HIGH COURT OF AUSTRALIA

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

PLAINTIFF M150 OF 2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — DEFENDANTS

Plaintiff M150 of 2013 v Minister for Immigration and Border Protection
[2014] HCA 25
20 June 2014
M150/2013

ORDER

The questions asked by the parties in the special case dated 16 April 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

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

Answer

Yes.

Question 2

What, if any, relief should be granted to the plaintiff?

Answer

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

Question 3

Who should pay the costs of the special case?

Answer

The defendants.

Representation

R M Niall SC with C L Lenehan and S M Keating for the plaintiff (instructed by Allens Lawyers)

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

CATCHWORDS

Plaintiff M150 of 2013 v Minister for Immigration and Border Protection

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

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

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

FRENCH CJ.

Introduction

1 This proceeding, referred by way of special case to the Full Court, raises the question whether the power, conferred on the Minister for Immigration and Border Protection ("the Minister") by s 85 of the *Migration Act* 1958 (Cth) ("the Migration Act"), to determine the maximum number of visas of a specified class that may be granted in a specified financial year, applies to protection visas. The Minister made a determination on 4 March 2014 limiting the number of Protection (Class XA) visas that could be granted in the financial year ending 30 June 2014. The plaintiff is an applicant for a protection visa who, by reason of the determination, if it be valid, cannot be granted a visa on or before 30 June 2014.

2 Some classes of visa are created by the Migration Act and some by regulation made pursuant to s 31(1) of that Act. The protection visa is a class of visa created by the enactment of s 36(1) of the Migration Act, which came into effect on 1 September 1994[1]. Criteria for the grant of visas of a specified class may be prescribed by regulation[2]. Some criteria are set out in the Act. Uniquely among the classes of visa for which the Act itself provides, a criterion for the grant of a protection visa is expressed in terms of Australia's international obligations. That criterion, set out in s 36(2)(a), requires the applicant for a protection visa to be:

> "a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[3].

The coverage of s 36 was extended, by amendments made in 2011[4], to non-citizens in respect of whom the Minister is satisfied Australia has protection

---

1 *Migration Reform Act* 1992 (Cth), s 10, inserting s 26B into the Migration Act (renumbered as s 36 of the Act by the *Migration Legislation Amendment Act* 1994 (Cth)).

2 Migration Act, s 31(3). The power to make regulations prescribing criteria extends to the classes of visa set out in ss 32, 36, 37, 37A and 38B of the Act.

3 The "Refugees Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951; the "Refugees Protocol" means the Protocol relating to the Status of Refugees done at New York on 31 January 1967 — Migration Act, s 5(1).

4 *Migration Amendment (Complementary Protection) Act* 2011 (Cth), Sched 1, item 12, inserting s 36(2)(aa) into the Migration Act.

obligations under other international conventions[5]. Importantly, validly made applications for a protection visa under s 46 of the Migration Act are subject to a decisional time limit of 90 days from the making of the application. That time limit is imposed by s 65A, which was enacted in 2005[6].

3 The Explanatory Memorandum to the Bill for the *Migration Reform Act* 1992 (Cth), which introduced protection visas into the Migration Act, stated that[7]:

> "A protection visa is intended to be the mechanism by which Australia offers protection to persons who fall under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees."

The purpose of the provisions of the Migration Act relating to protection visas informs the construction of those provisions and the Act as a whole. As this Court said in *Plaintiff M61/2010E v The Commonwealth*[8]:

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

4 The plaintiff contends that, having regard to its history, context and purpose, and the special position of protection visas under the Migration Act, s 85 does not apply to that class of visa. He points in particular to the decisional

---

5 The purpose of s 36(2)(aa) is to provide for a criterion for a protection visa on the basis of a non-refoulement obligation contained or implied in the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if the Minister is not already satisfied that the non-citizen is owed protection obligations under the Refugees Convention as amended by the Refugees Protocol — Australia, House of Representatives, Migration Amendment (Complementary Protection) Bill 2011, Explanatory Memorandum at 10 [65].

6 *Migration and Ombudsman Legislation Amendment Act* 2005 (Cth), Sched 1, item 1.

7 Australia, House of Representatives, Migration Reform Bill 1992, Explanatory Memorandum at 18 [26].

8 (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41.

time limit imposed by s 65A(1). The defendants point to the generality of the language of s 85, which they contend cannot support implied words of exception which would be necessary for the plaintiff's construction. They also rely upon statutory context. Contrary to the defendants' submissions, the purposes of the relevant provisions of the Act lead to the conclusion that, properly construed, s 85 does not apply to protection visas. The questions on the special case should be answered as set out at the end of these reasons.

Factual background

5 The facts necessary to the disposition of the special case were agreed and may be summarised briefly.

6 The plaintiff is a national of Ethiopia who entered Australia at the Port of Gladstone on 29 March 2013. He entered without a visa, having been a stowaway aboard a vessel. Being an "unlawful non-citizen" within the meaning of ss 5(1) and 14 of the Migration Act, he was taken into immigration detention pursuant to s 189. He remained in immigration detention from 29 March 2013 to 10 February 2014. Between 27 June 2013 and 10 February 2014, he was held in community detention pursuant to a residence determination made under s 197AB(1) of the Migration Act.

7 On 19 April 2013, the plaintiff made a valid application for a protection visa. That application was refused on 3 July 2013. On 16 July 2013, the plaintiff applied to the Refugee Review Tribunal ("the RRT") for a review of the decision to refuse his protection visa application. On 3 October 2013, the RRT remitted his application to the Minister with a direction that the plaintiff satisfied the criterion under s 36(2)(a) of the Migration Act for the grant of a protection visa.

8 On 10 February 2014, a delegate of the Minister refused to grant the plaintiff a protection visa on the basis that the plaintiff did not satisfy the criteria prescribed by cl 866.222 of Sched 2 to the Migration Regulations 1994 (Cth) ("the Regulations"). Those criteria, which were introduced by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth), required, inter alia, that at the time of decision in relation to an application for a protection visa, the applicant held a visa that was in effect on his or her last entry to Australia and was immigration cleared on that last entry. The plaintiff did not meet those requirements. On the same day as his application was again refused by the Minister's delegate, the Assistant Minister for Immigration and Border Protection exercised her power under s 195A of the Migration Act and granted the plaintiff a Temporary Safe Haven (Class UJ subclass 449) visa and a Temporary (Humanitarian Concern) (Class UO) visa. By reason of the grant of those visas, the plaintiff became a lawful non-citizen and was released from immigration detention.

9 The plaintiff applied again to the RRT on 14 February 2014 for a review of the Minister's decision to refuse to grant him a protection visa. He commenced proceedings in the original jurisdiction of this Court on 19 December 2013. On 22 April 2014, by order of this Court made by consent, certiorari issued to quash the decision made by the delegate on 10 February 2014 to refuse to grant the plaintiff's application for a protection visa. The plaintiff's application for a protection visa remains undetermined.

10 The plaintiff's application remains undetermined because, on 4 March 2014, the Minister made a determination under s 85 that the maximum number of protection visas that could be granted in the year ending 30 June 2014 was 2,773. The effect of that determination, if valid, was that no more protection visas could be granted between 24 March 2014, when the maximum number of protection visas was reached, and 30 June 2014. Its effect, if valid, is that the plaintiff cannot be granted a protection visa in the current financial year.

