of the Migration Act) might raise issues relating to:

(a) the right of a sovereign state to expel a refugee on grounds of national security[382];

(b) the obligation not to expel or return such a refugee to a country where his life or freedom would be threatened on Convention grounds ("the non-refoulement obligation")[383] unless there are reasonable grounds for regarding the refugee as "a danger to the security of the country in which he is"[384];

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382 See Convention, Arts 32(1) and (2); *Attorney-General (Canada) v Cain* [1906] AC 542 at 546; *Chu Kheng Lim* (1992) 176 CLR 1 at 29 per Brennan, Deane and Dawson JJ; *T v Immigration Officer* [1996] AC 742 at 754 per Lord Mustill; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18] per Gleeson CJ; [2004] HCA 49; *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735 at 748 [32]-[33] per Lord Hope of Craighead; [2012] 3 All ER 1037 at 1052.

383 Convention, Art 33(1).

384 Convention, Art 33(2).

(c) the authority to detain under the Migration Act, which is limited by reference to the purposes of detention, which can include removal[385];

(d) the possible length and efficacy of the removal process in respect of a refugee with an adverse security assessment if a sovereign state wishes to expel the refugee, but not to a country where his life or freedom would be threatened on Convention grounds[386]; and

(e) the authorities which provide that there must be "express authorization of an abrogation or curtailment of a fundamental right [or] freedom" such as the right to personal liberty[387].

401 There is potential for serious conflict between the right to expel and the non-refoulement obligation. In the light of the relevant authorities, there is also the possibility that the lawfulness of detention will be affected by the length of the removal process. Removal under s 198 of the Migration Act must occur "as soon as reasonably practicable". However, what is reasonably practicable in respect of an unlawful non-citizen who is a refugee with an adverse security assessment may differ from what is reasonably practicable in respect of an unlawful non-citizen without such an assessment. This highlights the importance of the specific provisions of the Migration Act which apply to the expulsion of a refugee who poses a risk to national security. It also shows the seriousness of departing from those specific provisions, or undermining their operation, as is occasioned by the prescription of PIC 4002 as a criterion for the grant of a protection visa.

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385 *Chu Kheng Lim* (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ. See also at 11-12 per Mason CJ, 57 per Gaudron J, 65-66 and 71 per McHugh J. See further *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 13-14 [20]-[21] per Gleeson CJ, 19-20 [44]-[45] per McHugh J, 51-52 [133]-[134] per Gummow J.

386 See, for example, *Zaoui v Attorney-General* [2005] 1 NZLR 577, particularly at 599-602 [88]-[97] per McGrath J.

387 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15. See *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; [1990] HCA 57; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ; [2004] HCA 37; *CTM v The Queen* (2008) 236 CLR 440 at 497-498 [201] per Heydon J; [2008] HCA 25. See also *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423] per Crennan and Bell JJ; [2010] HCA 39.

Questions 2 and 3 – detention and removal

402 The legislation which introduced mandatory detention under the Migration Act in 1992[388] was considered in *Chu Kheng Lim*[389]. In a joint judgment of Brennan, Deane and Dawson JJ, with which Mason CJ relevantly agreed[390], it was recognised that aliens (now referred to as "unlawful non-citizens") are subject to a power to expel or exclude which is recognised in international law as an incident of sovereignty over territory[391]. Their Honours also said that the limited authority under the Migration Act to detain an alien did not infringe Ch III of the Constitution because "authority to detain in custody [under the Migration Act] is neither punitive in nature nor part of the judicial power of the Commonwealth."[392] Applying those principles, their Honours upheld as constitutional sections of the Migration Act dealing with powers to detain and deport on the basis that the power to detain required and authorised by those sections was "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."[393]

403 The principle established in *Chu Kheng Lim*, that the Executive's authority to detain under the Migration Act is limited by reference to the purposes of the detention (which then included expulsion and deportation), applies with equal force in respect of current provisions[394] concerning detention of unlawful non-

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388 The *Migration Amendment Act* 1992 (Cth) inserted a new Div 4B into Pt 2 of the Migration Act (later renumbered Div 6 of Pt 2 of the Migration Act), providing for the detention of certain non-citizens.

389 (1992) 176 CLR 1.

390 (1992) 176 CLR 1 at 10.

391 (1992) 176 CLR 1 at 29. See also *Attorney-General (Canada) v Cain* [1906] AC 542 at 546; *T v Immigration Officer* [1996] AC 742 at 754 per Lord Mustill; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18] per Gleeson CJ; *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735 at 748 [32]-[33] per Lord Hope; [2012] 3 All ER 1037 at 1052.

392 (1992) 176 CLR 1 at 32 (citation omitted).

393 (1992) 176 CLR 1 at 33.

394 The *Migration Reform Act* 1992 (Cth) introduced a new Div 4C into Pt 2 of the Migration Act (later renumbered Div 7 of Pt 2 of the Migration Act), providing for the detention of unlawful non-citizens.

citizens for purposes which include enabling an application for a visa to be made and considered, and expulsion or removal[395].

404 The conclusion that cl 866.225 is invalid to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa has the effect that the plaintiff's application for a protection visa is yet to be considered, and the plaintiff remains in lawful detention for that purpose, pursuant to ss 189 and 196 of the Migration Act. This answers Question 3.

405 The conclusion described above renders it unnecessary to consider the plaintiff's continuing detention in the context of powers to remove under s 198, or to answer Question 2. It is worth noting that it follows from the provisions of the ASIO Act, particularly s 17(1)(c)[396], that the conclusion of invalidity in respect of cl 866.225 has no necessary impact on the 2012 assessment. Further, the conclusion that the requirements of procedural fairness were afforded in the interview of the plaintiff by officers of ASIO in November 2011 may be relevant to the continuing use of the 2012 assessment for the purposes of functions and responsibilities under the Migration Act. In that regard, the provisions of the ASIO Act do not preclude the regular review of assessments made pursuant to that Act.

Answers

406 I would answer the questions in the Special Case, including Question 2A as amended, as proposed by Kiefel J.

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395 See, for example, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 13-14 [20]-[21] per Gleeson CJ, 19-20 [44]-[45] per McHugh J, 51-52 [133]-[134] per Gummow J.

396 ASIO Act, s 17(1)(c) provides that one of the functions of ASIO is "to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities". ASIO Act, s 37(1) provides that "[t]he functions of [ASIO] referred to in [s 17(1)(c)] include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities."

407 KIEFEL J. The plaintiff is a national of Sri Lanka and entered the Australian migration zone at Christmas Island on 29 December 2009 as the holder of a special purpose visa which expired that day. He has not since held a visa and is therefore an unlawful non-citizen[397] and liable to removal from Australia under the *Migration Act* 1958 (Cth)[398] on that account, subject to consideration of his application for a protection visa. On 18 February 2011, a delegate of the fourth defendant, the Minister for Immigration and Citizenship, found that the plaintiff was a refugee within the meaning of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (together referred to as "the Refugees Convention") because he had a well-founded fear of persecution in Sri Lanka for reasons of his race and imputed political opinion and is unable, or, owing to such fear, is unwilling, to return to that country. The plaintiff had been a member of the Liberation Tigers of Tamil Eelam ("the LTTE"). The delegate found, and the defendants accept, that should the plaintiff be returned to Sri Lanka, there is a real risk that he will be persecuted by way of abduction, torture or death.

408 Despite these findings, the delegate did not grant the plaintiff a protection visa. The sole reason for the delegate's refusal to do so was that the plaintiff did not meet the requirements of public interest criterion ("PIC") 4002, which is referred to in cl 866.225(a) of Sched 2 to the Migration Regulations 1994 (Cth). PIC 4002 requires[399] that an applicant for a protection visa not be assessed by the Australian Security Intelligence Organisation ("ASIO") as "directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*." The plaintiff was unable to meet the requirements of PIC 4002 because, in December 2009, ASIO had made such an assessment.

409 The Refugee Review Tribunal affirmed the delegate's decision on 25 May 2011. The Tribunal recorded that it had no alternative but to do so, since the plaintiff could not satisfy PIC 4002 and was therefore not entitled to be granted a protection visa. The Tribunal regarded the existence of a valid adverse security assessment by ASIO as sufficient for the purposes of PIC 4002.

410 Neither the delegate nor the Tribunal had the assessment before it. In this regard, it may be observed that ASIO is not required to provide a statement of the grounds of an adverse security assessment where the assessment is conducted in connection with the exercise of a power or performance of a function under the

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397 *Migration Act* 1958 (Cth), ss 13-14.

398 *Migration Act* 1958, s 198.

399 Migration Regulations 1994 (Cth), Sched 4.

Migration Act[400]. It would appear from an affidavit filed in these proceedings by the Director-General of Security, the first defendant, that an opinion was formed by ASIO that the plaintiff:

> "remains supportive of the LTTE and its use of violence to achieve its political objectives, and will likely continue to support LTTE activities of security concern in and from Australia."

411 In the hearing before the Refugee Review Tribunal, the plaintiff claimed that he had not been interviewed by ASIO prior to the issue of the 2009 assessment and had therefore been denied procedural fairness. An interview was subsequently conducted by officers of ASIO on or around 4 November 2011 in the presence of the plaintiff's lawyer. The interview was recorded and transcribed. On 9 May 2012, a further security assessment, to the same effect as the earlier assessment and following the terms of PIC 4002, issued. The parties have treated the earlier assessment as superseded.

412 The plaintiff is presently detained in Melbourne by the second defendant, the Officer in Charge of the Melbourne Immigration Transit Accommodation, who relies on s 189(1) of the *Migration Act* for that purpose. The plaintiff has no present right to enter and remain in any country, other than Sri Lanka, including a country which is a safe third country within the meaning of s 91D of the *Migration Act*. This is despite enquiries and requests of other countries having been made by the Australian authorities.

Procedural fairness?

413 In these proceedings, the plaintiff contends that he was denied procedural fairness because the officers of ASIO who conducted the interview did not put to him specific allegations concerning his involvement with and support for the LTTE and the likelihood that he would continue to support that organisation. However, these matters were largely in the nature of opinions formed by the officers and as such were not required to be put before the plaintiff for comment[401].

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400 *Australian Security Intelligence Organisation Act* 1979 (Cth), s 36(b) read with ss 35(1) (par (b) of the definition of "prescribed administrative action") and 37(2). An exception exists in respect of assessments made for the purposes of s 202(1) of the *Migration Act*.

401 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219 [21]-[22]; [2003] HCA 56, citing *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196

(Footnote continues on next page)

414 The defendants accept that the ASIO officers were required to afford the plaintiff procedural fairness and that that obligation extended to directing the plaintiff's attention to the issue of concern to ASIO – in this case, his role in the LTTE – and to giving him an opportunity to address that issue and to advance any evidence or material relevant to it. The defendants contend that obligation was fulfilled.

