SHAHI.. ..... PLAINTIFF;

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP.. ..... DEFENDANT.

[2011] HCA 52

HC of A
2011
Sept 26;
Dec 14
2011
French CJ,
Gummow,
Hayne,
Heydon and
Bell JJ

Immigration — Refugees — Application for refugee and humanitarian visa — Applicant required to be member of immediate family of proposer at time of application — Requirement that applicant continue to satisfy criterion — Proposer attained eighteen years of age before decision — Applicant no longer member of immediate family of proposer — Whether applicant must continue to be member of immediate family of proposer at time of decision — Migration Act 1958 (Cth), s 31(3) — Migration Regulations 1994 (Cth), reg 1.12AA, Sch 1, item 1402, Sch 2, cll 202.211, 202.221.

Section 31(3) of the *Migration Act 1958* (Cth) provided that the Regulations may prescribe criteria for a specified class of visa. The criteria for a refugee and humanitarian (Class XB), subclass 202 global special humanitarian visa were prescribed by reg 2.03 and subclass 202 of Sch 2 of the *Migration Regulations 1994* (Cth). Clause 202.211(1) prescribed two alternative criteria to be satisfied at time of application. Clause 202.211(1)(a) required that the applicant was subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and was living in a country other than the applicant's home country. Clause 202.211(1)(b) required the applicant to meet the requirements of cl 202.211(2), which included that the applicant's entry to Australia had been proposed by an Australian citizen or permanent resident who was or had been the holder of a protection visa and that the visa applicant was a member of the immediate family of the proposer on the date of the application for that visa and continued to be a member of the immediate family of the proposer. The expression "member of the immediate family" was defined by reg 1.12AA(1) to include a parent of a person who was not eighteen years or more. Clause 202.221 prescribed as a criterion to be satisfied at time of decision that the applicant continue to satisfy the criterion in cl 202.211.

An unaccompanied minor arrived in Australia and was granted a protection visa. He proposed the entry to Australia of his mother, who (together with some other relatives) applied for a refugee and humanitarian (Class XB) visa. At the time of the visa application, the mother was a member of the immediate family of the proposer, who was under eighteen years of age. After the proposer had attained eighteen, a delegate of the Minister made a decision to refuse to grant a visa to the mother because she was no longer a member of the immediate family of the proposer and did not satisfy the criterion in cl 202.211.

Held, by French CJ, Gummow, Hayne and Bell JJ, Heydon J dissenting, (1) that the requirement in cl 202.221 of continuing to satisfy the criterion in cl 202.211 did not engage with cl 202.211(1)(b) or any of the requirements of cl 202.211(2).

(2) That it was not a requirement for the grant of a subclass 202 visa under cl 202.211(1)(b) that the visa applicant continue to be a member of the immediate family of the proposer at time of decision.

CERTIORARI and MANDAMUS.

Sayed Abdul Rahman Shahi, who was born in Afghanistan, arrived in Australia at Christmas Island without a valid visa on or about 18 May 2009. On 14 September 2009, he was granted a protection visa. On 4 December 2009, his mother applied for a Refugee and Humanitarian (Class XB) visa, along with other relatives who were included in the application. At the time of making the application and subsequently, the mother and other relatives were outside Australia. Mr Shahi was the proposer in respect of their entry to Australia. While Mr Shahi was under eighteen years of age at the time the application for the visa was made, he was over eighteen years of age at 7 September 2010, when a delegate of the defendant decided to refuse the application for the visa because he was not satisfied that at the time of decision any of the visa applicants continued to be a member of the immediate family of the plaintiff. A letter notifying Mr Shahi and his mother of the delegate's decision specified cll 202.211(2)(b) and 202.221 as criteria that were not satisfied by the visa applicants. On 27 January 2011, Mr Shahi filed an application for an order to show cause seeking a writ of certiorari quashing the delegate's decision and an order in the nature of mandamus directing the defendant to determine the visa application according to law. On 15 June 2011, Crennan J made an order referring a special case to the Full Court for hearing, in which the following question was stated for opinion of the Full Court: Did the delegate make a jurisdictional error in finding that the plaintiff's mother did not meet the requirements of cl 202.221 of Sch 2 to the *Migration Regulations 1994* (Cth)?

L G De Ferrari, for the plaintiff. Under the "split family" stream, an applicant must stand in a close family relationship with a person who has been granted a refugee or humanitarian visa and who proposes the applicant for the grant of a visa, but there is no requirement to demonstrate that the applicant is subject to persecution or substantial discrimination. The headings "criteria to be satisfied at time of application" and "criteria to be satisfied at time of decision" are not determinative of the proper construction of issues of timing in determining whether a particular criterion is satisfied (1). How a criterion is capable of being satisfied must be determined on a proper construction of the provision having regard to its context, purpose and

(1) *Berenguel v Minister for Immigration and Citizenship* (2010) 84 ALJR 251; 264 ALR 417.