The questions in the special case

11 The questions referred to the Court in the special case, based on the proceedings as they now stand, are:

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

2. What, if any, relief should be granted to the plaintiff?

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

Sections 85 and 86 of the Migration Act and their companion provisions

12 Sections 85 and 86 of the Migration Act, which must be read together, appear in subdiv AH of Div 3 of Pt 2, entitled "Limit on visas". Both sections commenced on 16 December 1992 as ss 28A and 28B of the Migration Act, contained in what was then a new subdiv AA of Div 2 of Pt 2[9]. Section 85 provides, in language unchanged since its enactment:

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

---

9 *Migration Laws Amendment Act* 1992 (Cth), s 7.

that may be granted in a specified financial year."

Section 86 attaches a legal consequence to a determination under s 85. It provides:

"If:

(a) there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and

(b) the number of visas of the class or classes granted in the year reaches that maximum number;

no more visas of the class or classes may be granted in the year."

13 The two sections were described in the relevant Second Reading Speech as a mechanism for managing "the migration program"[10]. The Minister, it was said, could "target the grant of visas in accordance with the priorities of the migration program."[11] In the Explanatory Memorandum, the new subdiv AA was described as establishing "a capping scheme to assist in the delivery of the annual migration program."[12]

14 Given their purpose of program management, it is not surprising that ss 85 and 86 do not apply to all classes of visa, for not all classes of visa can be related to what could be called migration programs. Subdivision AH is expressly excluded from application to five classes of visa discussed in the next section of these reasons[13]. Even without those exclusions, s 85 could not logically apply to them. There is another class of visa, the bridging visa, not the subject of an express exclusion, to which s 85 is of doubtful application. Consideration of the purpose of ss 85 and 86 against the purpose of protection visas, supported in part

---

10 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 August 1992 at 185.

11 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 August 1992 at 185.

12 Australia, Senate, Migration Laws Amendment Bill 1992, Explanatory Memorandum at [7].

13 Those classes are special purpose visas (s 33), absorbed person visas (s 34), ex-citizen visas (s 35), criminal justice visas (s 44) and enforcement visas (s 44).

by the decisional time limit mandated by s 65A(1), leads to the conclusion that ss 85 and 86, which predated that class of visa, do not apply to them[14].

15 Subdivision AH provides the immediate statutory context for ss 85 and 86. It comprises ss 85 to 91 inclusive. Section 87 qualifies s 86 so as not to prevent the grant of a visa to a person who applied for it on the ground that he or she is the spouse, de facto partner or dependent child of an Australian citizen, of the holder of a permanent visa or of a person usually resident in Australia whose continued presence in Australia is not subject to a time limit imposed by law. In the cognate proceeding, *Plaintiff S297/2013 v Minister for Immigration and Border Protection*[15], the plaintiff submitted that s 87 is in tension with s 36. The family members protected by s 87 comprise a narrower class of persons than the "member[s] of the same family unit" as a protection visa holder who may, on account of that membership, satisfy the criterion for the grant of a protection visa set out in s 36(2)(b). The definition of the class "member of the same family unit", which derives from the definition of the class "member of the family unit", is left by s 5(1) of the Act to the Regulations. That class presently includes, as well as those family members mentioned in s 87, grandchildren, stepchildren and other relatives[16]. However, as the defendants correctly submitted, no constructional conclusion can be drawn from the definition in the Regulations as they stand from time to time[17].

16 Section 88 allows visa processing to continue even though a limit under s 85 may be in place. It provides that the prevention of a grant of a visa by s 86 "does not prevent any other action related to the application for it." It is also consistent with the continuance of the obligation on the part of the Minister, pursuant to s 65(1)(b), discussed later in these reasons, to refuse to grant a visa if not satisfied of the matters set out in s 65(1)(a).

17 Section 89 provides:

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

---

14 See footnote 1.

15 [2014] HCA 24.

16 reg 1.03 ("relative") with reg 1.12.

17 A further exemption from the limit imposed under s 85, not material for present purposes, is set out in s 87A for persons unable to meet health or character requirements before the limit becomes applicable.

The defendants submitted that s 89 militates against the contrariety, for which the plaintiff contended, between the decisional time limit imposed by s 65A(1) and the prohibition imposed by s 86 on the grant of visas exceeding a ministerial cap imposed under s 85. However, s 65A is directed to decisions on the merits of applications for protection visas. Section 89 was directed to ensuring that a failure to make a decision by reason of s 86 could not constitute the ground for judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) that the Minister had failed to exercise a power or perform a duty[18], later available under Pt 8 of the Migration Act[19]. Section 89 does not assist the defendants' argument that s 85 is applicable to protection visas.

18 Section 90 has a similar function to s 89[20]. It provides that the failure to consider or dispose of a visa application to which a determination under s 85 applies does not mean that the application is "unreasonably delayed". That is so, even though an application for another visa of the class or classes that was made later has been considered or disposed of.

19 Section 91 appears to have the effect that visas which could have been granted in a given financial year, but for a limit imposed under s 85, have no priority when the limit ceases to operate, ie, at the end of the relevant financial year. It provides:

> "If a determination under section 85 applies, or has applied, to visas of a class or classes, the Minister may consider or, subject to section 86, dispose of outstanding and further applications for such visas in such order as he or she considers appropriate."

The discretion thus conferred on the Minister is in tension with the decisional time limit imposed with respect to protection visas by s 65A and, to that extent, is another indicator that s 85 does not apply to protection visas.

20 A feature of the wider statutory context of s 85, upon which the defendants relied, is the existence of express provisions of the Migration Act disapplying subdiv AH, and thereby ss 85 and 86, to particular classes of visa. There is no such express disapplication in relation to protection visas. Those provisions are considered in the next section of these reasons.

---

18 See s 7(1) of the *Administrative Decisions (Judicial Review) Act*: Australia, Senate, Migration Laws Amendment Bill 1992, Explanatory Memorandum at [13].

19 See s 477(1) of the Migration Act. Part 8 of the Act, which commenced on 1 September 1994, was introduced as Pt 4B by s 33 of the *Migration Reform Act* and renumbered by the *Migration Legislation Amendment Act* 1994.

20 See s 7(1) of the *Administrative Decisions (Judicial Review) Act.*

Visas to which s 85 does not apply

21 Legislation enacted between 1992 and 1994 replaced the pre-existing dual visa and entry permit system with a visa system[21]. The term "visa" now means a permission granted to a non-citizen by the Minister to travel to and enter Australia and/or remain in Australia[22]. A non-citizen in the "migration zone", who holds a visa that is in effect, is a lawful non-citizen[23]. A non-citizen in the migration zone who is not a lawful non-citizen is an "unlawful non-citizen"[24]. The latter category of person, of which the plaintiff is a member, attracts the provisions of the Migration Act relating to mandatory detention[25] and removal from Australia[26].