415 The defendants point out that: the plaintiff was legally represented at the interview; the interview was lengthy; the plaintiff's attention was directed to the issue of concern to ASIO, namely his association with and support for the LTTE; and he was given ample opportunity to respond to that issue. A reading of the transcript of the interview confirms the correctness of these submissions. There was no denial of procedural fairness.

The *Migration Act* and Arts 1F, 32 and 33 of the Refugees Convention

416 In *Plaintiff M61/2010E v The Commonwealth*[402], and again in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[403], this Court said that the text and structure of the *Migration Act* proceed from an assumption that Australia may have protection obligations to individuals. In that expression, the *Migration Act* may not accurately reflect the nature of Australia's obligations under the Refugees Convention. As was pointed out in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[404], those obligations are owed to other "Contracting States" rather than to individuals. This observation does not affect the means provided by the *Migration Act* to deal with a non-citizen's claim to protection.

417 In *Plaintiff M61*, the Court went on to say that the *Migration Act* provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning a person to a country where he or she has a well-founded fear of persecution for a reason stipulated in Art 1A[405]. It is necessary to understand how that response is framed and the importance that certain articles of the Convention have to the Minister's power to grant or refuse a protection visa.

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[18]; 235 ALR 609 at 616; [2007] HCA 26; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 598-599 [9]; [2011] HCA 1.

402 (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41.

403 (2011) 244 CLR 144 at 174-175 [44], 189 [90]; [2011] HCA 32.

404 (2005) 222 CLR 161 at 169 [16]; [2005] HCA 6.

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

418 Article 1A of the Refugees Convention contains a definition of the term "refugee" for the purposes of the Convention. It is not necessary to set it out. The plaintiff has a finding in his favour which follows the terms of that definition.

419 Article 1F provides that the Refugees Convention shall not apply to any person for whom there are serious reasons for considering that the person has committed certain crimes – a crime against peace, a war crime, or a crime against humanity, or a serious non-political crime prior to the person's admission to the country of refuge – or has been guilty of acts contrary to the purposes and principles of the United Nations.

420 Article 32 provides that "Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Article 33(1) prohibits the expulsion or return (refoulement) of a refugee to the frontiers of territories "where his life or freedom would be threatened". Article 33(2) states that "[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is".

421 Attention is necessarily directed, in these proceedings, to the references in Arts 32 and 33 to the national security of a Contracting State, to s 500(1)(c) of the *Migration Act*, which refers to these Articles, and to Art 1F, as bases for refusing the grant of a protection visa. It will be necessary, in due course, to consider the scheme of the *Migration Act* as a whole[406]. The starting point of analysis, however, is s 500(1)(c), which, on the view I have taken, is critical to the plaintiff's argument concerning PIC 4002.

422 Section 500 is entitled "Review of decision" and sub-s (1) provides for a review by the Administrative Appeals Tribunal ("the AAT") of three kinds of decisions: decisions under s 200 to deport a non-citizen convicted of certain crimes; decisions concerning the application of the character test in s 501; and, relevantly:

> "(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)"[407].

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406 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

407 References in these reasons to s 500 refer to that provision as it stood prior to amendment by the *Migration Amendment (Complementary Protection) Act* 2011 (Cth).

Section 500(1)(c) therefore recognises that the Minister has the power to refuse a protection visa, inter alia, on the ground that the applicant poses a danger to national security.

423 Section 501(1) provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that he or she passes the character test. It is not restricted in its application to protection visas. A person does not pass the character test, which is set out in s 501(6), if, inter alia, there is a significant risk that he or she would represent a danger to the Australian community if he or she were allowed to enter or remain in Australia. It may be observed that this is not inconsistent with the terms of Art 33(2).

424 The *Migration Act* contains further references to a decision to refuse to grant a protection visa based upon Arts 1F, 32 or 33(2). Section 502(1) provides that when the Minister intends to refuse to grant or to cancel a protection visa, relying on one or more of the Articles, and the Minister decides it is in the national interest that the person be declared an excluded person, the Minister may personally so certify. Section 503(1)(c) provides that a person who has been refused a protection visa, or whose protection visa has been cancelled, based on a decision relying on one or more of the Articles is not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations.

425 Mention may also be made of s 91T, which clarifies the meaning of the term "non-political crime" appearing in Art 1F, for the purposes of the *Migration Act*. Section 91U likewise clarifies the meaning of a "particularly serious crime", which appears in Art 33(2).

426 Sections 500 to 503 may be seen as something of a scheme which provides the Minister with a power to refuse a visa to a person, to cancel a person's visa, or to directly exclude a person from Australia, where that person is seen to pose risks of certain kinds to the Australian community. Decisions made under s 501(1) or in exercise of the power recognised by s 500(1)(c) are, however, expressed to be subject to review by the AAT[408]. The Minister's personal decision under s 502 to exclude a person in the national interest is not[409], but it is subject to the scrutiny of Parliament[410].

427 It is clearly possible that the application of s 501 may involve an assessment of the risk posed by a person to the security of Australia in

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408 *Migration Act* 1958, ss 500(1)(b), 500(1)(c).

409 *Migration Act* 1958, s 500(1) expressly excepts from such review decisions to which a certificate under s 502 applies.

410 *Migration Act* 1958, s 502(3).

considering whether the person represents a danger to the Australian community. That is not, however, the principal focus of the section. It involves wider considerations as to a person's character and is not limited to decisions concerning protection visas. Section 501 does not refer to refugees or the Refugees Convention. Questions as to national security, in the context of a refusal of a person's application for a protection visa, are more squarely raised by s 500(1)(c).

428 The power of refusal recognised by s 500(1)(c) is clearly one that is additional to, and separate from, the power given by s 501(1) and should be applied in its field of operation. The source of the power so recognised is a matter dealt with later in these reasons[411]. For present purposes it may further be observed that the power is said by s 500(1)(c) to draw upon what is contained in the three Articles of the Refugees Convention, two of which, Arts 32 and 33(2), identify, as grounds for expulsion of a person from a country, the risks posed by the person to national security. Attention should therefore be directed, at least in the first instance, to the source of the power recognised by s 500(1)(c) and, if possible, effect given to that power.

The issue concerning PIC 4002

429 Section 504(1) of the *Migration Act* provides that regulations may be made "not inconsistent with this Act, prescribing all matters which … are necessary or convenient to be prescribed for carrying out or giving effect to this Act". Section 31(3) provides that the regulations may prescribe criteria for a visa of a specified class, including for the class provided for by s 36. Section 36(1) provides that there is a class of visas to be known as protection visas.

430 A primary criterion specified by s 36(2)(a) for a protection visa is that the applicant for the visa is "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the [Refugees Convention]". Under the Migration Regulations, protection visas are subclass 866 visas. The criterion in s 36(2)(a) is restated in the Regulations[412]. Clause 866.225 requires that an applicant satisfy particular public interest criteria.

431 PIC 4001 concerns the application of the character test. To satisfy PIC 4001, either an applicant must pass the character test, the Minister must be satisfied that the applicant would pass if the test was applied, or the Minister must have decided not to refuse a visa regardless of the test not being passed. PIC 4001(a) expresses no more than the requirements of s 501(1) of the *Migration Act*.

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411 At [441]-[444].

412 Migration Regulations, cll 866.211, 866.221.

432 PIC 4002 is referred to above[413]. It refers to a security assessment made under the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). The term "security" is defined in s 4 as:

> "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
>
> (ii) sabotage;
>
> (iii) politically motivated violence;
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> (iv) promotion of communal violence;
>
> (v) attacks on Australia's defence system; or
>
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa)."

433 Paragraph (b) may extend the notion of security beyond what is contemplated by Arts 32 and 33(2). Those Articles are concerned with the risk that an individual may present for the security of the country in which he or she is residing. Paragraph (b) appears to comprehend obligations undertaken by Australia to other countries in connection with security. Conceivably, those obligations may be directed not to the security of Australia but to the security of another country. It may be accepted that the security of one country may be dependent upon the security of other countries[414], but par (b) does not limit an assessment to such a consideration. An assessment based on par (b) would presumably link the applicant for a protection visa with Australia's obligation to another country, but in order to find that the applicant presented a threat to

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413 At [408].

414 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 50 [87].

security, it would not be necessary to show that the applicant, directly or indirectly, presented a threat to the security of Australia.

434 Regulations must not conflict with or override the provisions of their enabling Act, unless the enabling Act so provides[415]. Section 504 of the *Migration Act* requires that any regulations made under that provision carry out and give effect to the Act and not be inconsistent with it. In *Harrington v Lowe*[416] it was held that rules of court could not vary or depart from the positive provisions of their enabling Act by imposing a regime inconsistent with the Act. A similar issue arises here concerning PIC 4002, which necessitates a consideration of the scheme of the *Migration Act* concerning the refusal of protection visas on grounds relating to national security. As will be observed, there is more involved than a difference in notions of security.

The statutory scheme and s 500(1)(c)

435 It was said in *Minister for Immigration and Ethnic Affairs v Mayer*[417], and repeated by me in *Plaintiff M70*[418], that the *Migration Act* may be seen to give effect to an obligation to determine whether an asylum seeker is a refugee, for the purposes of the Refugees Convention. The power of removal in s 198 cannot be engaged until such a determination is made. The plaintiff submits that his removal can occur only if there has been a decision to refuse to grant a protection visa relying on Arts 32 or 33(2).

436 The course contemplated by the *Migration Act* is for the Minister, or the Minister's delegate, to consider whether to grant the visa. Section 65(1)(a) provides that if the Minister, after considering a valid application for a visa, is satisfied that:

> "(i) the health criteria for it (if any) have been satisfied; and
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> (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

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415 *Ex parte Davis; In re Davis* (1872) LR 7 Ch App 526 at 529; Bennion, *Bennion on Statutory Interpretation*, 5th ed (2008) at 244.

416 (1996) 190 CLR 311 at 324-325; [1996] HCA 8.

417 (1985) 157 CLR 290 at 300, 305-306; [1985] HCA 70.

418 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 224 [215], 225-226 [217]-[218], 227 [223], 231 [238].

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid",

a visa is to be granted.

437 The health criteria[419] require visa applicants to undergo medical and chest x-ray examinations. They may result in an applicant being placed under medical supervision if he or she presents a threat to public health in Australia. A criterion prescribed by the *Migration Act* is that in s 36(2), which has been referred to above. It follows from *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[420], and the finding that the plaintiff is a refugee within the meaning of the Refugees Convention, that that criterion is satisfied.