policy and its consistency and fairness (2). One purpose of cl 202.211(2) is to set a timeline for the different matters with which the sub-clause deals. Some of the matters in sub-cl (2) will be either true or false at whatever time they are considered by the delegate. In the construction adopted by the delegate, the only matter where evaluation "at time of decision" may lead to a different result from evaluation "at time of application" is the matter provided in cl 202.211(2)(c). The better construction of cl 202.211(2) is that it is directed at establishing the existence of the required relationship between the visa applicant and the proposer at the two specified points in time identified in cl 202.211(2)(b)(ii) and (c) – at the time the proposer applied for the subclass 866 protection visa and at the time the applicant applied for the subclass 202 visa. If the existence of that relationship is satisfied at those two points in time, the criterion in cl 202.211 will be met. The criterion in cl 202.221 will also be met – the applicant will continue to meet the requirements of cl 202.211(2) because the applicant was a member of the immediate family of the proposer at the two specified points in time, and that result does not differ when the matter is evaluated "at time of decision". [GUMMOW J. The problem about cl 202.221 is that it says "the criterion", when in fact cl 202.211 has been split into (1)(a) or (b). Does cl 202.221 assume a singular criterion?] Where the drafter intended that a relationship should exist both at time of application and as a continuing circumstance at time of decision, express provision was made to that effect (3). This construction of cl 202.221 does not compromise the purpose of the "split family" provisions and avoids the unfairness of having the outcome of an application being made to depend on how long the delegate takes to make a decision. It follows that, if an applicant for a subclass 202 visa under the "split family" stream satisfies cl 202.211(2), he will satisfy the cl 202.221 criterion. Clause 202.221 continues to have the field of operation with respect to the criterion in cl 202.211(1)(a) which it had prior to the introduction of the "split family" stream in 1997 (4).

S B Lloyd SC, for the defendant. The delegate was required to be satisfied that the mother was a member of the immediate family of the plaintiff at three points in time: when the plaintiff applied for a protection visa, when the mother applied for her visa, and when the delegate made a decision whether or not to grant a visa to the mother. This construction of cl 202.221 gives all clauses meaningful work and serves the purpose that a visa is not granted to a person who is no longer a member of the proposer's immediate family at the time of decision. A person may cease to be a member of the immediate family

(2) *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [69].

(3) See, eg, cll 202.311 and 202.321.

(4) *Migration Regulations (Amendment) 1997* (SR 1997 No 137).

of another person – for example, if they get divorced, or if the first person ceases to be dependent on the second person, or if the first person is the parent of the second person and the second turns eighteen. Generally, when a visa application is being considered, the Minister or delegate is required to reach a state of satisfaction of whether the criteria in the subdivision entitled "criteria to be satisfied at time of application" were met by reference to circumstances at the time the applicant lodged the visa application, and whether the criteria in the subdivision entitled "criteria to be satisfied at time of decision" are met when the decision is made. That approach is consistent with the design and structure of Sch 2, and a number of provisions in the Regulations are premised on such a construction (5). The decision in *Berenguel v Minister for Immigration and Citizenship* (6), where the headings and the location of the relevant criterion were not decisive of how that criterion was to be construed, can be distinguished from the present case. Clause 202.221 requires the delegate to determine whether the matters in cl 202.211 which are capable of varying over time continue to be satisfied at the time of the decision. "The criterion" is the whole of cl 202.211. For a visa applicant who relies on cl 202.211(1)(b), the delegate must be satisfied that the elements of cl 202.211(2) continue to be satisfied at the time of decision. As each of the elements except cl 202.211(2)(c) remains met once originally fulfilled, the sole effective function of cl 202.221 in respect of visa applicants to whom cl 202.211(2) applies is to ensure that the applicant continues to be a member of the immediate family of the proposer up to the time of decision. That is consistent with the legislative history by which "split family" provisions were introduced into all of the refugee and humanitarian visas in 1997. The plaintiff's construction gives cl 202.221 no work, and leads to absurd results contrary to the apparent policy of the definition of "member of the immediate family", such as requiring a visa to be granted to a former spouse of the proposer who was divorced while the visa application was being considered, or to a child who has chosen to become independent of his or her parent before the visa application is determined. Further, subclass 202 visas may be subject to a limit imposed by gazette notice under s 85 of the *Migration Act*, allowing the Minister to defer consideration of pending applications to the next financial year, and the provisions should therefore be construed against the possibility that there may be delays during which things may happen which affect eligibility for the visa.

L G De Ferrari, in reply. A limit on the number of visas has not been prescribed in respect of subclass 202 visas, so there is no reason to think that delay is an envisaged circumstance in construing cll 202.211 and 202.221. The existence of a legislative scheme to permit the capping of the number of visas supports the plaintiff's

(5) See, eg, *Migration Regulations 1994*, regs 2.08, 2.08AA.
(6) (2010) 84 ALJR 251; 264 ALR 417.

argument on unfairness. Any results contrary to an apparent policy of the definition of "member of the immediate family" are capable of being addressed under cll 202.222, 202.223 and 202.224.