22 Section 31(1) provides for "prescribed classes of visas", that is to say, visas prescribed by the regulations[27]. In addition to the prescribed classes, there are classes provided for in the Migration Act itself. All of them post-dated the enactment of ss 85 and 86. They are special category visas (s 32), special purpose visas (s 33), absorbed person visas (s 34), ex-citizen visas (s 35), protection visas (s 36), bridging visas (s 37), temporary safe haven visas (s 37A), criminal justice visas (s 38), enforcement visas (s 38A) and maritime crew visas (s 38B). They were introduced into the Migration Act at different times from and after 1994. Special purpose, absorbed person and ex-citizen visas were

---

21 The legislative history of those changes was set out in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 574–576 [10]–[17] per Gummow and Hayne JJ; [2006] HCA 50.

22 Migration Act, s 29(1). Section 30 provides that a visa may be permanent, authorising its holder to remain in Australia indefinitely, or may be temporary, authorising a stay for a specified period or until a specified event happens or while the holder has a particular status.

23 Migration Act, s 13(1). "Migration zone" is defined in s 5(1) to mean "the area consisting of the States, the Territories, Australian resource installations and Australian sea installations".

24 Migration Act, s 14(1).

25 Migration Act, ss 189 and 196.

26 Migration Act, s 198.

27 See the definition of "prescribed" in s 5(1) of the Migration Act.

introduced by the *Migration Legislation Amendment Act* 1994 (Cth)[28], which commenced on 1 September 1994, as did the *Migration Reform Act*, which introduced protection visas and criminal justice visas[29]. Enforcement visas were created by the *Border Protection Legislation Amendment Act* 1999 (Cth)[30], which relevantly commenced on 16 December 1999. Maritime crew visas were created in 2007 by the *Migration Amendment (Maritime Crew) Act* 2007 (Cth)[31], which commenced on 1 July 2007. When the special purpose, absorbed person, ex-citizen, criminal justice and enforcement visas were created, express provision was made disapplying to them the provisions of subdiv AH of Div 3 of Pt 2 of the Migration Act and thus disapplying ss 85 and 86[32]. It is a common feature of those classes of visa that their grant does not depend upon application and they are not of a kind, nor do they serve purposes, to which annual numerical limits or targets, elements of migration programs, would be relevant[33]. The special purpose, absorbed person and ex-citizen visas are each "taken to have been granted" upon the satisfaction of certain conditions which it is not necessary to set out here[34]. Criminal justice visas are granted in aid of the administration of criminal justice[35]. Enforcement visas are granted in aid of law enforcement activities involving non-citizens in relation to fisheries and environmental

---

28 *Migration Legislation Amendment Act* 1994, s 8. The provisions creating these classes were respectively numbered ss 26AA, 26AB and 26AC and were renumbered as ss 33, 34 and 35 by the same amending Act.

29 *Migration Reform Act*, s 10. The provisions creating these classes were respectively numbered ss 26B and 26D and were renumbered by the *Migration Legislation Amendment Act* 1994 as ss 36 and 38.

30 *Border Protection Legislation Amendment Act*, Sched 1, Pt 3, item 19.

31 *Migration Amendment (Maritime Crew) Act*, Sched 1, Pt 1, item 5.

32 The disapplication provisions are s 33(10) for special purpose visas, s 34(3) for absorbed person visas, s 35(4) for ex-citizen visas, s 44(1) for criminal justice visas and s 44(2) for enforcement visas.

33 For example, see the discussion of the rationale for absorbed person visas in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 576–577 [18]–[20] per Gummow and Hayne JJ.

34 Migration Act, ss 33(2), 34(2) and 35(2).

35 Migration Act, s 141. The grant of such a visa is conditioned upon the issue of a criminal justice certificate by the Commonwealth Attorney-General or a State authorised official, or a criminal justice stay warrant issued by a court — Migration Act, s 159(1) read with ss 147, 148 and 151.

protection legislation[36]. Neither requires a prior application as a condition of its grant. The inapplicability of s 85 to those classes of visa is apparent. No modification or repeal, express or implied, of s 85 was necessary to support the conclusion that the power it confers could not extend to them. Indeed, the express exclusions, so far as they relate to s 85, may be seen as declaratory in the sense that they are statements of the obvious.

23 There is no express exclusion from s 85 for bridging visas created by the Migration Act[37]. Nevertheless, it is difficult to see how the power conferred by that section would serve any purpose applicable to them. They are temporary visas, ancillary to the provisions of the Migration Act relating to the application for, and grant or refusal of, a substantive visa. A bridging visa may be granted by the Minister to a non-citizen who, inter alia, has made a valid application for a protection visa and who is determined by the Minister, in the public interest, to be an eligible non-citizen[38]. When an eligible non-citizen in immigration detention makes an application for a bridging visa of a prescribed class and the Minister does not, within the prescribed period, make a decision to refuse or grant the visa, "the non-citizen is taken to have been granted a bridging visa of the prescribed class … at the end of that period."[39] The deemed grant resembles that effected with respect to classes of visa expressly exempted from the application of s 85 and discussed above.

24 Classes of visa have been created by the Migration Act to which s 85 is inapplicable. That inapplicability derives from the functional incompatibility between the purposes served by those classes of visa and the purpose served by s 85. The latter purpose may be discerned more clearly by reference to the place of s 85 in the Migration Act as one of a group of provisions designed to provide mechanisms for controlling the volume of applications considered and grants of particular classes of visa made in any given financial year. The place of s 85 among those provisions, and, in particular, its relationship to s 39, is considered in the next section of these reasons.

---

36 Migration Act, ss 164A–164BA.

37 Bridging visas were introduced as s 26C of the Migration Act by s 10 of the *Migration Reform Act*, commencing on 1 September 1994. Section 26C was renumbered as s 37 by the *Migration Legislation Amendment Act* 1994.

38 Migration Act, ss 72 and 73.

39 Migration Act, s 75(1).

The visa capping power — ss 39 and 85

25 Mechanisms for regulating the number of visas of specific classes being processed and granted are to be found in three sections of the Migration Act, which, in chronological order of their first appearances in the legislation, are ss 84, 39 and 85. Section 84 entered the Migration Act before s 39 and its precursors, and before s 85 and its precursor. It empowers the Minister, by notice in the Gazette, to "determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice". Its first precursors were ss 11J and 11W, introduced into the Migration Act by the *Migration Legislation Amendment Act* 1989 (Cth)[40]. They were renumbered as ss 28 and 40 by the same Act and further renumbered as s 84 by the *Migration Legislation Amendment Act* 1994. When the precursors to ss 85 and 86 were enacted the Minister, in the Second Reading Speech, observed that the suspension power had not been exercised and said that while it was "a powerful administrative tool in ensuring that program levels are not exceeded", it was also "a very blunt one."[41]

26 There was a mechanism in place for the capping of visa numbers before the enactment of ss 85 and 86. That was s 39. Its legislative precursors predated ss 85 and 86 and their precursors. Section 39 authorises the imposition by regulation of a criterion limiting, to a maximum fixed by the Minister, the number of visas of a class that may be granted in a particular financial year. It provides:

> "(1) In spite of section 14 of the *Legislative Instruments Act 2003*, a prescribed criterion for visas of a class, *other than protection visas*, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).
>
> (2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made."[42] (emphasis added)

---

40 *Migration Legislation Amendment Act* 1989, s 6.

