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High Court decides that regulations are inconsistent with the *Migration Act 1958*

In *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 a majority of the High Court (French CJ and Hayne, Crennan and Kiefel JJ), in 4 separate judgments, struck down a regulation made under the *Migration Act 1958* prescribing the absence of an adverse security assessment by the Australian Security and Intelligence Organisation (ASIO) as a criterion for granting a protection visa, on the basis of inconsistency with that Act.

The case illustrates the complex and difficult statutory interpretation issues which can arise in deciding whether there is power to make a regulation or other legislative instrument and, in particular, the need to have careful regard to the context in which the power to make the regulation or instrument operates within the primary legislation.

Five of the 7 judges also found that there had been no denial of procedural fairness in making the adverse security assessment. The plaintiff had been interviewed in the presence of his legal representative and was given ample opportunity to respond to the issue of concern to ASIO.

A range of other issues was considered in the case, but without a majority view emerging.

Background

The Minister's delegate assessed the plaintiff, a Sri Lankan national, to have a well-founded fear of persecution if he were to return to Sri Lanka and therefore to be a refugee to whom Australia owes protection obligations within the meaning of s 36(2) of the Migration Act. Nevertheless, the delegate declined to grant the plaintiff a protection visa, on the grounds that he was assessed by ASIO to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979*.

The sole reason for the delegate's decision was that the plaintiff did not meet the criteria set out in clause 866.225 of Schedule 2 of the *Migration Regulations 1994* prescribing public interest criterion 4002 (PIC 4002) as a criterion for the grant of a protection visa. PIC 4002 requires that the visa applicant is not assessed by ASIO to be directly or indirectly a risk to security, within the meaning of s 4 of the ASIO Act. The relevant regulation was purportedly made under s 504 of the Migration Act, which authorises the making of regulations 'not inconsistent with this Act', read with s 31(3), which provides that regulations may prescribe criteria for a visa of a specified class, including for protection visas.

The plaintiff challenged the validity of:

- the regulation prescribing PIC 4002 as a criterion for the grant of a protection visa on the basis that it was inconsistent with the Migration Act
- the ASIO assessment on the basis that it was made without according him procedural fairness.

Inconsistency of the regulation prescribing PIC 4002 with the Migration Act

The considerations that led the majority to find that the relevant regulation 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), include the following:

Legislative scheme precludes prescription of PIC 4002

- The Migration Act implements Australia's obligations under the Convention Relating to the Status of Refugees [1954] ATS 5 and the Protocol Relating to the Status of Refugees [1973] ATS 37 (French CJ at [11] and [12]); Hayne J at [222]). The Act itself disclosed an intention of dealing with the refusal of an application for a protection visa on grounds of national security in implementation of Arts 32 and 33(1) of the Refugees Convention. In particular s 501 of the Migration Act provided for the refusal of a visa on character grounds, and s 500(1)(c) provided for review by the Administrative Appeals Tribunal of a decision to refuse a protection visa on the basis of Arts 32 and 33(2). The Regulations could not therefore deal with the same subject matter, and in particular could not extend the scope of the ability to refuse an application for a protection visa on national security grounds. The condition sufficient to support the assessment referred to in PIC 4002 is wider in scope than, and subsumes the criteria in, the Migration Act providing for the refusal or cancellation of a visa (French CJ at [54] and [71]). The prescription of PIC 4002 is therefore inconsistent with the Act read as a whole, and s 31(3) does not authorise such a regulation (Hayne J at [221]).
  - Under Art 32 of the Refugees Convention a State shall not expel a refugee lawfully in its territory 'save on grounds of national security or public order'.
  - Art 33(2) excludes from the benefit of the prohibition on expulsion or return to countries where their life or freedom would be threatened a person for whom there are reasonable grounds for regarding as a danger to the security of the country to which they have fled.

Power to refuse or cancel a protection visa is reposed in the Minister

- The scheme under the Migration Act for refusing an application for a protection visa relying on Arts 32 and 33(2) of the Refugee Convention reposes the power of determining the application with the Minister personally or the Minister's delegate (French CJ at [71], Crennan J at [396], Kiefel J at [459]).
  - A decision to refuse 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 (French CJ at [71], Crennan J at [396], Kiefel J at [458]).

Unlike the Minister's decision to refuse or cancel a protection visa, ASIO's security assessment is not subject to merits review

- A decision to refuse an application for a protection visa relying on PIC 4002 is subject to merits review under Pt 7 of the Migration Act (Crennan J at [398], Kiefel J at [457]). However, neither the substance nor the making of the security assessment is relevantly subject to this merits review (French CJ at [71], Crennan J at [398]). The only relevant

matter for the Refugee Review Tribunal to consider on merits review under Pt 7 of the Migration Act is whether the applicant has or has not been 'assessed by [ASIO] to be directly or indirectly a risk to security' (Crennan J at [386]). The prescription of PIC 4002 erects an additional hurdle that circumvents the special review provisions made by the Migration Act. If the prescription of PIC 4002 is valid it would give the provision of the Migration Act making available merits review of decisions relying on Arts 32 and 33(2) no work to do (Hayne J at [181] and [206]).

Minority – consistency of the regulation prescribing PIC 4002 with the Migration Act

The considerations that led the minority to find that the relevant regulation is, to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa, consistent with the Migration Act, include the following:

- Section 36(2) does not purport to cover 'completely and exclusively' the criteria for the grant of a protection visa; and further, s 31(3) explicitly authorises the making of regulations that prescribe additional criteria (Gummow J at [133]–[136]).
- Additional visa criteria prescribed in regulations made pursuant to s 31(3) are of equal significance to the provisions that prescribe visa criteria in the Migration Act itself (Heydon J at [316], [326]).
- There is no repugnancy between PIC 4002 and the powers that are conferred on the Minister or Minister's delegate to refuse to grant a protection visa by either s 501 or, impliedly, s 500(1)(c) (Heydon J at [318]–[319], [321], [322]–[324] and see Bell J at [487]–[489]).
- The fact that the operative decision-maker when PIC 4002 is relied on is an ASIO officer rather than the Minister or the Minister's delegate does not give rise to an inference of repugnancy (Heydon J at [326] and see Bell J at [489]).

Implications for Commonwealth agencies

The issue of whether a regulation is within the power pursuant to which it is purported to be made is a question of statutory construction to be resolved by looking at the entirety of the relevant Act. As this case demonstrates, this can be a difficult and complex task. It is critically important that consideration be given not just to the specific provision in the primary Act which allows the regulation to be made but also to the purpose of that Act and to its structure and terms viewed as a whole. AGS acted for the defendants in this case.

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