Cur adv vult

14 December 2011

The following written judgments were delivered: —

1 FRENCH CJ, GUMMOW, HAYNE AND BELL JJ. The plaintiff, a refugee from Afghanistan, holds a protection visa. He proposed that his mother (and some other relatives) be granted visas to enter and remain in Australia. A criterion for the grant of the visa for which the plaintiff's mother applied was that at the time of her application she continue to be a member of the proposer's immediate family. After the mother made her application, but before the Minister's delegate decided whether to grant or refuse the application, the plaintiff attained eighteen years of age and, as a result, the mother ceased to be a member of the plaintiff's "immediate family". The Minister's delegate decided that the mother's ceasing to be a member of the plaintiff's immediate family required that the mother's application be refused.

2 Was this jurisdictional error, attracting relief in the original jurisdiction of this Court under s 75(v) of the *Constitution*? The litigation has proceeded on the footing that in this matter the Parliament has not conferred the necessary federal jurisdiction upon any other court.

The Act and Regulations

3 The *Migration Act 1958* (Cth) (the Act) provides, by s 31(3), that regulations made under the Act "may prescribe criteria for a visa or visas of a specified class". The *Migration Regulations 1994* (Cth) (the Regulations) provide (reg 2.01) for prescribed classes of visas. One such class, identified in item 1402 of Sch 1 to the Regulations, is Refugee and Humanitarian (Class XB). That class of visa is divided (7) into several subclasses. The presently relevant subclass is Subclass 202 Global Special Humanitarian.

4 Regulation 2.03(1) provides that "the prescribed criteria for the grant to a person of a visa of a particular class" are those set out in Sch 2 to the Regulations. The criteria may be (and in the case of Subclass 202 visas are) divided into primary and secondary criteria.

5 This case concerns the construction of those provisions of the Regulations that prescribe the primary criteria for the grant of a Subclass 202 visa. More particularly, how does the requirement made by cl 202.221 that "[t]he applicant continues to satisfy the criterion in clause 202.211" apply in relation to what is provided for by cl 202.211? What is "the criterion" in cl 202.211 which the applicant must continue to satisfy?

(7) *Migration Regulations 1994* (Cth), reg 2.02(1), Sch 1, item 1402(4).

The proceeding

6 The issue that has been identified arises in a proceeding instituted in the original jurisdiction of this Court. The plaintiff seeks certiorari to quash a decision made by a delegate of the defendant Minister refusing applications by the plaintiff's mother (and other relatives of the plaintiff) for Refugee and Humanitarian (Class XB) visas. The plaintiff alleges that the Minister's delegate made a jurisdictional error by misconstruing the applicable regulation and thus asking a wrong question (8). The parties have joined in stating a Special Case asking whether "the delegate [made] a jurisdictional error in finding that the Plaintiff's mother did not meet the requirements of clause 202.221 of Schedule 2" to the Regulations. These reasons will show that the question should be answered "Yes".

Subclass 202 Global Special Humanitarian visas

7 That part of Sch 2 to the Regulations which is set out under the general heading "Subclass 202 Global Special Humanitarian" (like other similar parts of the Schedule) is divided into seven subjects: Interpretation (Div 202.1); Primary criteria (Div 202.2); Secondary criteria (Div 202.3); Circumstances applicable to grant (Div 202.4); When visa is in effect (Div 202.5); Conditions (Div 202.6); and Way of giving evidence (Div 202.7).

8 As has already been observed, this case concerns the second of these seven subjects: the specification of the primary criteria for a Subclass 202 Global Special Humanitarian visa. It is necessary to set out the full text of the relevant parts of Div 202.2, but it will then be necessary to look more closely at some aspects of that text.

The relevant text of Div 202.2

9 Division 202.2 provides (so far as now relevant):

"202.2 *Primary criteria*

Note The primary criteria must be satisfied by all applicants except certain applicants who are members of the family unit, or members of the immediate family, of certain applicants who satisfy the primary criteria. Those other applicants need satisfy only the secondary criteria.

202.21 *Criteria to be satisfied at time of application*

202.211 (1) The applicant:

(a) is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; or

(b) meets the requirements of subclause (2).

(2) The applicant meets the requirements of this subclause if:

(8) *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82].

(a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called *the proposer*); and

(b) either:

(i) the proposer is, or has been, the holder of a Subclass 202 visa, and the applicant was a member of the immediate family of the proposer on the date of grant of that visa; or

(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(iia) the proposer is, or has been, the holder of a Resolution of Status (Class CD) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

(iii) the proposer is, or has been, the holder of a special assistance visa, and the applicant was a member of the immediate family of the proposer on the date of the application for that visa; and

(ba) the application is made within 5 years of the grant of that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to Immigration.

202.22 *Criteria to be satisfied at time of decision*

202.221 The applicant continues to satisfy the criterion in clause 202.211.

202.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

202.223 The permanent settlement of the applicant in Australia would be consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds.

202.224 The Minister is satisfied that permanent settlement in Australia:

(a) is the appropriate course for the applicant; and

(b) would not be contrary to the interests of Australia."

10 Clauses 202.225 and 202.227-202.229 provide for further criteria to be satisfied at time of decision. Neither party submitted that the content of any of those criteria bore upon the issues for decision in this matter. But some reference was made in argument to cl 202.226, which provides, in effect, that the number of Subclass 202 visas that can be granted in any financial year can be limited to the number "determined by Gazette Notice". It will be necessary to say a little more about that provision at a later point in these reasons.