41 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 August 1992 at 185.

42 The displacement of s 14 of the *Legislative Instruments Act* 2003 (Cth) overcomes the restriction in s 14(2) on a legislative instrument, in this case the regulations

(Footnote continues on next page)

27 The precursors of s 39(1) and (2) were s 23(3A) and (3B), enacted by the *Migration Amendment Act (No 2)* 1991 (Cth), which commenced on 15 January 1992[43]. Those sub-sections, as enacted, did not exclude protection visas because, as already explained, that class did not exist until the *Migration Reform Act* came into effect on 1 September 1994. The sub-sections were described in the Explanatory Memorandum as allowing the regulations "to authorise the Minister to fix a numerical limit on the number of visas or permits or [sic] a particular class which may be granted in a particular financial year."[44] In the Second Reading Speech, the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, said[45]:

> "These application capping powers will only apply to those classes where use of the power is specifically permitted under the regulations. The powers are, in effect, an extension of the capping powers already found in sections 28 and 40 of the Act."

As noted earlier, ss 28 and 40 of the Act as it then stood were the precursors of s 84. They did not and it does not confer a "capping power", but rather a power to suspend the processing of applications until a specified date. Sub-sections (3A) and (3B) of s 23 were repealed and reintroduced as s 26E by the *Migration Reform Act*[46] and, with the introduction of the exclusion for protection visas, came into force on 1 September 1994, the same date as protection visas were created[47].

28 A question whether s 39 confers a capping power on the Minister or simply attaches particular consequences to the exercise of the power conferred by

---

authorised by s 39, "applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time", in this case the legislative instrument referred to in s 39(1) by which the Minister fixes a maximum number of visas. In the precursors to s 39, the corresponding displacement was of s 49A of the *Acts Interpretation Act* 1901 (Cth).

43 *Migration Amendment Act (No 2)* 1991, s 4.

44 Australia, Senate, Migration Amendment Bill (No 2) 1991, Explanatory Memorandum at [4].

45 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 1991 at 1929.

46 *Migration Reform Act*, s 10.

47 Section 26E was renumbered as s 39 by the *Migration Legislation Amendment Act* 1994.

s 85 was debated at the hearing of the special case. The precursors of s 39, expressed in materially similar language to s 39, save for the exclusion of protection visas, clearly provided for a determination to be made by the Minister. There was no other provision for the Minister to fix a maximum number of visas to be granted in a given financial year. Neither s 85 nor its precursors had been enacted when the precursors of s 39 were enacted. In the event, the debate seems to be about a distinction without a difference. If the Minister makes a determination of a maximum number of visas that may be granted in a specified financial year and does so by legislative instrument, which may include a notice in the Gazette[48], the making of the determination is the common factum which attracts the legal consequences for which ss 39(2) and 86 respectively provide. The one determination may have legal consequences by operation of either s 39(2) or s 86. Sections 39, 85 and 86 may therefore be considered as part of the one statutory scheme now in existence for controlling the volume of grants of particular classes of visa made in a given financial year.

29 If the Minister's determination, fixing a maximum number of grants for a given year, relates to a class of visa for which a criterion has been prescribed pursuant to s 39(1) then, when the maximum is reached, all outstanding applications for the grant in that year of that class of visa are taken not to have been made. Section 86 would not be engaged. If the determination relates to a class of visa for which no criterion is prescribed under s 39(1), then applications for that class of visa remain on foot. As explained earlier in these reasons, by virtue of s 88, processing of the applications can continue but, by operation of s 86, no grant may be made in that financial year. A decision to refuse an application could and would have to be made if the conditions requiring such a decision, identified in s 65, which is discussed later in these reasons, were met.

30 The defendants also sought to support their preferred construction of s 85 by reference to the different consequences attaching, by ss 39(2) and 86 respectively, to a ministerial determination of a maximum number of visas to be granted in a given financial year. Under s 39(2), when the cap determined by the Minister has been reached for a class of visa, outstanding applications for visas of that class are taken not to have been made. The defendants submitted that there was a rationale, based upon that consequence, for the exclusion of protection visas from the application of s 39. They argued that had s 39 been applicable to protection visas, the consequential extinguishment of outstanding applications for such visas would have engaged the conditional obligations imposed by s 198 of the Migration Act to remove from Australia unlawful non-citizens who have not made a valid application for a substantive visa that could be granted when the applicant is in the migration zone[49]. That consequence was

---

48 *Legislative Instruments Act*, s 56(1).

49 Migration Act, s 198(2)(c)(i).

contrasted with the consequence imposed by s 86 on a determination under s 85, which would leave in place a pending application for a protection visa and thus not engage the removal process.

31 The defendants' argument should not be accepted. For an unlawful non-citizen in detention awaiting determination of a valid application for a protection visa, the application of ss 85 and 86, read with s 91, would have the consequence that the date of decision could be indefinitely deferred by the imposition of successive caps, thus prolonging the period that that applicant would remain in detention absent a request for removal or, as in the present case, the exercise of a non-compellable ministerial discretion to grant a visa pursuant to s 195A(2) of the Migration Act. That consequence, extending as it necessarily would to persons who, like the plaintiff, have satisfied the criterion in s 36(2)(a) that they are persons in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol, is at odds with the purpose of the Act relating to Australia's obligations under the Convention and the purpose of protection visas as a mechanism for meeting those international obligations.

32 The defendants also submitted that the express exclusion of protection visas from the application of s 39 militated against their implied exclusion from the application of ss 85 and 86. That submission deploys a familiar interpretative argument. However, it must be considered in the wider context of the scheme of the Migration Act relating to protection visas and the purposes which they serve.

Specific provisions relating to protection visas

33 Section 39 is one of a number of provisions of the Migration Act which, for a variety of purposes, refer expressly to protection visas. Section 40 authorises regulations which provide that visas of "a specified class" may only be granted in specified circumstances[50]. Applicants for protection visas enjoy a limited express exemption with regard to "circumstances" requiring the provision of certain kinds of personal identifier to an officer[51]. A limited exemption also exists in relation to s 41, which authorises regulations providing that a visa or visas of a specified class may be subject to specified "conditions"[52]. No condition can be imposed to prevent a visa holder from applying for a protection visa[53]. A bar on repeat applications for protection visas is imposed by s 48A(1),

---

50 Migration Act, s 40(1).

51 Migration Act, s 40(3A).

52 Migration Act, s 41(1).

53 Migration Act, s 41(2)(a).

which is subject to a ministerial dispensing discretion under s 48B, albeit, pursuant to s 50(c), the Minister is not required to base consideration of the repeat application on information provided in support of the earlier application. Section 65A, which has already been mentioned, imposes a decisional time limit in relation to applications for protection visas that are validly made or remitted to the Minister for reconsideration.

34 Subdivision AF of Div 3 of Pt 2 of the Migration Act (ss 72–76) provides for the grant of a bridging visa to an unlawful non-citizen who has made a valid application for a protection visa after arriving in Australia and is determined by the Minister to be an eligible non-citizen. The holder of a criminal justice entry visa, or the former holder of such a visa which has been cancelled, cannot apply for a visa "other than a protection visa"[54]. Similar provision is made in relation to the holder of an enforcement visa[55]. Unlawful non-citizens held in immigration detention are subject to time limits in relation to visa applications, other than applications for bridging visas or protection visas[56].