438 Attention is focused by the defendants upon PIC 4002 as "other criteria … prescribed by … the regulations" within the meaning of s 65(1)(a)(ii). The defendants contend that one need go no further than to treat PIC 4002 as an essential criterion which is not met, and from which it follows that a protection visa must be refused. This was the approach taken by the delegate and the Refugee Review Tribunal. On this view it is not necessary for the Minister to consider the matters to which s 500(1)(c) directs attention. However, the submission overlooks the need to construe the *Migration Act* and Migration Regulations together. It assumes the validity of the prescription of PIC 4002 as a criterion for the grant of a protection visa, which is the matter in issue.

439 On the material before the delegate and the Tribunal, the grant of a protection visa to the plaintiff was not prevented by any of the matters referred to in s 65(1)(a)(iii). The ASIO Act does not operate as a Commonwealth law upon the *Migration Act*, so that an assessment made under it could prevent the grant of a protection visa. The ASIO Act provides for the functions of ASIO, which include the furnishing of security assessments to Commonwealth agencies as relevant to their functions and responsibilities[421]. It is the Migration Regulations,

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419 Migration Regulations, cll 866.223-866.224B of Sched 2.

420 (2005) 222 CLR 161 at 174 [33], 176 [42], 179-180 [57].

421 *Australian Security Intelligence Organisation Act* 1979, s 37(1).

through PIC 4002, which purport to give an ASIO security assessment the effect of preventing the grant of a visa.

440 Section 501 of the *Migration Act*, which contains the character test, is specified as a provision which may prevent the grant of a protection visa. Section 500(1)(c) is an "other provision of this Act" for the purposes of s 65(1)(a)(iii), which may also prevent a grant, because it provides grounds for refusal. The defendants accept that s 500(1)(c) appears to contemplate a decision made by reference to the abovementioned Articles. For the reasons earlier given[422], it is preferable to first consider the source of the power recognised by s 500(1)(c) to refuse a visa on grounds of, inter alia, security by reference to the Articles.

441 The assumption made in s 500(1)(c), that there is a power to refuse the grant of a protection visa relying on the three Articles, suggests that there is another provision in the *Migration Act* which confers the power. But for the decision in *NAGV*, the obvious candidate would be s 36(2) and its requirement that a visa applicant be a person to whom the Minister is satisfied Australia has "protection obligations" under the Refugees Convention. On one view, the qualification of a person as a refugee under Art 1A is not sufficient to answer that question. Articles 1F, 32 and 33(2) are expressed in terms which prevent the operation of the Refugees Convention in certain circumstances, or prevent a particular person claiming the benefit of its provisions. Where those Articles operate such that the Refugees Convention does not apply or a refugee is disentitled from claiming the benefit of the prohibition on refoulement, it might be thought possible to conclude that Australia does not owe protection obligations to that person. However, *NAGV* holds that the reference to these Articles in the *Migration Act* does not derogate from a construction of s 36(2) by which the criterion there expressed is answered by reference to the definition of a refugee in Art 1A of the Refugees Convention[423]. The plaintiff's submissions do not seek to cast doubt upon the decision in *NAGV*.

442 The defendants refer to the Explanatory Memorandum dealing with what became s 500(1)(c)[424], where it was said that the provision has the effect of "removing the obligation to provide protection as a refugee to a person who has

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422 At [428].

423 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 174 [33], 176 [42], 177 [47], 179-180 [57].

424 Section 180(1)(c), discussed in Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 3 [10].

committed crimes against peace, war crimes, crimes against humanity, serious non-political criminal offences, or otherwise presents a threat to the security of Australia or to the Australian community." A threat to the "security of Australia" may be taken to refer to Arts 32 and 33(2) and a "threat to the … Australian community" may reflect the danger to the community referred to in Art 33(2).

443 The defendants point out that the assumption there expressed, that the effect of a person coming within Arts 1F, 32 or 33(2) was to remove protection obligations, was shown to be wrong in *NAGV*. But an acceptance of the defendants' proposition does not mean that the power referred to in s 500(1)(c), and the other sections referred to above, does not exist and cannot be used to refuse a protection visa on the grounds provided by these Articles. Section 500 and the other sections necessarily imply the existence of the power.

444 *Minister for Immigration and Ethnic Affairs v Mayer*[425], which has been referred to above, concerned s 6A(1)(c) of the *Migration Act*. That section provided that a permanent entry permit was not to be granted to a non-citizen after his entry into Australia unless, inter alia, the Minister had determined that he had the status of refugee within the meaning of the Refugees Convention. There was no other provision in the *Migration Act* providing a power of determination. This Court held that s 6A(1)(c) should be construed so as to imply that authority. It was said[426] that a legislative provision which operates upon a specified determination of a Minister can readily be construed as impliedly conferring the statutory function to make the determination. Such a construction is clearly warranted where there is no other source apparent and the legislative provision would otherwise be without content if no authority to make the determination existed. The approach taken in *Mayer* was applied in *Chan v Minister for Immigration and Ethnic Affairs*[427] and cited with approval in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[428]. So far as concerns s 500(1)(c), the provision of a power to review a decision made relying upon the Articles confirms the correctness of the approach by which the power is implied.

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425 (1985) 157 CLR 290.

426 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-303 per Mason, Deane and Dawson JJ.

427 (1989) 169 CLR 379; [1989] HCA 62.

428 (1996) 185 CLR 259 at 273-274; [1996] HCA 6. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 157; [1997] HCA 27; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 172 [16]; [1999] HCA 35; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 175 [36].

445 The refusal of a protection visa on the grounds provided by those Articles, which include the safety of the community and national security, is not inconsistent with a conclusion that a person is a refugee to whom protection obligations are owed. Elsewhere in their submissions, the defendants rely upon the fact that s 36 itself recognises that some refugees may not be eligible to obtain protection visas. Section 36(3), which was introduced as part of the *Border Protection Legislation Amendment Act* 1999 (Cth) and was in place at the time *NAGV* was decided[429], provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in a country apart from Australia.

446 *NAGV* was concerned with the construction of s 36(2) of the *Migration Act* and what constituted satisfaction of the criterion therein expressed. In the process of construing the provision, this Court excluded the operation of the Articles, in particular, the terms in which the obligation of non-refoulement is expressed in Art 33(1)[430]. But it did not suggest that satisfaction of that criterion meant that a refugee was entitled to a protection visa, or that the power referred to in s 500(1)(c) of the *Migration Act* could not be utilised to refuse the grant of a visa on the grounds provided by the Articles. Indeed the Court recognised the operation the Articles might have in relation to the grant or cancellation of a protection visa[431].

447 It is of no small importance to the statutory scheme, and its comparison with PIC 4002, that s 500(1)(c) provides a right of review from a decision refusing the grant of a protection visa which relies upon one or more of the Articles. The AAT has been selected to undertake the review of these decisions. Section 500(4) provides, in effect, that such a decision, along with the other types of decisions referred to in s 500(1) – to deport non-citizens who have been in Australia for less than 10 years and have been convicted of certain offences; and to refuse to grant or to cancel a visa based on application of the character test

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429 Although s 36(3) of the *Migration Act* 1958 had been enacted by the time *NAGV* was decided, the visa application concerned in that case predated s 36(3). Thus, the relevant form of the *Migration Act* 1958 considered in *NAGV* was that prior to changes being made to s 36 by Pt 6 of Sched 1 to the *Border Protection Legislation Amendment Act* 1999 (Cth): see *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 168 [10].

430 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 173-174 [28]-[33], 186 [81].

431 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 179-180 [57].

under s 501 – is not reviewable by other tribunals having review functions under the *Migration Act*, including the Refugee Review Tribunal.

448 The reason for the choice of the AAT as the reviewing body may be that it is a "high ranking review tribunal", the President of which is required to be a judge of the Federal Court[432]. Section 500(5) of the *Migration Act* makes special provision for the President of the AAT to consider the persons who are to constitute the AAT in a proceeding to review decisions of the kind in question. Amongst the factors to which the President must have regard are the degree of public importance and the complexity of the matters to which the proceeding relates, and the degree to which the matters concern the security, defence or international relations of Australia.

Can Arts 32 and 33(2) apply to a refusal?

449 The defendants point to the terms of Art 32, which are expressed to deal only with the expulsion of a refugee who is lawfully in the territory of a Contracting State. Decisions in the United Kingdom and elsewhere, such as *R (ST) v Secretary of State for the Home Department*[433], hold that whether a person is "lawfully" in a Contracting State falls to be determined by reference to whether the refugee has been granted the right to live in that State under its domestic law. The plaintiff in this case has not been granted that right. It follows, the defendants say, that there can never be a decision to refuse relying on Art 32. The "refusal to grant" referred to in s 500(1)(c) therefore miscarries.

450 A literal application of the Articles is neither necessary nor appropriate in construing s 500(1)(c) to determine its intended operation in the statutory scheme. Rather it is necessary to approach the provision on the basis that no word, sentence or clause is superfluous, void or insignificant[434].

451 The decision to refuse a visa to which s 500(1)(c) refers is one made "relying on" the Articles. It cannot sensibly be suggested that the terms of the Articles are to be applied literally in this process. Section 500(1)(c) directs attention to the matters which form the basis for the non-operation of the Refugees Convention or the disentitlement of a person to the benefit of its provisions.

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432 *Daher v Minister for Immigration and Ethnic Affairs* (1997) 77 FCR 107 at 110.

433 [2012] 2 WLR 735 at 748 [33]; [2012] 3 All ER 1037 at 1052.

434 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71], referring to *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; [1905] HCA 11.

452 It is therefore not to the point, for the purpose of s 500(1)(c), that a person be lawfully resident in Australia. It is not to the point that the refoulement of the plaintiff is not contemplated, which is the premise for Art 33. Rather, those Articles should be taken to provide grounds for refusal by reference to the conduct, or potential future conduct, of a refugee and the effect of such conduct upon Australia's interests so far as they concern national security and the protection of the community. If there are reasonable grounds for regarding a refugee as "a danger to the security of [Australia]" (Art 33(2)) or there are "compelling reasons of national security" (Art 32(2)), the grant of a visa is prevented by a provision of the *Migration Act* within the meaning of s 65(1)(a)(iii).

The AAT and review of security assessments

453 The defendants point to special provisions in the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") with respect to review of security assessments made by ASIO. These provisions include the creation of a Security Appeals Division[435]. Certain powers, such as the power to review adverse security assessments by ASIO[436], may be exercised by the AAT only in this Division. Special procedures are involved in certain hearings in the Security Appeals Division, such as provisions for a private hearing[437], and for the consideration by the presidential member as to whether information be disclosed where it is subject to certification by the Attorney-General that disclosure would be contrary to the public interest[438].

454 Section 500(1) is not the only provision in the *Migration Act* concerned with review by the AAT of security assessments or decisions based on such assessments. Section 202, which concerns deportation upon security grounds, refers to the availability of review and does so without reference to the additional procedures provided for in the AAT Act.