11 Some observations may be made about the structure of Div 202.2. Under the general heading "202.2 Primary criteria" there are two subdivisions: subdiv 202.21 entitled "Criteria to be satisfied at time of application" and subdiv 202.22 entitled "Criteria to be satisfied at time of decision".

12 Subdivision 202.21 states alternative criteria to be satisfied at time of application. The first (cl 202.211(1)(a)) is that the applicant "is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country". The second (cll 202.211(1)(b) and 202.211(2)) applies to cases where the applicant's entry to Australia has been proposed by an Australian citizen or an Australian permanent resident.

13 Clause 202.211(1)(b) states, as the criterion to be satisfied at time of application, that the applicant "meets the requirements of sub-clause (2)". Subclause (2) of cl 202.211 sets out six requirements. First, the proposer must be an Australian citizen or an Australian permanent resident and have proposed the applicant in accordance with a particular form (cl 202.211(2)(a)). Secondly, the proposer must be or have been the holder of one of four specified kinds of visa (cl 202.211(2)(b)). Thirdly, the visa applicant must have been a member of the immediate family of the proposer at a particular date. (The date is identified in cl 202.211(2)(b) according to the kind of visa held by the proposer as either the date of grant of or the date of application for the relevant visa.) Fourthly, the application must be made within five years of the grant of the relevant visa that the proposer holds or held (cl 202.211(2)(ba)). Fifthly, the visa applicant must continue to be (at the time of the application) a member of the immediate family of the proposer (cl 202.211(2)(c)). Sixthly, before the grant of the relevant visa held by the proposer, the relationship between visa applicant and proposer must have been "declared to Immigration" (cl 202.211(2)(d)).

The issue

14 As earlier indicated, the issue in this case is how, if at all, the provision made by cl 202.221 (that "[t]he applicant continues to satisfy the criterion in clause 202.211") engages with the six requirements stated in cl 202.211(2). More particularly, does cl 202.221 require that

at the time of the Minister's decision the visa applicant continue to be a member of the immediate family of the proposer?

15 The expression "member of the immediate family" is defined in reg 1.12AA(1):

> "For these Regulations, a person *A* is a member of the immediate family of another person *B* if:
>
> (a) A is a spouse or de facto partner of B; or
>
> (b) A is a dependant child of B; or
>
> (c) A is a parent of B, and B is not 18 years or more."

The facts

16 In May 2009, the plaintiff arrived in Australia as an unaccompanied minor. In September 2009, he applied for and was granted a Protection (Class XA) visa. In December 2009, the plaintiff was the proposer in an application by his mother (and some other relatives) for the grant of a Refugee and Humanitarian (Class XB) visa. The relevant subclass of visa was Subclass 202 Global Special Humanitarian. At the time of the visa application the plaintiff was under eighteen years of age and thus the mother was "a member of the immediate family" of the plaintiff. The visa application was refused by a delegate of the Minister in September 2010.

17 The plaintiff does not know his exact date of birth. The parties have agreed that at some time between the date of the visa application (in December 2009) and the date of the decision to refuse the application (in September 2010) the plaintiff attained eighteen years of age. Once the plaintiff turned eighteen, his mother was no longer a member of his "immediate family" as reg 1.12AA(1) defines that term.

The delegate's decision

18 The Minister's delegate decided that the visa application should be refused on grounds including that, at the time of the decision, the plaintiff's mother was no longer a member of the immediate family of the proposer (the plaintiff) because the proposer was no longer under eighteen years of age. The delegate also decided that another provision of subdiv 202.22 had not been met. That other provision (cl 202.222) requires the Minister to be "satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to" certain matters. The parties agreed that the delegate's conclusion about the application of this other provision "does not provide a separate basis for the decision". It was said, in argument, that it was the policy of the Minister to treat the presence or absence of "compelling reasons" as affected by (even dependent upon) satisfaction of the matters identified in cl 202.211. The accuracy of this view was not in issue and need not be examined.

Applying cl 202.221

19 The provision made by cl 202.221 that "[t]he applicant continues to satisfy the criterion in clause 202.211" is readily applied to the first of the alternative criteria stated in cl 202.211 (that "[t]he applicant … is

subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country"). The criterion in cl 202.211(1)(a) is stated in such a way as readily to permit its application "at time of application" and its separate application "at time of decision".

20 Seeking to have cl 202.221 engage with the second criterion stated in cl 202.211 (that "[t]he applicant … meets the requirements of subclause (2)") is more difficult. The difficulty arises from the circumstance that the requirements of sub-cl (2) of cl 202.211 have several different temporal elements. Those different temporal elements can be identified as follows.

21 One of the requirements of cl 202.211(2) (provided by cl 202.211(2)(a)) looks to the past, that is, to a time *before* the time of application: "the applicant's entry to Australia *has been proposed* …" The requirements made by cl 202.211(2)(b)(i) to (iii) look to the present *or* the past: "the proposer *is*, or *has been*, the holder" of a particular class of visa. The requirement made by cl 202.211(2)(ba) looks to a period of time fixed by reference to the date of application for the visa and the date of grant of the proposer's relevant visa: "the application *is made within 5 years* of the grant" of the relevant visa that is or was held by the proposer. The requirement made by cl 202.211(2)(d) takes the time of the grant of the relevant visa that is or was held by the proposer as the relevant time and looks backwards: "*before* the grant of that visa, that relationship was declared to Immigration." And of critical importance to the present matter, the requirement of cl 202.211(2)(c) has a temporal requirement that differs from all other elements of cl 202.211(2). It requires that "the applicant *continues* to be a member of the immediate family of the proposer".