35 Those provisions were all referred to by the defendants in their submissions. They contended that when Parliament wishes to exclude protection visas from the operation of particular provisions, it does so expressly. Those exclusions, the express exclusion in s 39, and the absence of any such exclusion in s 85, were said to support the application of s 85 to protection visas. What those exclusions indicate, however, is the particular purpose of protection visas in the statutory scheme.

36 More generally, protection visas were not created for purposes relevant to a migration program of the kind amenable to management by the powers conferred by ss 84, 85 and 39. Protection visas are a mechanism, albeit not the only mechanism, by which Australia can discharge its international obligations not to send back to their countries of origin persons falling under the protection of the Refugees Convention and the other international conventions underpinning s 36(2)(aa). That "non-refoulement" obligation may also be met by removal of a person claiming to be a refugee to a safe third country[57]. The existence of that alternative is provided for in subdiv AI of Div 3 of Pt 2 of the Migration Act, entitled "Safe third countries". Its existence, however, is not relevant to the

---

54 Migration Act, s 161(5) and (6).

55 Migration Act, s 164D.

56 Migration Act, s 195(2).

57 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 175 [45] per French CJ, 198 [122] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 32.

constructional question raised in this proceeding. Nor are the recently enacted provisions of the Migration Act relating to removal of unauthorised maritime arrivals to regional processing countries[58].

37 The express provisions of the Migration Act relating to protection visas reflect their special purpose. They point away from the interpretative submission advanced by the defendants based upon the difference in language between ss 39 and 85. General provisions of the Act should not be construed in a way that is inconsistent with that purpose, involving the discharge of international obligations, unless their text plainly requires such a construction. That approach is mandated by s 15AA of the *Acts Interpretation Act* 1901 (Cth), which provides:

> "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."

38 A construction of s 85 which would permit the deferral of a decision about an application for a protection visa by a person in respect of whom Australia has been found to owe protection obligations, and which would expose such a person to the prolongation of immigration detention, would be at odds with the purposes of the statutory scheme of which protection visas are a central part. That construction is not to be preferred. For that reason, together with the textual and contextual considerations thrown up by s 65A of the Migration Act, which are considered in the next section of these reasons, s 85 should not be construed as authorising a determination by the Minister of the maximum number of protection visas that may be granted in a specified financial year.

Consideration and determination of visa applications — ss 65 and 65A

39 A non-citizen who wants a visa must apply for a visa of a particular class[59]. That requirement is expressed to be subject to the Migration Act and the regulations. Mention has already been made of classes of visa which may be granted without application. Section 46(1) provides, as a general rule, that an application for a visa is valid if, and only if, it is for a visa of a class specified in the application and it satisfies the criteria and requirements prescribed under s 46[60].

---

58 Migration Act, subdiv B of Div 8 of Pt 2 (ss 198AA–198AJ).

59 Migration Act, s 45(1).

60 This case does not require consideration of the effects of statutory bars to valid applications in relation to unauthorised maritime arrivals found in s 46A and

(Footnote continues on next page)

40 The Minister is required by s 47 to consider a valid application for any class of visa[61]. The Minister also has a discretion, conferred by s 51, to consider and dispose of applications for visas in such order as he or she considers appropriate[62]. Section 63 provides that, subject to s 39, the Minister may grant, or refuse to grant, a visa at any time after the application has been made[63]. That discretion is subject to the express time limits for decision-making in relation to protection visas imposed by s 65A.

41 Subdivision AC of Div 3 of Pt 2 of the Migration Act deals specifically with the grant of visas. Sections 65 and 65A appear in that subdivision. Section 65(1) requires one of two outcomes from the consideration of an application for any class of visa:

> "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
>
> (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."

---

related provisions of the Act and discussed in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 647–649 [26]–[31] per French CJ and Kiefel J, 661–664 [77]–[87] per Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 31.

61 Migration Act, s 47(1).

62 Migration Act, s 51(1).

63 Migration Act, s 63(1).

Section 65(2) is not material for present purposes. Section 65 was introduced by the *Migration Reform Act* as s 26ZF[64]. It was renumbered by the *Migration Legislation Amendment Act* 1994, on the same date, as s 65. As the plurality observed in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[65]:

> "s 65(1) imposes an obligation to grant a visa, as distinct from conferring a power involving the exercise of a discretion. The satisfaction that is required is a component of the condition precedent to the discharge of that obligation." (footnote omitted)

42 Section 65 must be read with ss 85 and 86. The defendants submitted that where a determination under s 85 applies then, even if the Minister has considered a valid application for a visa and is satisfied of the matters in s 65(1), the duty to grant the visa gives way, pro tem, to the prohibition imposed by s 86. That may be accepted, subject to two qualifications. The first qualification is that neither s 65 nor s 86 is engaged if the Minister's determination of a maximum number of visas to be granted in a particular financial year applies to a class of visa which attracts the application of a criterion under a regulation made pursuant to s 39. As explained earlier in these reasons, any application outstanding after the determined maximum has been reached is taken never to have been made. The second qualification arises from the obligation imposed by s 65A, which is not susceptible of displacement by the prohibition in s 86.

43 Section 65A, which relates only to protection visas, imposes a specific temporal limit on the decision-making required by s 65 and indirectly affects the order of consideration and disposition of applications which may be adopted by the Minister pursuant to s 51. Section 65A post-dates ss 51 and 65, having been introduced into the Migration Act in 2005 with effect from 12 December 2005[66]. It provides:

> "(1) If an application for a protection visa:
>
> (a) was validly made under section 46; or
>
> (b) was remitted by any court or tribunal to the Minister for reconsideration;

---

64 *Migration Reform Act*, s 10.

65 (2000) 201 CLR 293 at 306 [41] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2000] HCA 19.

66 *Migration and Ombudsman Legislation Amendment Act*, Sched 1, item 1.

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

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

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

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

The Explanatory Memorandum relevant to s 65A stated[67]:

> "The purpose of this new section is to reflect the Government's policy that decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants. Timeliness in the decision-making process will be enhanced by these provisions as the Minister will be required to make all decisions within a set time frame."

44 It is plain that s 65A is incompatible with the application of ss 85 and 86 to protection visas. Those sections, if applied to such visas, would leave applications and their processing on foot but, once a maximum determined under s 85 was reached, would prevent a grant in the financial year to which the determination applied. The defendants submitted that the obligation created by s 65A is dependent upon the existence of the duty imposed by s 65 and is, therefore, susceptible to displacement, pro tem in respect of grant decisions, by the prohibition imposed by s 86. The premise that s 65A is parasitic upon s 65 is inconsistent with the evident purpose of s 65A and should be rejected. The preferred construction, consistent with its statutory purpose, is that s 65A incorporates by reference, in relation to protection visas, the obligation created by s 65, and attaches a time limit to its discharge. The obligation to decide and to decide within a certain time is imposed by s 65A as a special provision in relation to protection visas. It is not displaced in respect of grant decisions by the application of the general provisions of ss 85 and 86. No question arises of s 65A effecting an implied repeal of ss 85 and 86 in their application to protection visas. The enactment of s 65A confirms the anterior conclusion that the nature and purposes of protection visas and the statutory scheme of which protection visas are a part are inconsistent with the application to that class of

---

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

visa of the general capping provision under s 85, which was enacted before they came into existence.