455 It is not entirely clear what is sought to be drawn by the defendants from reference to the different procedures which apply to a review by the AAT of an adverse security assessment, so far as concerns the operation of s 500(1)(c). What the defendants' submission points out is that an assessment made for the purposes of PIC 4002 may be subject to a different review process. This tends to

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435 *Administrative Appeals Tribunal Act* 1975 (Cth), Pt III, Div 1, s 19(2)(baa).

436 *Administrative Appeals Tribunal Act* 1975, s 19(6).

437 *Administrative Appeals Tribunal Act* 1975, s 39A(5).

438 *Administrative Appeals Tribunal Act* 1975, s 39B(5).

highlight the fact that the Migration Regulations, by PIC 4002, establish a regime different from that applying under the *Migration Act*.

Conclusions

456 The *Migration Act* contemplates that the Minister, or the Minister's delegate, may consider whether a person poses a risk to the security of Australia in determining whether to grant or to refuse a protection visa. If the Minister considers that the risk to security is unacceptable, a visa may be refused notwithstanding that a person comes within the Refugees Convention's definition of a refugee. The Minister could be informed by an assessment by ASIO. It may be noted that such an assessment is required under the *Migration Act* where a person is to be deported on security grounds[439].

457 The *Migration Act*, by s 500(1)(c), provides for a review to be conducted by the AAT of a decision of this kind. This strongly implies that the grounds provided by the three Articles of the Refugees Convention, which may be relied upon by the Minister in refusing to grant a protection visa, are not criteria respecting the grant of a visa under s 65(1)(a)(ii); rather, what is contemplated is that the procedure concerning refusal on these grounds is subject to review by a tribunal chosen for that purpose.

458 PIC 4002, if applied, would deny the Minister that consideration and it would deny the review process specified in s 500(1). It has the effect of bringing the consideration by the Minister, or the Minister's delegate, to a premature end and rendering the decision to that effect non-reviewable. The process created by PIC 4002 requires a refusal of a protection visa based entirely upon an opinion formed by officers of ASIO. But it is nowhere contemplated by the *Migration Act* that officers of ASIO are to have a determinative role regarding applications for visas.

459 The ASIO Act provides for a review of an adverse security assessment by the AAT[440], but that review would be of an assessment of security as defined by s 4 of the ASIO Act, which, as has been noted, contemplates wider notions of security. PIC 4002 could, on one view, be read down to limit the assessment of Australia's security conformably with Arts 1F, 32 and 33(2), but this would not overcome the clear intention of the *Migration Act* that the Minister, or the Minister's delegate, consider for him- or herself whether a protection visa should be refused on grounds of national security. PIC 4002's statement that the non-existence of an adverse security assessment is a criterion impermissibly cuts across the process intended by the *Migration Act*.

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439 *Migration Act* 1958, s 202(1)(b).

440 *Australian Security Intelligence Organisation Act* 1979, s 54(1).

460 On the view I have taken of this matter, it is neither necessary nor appropriate at this point to consider the arguments directed at the decision in *Al-Kateb v Godwin*[441]. The plaintiff may lawfully be detained until his application has been considered in accordance with the *Migration Act*. Until the outcome of the plaintiff's application is known, the determination of which may include the review provided by s 500(1)(c), consideration of the constitutional limits to the power to detain unlawful non-citizens is premature.

461 I am in agreement with Hayne J as to the answers which should be given to questions 2, 3 and 4 of the Special Case, and to question 2A as amended. I have dealt with the question of procedural fairness. I would answer Question 1 as follows.

Question 1: In furnishing the 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness?

Answer: No.

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441 (2004) 219 CLR 562; [2004] HCA 37.

462 BELL J. The plaintiff is a Tamil national of Sri Lanka. He has been assessed by the United Nations High Commissioner for Refugees ("the UNHCR") and by Australia to be a refugee with a well-founded fear of persecution should he be returned to Sri Lanka. The plaintiff was registered by the UNHCR in Indonesia in July 2009. In November 2009, he was interviewed by an officer of the Commonwealth Department of Immigration and Citizenship ("DIAC"). At the time, the plaintiff was being held in an Indonesian immigration detention facility. Following the interview, the plaintiff was issued with a special purpose visa. The possession of the visa permitted the plaintiff to lawfully enter Australia. He entered Australia at Christmas Island on 29 December 2009. Within an hour of his arrival, the plaintiff's special purpose visa expired and he has not since held a visa under the *Migration Act* 1958 (Cth) ("the Act").

463 The plaintiff has been held in immigration detention since 30 December 2009.

464 The plaintiff made a valid application for the grant of a protection visa, which would enable him to reside in the Australian community. Section 36(2)(a) of the Act provides as a criterion for the grant of a protection visa that the Minister for Immigration and Citizenship ("the Minister") is satisfied that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol[442] ("the Convention"). Additional criteria for the grant of protection visas are specified in the Migration Regulations 1994 (Cth) ("the Regulations")[443]. These include that at the time a decision to grant or refuse to grant the visa is made, the applicant must satisfy certain public interest criteria[444]. Public interest criterion 4002 ("PIC 4002") requires that the applicant is not assessed by the Australian Security Intelligence Organisation ("ASIO") to be directly or indirectly a risk to security[445].

465 The question of whether Australia has protection obligations to a person is answered by determining whether the person is a refugee to whom the

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442 Section 5 of the Act provides that the "Refugees Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the "Refugees Protocol" means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

443 The Regulations, Sched 2, Subclass 866.

444 The Regulations, Sched 2, cl 866.225(a).

445 PIC 4002 is set out in Sched 4, Pt 1, cl 4002 of the Regulations.

Convention applies by reference to Art 1[446]. A person with a well-founded fear of persecution for a Convention reason within the meaning of Art 1A(2) is a refugee. However, Art 1F states that the provisions of the Convention do not apply to a person if there are serious reasons for considering that the person has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge or other acts contrary to the purposes and principles of the United Nations.

466 The plaintiff was assessed by the Minister's delegate to have a well-founded fear of persecution in Sri Lanka from the Sri Lankan Government, paramilitary groups and Tamil separatist groups on the basis of his race and his imputed political opinion. The latter was attributed to him by putative persecutors because he is a former member of the Liberation Tigers of Tamil Eelam ("the LTTE"). The delegate was satisfied that the plaintiff is at risk of being abducted, tortured or killed in Sri Lanka by the agents of persecution. She assessed the plaintiff to be a refugee. She was satisfied that he is not excluded under Art 1F from the benefit of that status. Notwithstanding that Australia owes protection obligations to the plaintiff, he was refused a protection visa. The refusal was the consequence of the plaintiff's inability to satisfy PIC 4002: ASIO has assessed that the plaintiff is directly or indirectly a risk to security.

467 The central obligation assumed by Contracting States under the Convention is stated in Art 33(1): a State shall not expel or return ("refouler") a refugee to the frontiers of territories where the refugee's life or freedom would be threatened for a Convention reason. Article 33(2) provides that the benefit of this guarantee does not prevent the expulsion or return of a refugee where there are reasonable grounds for believing that the refugee is a danger to the security of the Contracting State. Australia does not claim to be relieved of its protection obligations to the plaintiff. It is not said that there are reasonable grounds for regarding the plaintiff as a danger to Australia's security such that he might be expelled or returned relying on Art 33(2).

468 The plaintiff is being held in the Melbourne Immigration Transit Accommodation ("MITA"). The authority relied upon by the Officer in Charge of MITA is s 189(1) of the Act. That provision requires an officer to detain an unlawful non-citizen who is in the migration zone. A person who is detained under s 189 must be kept in immigration detention until removed from Australia under ss 198 or 199, deported, or granted a visa[447]. An officer must remove an

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446 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 6 ("*NAGV*").

447 The Act, s 196(1).

unlawful non-citizen detainee from Australia as soon as reasonably practicable after the final determination of the detainee's application for a substantive visa[448]. The scheme is detailed in *Al-Kateb v Godwin*[449]. The defendants submit that the power of removal from Australia under s 198 is to be construed as not authorising or requiring the removal of a refugee in breach of Australia's obligations under the Convention. That submission should be accepted.

469 Sri Lanka is the only country which the plaintiff has a right to enter. The plaintiff remains in immigration detention because he cannot be returned to Sri Lanka and no other country is willing to receive him. These are the circumstances in which the plaintiff commenced proceedings in the original jurisdiction of the Court pursuant to ss 75(iii) and 75(v) of the Constitution, claiming relief including an order absolute for a writ of habeas corpus against the Officer in Charge of MITA and the Secretary of DIAC.

470 The amended Special Case raised three substantive questions for determination. The first question asks whether, in furnishing to DIAC the adverse security assessment, the Director General of Security ("the Director General") failed to comply with the requirements of procedural fairness. The second question asks whether s 198 of the Act authorises the plaintiff's removal to a country in which he does not have a well-founded fear of persecution in circumstances in which he is a person to whom Australia has protection obligations and who has an adverse security assessment. The third question asks whether ss 189 and 196 authorise the plaintiff's detention. The answer to this question for which the plaintiff contends requires the Court to re-open the decision in *Al-Kateb*.

471 In the course of the hearing, the plaintiff was given leave to claim additional relief on a further ground. In the event that the answer to the second question is "yes", the plaintiff seeks a declaration that cl 866.225 of Sched 2 of the Regulations is ultra vires the power conferred by s 31(3) of the Act and invalid to the extent that it requires an applicant for a protection visa to satisfy PIC 4002. Success on this ground would mean that the plaintiff's application for a protection visa has not been lawfully determined. Since, in my opinion, the answer to the second question is "yes", it is convenient to address the challenge to the Regulations first. If the stipulation of PIC 4002 is ultra vires the regulation-making power under the Act, the remaining questions do not arise for determination. In such an event, the plaintiff acknowledges that his continued detention while his application is redetermined would be authorised under the Act.

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448 The Act, ss 198(2) and 198(6).

449 (2004) 219 CLR 562; [2004] HCA 37 ("*Al-Kateb*").

The challenge to PIC 4002

472 Before 1 November 1993, persons seeking to engage Australia's protection obligations were required to apply for recognition as a refugee and thereafter to seek permission to remain in Australia[450]. The *Migration Reform Act* 1992 (Cth) ("the Reform Act") combined these two processes into the single process of applying for a protection visa. From its inception, the scheme required an applicant for a protection visa to satisfy criteria in addition to the statutory criterion of being a person to whom Australia has protection obligations. Express provision was made for additional criteria to be specified in the regulations[451]. The regulations which accompanied the amendments introduced by the Reform Act included the requirement that an applicant satisfy public interest criteria, of which PIC 4002 was one. At the time, PIC 4002 stipulated that "the applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security"[452]. Another public interest criterion stipulated by the regulations at the inception of the scheme required that the applicant not be a person whose presence in Australia was prejudicial to Australia's foreign relations[453].