22 All of the requirements of cl 202.211(2), other than the requirement about membership of the immediate family of the proposer, are requirements that, if met at the time of application, cannot thereafter cease to be met. Or to put the same point positively, the only one of the requirements of cl 202.211(2) satisfaction of which can change over time is the requirement about membership of the immediate family. That requirement can cease to be met by the simple effluxion of time (because the person in question attains the age of eighteen years (reg 1.12AA(1)(c))). It can cease to be met because dependency ceases (9). It can cease to be met because of a change in marital status (by dissolution of a marriage) (reg 1.12AA(1)(a)). It can change because there is some change in the relationship between persons that makes one the "de facto partner" of the other (10).

(9) reg 1.03 (dependent child) with reg 1.12AA(1)(b).

(10) Determination of who is the "de facto partner" of another is to be made in accordance with s 5CB of the *Migration Act 1958* (Cth) and reg 1.09A of the Regulations. The detail of those provisions need not be examined.

23 Whether such a change has occurred may obviously be affected by how long a time has elapsed between the application for a visa and the decision to grant or refuse the application. When the relevant change is the proposer's attaining eighteen years of age (as it is in this case), the length of time taken to decide the application will directly determine whether the visa applicant continues to be a member of the immediate family of the proposer at the time the decision to grant or refuse the visa application is made.

One criterion; several criteria?

24 The heading to subdiv 202.21 refers to "Criteria" to be satisfied at time of application; the text of cl 202.221 requires that the applicant continue to satisfy "the criterion" in cl 202.211. The drafter thus does not observe the distinction that must be made between the specification of a single criterion and the specification of several criteria. An examination of the rest of Sch 2 to the Regulations shows that the drafter has not (or successive drafters have not) observed that distinction. Rather, as in subdivs 202.21 and 202.22, a common form of heading referring to "Criteria" has been adopted throughout the several provisions of Sch 2, regardless of whether the text set out under the heading states one criterion or several criteria.

25 As already noted, cl 202.211(1) states alternative *criteria* yet cl 202.221 speaks of the applicant continuing to satisfy the (single) *criterion* in cl 202.211. It is, however, not a large step to take to read cl 202.221 (with its reference to continuing to satisfy a single criterion) as referring to continued satisfaction of whichever of the alternative criteria is relied on. If that step is taken, the question that then is posed in the present case – where the relevant alternative in cl 202.211(1) is para (b) ("meets the requirements of subclause (2)") – is how cl 202.221 ("[t]he applicant continues to satisfy" the criterion) can or does engage with that criterion when it contains several requirements, each with a temporal aspect, but only one of which can vary over time.

26 There is an evident textual awkwardness in reading the requirement of "continues to satisfy" the criterion as engaging with only one of the several requirements that go to make up the relevant criterion. And that awkwardness is increased when the requirement in question is expressed as "*continues* to be" a member of the immediate family. As the plaintiff submitted, the requirement would have to be read textually as being that the applicant "continues to continue to be" a member of the immediate family of the proposer.

Statutory context

27 How cl 202.221 (providing that the applicant continues to satisfy the criterion in cl 202.211) can or does engage with cl 202.211(1)(b) and the requirements of cl 202.211(2) must be considered in the context provided by those provisions of the Act that regulate the grant of visas. Of particular importance is s 65(1) of the Act, which provides in effect that after considering a valid application for a visa the Minister, if satisfied that the relevant criteria are met, "is to grant the visa".

28 Although s 65A of the Act fixes the time within which the Minister must make a decision on certain applications for protection visas (those validly made under s 46 or remitted by any court or tribunal to the Minister for reconsideration), the Act and the Regulations do not fix the time within which a visa application of the kind now in issue must be decided. Yet it is not to be supposed that the Minister could refuse to consider a valid application for a visa (s 47(1)) or could unreasonably delay making the decision to grant or refuse the application (11). That is, the relevant provisions of the Regulations are to be construed on the footing that a decision to grant or refuse to grant a visa will be made promptly.

29 In the present case, the visa application was made in December 2009 but the decision to refuse the application was not made until September 2010. Counsel for the Minister submitted (rightly) that there was no evidence before the Court which would show that this apparently long interval between application and decision constituted some unreasonable delay in dealing with the application. The weight to be accorded to the absence of demonstrated unreasonable delay is to be assessed in the light of a further submission advanced on behalf of the Minister.