Conclusion

45 The conclusion that ss 85 and 86 are not applicable to protection visas means that the first question in the special case must be answered in the affirmative. The question of further relief should be remitted to a single Justice to determine. The defendants should pay the plaintiff's costs of the special case. The costs of the proceedings otherwise should be remitted to a single Justice.

HAYNE AND KIEFEL JJ.

The issue

46 The plaintiff, now aged 15 years, is an Ethiopian national. In March 2013, he arrived in Gladstone Port, Queensland, as a stowaway on a cargo ship. He had no visa permitting him to enter or remain in Australia and was, therefore, an unlawful non-citizen within the meaning of the *Migration Act* 1958 (Cth) ("the Act").

47 The plaintiff has made a valid application for a protection visa (a visa of the class provided for by s 36 of the Act). It has been determined that he is a refugee within the meaning of the Refugees Convention[68]. The plaintiff has been neither granted nor refused a protection visa. The Minister has determined that the maximum number of protection visas that may be granted in the financial year ending on 30 June 2014 is 2,773. Granting the plaintiff a protection visa in this financial year would exceed that limit.

48 The plaintiff alleges, and the Minister and the Commonwealth deny, that the determination limiting the number of protection visas which may be granted is invalid and that the Minister is bound to consider and determine the plaintiff's application and grant him a protection visa. The plaintiff's submissions should be accepted. The questions of law stated by the parties in the form of a special case should be answered accordingly.

A question of statutory construction

49 Resolution of the central issue presented by the case depends upon the proper construction of the relevant provisions of the Act, in particular the provisions of subdiv AC of Div 3 of Pt 2 (ss 65-69), dealing with "Grant of visas", and the provisions of subdiv AH of Div 3 of Pt 2 (ss 85-91), dealing with "Limit on visas". As with any legislation, the Act, and these provisions in particular, "must be construed on the prima facie basis that [the] provisions are intended to give effect to harmonious goals"[69].

50 Section 65 obliges the Minister, after considering a valid application for a visa, either to grant or to refuse to grant the visa. Section 65A fixes a time limit

---

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

69 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, citing *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J; [1979] HCA 29.

within which the Minister must make decisions on protection visas. Section 91Y requires the Secretary of the Minister's Department to give to the Minister a report for tabling in the Parliament if that time limit is not met.

51 The central question in the case is whether the power given by s 85 to limit the number of visas of a specified class that may be granted in a financial year permits the Minister to limit the number of protection visas that may be granted. The Minister and the Commonwealth submitted that if the Minister may limit the number, the consequence is that, once that number has been granted, the Minister may not grant any other protection visas during the financial year, but also may not refuse to grant a visa on the ground that its grant would exceed the permitted number of visas.

52 Consideration of the text of the relevant provisions, their history, and the consequences of adopting the construction of the Act asserted by the Minister and the Commonwealth, requires the conclusion that s 65 (governing the grant or refusal of visas) is the leading provision of the Act, in the sense that s 85 (and the associated provisions of subdiv AH) is subsidiary to s 65. The provisions of s 65A (obliging the Minister to determine applications for protection visas within a limited time) reinforce this conclusion.

The relevant provisions

53 Section 65 obliges the Minister, after considering a valid application for a visa, to grant or refuse to grant the visa according to whether the Minister is satisfied that certain conditions are met. Two conditions are relevant to this proceeding. First, the Minister must be satisfied[70] that the criteria for the grant of the visa "prescribed by [the] Act or the regulations" have been met. Second, the Minister must be satisfied[71] that the grant of the visa "is not prevented" by certain identified provisions of the Act[72] or by any "other provision of [the] Act or of any other law of the Commonwealth".

54 Section 85 provides that the Minister may, by notice in the *Commonwealth of Australia Gazette*, determine the maximum number of visas of a specified class that may be granted in a specified financial year.

55 Section 86 provides for the effect of the Minister limiting the number of visas of a specified class which may be granted. It provides:

---

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

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

72 None of which is relevant to this case.

"If:

(a) there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and

(b) the number of visas of the class or classes granted in the year reaches that maximum number;

no more visas of the class or classes may be granted in the year."

56 Section 88 provides that "[s]ection 86's prevention of the grant of a visa does not prevent any other action related to the application for it". Section 89 provides that the Minister's having neither granted nor refused to grant a visa of a class to which a determination under s 85 applies "does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa". And s 90, in effect, provides that, where a determination under s 85 applies, the Minister's disposing of an application for a visa which was lodged after another application "does not mean, for any purpose, that the consideration or disposal of the earlier application is unreasonably delayed".

57 There is, then, an evident tension between s 65 and the provisions of subdiv AH. Section 65 requires a decision to grant or refuse to grant a visa; subdiv AH requires that visas of a specified class not be granted but does *not* require that they be refused. The tension is emphasised by s 65A requiring the Minister to determine applications for protection visas (by granting or refusing to grant the visa sought) within a limited time.

58 As will later be explained, the tension is resolved by s 39 of the Act, which gives the Minister power to make compliance with a limit a criterion for the grant of a visa. It provides:

"(1) In spite of section 14 of the *Legislative Instruments Act 2003*, a prescribed criterion for visas of a class, *other than protection visas*, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

(2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any *outstanding applications* for the grant in that year of visas of that class *are taken not to have been made*." (emphasis added)

It is important to notice that s 39(1) expressly excludes protection visas.

Competing considerations

59 The Minister and the Commonwealth submitted that any tension between s 65 and subdiv AH was to be resolved by treating subdiv AH as providing comprehensively for the consequences of the Minister making a determination under s 85. They submitted that s 86 provides the chief consequence of a determination: that visas not be granted in excess of the limit fixed. They submitted that s 86 "*prohibits* the Minister from making the decision otherwise *required* by s 65(1)" (original emphasis). The duty in s 65 to grant or refuse to grant a visa was thus said to "give way to the prohibition in s 86". They further submitted that this construction of the Act was supported by reference to ss 88, 89 and 90. But the arguments advanced by the Minister and the Commonwealth did not demonstrate that this was a construction which would yield a harmonious construction of either the Act as a whole or the relevant provisions.

60 All of the submissions of the Minister and the Commonwealth proceeded from the premise that ss 39 and 85 give two separate powers for the Minister to limit the number of visas of a particular class which may be granted in any financial year. That is, the submissions proceeded on the footing that, if the Minister exercised the power given by s 85 to fix a limit, effect was to be given to that limit in accordance with s 86 regardless of whether the power under s 39 to make compliance with a limit a criterion for the grant of a visa could be, or had been, exercised. This premise should not be accepted.

61 If s 85 did not appear in the Act, the phrase used in s 39(1) – "whatever number is fixed by the Minister, by legislative instrument" – might have been construed as giving the Minister the power to fix the maximum number of visas of a particular class that may be granted in a financial year. But that construction of s 39(1) should not be adopted. Sections 39 and 85 should be construed as working together, not separately.

