

These contracts were not merely the ‘subject matter’ or ‘factual background’ but rather ‘an element of a claim made in the relevant proceedings’. The proceedings also fell within the scope of s 11(3) more generally, as even transactions that are in restraint of trade can constitute commercial or trading transactions.

Garuda’s private–public distinction suffered a final blow from Heydon J, who stated that ‘there is nothing in s 11 or in any other provision of the Act to support the distinctions the appellant sought to draw between public and private rights, between proceedings brought by a regulator and proceedings brought by beneficial objects of the regulating legislation, and between specific statutory norms and general law norms.’⁹

Endnotes

1. Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xv.
2. D. Gaukrodger, (2010), ‘Foreign State Immunity and Foreign Government Controlled Investors’, OECD Working Papers on International Investment, 2010/2, OECD Publishing.
3. At xv.
4. [2012] HCA 33
5. *Australian Competition and Consumer Commission (ACCC) v PT Garuda Indonesia Limited* (2010) 269 ALR 98; [2010] FCA 551.
6. *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission (ACCC)* (2011) 192 FCR 393; (2011) 277 ALR 67; (2011) 83 ACSR 35; [2011] FCAFC 52.
7. *PT Garuda Indonesia Limited v Australian Competition & Consumer Commission* [2011] HCATrans 280.
8. Judgment at [41] per French CJ, Gummow, Hayne and Crennan JJ.
9. Judgment at [68] per Heydon J.

Security assessments and the granting of protection visas

Amy Munro reports on *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46

In *Plaintiff M47/2012 v Director General of Security & Ors*,¹ the High Court of Australia had cause to consider Clause 866.225 of Schedule 2 to the *Migration Regulations 1994* (Cth), which requires the minister for immigration and citizenship (minister) to refuse to grant a protection visa to a refugee if that refugee has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (Public Interest Criterion 4002). A majority of the court held that Public Interest Criterion 4002 was invalid.

The facts

The plaintiff is a national of Sri Lanka. At about 11.10pm on 29 December 2009, he arrived on Christmas Island on a special purpose visa. His visa expired at midnight. Since this time, the plaintiff has been an unlawful non-citizen within the meaning of s 14 of the *Migration Act 1958* (Cth) (Migration Act) and been held in immigration detention pursuant to ss 189 and 196 of that Act.

On 25 June 2010, the plaintiff applied for a protection visa under s 36 of the Migration Act. A delegate of the minister concluded that the plaintiff had a well-founded fear of persecution. As such, the plaintiff was found to

be a refugee within the meaning of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (Refugees Convention).

Despite the finding that the plaintiff was a refugee, on 18 February 2011, the delegate refused the plaintiff’s application for a protection visa. The reason for the refusal was an adverse security assessment by ASIO, which meant that the plaintiff did not meet Public Interest Criterion 4002.

The Australian Government does not intend to remove the plaintiff to Sri Lanka and there is presently no other country to which he can be sent.

The questions in the special case

The plaintiff commenced proceedings in the original jurisdiction of the High Court. He challenged the validity of his security assessment and the lawfulness of his detention. On 6 June 2012, Hayne J directed that a special case filed by the parties be set down for hearing by a full court on 18 June 2012. His Honour reserved the following four questions for the court:

1. In furnishing the adverse security assessment, did the director general of security fail to comply with

the requirements of procedural fairness?

2. Does s 198 of the Migration Act authorise the removal of the plaintiff, being a non-citizen:
 - 2.1 to whom Australia owes protection obligations under the Refugees Convention; and
 - 2.2 whom ASIO has assessed poses a direct or indirect risk to security;to a country where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Refugees Convention?
3. Does 189 and 196 of the Migration Act authorise the plaintiff's detention?
4. Who should pay the costs of the special case?

However, the determination of the matter ultimately turned on the resolution of the following question, which was added, by leave, during the hearing:

2A. If the answer to question 2 is 'Yes' by reason of the plaintiff's failure to satisfy Public Interest Criterion 4002, is that clause to that extent *ultra vires* the power conferred by section 31(3) of the Migration Act and invalid?

The validity of Public Interest Criterion 4002

The plaintiff challenged the validity of Public Interest Criterion 4002. The plaintiff submitted that the criterion was inconsistent with provisions of the Migration Act, which provide for the refusal of protection visas on national security grounds and which attract statutory review processes in the Administrative Appeals Tribunal.

French CJ, Hayne, Crennan and Kiefel JJ held that Public Interest Criterion 4002 was not consistent with the scheme of the Migration Act and was invalid.² Some of the factors relevant to that determination were: Public Interest Criterion 4002 is wider in scope than the provisions of the Act, which provide for the refusal of protection visas on national security grounds;³ Public Interest Criterion 4002 effectively shifts the power of determining the application for a protection visa from the minister to ASIO;⁴ and the adverse security assessment cannot be challenged, whereas the Migration Act provides for a merits review process for the refusal to grant visas on security grounds.⁵

Procedural fairness

The security assessment process in this case, included a lengthy interview with the plaintiff (and his legal advisor and interpreter). During the interview, the plaintiff was provided with an opportunity to address the issues of concern to ASIO. He was also given breaks and the opportunity to consult privately with this legal advisor.

In the circumstances of this case, Gummow, Heydon, Crennan, Kiefel and Bell JJ⁶ held that the plaintiff was afforded procedural fairness in the conduct of the security assessment. Bell J noted that the circumstances of the special case made it 'an inappropriate proceeding in which to consider the extent of any curtailment of the obligation of procedural fairness in the conduct of DIAC security assessments by reason of ASIO's statute and the nature of its intelligence work.'⁷

The lawfulness of the plaintiff's detention

The special case required the court to consider the statutory scheme, which provides for mandatory detention for an indefinite period. It necessarily gave rise to submissions on the applicability and correctness of the decision in *Al Kateb v Goodwin*.⁸

Gummow and Bell JJ adopted Gleeson CJ's construction of the scheme providing for mandatory detention and held that the *Al Kateb* should not be followed.⁹ However, French CJ, Hayne, Crennan and Kiefel JJ held that the plaintiff was entitled to have his application for a protection visa considered according to law and that he can be lawfully detained pursuant to s 196 of the Migration Act until his application has been determined.¹⁰ As such, the majority did not consider the applicability or correctness of *Al Kateb v Goodwin*.

Endnotes

5. [2012] HCA 46.
6. French J at [3] and [71], Hayne J at [221], Crennan J at [381] and [399], and Kiefel J at [461].
7. French J at [71] and Hayne J at [204].
8. French CJ at [71]; Crennan at [396]; Kiefel J at [458].
9. French CJ at [71], Hayne J at [221], Crennan J at [398] and Kiefel J at [458].
10. Gummow J at [140], Heydon J at [253], Crennan J at [380], Kiefel J at [415] and Bell J at [505].
11. Bell J at [498].
12. (2004) 219 CLR 562.
13. Gummow J at [145] and [148] and Bell J at [533].
14. French CJ at [3] and [72], Hayne J at [160] and [225], Crennan J at [404] and Kiefel J at [460].