30 Section 39(1) of the Act expressly permits the provision of limits on the number of certain visas that may be granted and, as noted earlier, particular provision for the prescription of such a limit has been made in respect of Subclass 202 visas by cl 202.226 (12), but no limit has been fixed. Given that s 39(2) provides expressly that outstanding applications for the grant of such visas remaining after the prescribed number of visas have been granted "are taken not to have been made", it is not to be supposed that this requirement could, as the Minister submitted, be circumvented by "deferring" consideration of an application to the next financial year. It is, however, not necessary to explore this aspect of the matter further. It is enough to observe that, although an interval of nine months was not shown in this case to be an unreasonable delay, it is not to be assumed that a period of that length is typical of the time that will elapse between application and decision.

31 There is, as already noted, evident textual awkwardness in reading the requirement that an applicant continue to meet a single criterion as applying to only one of the several requirements that make up that criterion, and especially is that so when the temporal element of the relevant requirement is expressed as "continues to be". But more than

(11) cf *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470.

(12) Clause 202.226 provides: "Grant of the visa would not result in either: (a) the number of Subclass 202 visas granted in a financial year exceeding the maximum number of Subclass 202 visas, as determined by Gazette Notice, that may be granted in that financial year; or (b) the number of visas of particular classes, including Subclass 202, granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year."

that, there is evident scope for capricious and unjust operation of the requirement in circumstances where its engagement depends upon the occurrence of a relevant factual change which, in the case of a person attaining the age of eighteen years, depends wholly upon how promptly the application for a visa is determined. Why should such a construction of the provisions be adopted?

Drafting history and context

32 The drafting history of the Regulations points against reading cl 202.221 as engaging at all with the second of the criteria stated in cl 202.211. Rather, that history points to reading the requirement that the applicant continue to satisfy "the criterion" in cl 202.211 as engaging only with the first criterion stated in cl 202.211 (the criterion concerning being subject to substantial discrimination in the visa applicant's home country).

33 Provision was made for Subclass 202 Global Special Humanitarian visas in the Regulations when first they were made (13) in 1994. The primary criteria for such visas were expressed (so far as now relevant) as being:

> "202.21 *Criteria to be satisfied at time of application*
>
> 202.211 The applicant is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country.
>
> 202.212 The applicant is living in a country other than the applicant's home country.
>
> 202.22 *Criteria to be satisfied at time of decision*
>
> 202.221 The applicant continues to satisfy the criteria in clauses 202.211 and 202.212."

Two features of those provisions should be noted. First, what were originally stated as two criteria to be satisfied at time of application (substantial discrimination and living outside the applicant's home country) are now expressed as a single compound criterion. Secondly, there was no doubt about the relationship between the criteria to be satisfied at the time of decision and those to be satisfied at time of application. Clause 202.221 specified "the criteria" to be satisfied at the time of decision as those "in clauses 202.211 and 202.212". Visas were to be available only to those who, *both* at time of application *and* at time of decision, were subject to discrimination of the stated kind and were living in a country other than their home country. And whether the applicant met those criteria could change over time. The discrimination might cease; the applicant might resume living in his or her home country. Application of cl 202.221 to the criteria to which it referred (those "in clauses 202.211 and 202.212") presented neither verbal awkwardness nor any likelihood of capricious or unjust application.

(13) As Statutory Rule No 268 of 1994.

34 In 1997, the Regulations were amended (14) to a form which in all material respects is the form that now applies. In particular, the first criterion to be satisfied at time of decision was changed (15) to become "[t]he applicant continues to satisfy the criterion specified in clause 202.211". (This criterion took its present form in 1999 when "specified" was omitted (16) from cl 202.221. This amendment is immaterial.)

35 If the drafter of the amending Regulations had wanted to provide as a criterion to be satisfied at time of decision that the applicant continue to be a member of the immediate family of the proposer, the Regulations as made in 1994, and as amended in 1997, contained within the text of the provisions dealing with Subclass 202 visas a readily available form of words that could have been adopted. Secondary criteria to be satisfied by applicants for Subclass 202 visas who were (in 1994) members of the family unit of a person who satisfies the primary criteria or (since 1997) are members of the family unit or members of the immediate family of certain persons meeting the primary criteria have always included a requirement that, at the time of decision, the applicant continue to be a member of the relevant immediate family or family unit. So, as the Regulations now stand, subdiv 202.32 provides:

> "202.32 *Criteria to be satisfied at time of decision*
>
> 202.321 The applicant:
>
> (a) continues to be a member of the family unit of a person who, having satisfied the primary criteria (and, in particular, having met the requirements of paragraph 202.211(1)(a)), is the holder of a Subclass 202 visa; or
>
> (b) continues to be a member of the immediate family of a person who, having satisfied the primary criteria (and, in particular, having met the requirements of paragraph 202.211(1)(b)), is the holder of a Subclass 202 visa (17)."

But despite having numerous precedents for a provision which would have the effect for which the Minister now contends, and despite the drafter adopting and adapting those precedents in drafting an amended cl 202.321 in 1997, the drafter did not adopt this precedent in making provisions for primary "Criteria to be satisfied at time of decision".

36 The failure to adopt this precedent suggests that the provision made by cl 202.221 of continuing to satisfy the criterion in cl 202.211 was to

(14) *Migration Regulations (Amendment) 1997* (Cth) (Statutory Rule No 137 of 1997), reg 14.

(15) *Migration Regulations (Amendment) 1997*, reg 14.3.