62 Section 85 provides the Minister with the power to limit the number of visas of a particular class which may be granted in a financial year. There is no reason to read the Act as providing two separate powers to limit the number of visas of a particular class. The words "whatever number is fixed by the Minister, by legislative instrument" are better read in s 39(1) as a reference to the exercise of the power conferred by s 85 to fix a limit rather than as granting any additional or different power to fix a limit. That is, the determination made under s 85 is the legislative instrument of which s 39(1) speaks.

63 Rejection of the separate powers premise for the arguments advanced by the Minister and the Commonwealth permits dealing with their reliance on ss 88, 89 and 90 briefly.

64 The Minister and the Commonwealth submitted that the provisions of s 88 (that s 86's prevention of the grant of a visa does not prevent any other action related to the application) point towards subdiv AH operating independently of s 39. Were that not so, they submitted, effect could not, or at least would not, be given to both s 39(2) (deeming the application not to have been made) and s 88 (permitting continued processing of applications). The submission should not be accepted. Section 39 has a particular operation with respect to s 65. Section 88 goes no further than saying that other action related to an application is not prevented by s 86. It may readily be supposed that, in some cases, processing of an application for a particular class of visa may continue during a financial year in which the grant of that visa would exceed the limit with a view to its speedy grant in the next financial year.

65 The Minister and the Commonwealth made a similar submission based on the provisions of s 89 (that the Minister's having neither granted nor refused to grant a visa of a class to which a determination under s 85 applies "does not mean, for any purpose, that the Minister has failed to make a decision to grant or refuse to grant the visa") and s 90 (that not considering or disposing of an application for such a visa does not demonstrate unreasonable delay). They submitted that ss 89 and 90 not only point towards subdiv AH operating independently of s 39 but also, in the case of protection visas, provide statutory authority for the Minister neither granting nor refusing to grant a valid application for a protection visa. Neither branch of the argument should be accepted.

66 Sections 89 and 90 were evidently directed[73] to the availability of judicial review of decisions made, or not made, in respect of visa applications. Their retention in the Act is readily explained as abundant caution against arguments that, despite the deeming worked by s 39(2), the failure to decide to grant or refuse to grant a visa of a class to which s 39 applied would attract an order for mandamus. It takes little imagination to devise an argument to that effect (whatever may be its merit) being founded on the repeal of either or both of ss 89 and 90.

67 It is necessary to return to the question of the tension between s 65 and subdiv AH.

---

73 cf Australia, Senate, Migration Laws Amendment Bill 1992, Explanatory Memorandum at [13]-[14].

Resolving the tension

68 As was pointed out in *Project Blue Sky Inc v Australian Broadcasting Authority*[74], "[w]here 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". And reconciling conflicting provisions "will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'"[75]. That is why, as was also said[76] in *Project Blue Sky*, in many cases it is only by determining the hierarchy of the provisions that each provision can be given "the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme".

69 In this case, that hierarchy can be determined only by first resolving some associated issues about how s 39 of the Act intersects with subdiv AH and, in particular, ss 85 and 86.

Section 39

70 If regard is had only to the text of the Act as it now stands, the better, and more obvious, construction of ss 39, 85 and 86 can be described in three related propositions. First, s 85 prescribes how the Minister may fix a limit on the number of visas of a particular class which may be granted in a financial year. Second, s 39(1) prescribes how effect is given to that determination (by making not exceeding the limit a criterion for the grant of a visa of the relevant class). Third, s 39 resolves the tension between s 65 and the fixing of a limit on the number of visas.

71 It is necessary to explain how s 39 resolves the tension. It does so in two steps. If an application relates to a visa of a specified class, ss 39(1) and 65(1)(a)(ii) *prevent* the grant of the visa. Without more, s 65(1)(b) would compel the Minister to *refuse* to grant the visa. But that consequence would be at odds with subdiv AH going no further than saying (in s 86) that the visa not be granted, yet saying (in s 88) that the limit on numbers does not affect processing

---

74 (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ (footnote omitted).

75 (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ (footnote omitted).

76 (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

of applications. Hence, s 39(2) takes a second step to resolve the tension, by deeming outstanding applications not to have been made.

72 Deeming the visa application not to have been made disengages the duty that s 65(1)(b) in particular (and hence s 65 in general) would otherwise impose on the Minister. It disengages that duty in a manner which is consistent with subdiv AH. Section 39 speaks to all cases where there is a valid application for a visa; s 86 speaks to all other circumstances in which, with or without a valid application[77], the Minister may grant a visa. And disengaging the *duty* to determine a valid application would not be inconsistent with s 88 permitting "any other action related to the application" to proceed. The kind of "other action" embraced by the section would readily include action founded in the consent of the visa applicant, such as submission to medical examination.

73 What then of protection visas? Section 39 expressly excepts visas of that class from its reach.

74 Given that the Act provides a mechanism for resolving any tension with respect to any other kind of visa, the more natural construction of the Act is to treat s 65 as the leading provision and ss 85 and 86 as subordinate to it. The effect of reading the Act in this way is that the duty imposed by s 65, after considering a valid application for a visa, either to grant or to refuse to grant the visa, can be disengaged *only* by the operation of s 39. And if that is so, two conclusions follow.

75 First, neither s 85 nor s 86 directly intersects with the duty imposed by s 65. Second, the power to limit the number of visas of a particular class given by s 85 does *not* extend to protection visas. Reading the Act in this way gives each of its provisions "the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme"[78]. It achieves a harmonious construction.

76 Consideration of the history of the provisions reinforces these conclusions.

---

77 See, for example, s 195A, permitting the Minister to grant a visa to a person who is in detention under s 189 whether or not that person has made a valid application for a visa.

78 *Project Blue Sky* (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

The history of the provisions

77 Describing the history of the relevant provisions is made more difficult by the renumbering of provisions effected by s 83 of the *Migration Legislation Amendment Act* 1994 (Cth). For the most part it will be convenient to refer to the provisions in the text of these reasons by their present numbers, and identify their original numbers by footnote.

78 It is necessary to trace the history of s 39, s 65 and the provisions of subdiv AH and to observe how those sections intersected with provisions dealing with persons making claims that they were owed protection obligations under the Refugees Convention.

79 Central to an understanding of the history is recognition of the important changes which were made to the Act by the *Migration Reform Act* 1992 (Cth) ("the 1992 Reform Act"). Many of the provisions of the 1992 Reform Act did not come into operation until 1994 and there were amendments made to some of its provisions before it came into operation. Nothing turns on either the delay in commencement or the details of the intervening amendments.

80 The 1992 Reform Act made three changes to the Act of most immediate significance. First, it introduced the binary classification of non-citizens as either "lawful non-citizens" or "unlawful non-citizens". Second, it provided for the mandatory detention of unlawful non-citizens. Third, it provided for a new class of visa: "protection visas".

81 Until the 1992 Reform Act came into operation, a person making claims to protection under the Refugees Convention was granted an *entry permit*, not a visa, after the Minister had determined that the person was a refugee. The 1992 Reform Act did away with the system which distinguished between visas and entry permits and treated all forms of permission to travel to, enter, or remain in Australia as visas.