473 PIC 4002 was amended in 2005 by the omission of the words "competent Australian authorities" and the substitution of the words "Australian Security Intelligence Organisation"[454]. The words "Australian national" before the word "security" were omitted and the words "within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*" were inserted after it. The changes confined the assessment to one carried out by ASIO. The assessment was not restricted to Australia's national security but it included

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450 The scheme is described in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290; [1985] HCA 70.

451 Migration Act, s 26(3) as at 1 November 1993 (now s 31(3)).

452 Migration (1993) Regulations 1992 (Cth), Sched 4, cl 4002. The Reform Act received assent on 17 December 1992. The bulk of the Reform Act, including the amendment to PIC 4002, commenced on 1 November 1993. The Migration (1993) Regulations 1992 (Cth), which introduced PIC 4002, commenced on 1 February 1993. PIC 4002 was amended to include the reference to "competent Australian authorities" and "Australian national security" by reg 36.2 of the Migration (1993) Regulations (Amendment) 1993 No 88 on 31 May 1993.

453 Migration (1993) Regulations 1992 (Cth), Sched 4, cl 4003.

454 Migration Amendment Regulations 2005 (Cth) (No 10).

consideration of security matters in the conduct of Australia's responsibilities to foreign countries[455].

474 Other amendments to the Act which were intended to commence with those introduced by the Reform Act inserted provisions relating to the refusal or cancellation of a protection visa "relying on one or more of ... Article 1F, 32 or 33(2) [of the Convention]"[456]. Jurisdiction was conferred on the Administrative Appeals Tribunal ("the AAT") to review a decision to refuse to grant a protection visa, or to cancel a protection visa, "relying on" one of more of Arts 1F, 32 or 33(2) (now s 500(1)(c)). The right to seek AAT review of decisions to refuse to grant or to cancel a protection visa relying on Arts 1F, 32 or 33(2) was not to apply to certain decisions taken personally by the Minister (now s 502(1)(a)(iii)). A person in relation to whom a decision has been made to refuse to grant, or to cancel a protection visa, relying on one or more of Arts 1F, 32 or 33(2) was not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations (now s 503(1)(c)).

475 Reference to Art 1F has been made earlier in these reasons. It deals with a person's past serious criminal activity and past acts that are contrary to the purposes and principles of the United Nations. A person to whom Art 1F applies is outside the provisions of the Convention. Articles 32 and 33(2) deal with the expulsion or return of refugees. Article 32 is concerned with a refugee who is lawfully in the territory of the expelling State. A refugee who answers this description is not to be expelled "save on grounds of national security or public order". In such an event, Art 32 dictates (except where compelling reasons of national security otherwise require) that the refugee be permitted to submit evidence to clear himself, and to appeal to and be represented before a competent authority, and to be allowed a reasonable period in which to seek legal admission into another country.

476 The obligation of non-refoulement imposed by Art 33(1) applies whether the refugee is lawfully present within the territory of the State or otherwise. The obligation is subject to the exception stated in Art 33(2), which allows a Contracting State to return a refugee in circumstances in which there exist

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455 *Australian Security Intelligence Organisation Act* 1979 (Cth) ("ASIO Act"), s 4, par (b) of definition of "security".

456 The *Migration (Offences and Undesirable Persons) Amendment Act* 1992 (Cth), ss 4(2)(b), 6, 7.

reasonable grounds for regarding the refugee as being a danger to the security of the country in which he is[457].

477 No express power to refuse to grant or to cancel a protection visa "relying on" Arts 1F, 32 or 33(2) is provided in the Act. As noted, s 36(2) incorporates as a criterion for the grant of a protection visa that the applicant is a person to whom Australia has protection obligations under the Convention. A decision to refuse to grant a protection visa because the person is not a person to whom the provisions of the Convention apply under Art 1F, and for that reason not within the criterion stated in s 36(2), is a decision "relying on" Art 1F to which the right of review before the AAT applies. The plaintiff's challenge to the validity of the stipulation of PIC 4002 is on the ground of repugnancy to the provisions of the Act respecting decisions to refuse to grant or to cancel a protection visa "relying on" Arts 32 and 33(1). Each deals, inter alia, with security in a manner that is said to be inconsistent with the stipulation of PIC 4002.

478 The Explanatory Memorandum to the Bill introducing the provisions relating to decisions "relying on one or more of Arts 1F, 32 and 33(2)" stated[458]:

> "Subclause 4(2)(b) inserts new paragraph (c) into section 180 [now s 500(1)(c)] to extend the jurisdiction of the AAT to review decisions to refuse or cancel protection visas relying on Articles 1F, 32 or 33(2) of the Refugees Convention. Protection visas will come into existence on the commencement of the *Migration Reform Act 1992* on 1 November 1993. **The Articles of the Refugees Convention referred to in new paragraph 180(1)(c) have the effect of removing the obligation to provide protection as a refugee to a person who has committed crimes against peace, war crimes, crimes against humanity, serious non-political criminal offences, or otherwise presents a threat to the security of Australia or to the Australian community**." (emphasis added)

479 In *NAGV*[459], it was explained that the adjectival phrase in s 36(2) (as it then stood) "to whom Australia has protection obligations under [the Convention]" describes a person who is a refugee within the meaning of Art 1 of

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457 Under Art 33(2), a Contracting State may also refouler a refugee who has been convicted by a final judgment of a particularly serious crime and who constitutes a danger to the community of that country.

458 Australia, House of Representatives, Migration (Offences and Undesirable Persons) Amendment Bill 1992, Explanatory Memorandum at 3 [10].

459 (2005) 222 CLR 161.

the Convention[460]. The assumption in the concluding sentence of the Explanatory Memorandum that each of Arts 1F, 32 and 33(2) have the effect of "removing the obligation to provide protection as a refugee" was wrong. A decision to refuse to grant a protection visa because an applicant is not a person to whom Australia has protection obligations is not one made relying on Arts 32 or 33(2). The introduction of the provisions relating to the refusal to grant or the cancellation of protection visas "relying on" the Convention Articles was noted in *NAGV*[461]. Their Honours suggested that the reference to Arts 32 and 33(2) may have been included "for more abundant caution or as epexegetical of Art 1F in its adoption by the Act, with operation both at the time of grant and later cancellation of protection visas."[462]

480 The plaintiff submits that ss 500(1)(c), 500(4)(c)[463], 502(1)(a)(iii) and 503(1)(c) must be taken to reflect an express legislative intention that the Minister be permitted to refuse to grant or to cancel a protection visa "relying on" Arts 32 or 33(2). He contends that the power resides in s 501(1) and 501(6)(d)(v) or, perhaps, as an implication from the grant of jurisdiction under s 500(1)(c).

481 Section 65(1) requires the Minister to grant the visa if he or she is satisfied that the criteria for the visa prescribed by the Act or the Regulations have been satisfied, and that the grant is not prevented by ss 40, 500A or 501 of the Act or by any other provision of the Act or any Commonwealth law, and that any applicable charge has been paid. If the Minister is not so satisfied, he or she is required to refuse to grant the visa[464].

482 Section 501 provides that the Minister may refuse to grant a visa to a person who does not pass the "character test". The "character test" is defined in s 501(6). Of present relevance is s 501(6)(d)(v), which states that a person does

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460 (2005) 222 CLR 161 at 176 [42] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

461 (2005) 222 CLR 161 at 179 [55] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

462 (2005) 222 CLR 161 at 179 [57] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

463 Section 500(4)(c) provides that decisions to refuse to grant or to cancel a protection visa relying on one or more of Arts 1F, 32 or 33(2) are not reviewable by the Refugee Review Tribunal or the Migration Review Tribunal.

464 The Act, s 65(1)(b).

not pass the character test if, in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

> "represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way."

483 The plaintiff submits that the refusal to grant a protection visa because the applicant does not pass the character test under s 501(6)(d)(v) is a decision that "relies on" one or both of Arts 32 or 33(2) and is subject to review before the AAT.

484 The stipulation under the Regulations[465] of PIC 4002 is challenged as inconsistent with the Act in several ways. First, satisfaction of PIC 4002 involves a broader inquiry than satisfaction of the security aspect of the character test[466]. PIC 4002 thus erects a barrier to entry of a more extensive kind than under the Act. Secondly, PIC 4002 interposes a different decision-maker to the repository of the power under the Act, giving rise to the possibility of "disconformity of views between different arms of the Executive on the same subject matter". Thirdly, PIC 4002 does not require the Minister or the Minister's delegate to be satisfied of the content of the assessment, whereas the Minister or the Minister's delegate is required to be satisfied as a matter of substance that an applicant passes the character test. Fourthly, PIC 4002 circumvents the special process of review provided for in the Act for decisions to refuse or cancel protection visas relying on Arts 32 or 33(2).

485 The plaintiff disavows any contention that criteria additional to those in the Act cannot be imposed by regulation under the express power conferred by ss 31(3) and 504(1). His argument is that PIC 4002 deals with a topic that is dealt with in the Act by reference to the Convention, and which he identifies as "whether the person represents a danger to the Australian community in any way". That characterisation of the subject matter of PIC 4002 and Arts 32 and 33(2) is too broad. As the first of the plaintiff's submissions on inconsistency

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465 The Act, s 504(1) relevantly provides: "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act".

466 *Morton v United Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 412; [1951] HCA 42; *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381 at 407 per Fullagar J; [1953] HCA 67; *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ; [1957] HCA 4.

recognises, PIC 4002 and Arts 32 and 33(2) in certain respects address different topics.

486 In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*, the joint reasons state[467]:

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

487 The obligations that Australia has assumed under the Convention and which are reflected in the Act do not require that a refugee be granted asylum[468]. Australia has a sovereign right to determine which persons, including which refugees, will be permitted to enter and reside within its territory. The stipulation that an applicant for a protection visa, in common with applicants for other classes of visa, is not a risk to "security" in the way that term is defined in the ASIO Act, is not on its face inconsistent with the treatment in the Act of a decision to refuse to grant a protection visa that may be characterised as "relying on" Arts 32 or 33(2).

488 A decision to refuse to grant or to cancel a protection visa because an applicant fails to satisfy s 501(6)(d)(v) of the character test may involve consideration of matters that answer the description of "national security" or "danger to security" but it is strained to characterise such a decision as one "relying on" Arts 32 or 33(2). The Act states the test in terms which do not draw

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467 (2006) 231 CLR 1 at 5 [2] per Gummow ACJ, Callinan, Heydon and Crennan JJ; [2006] HCA 53. See *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [44] per McHugh and Gummow JJ; [2002] HCA 14. See also *NAGV* (2005) 222 CLR 161 at 169-170 [16] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, citing *T v Home Secretary (UK)* [1996] AC 742 at 753-754 and *Sale v Haitian Centers Council* 509 US 155 at 179-183 (1993).