(16) *Migration Amendment Regulations 1999 (No 6)* (Cth) (Statutory Rule No 81 of 1999), Sch 6, Pt 6.3.

(17) This form of cl 202.321 (in all presently material respects) was inserted by reg 14.4 of the *Migration Regulations (Amendment) 1997*. As originally made in 1994, cl 202.321 provided: "The applicant continues to be a member of the family unit of a person who, having satisfied the primary criteria, is a holder of a subclass 202 visa."

engage with the first criterion in that clause: being subject to substantial discrimination and living outside the applicant's home country. It suggests that the requirement of continuing to satisfy the criterion in cl 202.211 was *not* to engage at all with the second criterion in that clause: meeting the requirements of sub-cl (2) of cl 202.211. In particular it suggests that the provision made by cl 202.221 of continuing to satisfy the criterion in cl 202.211 was not to engage with the requirement about membership of the proposer's immediate family.

An intervening divorce?

37 The Minister submitted that the relevant provisions should be read as having an operation in this case that was the same as that specifically provided in subdiv 202.32 (although that drafting was not adopted) lest, despite an intervening divorce, the Minister be obliged to grant a Subclass 202 visa to the former spouse of the proposer. Two points must be made in respect of this submission. First, it is a submission that depends, at least inferentially, on the unstated premise that conformably with the due administration of the Act and the Regulations the interval between application and decision may be so long that the relationship between proposer and visa applicant may deteriorate to the point of final rupture, even divorce. The premise should not be accepted. Secondly, even if the premise were to be accepted, the Minister has ample discretion to deal with such a case should it arise. The breakdown in relationship would bear directly upon "the extent of the applicant's connection with Australia" (one of the matters to which the Minister is to have regard under subdiv 202.22 in deciding whether there are "compelling reasons for giving special consideration to granting to the applicant a permanent visa").

Conclusion and orders

38 The Minister's submission to the effect that adopting the plaintiff's construction of the provisions would lead to an absurd result or a result contrary to the purpose of the provisions should therefore not be accepted. On the contrary, adoption of the Minister's construction of the provision would lead to results that in some cases – including the present – are properly to be described as capricious and unjust (18). For these reasons cl 202.221 should not be read as engaging with cl 202.211(1)(b) or any of the requirements stated in cl 202.211(2). It is not a requirement for the grant of a Subclass 202 visa under cl 202.211(1)(b) that the visa applicant continue to be, at time of decision, a member of the immediate family of the proposer. Contrary to the Minister's further submission, to read the provisions in this way does not give cl 202.221 no work to do. Clause 202.221 does have work to do but that work is confined to applications made on the basis of the first criterion stated in cl 202.211.

(18) cf *Berenguel v Minister for Immigration and Citizenship* (2010) 84 ALJR 251; 264 ALR 417.

39 The question reserved for the opinion of the Full Court should be answered "Yes". The costs of the proceedings in the Full Court should be disposed of by the Justice who disposes of the proceedings.

40 HEYDON J. I would answer the reserved question "No".

41 Clauses 202.211 and 202.221 of Sch 2 to the *Migration Regulations 1994* (Cth) unquestionably present problems whichever interpretation is adopted. However, the defendant's is the more attractive.

42 Clause 202.221 imposes a requirement that the applicant for a Subclass 202 visa – the plaintiff's mother – "continues to satisfy the criterion in clause 202.211". What is that "criterion"? Clause 202.211(1) states alternative requirements. Clause 202.211(1)(a) requires that the applicant for a Subclass 202 visa be subject to substantial discrimination in his or her home country and be living in a country other than the home country. Clause 202.211(1)(b) states an alternative requirement: that an applicant for a Subclass 202 visa "meets the requirements of subclause (2)" (of which there are five). Thus cl 202.211 may be said to create two criteria. One criterion is that the applicant for a Subclass 202 visa be subject to substantial discrimination. The other criterion is that the applicant for a Subclass 202 visa has been proposed by a proposer meeting certain conditions.

43 In respect of any particular applicant for a Subclass 202 visa, it is only necessary that one of the two criteria be satisfied at the time of application. An applicant might seek to meet the cl 202.211(1)(a) criterion. Or an applicant might seek to meet the cl 202.211(1)(b) criterion. In those circumstances, the use of the words "the criterion" in cl 202.221 is not inappropriate, for any given applicant is likely to be concerned only with the single criterion relevant to his or her application. Whatever criterion the applicant is seeking to meet, if the applicant meets it at the time of the application, the applicant must also continue to satisfy it at the time of decision.

44 It is true that among the five requirements of cl 202.211(1)(b) set out in cl 202.211(2) there are some which, once satisfied at the time of the application, will continue to be satisfied at the time of decision whatever events take place between those two times. They are those listed in cl 202.211(2)(a), (b), (ba) and (d). In that sense an applicant will have no difficulty in continuing to satisfy them. But an event after application and before decision could prevent cl 202.211(2)(c) from continuing to be satisfied from whatever date it was satisfied on pursuant to cl 202.211(2)(b)(i), (ii), (iia) or (iii). If the applicant and the proposer were married at the time of the application, they may be divorced by the time of the decision. If they were de facto partners at the time of the application, they may have ceased to be de facto partners by the time of the decision. If the applicant were a dependent child of the proposer at the time of the application, the applicant may have ceased to be dependent by the time of the decision. If the proposer were a dependent child of the applicant at the time of the

application, the proposer may have ceased to be a dependent child by the time of the decision. If the applicant were a parent of a child under eighteen at the time of the application, the child may have turned eighteen by the time of the decision.