82 Subdivision AH, permitting the specification of limits on the number of *visas* of a particular class that may be granted in a financial year, was inserted[79] in the Act *before* the enactment of the 1992 Reform Act. At the time of the insertion of subdiv AH, the Act also contained provisions permitting the Minister to fix limits on the number of *entry permits* of a particular class that might be granted in a financial year. Those provisions about limiting the number of entry

---

79 *Migration Laws Amendment Act* 1992 (Cth), s 7, inserting, as subdiv AA of Div 2 of Pt 2 (ss 28A-28G), what now appear as ss 85-87 and 88-91.

permits had been inserted[80] in 1991 and were in a form generally similar to what is now s 39. In their then form, the provisions made no reference to entry permits relating to persons claiming protection under the Refugees Convention. The provisions were repealed by s 11 of the 1992 Reform Act and what is now s 39 was inserted[81] by s 10 of the same Act. As inserted, the new s 39 expressly excepted protection visas from its operation.

83 The express exception of protection visas from the 1992 Reform Act scheme for prescribing limits on the number of visas which may be granted is readily explained. First, the Act, as amended by the 1992 Reform Act, when read as a whole, contained what the whole Court has previously described[82] 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". This being so, it would be surprising if the Act permitted limiting the number of protection visas which may be granted in a financial year to those who, having landed in Australia, had made a valid application for a protection visa.

84 Second, the assumption which underpinned the 1992 Reform Act was that all unlawful non-citizens would be detained until granted a visa or removed. Excepting protection visas from the power to limit the number of visas of a particular class that may be granted in a financial year is consistent with the speedy determination of whether an unlawful non-citizen claiming protection is to be granted a visa, and released from detention, or removed from detention under the Act by being removed from Australia. By contrast, reading the Act as permitting the Minister, by a discretionary decision limiting the number of protection visas that may be granted, to suspend the statutory duty to decide to grant or refuse to grant such a visa would prolong the detention of the visa applicant. The period of detention would depend upon the exercise of the Minister's discretion to limit the number of visas granted. As the whole Court has also said[83], "[i]t is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive".

---

80 *Migration Amendment Act (No 2)* 1991 (Cth), s 5, amending s 33 by inserting new sub-ss (3A) and (3B).

81 As s 26E.

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

83 *Offshore Processing Case* (2010) 243 CLR 319 at 348 [64].

85 That the duty imposed by s 65 (to grant or refuse to grant the visa sought) was not to be affected by a decision to limit the number of visas of a class that may be granted in a financial year *except* through the application of s 39 is a conclusion reinforced by the legislative history of s 65.

86 It is necessary to recall[84] that, from the enactment of the *Migration Amendment Act (No 2)* 1980 (Cth)[85] until the 1992 Reform Act, an entry permit was not to be granted to a non-citizen after entry to Australia unless certain conditions were fulfilled. One of the conditions permitting the grant of an entry permit was that the non-citizen was the holder of a temporary permit and that the Minister had determined that the person was a refugee within the meaning of the Refugees Convention. If the conditions for the grant of an entry permit were satisfied, the Minister was obliged[86] to grant it.

87 By contrast, as the Act stood before the 1992 Reform Act came into operation, what was then s 24 governed the grant or refusal of visas. That section provided expressly[87] that the Minister's obligation to grant a visa (if satisfied of the requirements for a grant) was subject to what were then ss 28 and 28B and are now ss 84 and 86. That is, the Minister's obligation to grant a visa was expressly made subject first, to the provision permitting general suspension of visa processing (then s 28, now s 84) and second, to the provision (then s 28B, now s 86) prohibiting grant of visas in excess of a limit determined in accordance with what was then s 28A and is now s 85.

88 In the form enacted by the 1992 Reform Act, s 65[88] makes no reference to the provision for general suspension of processing of visas of a particular class and makes no reference to the provisions permitting the specification of limits on the number of visas that may be granted. The omission from s 65 of any reference to these provisions (ss 84 and 86) is telling.

---

84 The relevant history of the provisions is more fully described in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 174-176 [34]-[41] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 6.

85 s 6, inserting s 6A into the Act.

86 See s 34(3)(b), as in force immediately before the 1992 Reform Act came into operation.

87 s 24(3)(b).

88 Inserted as s 26ZF.

The preferred construction

89 As has been observed, the tension between s 65 and subdiv AH is to be resolved by treating s 65 as the leading provision, and the provisions of subdiv AH as subordinate to it. That is the preferable construction of the text of the Act. The history of the provisions which are now found in ss 39 and 65 and subdiv AH reinforces that conclusion. The consequences for the detention of unlawful non-citizens who have made a valid application for a protection visa which would follow from adopting the contrary construction of the Act have been identified and those consequences provide a further and compelling reason for adopting the preferred construction. The prescription of time limits by s 65A for determination of applications for protection visas is a still further and compelling reason for adopting it.

Conclusion and orders

90 For these reasons, the Minister's determination of the maximum number of protection visas which may be granted during the financial year ending on 30 June 2014 was not authorised by s 85 of the Act. Having been made beyond power, the determination is invalid. It is not necessary to consider the plaintiff's submissions about the construction of s 85.

91 The questions stated for the consideration of the Full Court in the form of a special case should be answered as follows.

92 Question 1, which asks whether the Minister's determination fixing the maximum number of protection visas which may be granted in the financial year ending on 30 June 2014 is invalid, should be answered: "Yes".

93 Question 2 asks what relief should be granted to the plaintiff. The exact form of relief which the plaintiff should have will be a matter for the single Justice making orders finally disposing of the proceeding and the question should be answered accordingly. As the matter presently stands, it would seem probable that the plaintiff would be entitled to a declaration that the Minister's determination is invalid, an order for mandamus directed to the Minister requiring the Minister to determine according to law the plaintiff's application for a protection visa and an order that the defendants pay the plaintiff's costs. But those are matters which should finally be determined by a single Justice.

94 Question 3, which asks who should pay the costs of the special case, should be answered: "The defendants".

95 CRENNAN, BELL, GAGELER AND KEANE JJ. This special case has been heard concurrently with the special case in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*[89]. For the reasons we have given in that case, which will need to be read in conjunction with these reasons, the instrument signed by the Minister on 4 March 2014 was beyond the substantive scope of the power conferred by s 85 of the Act.

96 The plaintiff in this proceeding made a valid application for a protection visa on 19 April 2013. A delegate of the Minister refused to grant him a protection visa on 10 February 2014. That decision was quashed by a writ of certiorari on 22 April 2014.

97 Although the 90 day period set by s 65A for compliance with the duty imposed by s 65 of the Act has not yet expired, it is an agreed fact that the plaintiff has done all things necessary for the purpose of having his protection visa determined by the Minister and the Minister has pointed to no reason why he has not yet made a decision to grant or refuse to grant the protection visa other than the existence of the instrument. Absent any discretionary reason for withholding that relief, there is no reason why the plaintiff should not now have a writ of mandamus directing the Minister to consider and determine his application according to law.

98 The questions reserved should be answered as follows:

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

Answer: Yes.

Question 2: What, if any, relief should be granted to the plaintiff?

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

Question 3: Who should pay the costs of the special case?

Answer: The defendants.

---

89 [2014] HCA 24.