468 *NAGV* (2005) 222 CLR 161 at 169-171 [13]-[21] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274 per Gummow J; [1997] HCA 4, citing *Nguyen Tuan Cuong v Director of Immigration* [1977] 1 WLR 68 at 79 per Lord Goff of Chieveley and Lord Hoffmann; and Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia", (1994) 15 *Australian Year Book of International Law* 35 at 54-55; *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 346 [15], 348-349 [29]-[32].

on either Article of the Convention. While there is much to be said for the view stated in the joint reasons in *NAGV* quoted above[469], it was unnecessary for their Honours to determine whether, as the defendants here submit, the reference to Arts 32 and 33(2) in s 500(1)(c) and the linked provisions was enacted in error. An interpretation that gives no work to provisions of an Act should be avoided. Whether the power is sourced in s 501(6)(d)(v) or is to be implied from the grant of jurisdiction to review in s 500(1)(c), it is a power to refuse to grant or to cancel a protection visa relying on grounds that would support the expulsion or refoulement of a refugee under the Convention. An adverse security assessment by ASIO may be based on considerations that would not support a decision to refuse a protection visa on the ground that there is a significant risk that the person is a danger to the Australian community or a segment of it (s 501(6)(d)(v)) or more directly relying on Arts 32 or 33(2). However, there is no inconsistency in subjecting applicants for protection visas to the same barrier to entry that is applied to applicants for other classes of visa which entitle the holder to enter and reside in Australia[470].

489 The issue of an adverse security assessment requires the Minister to refuse to grant a visa in all the classes of visa for which satisfaction of PIC 4002 is a criterion[471]. This is not to interpose ASIO as the decision-maker. Contrary to the tenor of certain of the plaintiff's submissions, the issue of an adverse security assessment does not involve the exercise of an unexaminable power. Nor is there any disconformity arising from the circumstance that ASIO may assess a person as a risk to security and the Minister's delegate may find that the person satisfies the character test. ASIO is a specialist intelligence organisation that carries out an assessment of risk including indirect risk to security as defined in its Act[472]. That assessment involves a different and lesser threshold than the determination of whether there is a significant risk that a person presents a danger to the Australian community or a segment of it.

490 Clause 866.225 of the Regulations, to the extent that it stipulates PIC 4002 as a criterion for the grant of a protection visa, is not ultra vires the power conferred by s 31(3) of the Act.

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469 (2005) 222 CLR 161 at 179 [57] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

470 PIC 4002 is stipulated by the Regulations as a criterion for the grant of a large number of classes of visa.

471 The Act, s 65(1)(a)(ii).

472 ASIO Act, s 4, definition of "security", and s 17(1)(c) read with s 37(1).

The security assessment and the content of procedural fairness

491 ASIO's functions include advising Ministers and Commonwealth authorities respecting matters relating to security[473]. Particular provision is made under the ASIO Act for ASIO to furnish Commonwealth agencies with security assessments[474]. Relevantly, a security assessment is[475]:

> "a statement in writing furnished by [ASIO] to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person".

492 The reference to "prescribed administrative action" includes "the exercise of any power, or the performance of any function, in relation to a person" under the Act or the Regulations[476].

493 On 11 December 2009, ASIO furnished DIAC with an assessment that the plaintiff was directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act. Subsequently, ASIO undertook a further security assessment of the plaintiff. On 4 November 2011, the plaintiff was interviewed by ASIO officers in the presence of his lawyer. The interview was recorded and a transcript of it forms part of the materials in the Special Case. On 9 May 2012, ASIO furnished DIAC with a further adverse security assessment of the plaintiff ("the 2012 assessment"). The parties have treated the earlier assessment as superseded by the 2012 assessment.

494 ASIO assessed the plaintiff to be directly or indirectly a risk to security taking into account the following findings based on its investigations. First, the plaintiff was a voluntary and active member of the LTTE intelligence wing from 1996 to 1999, with responsibilities including identifying Sri Lankan Army collaborators, which he was aware likely led to extrajudicial killings. He had maintained further involvement in intelligence activities on behalf of the LTTE from 1999 to 2006. Secondly, the plaintiff deliberately withheld information about his activities of security concern and provided mendacious information in

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473 ASIO Act, s 17(1)(c).

474 ASIO Act, s 37(1).

475 ASIO Act, s 35(1), definition of "security assessment".

476 ASIO Act, s 35(1), par (b) of definition of "prescribed administrative action".

the assessment process in order to conceal those activities. Thirdly, the plaintiff remains supportive of the LTTE and its use of violence to achieve its political objectives and he will likely continue to support LTTE activities of security concern in and from Australia.

495 The 2012 assessment was an adverse security assessment in that it contained an opinion or advice that could be prejudicial to the interests of the plaintiff[477]. Generally, the ASIO Act requires that an adverse security assessment be accompanied by a statement of the grounds for the assessment, setting out the information that has been relied on in making the assessment, other than information that would be contrary to the requirements of security[478]. The agency or authority furnished with an adverse security assessment is ordinarily required to give the subject of it notice of the fact of the assessment and a copy of the statement containing the grounds for it[479]. These requirements do not apply if the Attorney-General certifies that withholding notice of the making of a security assessment is essential to the security of the nation, or that disclosure of the statement of grounds, or a particular part of the statement, would be prejudicial to the interests of security, as the case may be[480].

496 The provisions governing the giving of notice of the making of the assessment and the statement of the grounds for it do not apply to adverse security assessments of non-citizens who do not hold a permanent or special purpose visa and which are issued in connection with the exercise of any power under the Act or Regulations[481].

497 ASIO is required to accord procedural fairness to non-citizens in the conduct of security assessments under the Act or Regulations. An adverse security assessment issued in terms reflecting PIC 4002 in relation to an applicant for a protection visa will lead to the refusal of the visa and the likelihood that the subject of the assessment will remain in detention for some period. This is a consideration which, as the defendants acknowledge, tends to increase the content of the obligation of procedural fairness in the conduct of the assessment. The defendants submit that there are countervailing considerations. They rely on the scheme of the ASIO Act, in particular on the exclusion of the requirement to give a statement of the grounds for an assessment to non-citizens

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477 ASIO Act, s 35(1), par (a) of definition of "adverse security assessment".

478 ASIO Act, s 37(2)(a).

479 ASIO Act, s 38(1).

480 ASIO Act, s 38(2) and (4).

481 ASIO Act, s 36(b).

in the position of the plaintiff, notwithstanding that provision of that information may not be prejudicial to the requirements of security, and on the secrecy that is said to be essential to the collection and maintenance of intelligence concerning security matters. These factors are said to militate against any requirement that "issues" be identified to the subject of an adverse security assessment other than at a high level of generality.

498 The statutory framework within which an administrative decision is made is of course critical to the assessment of the content of procedural fairness[482]. So, too, is consideration of the particular circumstances of the case[483]. That consideration in this case reveals that the plaintiff's challenge is without substance. This conclusion makes the Special Case an inappropriate proceeding in which to consider the extent of any curtailment of the obligation of procedural fairness in the conduct of DIAC security assessments by reason of ASIO's statute and the nature of its intelligence work.

499 It is the plaintiff's case that, in the conduct of the 2012 assessment, procedural fairness required that ASIO's interviewing officers put the following allegations to him so that he might have the opportunity to deal with each:

> "(a) that the plaintiff maintained further involvement with LTTE Intelligence activities from 1999-2006;
>
> (b) that the plaintiff remains supportive of the LTTE's use of violence to achieve political objectives; and
>
> (c) that the plaintiff is likely to continue to support the LTTE activities of security concern in and from Australia."

500 The plaintiff complains that in the absence of the allegations (a), (b) and (c) being put to him, the interview which resulted in the 2012 assessment was no more than a "general and unfocused invitation to make submissions". This was a reference to the statement of Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic*[484]. In issue in that case was the failure to make known to the

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482 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160 [26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; [2006] HCA 63.

483 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [38] per Gleeson CJ, 16 [48] per McHugh and Gummow JJ; [2003] HCA 6; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99 [25] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2005] HCA 72.

484 (1990) 21 FCR 193 at 223.

respondent material supplied by the New South Wales prison authorities that was critical to the decision-maker's determination. It is far removed from the facts of the present case.

501 The focus of the interview was on the circumstances in which the plaintiff joined the LTTE and the nature and extent of his activities within it. The interviewing officers made abundantly plain to the plaintiff that his claim to have been an unwilling recruit to the LTTE was in issue, as was his claim to have been dilatory in the discharge of his intelligence duties and to have ceased any role with the LTTE in 1999. The interviewing officer squarely raised with the plaintiff the charge that he had deliberately withheld information concerning his association with the LTTE. Claimed inconsistencies in the plaintiff's account of the circumstances in which he joined the LTTE and in which he left employment with a garage owned by the LTTE in 2004 were drawn to his attention and he was invited to comment on them.

502 The plaintiff invoked Lord Diplock's statement in *Mahon v Air New Zealand Ltd*[485], that procedural fairness required that he "not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value". The plaintiff cannot be said to have been "left in the dark" as to an allegation that he had maintained involvement with LTTE intelligence activities. The transcript of the interview is eloquent of the interviewing officers' scepticism of the plaintiff's account that he had been a reluctant LTTE operative. Notably absent from the plaintiff's case was any indication of what additional material he might have adduced had the interviewing officers put the allegations to him in terms.

503 At the hearing, the plaintiff's principal complaint was directed to the failure to put allegation (c). In circumstances in which the plaintiff was insisting that he was an unwilling LTTE recruit, the defendants rightly submit that it would have been pointless to put to him that his past voluntary association made it likely that he remained supportive of the LTTE and that he would continue that support.

504 The conclusion that the plaintiff had voluntarily joined the LTTE appears to have been based on the contents of a Refugee Referral Form supplied by the UNHCR to DIAC. In that document, the plaintiff is recorded as giving an account that he had joined the LTTE voluntarily. The delegate had raised this matter with the plaintiff in the course of her interview with him. The delegate was satisfied with the plaintiff's explanation that the statement in the form was an error. The delegate had regard to the existence of independent country information that confirmed the forcible recruitment by the LTTE of Tamils from

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485 [1984] AC 808 at 821.

the north of Sri Lanka. ASIO came to a different conclusion. Relevantly for the plaintiff's challenge, and contrary to one of his submissions, there is no material in the Special Case that would support a conclusion that the 2012 assessment was based on material that was not disclosed to him.

505 The plaintiff was not denied procedural fairness in the conduct of the 2012 assessment.

Section 198 – removal from Australia

506 The plaintiff contends that the removal power under s 198 is not engaged in the case of an unlawful non-citizen who is a refugee. The argument builds on the constraint on the obligation of removal respecting non-refoulement[486]. It draws on the structured schemes for the removal to safe third countries of persons who would otherwise be eligible to apply for protection visas[487]. It is suggested that the scheme in each case evinces an intention to avoid the possibility of refoulement, including indirect refoulement, of potential refugees. By contrast, the provisions of s 198 are silent as to how the officer subject to the duty of removal is to determine the claims of a refugee to have a well-founded fear of persecution on a Convention ground in the receiving country. The better view, in the plaintiff's submission, is that the removal of a refugee under the Act is only authorised as the result of a decision relying on Arts 32 or 33(2) of the Convention.