45 In short, cl 202.221 requires the applicant to continue to satisfy whichever of the matters in cl 202.211 are capable of varying over time. It is capable of affecting applicants adversely so far as a matter is capable of varying over time. But it is not capable of affecting applicants adversely so far as a matter is not capable of varying over time, for it is inevitable that the applicant will continue to satisfy the requirement in relation to it. The matters which are capable of varying over time are the two mentioned in cl 202.211(1)(a), namely being subject to substantial discrimination and living in a particular country (if the applicant is seeking a visa pursuant to that paragraph), and the matter mentioned in cl 202.211(2)(c) (if the applicant is seeking a visa by reason of a proposer being a member of the applicant's immediate family).

46 Where an applicant is relying on cl 202.211(1)(b), the provisions assign great importance to an applicant for a Subclass 202 visa being a member of the proposer's immediate family. Here the applicant is relying on the proposer falling within cl 202.211(2)(b)(ii). But an applicant relying on cl 202.211(2)(b) (ie (i), (iia) or (iii)) again must establish that the applicant is a member of the proposer's immediate family. The function of cll 202.211 and 202.221 appears to be to enable a Subclass 202 visa to be granted to an applicant, even though that applicant is not claiming to be subject to substantial discrimination, provided the applicant is a member of the immediate family of a proposer who is an Australian citizen or an Australian permanent resident who holds or has held one of the visas described in cl 202.211(2)(b). In short, cll 202.211 and 202.221 appear to have the function of ensuring the reunion of families, or at least the reunion of "immediate" families.

47 The plaintiff's construction has the result that a provision concerning the grant of visas to be granted to members of a proposer's immediately family is to be construed as compelling the grant of a visa even though the grantee has ceased to be a member of the proposer's immediate family. The plaintiff construes a provision dealing with the reunion of "immediate" families as compelling a grant of a visa even though that grant will not lead to the reunion of "immediate" families because the successful applicant, though once a member of the proposer's immediate family, no longer is.

48 Leaving aside the simple instance of a child attaining eighteen years of age shortly after the application, changes in the membership of the immediate family of the proposer – whether by divorce, or termination of a de facto relationship, or the movement of an adult child from dependency – can happen quite quickly. They are particularly likely to happen quickly in the circumstances contemplated by cl 202.211, where one person who at the time of the application was in the

immediate family of another is in Australia and the other is not: geographical separation is not conducive to permanency of relationships.

49 The plaintiff asked why rights should be defeasible by ministerial delay. Some applications will be easy to decide quickly. It may be reasonable that others take more time. It is not to be assumed that the Minister or the delegates of the Minister will slow down so as to create obstacles in the path of applicants, and no assumption of that kind should be taken into account as bearing on interpretation.

50 Although, as indicated at the outset, there are anomalies and difficulties with both the plaintiff's interpretation and the defendant's interpretation, it is a drawback to the plaintiff's interpretation that cl 202.221 applies only to cl 202.211(a), and not to cl 202.211(b), even though cl 202.221 is not expressed to be so limited. The plaintiff, in avoiding the difficulty that if cl 202.221 applies to cl 202.211(1)(b) it only operates on cl 202.211(2)(c), creates the greater difficulty that on his interpretation cl 202.221 applies even more narrowly still. Thus the plaintiff's interpretation produces the following anomaly. Clause 202.211 is dealing with the grant of a visa to two categories – persons who are subject to substantial discrimination and persons proposed by members of their immediate families. It is common ground that in relation to the first category, those who claim to be subject to substantial discrimination must be subject to it both at the time of the application and the time of decision. But on the plaintiff's interpretation, in relation to the second category the requirement that the applicant be a member of the proposer's immediately family only applies at the date of application, not the date of decision.

51 In short, it is necessary that the applicant for a visa, here the plaintiff's mother, be "a member of the immediate family" of the proposer, here the plaintiff, at three points in time. It had to be so when the plaintiff applied for the Subclass 866 (Protection) visa on 14 September 2009: cl 202.211(2)(b)(ii). It had to be so when the plaintiff's mother applied for a Subclass 202 visa on 4 December 2009: cl 202.211(2)(c). And it must also be so on the day of the delegate's decision as to the mother's application, namely 7 September 2010: cl 202.221. There is no controversy in relation to the first two points in time. The controversy centres on the third. It would be curious if the need for membership of the immediate family applied at the first two points but not the third.

Order that the question stated in the special case be answered as follows:

Question 1: Did the delegate make a jurisdictional error in finding that the plaintiff's mother did not meet the requirements of cl 202.221 of Sch 2 to the Migration Regulations 1994 (Cth)?

Answer: Yes.

Solicitor for the plaintiff, *Victoria Legal Aid*.

Solicitor for the defendant, *Australian Government Solicitor*.

CJH