507 The plaintiff acknowledges that his construction would result in a person in his position being entitled to reside in Australia notwithstanding that the person had not been granted a visa. It is a construction that does not sit with the objects and scheme of the Act[488]. The plaintiff submits that a material change to the Act since the decision in *Al-Kateb* is the insertion of subdiv B in Div 7 of Pt 2, which provides for the making of "residence determinations"[489]. The introduction of the residence determination scheme, it is argued, removes any "imperative" that an unlawful non-citizen be detained until removed, deported or granted a visa[490].

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486 *Plaintiff M70 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 178 [54] per French CJ, 190 [91] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 32.

487 The Act, subdivs AI and AK of Div 3 of Pt 2 and s 198(7).

488 The Act, ss 4, 13-14, 189.

489 Inserted by the *Migration Amendment (Detention Arrangements) Act* 2005 (Cth).

490 *Al-Kateb* (2004) 219 CLR 562 at 576 [17] per Gleeson CJ, 638 [226] per Hayne J.

508 Subdivision B in Div 7 of Pt 2 confers power on the Minister to determine that one or more persons are to reside at a specified place instead of being detained at a place covered by the definition of "immigration detention" in s 5(1)[491]. The Minister is not subject to a duty to consider whether to exercise the power to make a residence determination[492]. The Minister may at any time vary or revoke a residence determination[493]. A person residing at a specified place subject to a residence determination is deemed to be in immigration detention. Section 197AC(4) provides that if a residence determination is in force in relation to a person and a provision of the Act requires the person to be released from immigration detention, or no longer requires or permits the person to be detained, "the residence determination ... is revoked ... and the person is, by that revocation, released from immigration detention".

509 The plaintiff is an unlawful non-citizen whose circumstances bring him within the provisions of ss 198(2) and 198(6). He has made an application for a protection visa which has been finally determined. The Act does not preclude his removal from Australia to a country in which he does not have a well-founded fear of persecution. At a practical level, it is to be expected that an officer effecting the removal of the plaintiff would act on the advice of officers within DIAC, who are equipped to assess whether removal would be consistent with Australia's international obligations. In the event that an officer purported to remove the plaintiff from Australia to a country in which the plaintiff is at risk of persecution, the determination to do so would be subject to judicial review.

510 Before turning to the authority for the plaintiff's continued detention, reference should be made to his submission that his removal from Australia to any third country would place Australia in breach of the obligations that it owes to Contracting States under the Convention unless the conditions of Art 32 were met.

511 Contrary to the plaintiff's submission, he is not a person to whom Art 32 applies. His submission that he is "lawfully in" Australia is advanced in the face of a deal of authority to the contrary. The plaintiff's argument accepts that "lawfully" as it appears in Art 32 "fundamentally refers to domestic law", but goes on to contend that "lawfully" has "an autonomous, international meaning". In the plaintiff's submission, treating "lawfully" in Art 32 as coterminous with domestic laws risks "unreasonable outcomes". He instances the outcome in *R (ST) v Home Secretary*[494] in this respect. In that case, the claimant, an Eritrean

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491 The Act, s 197AB.

492 The Act, s 197AE.

493 The Act, s 197AD.

494 [2012] 2 WLR 735; 3 All ER 1037.

refugee, had been present in the United Kingdom under temporary permissions for 13 and a half years while her application for asylum was determined and her rights of appeal and review were pursued. The Supreme Court held that she was not lawfully within the United Kingdom for the purposes of Art 32. The plaintiff invites the Court not to adopt the reasoning in *R (ST) v Home Secretary*. His argument depends upon a more generous construction of the obligation under Art 32 in Professor Hathaway's commentary[495] and to a lesser degree in Professor Davy's work[496]. Professor Hathaway's analysis is discussed in *R (ST) v Home Secretary*, and the absence of consensus among the commentators on the point is noted[497].

512 Lord Hope of Craighead considered that Art 32 contemplates that the refugee "is not merely present in the territory of the contracting state, but that he is there lawfully."[498] The implication from the use of the word "lawfully" being that the refugee's presence in the territory of the Contracting State is "not just being tolerated"[499]. His Lordship considered that the use of the same phrase in Arts 18 and 26, which deal with self-employment and freedom of movement respectively, supports construing Art 32 as requiring presence to be lawful according to the domestic law of the Contracting State. In this connection, his Lordship said[500]:

> "It seems unlikely that the contracting states would have agreed to grant to refugees the freedom to choose their place of residence and to move freely within their territory before they themselves had decided, according to their own domestic laws, whether or not to admit them to the territory in the first place."

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495 Hathaway, *The Rights of Refugees Under International Law*, (2005) at 175-179.

496 Davy, "Article 32: Expulsion", in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1277 at 1304-1305.

497 [2012] 2 WLR 735 at 748-749 [34]; 3 All ER 1037 at 1052-1053. See Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 524-525 and Davy, "Article 32: Expulsion", in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1277 at 1299, 1304.

498 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 747 [32]; 3 All ER 1037 at 1052.

499 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 747 [32]; 3 All ER 1037 at 1052.

500 *R (ST) v Home Secretary* [2012] 2 WLR 735 at 750 [37]; 3 All ER 1037 at 1054.

513 Their Lordships' analysis in *R (ST) v Home Secretary*[501] is consistent with the decision of the House of Lords in *R v Home Secretary; Ex parte Bugdaycay*[502]. It accords with the decisions of courts in the United States[503]. It is consistent with the apparent approval in *NAGV* of Professor Shearer's analysis of the distinctly different character of Arts 32 and 33(2), the former assuming the "prior admission of the refugee to a status of lawful residence"[504]. It accords with Stephen J's analysis in *Simsek v Macphee*[505] and the decision of the Full Federal Court in *Rajendran v Minister for Immigration and Multicultural Affairs*[506]. The analysis in *R (ST) v Home Secretary* should be accepted.

514 The obligation which Contracting States undertake by Art 32 is with respect to refugees whose presence in their territory is lawful under domestic law. A non-citizen is lawfully present in Australia if he or she holds a visa that is in effect[507]. A non-citizen who does not hold a visa that is in effect is an unlawful non-citizen[508]. The plaintiff is not "lawfully in" Australia within the meaning of Art 32. Australia would not be in breach of the obligations that it owes to Contracting States by removing the plaintiff to a country in which he is not at risk of persecution.

The lawfulness of the plaintiff's continued detention

515 The challenge to the lawfulness of the plaintiff's detention centres on the construction of ss 189, 196(1)(a) and 198. These provisions are in Pt 2 of the Act, which deals with "Control of arrival and presence of non-citizens". Sections 189 and 196 are in Div 7 of Pt 2, which deals with the "Detention of unlawful non-citizens". Section 198 is in Div 8 of Pt 2, which deals with

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501 *R (ST) v Home Secretary* [2012] 2 WLR 735; 3 All ER 1037.

502 [1984] AC 514.

503 *Chim Ming v Marks* 505 F 2d 1170 at 1172 (1974); *Kan Kam Lin v Rinaldi* 361 F Supp 177 at 185-186 (1973).

504 *NAGV* (2005) 222 CLR 161 at 171 [21] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, citing Shearer, "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 205.

505 (1982) 148 CLR 636 at 644-645 per Stephen J; [1982] HCA 7.

506 (1998) 86 FCR 526 at 530-531.

507 The Act, s 13(1).

508 The Act, ss 13 and 14.

"Removal of unlawful non-citizens". Subsections 198(2) and (6) each require that an officer[509] remove an unlawful non-citizen from Australia as soon as reasonably practicable in the circumstances stated. The plaintiff's circumstances fall within each provision and it follows that he is subject to the obligation of removal. The authority relied upon for his detention pending that removal is s 196(1), which provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed from Australia under ss 198 or 199[510], deported under s 200, or granted a visa.

516 In *Al-Kateb*, the provisions of ss 189(1), 196(1) and 198(2) were found to authorise and require the detention of an unlawful non-citizen notwithstanding that removal from Australia was not reasonably practicable in the foreseeable future[511]. The plaintiff accepts that if an affirmative answer is given to the second question in the Special Case, his circumstances are governed by the decision in *Al-Kateb*. The plaintiff contends that *Al-Kateb* was wrongly decided and should not be followed.

517 The obligation to remove Mr Al-Kateb arose under s 198(1), as Mr Al-Kateb had requested that he be removed from Australia. The difficulty was that Mr Al-Kateb did not have a right of entry to any country and no country was willing to receive him. The plaintiff's circumstances are relevantly similar to those of Mr Al-Kateb in that the only country to which the plaintiff has a right of entry is the country in which he risks persecution and no other country is willing to receive him.

518 A preliminary question is whether, as the defendants submit, the factual basis for any reconsideration of the issue that divided the Court in *Al-Kateb* is not presented by the Special Case.

519 The following facts are agreed in the Special Case. The defendants do not propose or intend to remove the plaintiff to Sri Lanka and at present there is no other country to which the plaintiff can be sent. The Secretary of DIAC and the Minister have taken steps to locate a country that would be willing to receive the plaintiff. On 10 February 2010, DIAC sought the UNHCR's assistance in connection with the resettlement of seven refugees, including the plaintiff. The

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509 "Officer" is defined in s 5(1) of the Act as any person included in the class of persons authorised in writing by the Minister to be officers for the purposes of the Act.

510 Section 199 is concerned with the removal upon request of the spouse and dependent children of an unlawful non-citizen who is about to be removed.

511 (2004) 219 CLR 562 at 595 [74] per McHugh J, 640 [232] per Hayne J, 658-659 [290], 661 [298] per Callinan J, 662-663 [303] per Heydon J.

UNHCR declined to provide the assistance sought on the ground that it was contrary to its policy to refer refugees for resettlement to a third country in circumstances in which the refugees had been brought to Australia by the Australian government. Moreover, the cases were unlikely to meet any of the referral criteria in the UNHCR's Resettlement Handbook.

520 In May 2010, the Foreign Minister approached the governments of three countries requesting resettlement assistance in relation to persons, including the plaintiff. One country indicated it could not assist and the other two countries said that the request would be considered. In March 2011, the Department of Foreign Affairs and Trade advised that positive responses would not be forthcoming from either of those two countries.

521 DIAC made inquiries to ascertain if the plaintiff has any relatives living in third countries. He does not.

522 An annual consultation dealing with questions of the resettlement of persons is held in Geneva ("the ATCR"). At the July 2011 ATCR, the Assistant Secretary, Humanitarian Branch of DIAC ("the Assistant Secretary"), held discussions with the representatives of three further countries concerning the resettlement of persons, a majority of whom were refugees under Australian law and who had received adverse security assessments. Following those discussions, the Assistant Secretary wrote to the representatives of eight countries asking that their respective governments consider the resettlement of persons, a majority of whom were refugees under Australian law and who were subject to adverse security assessments. The Assistant Secretary conveyed Australia's willingness to make the substance of the adverse security assessments available to the security agencies of the receiving countries. On 7 June 2012, when the amended Special Case was settled, four countries had declined the request and responses had not been received from the remaining four.

523 As at 7 June 2012, it was the Assistant Secretary's intention to raise the resettlement of persons in the position of the plaintiff with the representatives of additional countries at the July 2012 ATCR.

524 The Special Case should be determined upon the understanding that no country from which a response was awaited at 7 June 2012 has to-date agreed to receive the plaintiff. Conscientious endeavours to find a third country that is willing to receive the plaintiff have been pursued by DIAC for not less than two years and eight months to no avail. It is open to the Court to draw from the facts stated and the documents identified in the Special Case any inference of fact which might have been drawn from them if proved at trial[512]. The inference to be

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512 High Court Rules 2004 (Cth), r 27.08.5.

drawn from the facts of the Special Case is that removal of the plaintiff from Australia is not likely to be practicable in the foreseeable future.

525 The defendants submit that leave should not be given to re-open the correctness of the decision in *Al-Kateb*. They submit that the power to disturb settled authority is to be exercised with restraint[513] and they make the following submissions by reference to the considerations identified in *John v Federal Commissioner of Taxation*[514]. First, the construction of ss 189, 196 and 198 had been ventilated and analysed in a series of decisions in the Federal Court culminating in the decision of the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Masri*[515], prior to the decision in *Al-Kateb*. Secondly, there was no material difference in the reasoning of the Justices constituting the majority. Thirdly, no inconvenience had been occasioned by the decision. Fourthly, the Act has been administered on the basis of the decision since 2004.

526 Differing interpretations of the detention power under s 196(1)(a) had been adopted by judges at first instance in the Federal Court. Those differing approaches were ventilated and analysed in *Al-Masri.* The Full Court of the Federal Court concluded that the power to detain under s 196(1)(a) was subject to implied limitation in circumstances in which there is no real likelihood of removal in the reasonably foreseeable future. This Court, by a slim majority, rejected that interpretation in *Al-Kateb.* It is therefore not correct for the purposes of the first of the *John* considerations to characterise *Al-Kateb* as a decision "rest[ing] upon a principle carefully worked out in a significant succession of cases."[516] Neither are the third or fourth *John* considerations apt to the circumstances of this case. To say that the decision has not produced inconvenience is glib. To observe that the decision has been acted upon is not to identify some aspect of those circumstances that militates against reconsideration[517].

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513 *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 71 [55] per Gleeson CJ, Gaudron and Gummow JJ; [1999] HCA 67.

514 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

515 (2003) 126 FCR 54.

516 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

517 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

527 *Al-Kateb* is a recent decision on a question of statutory interpretation. The composition of the Court has changed since it was decided and it is necessary to be mindful of Gibbs J's statement in the *Queensland v The Commonwealth* (the "*Second Territory Senators Case*") that a Justice is not entitled to ignore the decisions and reasoning of the Court "as though the authority of a decision did not survive beyond the rising of the Court"[518]. Barwick CJ in that case favoured a less emphatic approach, but these were observations made in the context of a constitutional case in which the doctrine of stare decisis may be less rigidly applied[519]. In *Wurridjal v The Commonwealth*, French CJ considered that the evaluation of the factors for and against re-opening previous decisions should be "informed by a strongly conservative cautionary principle"[520]. His Honour's remarks were not in this respect confined to cases concerning the interpretation of the Constitution.

528 The plaintiff's primary challenge to the reasoning of the majority in *Al-Kateb* is upon the application of the principle of legality. That longstanding principle of interpretation[521] was explained by Gleeson CJ, in dissent, in *Al-Kateb* in this way[522]:

> "Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most

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518 (1977) 139 CLR 585 at 599; [1977] HCA 60.

519 (1977) 139 CLR 585 at 593.

520 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]; [2009] HCA 2.

521 See *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ; [2003] HCA 2; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 582 [17], 583 [20] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann. See also J Spigelman, "Principle of legality and the clear statement principle", (2005) 79 *Australian Law Journal* 769; and Lord Steyn, "The Intractable Problem of The Interpretation of Legal Texts", (2003) 25 *Sydney Law Review* 5 at 17-19.

522 *Al-Kateb* (2004) 219 CLR 562 at 577 [19].

basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."

529 The statement of the principle in *Coco v The Queen*[523] is set out in Gummow J's reasons. In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, in their joint reasons, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that the principle had been "strictly applied" by this Court since *Re Bolton; Ex parte Beane*[524]. Their Honours suggested that this statement was subject to one possible exception. This was a reference to *Corporate Affairs Commission (NSW) v Yuill*[525], a case concerned with the abrogation of legal professional privilege under the Companies (New South Wales) Code. The statutory scheme here under consideration is one said to admit of mandatory administrative detention for an indefinite period that may extend to the balance of the detainee's life. Putting to one side the constitutional validity of such a scheme, the application of the principle of legality requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence.

530 In *Al-Kateb*, Gleeson CJ observed that the Act makes no express provision for the suspension and possible revival of the obligation imposed by s 196 by reference to the practicability of effecting removal under s 198. Nor does the Act make express provision for indefinite, or permanent, detention where the assumption of the reasonable practicability of removal is falsified[526]. Applying the principle of legality, his Honour held that indefinite, perhaps permanent, administrative detention was not to be dealt with by implication[527]. Gummow J identified temporal elements in the language of ss 196(1) and 198. His Honour

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523 (1994) 179 CLR 427 at 437; [1994] HCA 15.

524 *Daniels Corporation International Pty Limited v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; [2002] HCA 49, citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; [1987] HCA 12; *Bropho v Western Australia* (1990) 171 CLR 1; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427; and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; [1997] HCA 3.

525 *Daniels Corporation International Pty Limited v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; [1991] HCA 28.

526 *Al-Kateb* (2004) 219 CLR 562 at 576 [18].

527 *Al-Kateb* (2004) 219 CLR 562 at 577-578 [21].

considered that "practicable" connotes that which can be put into practice and which can be effected or accomplished. The qualification "reasonably" introduces an assessment or judgment of a period suitable to the purpose of the legislative scheme, that purpose being to facilitate the person's removal from Australia but not with such delay as to have the appearance of detention for an unlimited time[528].

531 In *Koon Wing Lau v Calwell*[529], provisions of the *War-time Refugees Removal Act* 1949 (Cth)[530] which, if read literally, permitted a deportee to be held in custody for the balance of his or her life, were interpreted as subject to temporal limitation. Dixon J considered that, read together, the provisions authorised custody for the purposes of fulfilling the obligation to deport. In the event that the deportee was not placed on board a vessel "within a reasonable time", the deportee "would be entitled to his discharge on habeas"[531].

532 The majority in *Al-Kateb* considered that the words "as soon as reasonably practicable" were "too clear" or "intractable" to admit of an implied temporal limit or qualification. It must be accepted that minds may reasonably differ on matters of statutory construction. However, in my view, the reasoning of two members of the majority is weakened by the absence of discussion of the principle of legality in the context of a conclusion that the scheme abrogates

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528 *Al-Kateb* (2004) 219 CLR 562 at 608 [121].

529 (1949) 80 CLR 533; [1949] HCA 65.

530 The *War-time Refugees Removal Act* 1949 (Cth) provided in s 5 that:

> "The Minister may, at any time within twelve months after the commencement of this Act, make an order for the deportation of a person to whom this Act applies and that person shall be deported in accordance with this Act."

Section 7(1) provided that:

> "A deportee may - (a) pending his deportation and until he is placed on board a vessel for deportation from Australia; (b) on board the vessel until its departure from its last port of call in Australia; and (c) at any port in Australia at which the vessel calls after he has been placed on board, be kept in such custody as the Minister or an officer directs."

531 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581.

fundamental rights in this degree. Those fundamental rights are not confined to Australian citizens.[532]

533 As Heydon J observes, the question of whether leave is required to overrule this Court's previous decisions may be an open one[533]. It is sufficient to say that if leave is required, I would grant it. In my opinion, the decision in *Al-Kateb* should not be followed. I would adopt Gleeson CJ's construction of the scheme of ss 189, 196(1) and 198. This conclusion makes it unnecessary, and for that reason inappropriate, to deal with the submissions as to the constitutional validity of a scheme providing for mandatory administrative detention for an indefinite period[534].

534 Important to Gleeson CJ's analysis is that while removal from Australia remains impractical the obligation imposed by s 196 is suspended but not displaced. A detainee in such a circumstance is able to obtain an order in the nature of habeas corpus to secure release. I agree with his Honour that there is nothing antithetical to the nature of habeas corpus for the order to be made upon terms which relate to the applicant's circumstances and "reflect temporal or other qualifications" upon the right to release[535]. One matter to which Gleeson CJ adverted in *Al-Kateb* concerned the power of a court to impose conditions or restraints in the case of a person shown to be a danger to the community or likely to abscond[536]. The question was not presented by the facts in *Al-Kateb*. It is not apparent that such a question is presented by the facts of this Special Case. The plaintiff entered Australia as the holder of a temporary visa. The evident purpose

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532 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ; [1992] HCA 64; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 560 [137] per Gummow and Hayne JJ; [1999] HCA 14.

533 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 313, 316; [1984] HCA 18; *British American Tobacco Australia v Western Australia* (2003) 217 CLR 30 at 63 [74]; [2003] HCA 47. See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 338; [1995] HCA 65; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554; [1997] HCA 25; *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 369-370; [1999] HCA 44.

534 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

535 *Al-Kateb* (2004) 219 CLR 562 at 579-580 [27]. See also *Zaoui v Attorney-General* [2005] 1 NZLR 577.

536 *Al-Kateb* (2004) 219 CLR 562 at 580 [29].

of the issue of the visa was to permit the plaintiff to enter Australia and to make a valid application for a protection visa. As has been remarked, the delegate did not find that the plaintiff is a person to whom Art 1F of the Convention applies. The Special Case has been conducted upon acceptance that the plaintiff is not a person about whom there are reasonable grounds for regarding as a danger to the security of Australia. Nor is he a person who having been convicted of a particularly serious crime constitutes a danger to the Australian community. Consideration of the terms and conditions of the plaintiff's release, as Gummow J observes, would be for the Justice disposing of the proceeding in this Court or upon remitter to another court.

535 The answers to the questions asked in the amended Special Case should be as stated by Gummow J.