FEDERAL COURT OF AUSTRALIA

EC v Minister for Immigration and Multicultural and Indigenous Affairs

[2004] FCA 978

Kenny J

13, 29 July 2004

Immigration — Visas — Where child adopted in a foreign jurisdiction — No previous relationship to the adoptive parents — Whether criteria for grant of the requisite visa satisfied — Migration Regulations 1994 (Cth), reg 1.14, Sch 2, cl 117.211.

Words and Phrases — "Orphan relative" — Migration Regulations 1994 (Cth), regs 1.03, 1.14, Sch 2, cl 117.211.

Words and Phrases — "Relative" — Migration Regulations 1994 (Cth), regs 1.03, 1.14, Sch 2, cl 117.211.

The applicant and his wife (both Australian citizens) adopted a child (a citizen of Vanuatu) by order of the Supreme Court of the Republic of Vanuatu. The child required a visa to enter and remain in Australia. The applicant conceded that a consequence of not using domestic adoption procedures was that the child could not satisfy the criteria for a Child (Migrant) (Class AH) visa, subclass 102 (Adoption). Instead the applicant argued that the child was eligible for a subclass 117 (Orphan Relative) visa.

The criterion for a subclass 117 (Orphan Relative) visa was set out in cl 117.211 of Sch 2 to the *Migration Regulations 1994* (Cth) (the Regulations). Clause 117.211 required that a visa applicant:

(a) is an orphan relative of an Australian relative of the applicant; or

(b) is not an orphan relative only because the applicant has been adopted by the Australian relative mentioned in para (a).

A visa applicant was an "orphan relative" of another person if, relevantly, he or she was a child under 18 who was a "relative" of that other person and who could not be cared for because both parents were either dead or incapacitated: reg 1.14. The term "relative" included an adopted parent or child: reg 1.03.

The respondent submitted that cl 117.211(b) was directed towards ameliorating the situation in which an Australian relative, being a relative of an orphan child before his or her adoption, adopts the child and thereby becomes a parent, with the consequence that the adopted child is no longer an orphan relative and would not meet the criterion in cl 117.211(a).

The applicant submitted that this construction imposed an artificial temporal requirement on how one assessed whether the various definitions in the Regulations were satisfied. The applicant contended that in interpreting

cl 117.211(b), the question of whether a sponsor was a relative could be determined after the adoption. Therefore, it was argued, the criterion in cl 117.211(b) could be satisfied since the adopted child was not an orphan relative only because he or she has been adopted by an Australian relative.

Held, dismissing the application: Clause 117.211(b) applies where the visa applicant would be "an orphan relative of an Australian relative of the applicant" if he or she had not been adopted by that Australian relative. [27]

Consideration of the relationship between subclass 102 (Adoption), subclass 117 (Orphan Relative) and Australian legislative provisions dealing with inter-country adoption.

Per curiam: If it were possible for a person to become a "relative" or "Australian relative" merely by obtaining an adoption order in a foreign jurisdiction and, by this means, to fulfil the criterion in cl 117.211(b), provisions that are designed to assist in the regulation of inter-country adoptions, which ensure that the adoption is in the best interests of the child, could be easily circumvented. [30]-[37]

Application

L De Ferrari, for the applicant.

SGE McLeish, for the respondent.

Cur adv vult

29 July 2004

Kenny J.

1 This is an application under s 39B of the *Judiciary Act 1903* (Cth) and s 475A of the *Migration Act 1958* (Cth) (the Act) for review by this Court of a decision of the Migration Review Tribunal (the Tribunal) made on 16 March 2004, affirming a decision of a delegate of the respondent (the delegate) not to grant a Child (Migrant) (Class AH) visa.

2 On 24 April 2003, a judge of the Supreme Court of the Republic of Vanuatu ordered that a child (the adopted child), who was then approximately 18 months old, be adopted by the applicant in this proceeding and his wife (the adoptive parents). The adoptive parents are Australian citizens. The adopted child is a citizen of Vanuatu. In order to be cared for by her adoptive parents in Australia, the adopted child requires a visa conferring permission on her to enter and remain in Australia. On 2 June 2003, the adoptive parents completed an application, on the adopted child's behalf, for a Child (Migrant) (Class AH) visa. By letter dated 22 July 2003, the delegate rejected this application. The adoptive parents applied to the Tribunal for a review. As already indicated, they were unsuccessful upon this review.

3 Under the Act, a visa may be granted upon the making of a valid application (s 46) and upon the Minister being satisfied that the visa applicant meets the statutory requirements for the grant of the visa (s 65). By virtue of the Act, there are classes of visas, which are identified in the Act and in the *Migration Regulations 1994* (Cth) (the Regulations) made under the Act. Item 1108 of Sch 1 to the Regulations provides for Child (Migrant) (Class AH) visas: see also reg 2.01. This class consists of three subclasses: subclass 101 (Child); subclass 102 (Adoption); and subclass 117 (Orphan Relative): see Sch 1, item 1108(4). Schedule 2 to the Regulations sets out the criteria to be observed before a visa in any of these subclasses can be granted.

4 A visa applicant is not eligible for a subclass 101 (Child) visa if, at the time of application, he or she cannot satisfy the criteria in cl 101.211(1). These criteria are:

> (1) The applicant:
> (a) is a dependent child of:
> (i) an Australian citizen; or
> (ii) the holder of a permanent visa; or
> (iii) an eligible New Zealand citizen; and
> (b) subject to subclause (2), has not turned 25; and
> (c) either:
> (i) is:
> (A) the natural child; or
> (B) the step-child within the meaning of paragraph (b) of the definition of *step-child*;
> of the Australian citizen, holder of a permanent visa or eligible New Zealand citizen mentioned in paragraph (a); or
> (ii) was adopted overseas by a person who, at the time of adoption, was not an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, but later became an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen.

(Emphasis in original.)

5 Before a subclass 102 (Adoption) visa can be granted, the visa applicant must, at the time of application, satisfy the criteria set out in cl 102.211. Clause 102.211(1) provides that, at the time of application, the visa applicant must meet the requirements of subcl (2), (3), (4) or (5). Broadly speaking, this means that a subclass 102 (Adoption) visa can be granted in three situations. First, such a visa may be granted where an adoptive parent had been residing overseas for more than 12 months at the time of the visa application and the Minister is satisfied that the adoptive parents residence overseas was not contrived in order to circumvent the requirements for entry to Australia of children for adoption. Thus, cl 102.211(2) states:

> (2) An applicant meets the requirements of this subclause if:
> (a) the applicant has not turned 18; and
> (b) the applicant was adopted overseas by a person who:
> (i) was, at the time of the adoption, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen; and
> (ii) had been residing overseas for more than 12 months at the time of the application; and
> (c) the Minister is satisfied that the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption; and
> (d) the adoptive parent has lawfully acquired full and permanent parental rights by the adoption; and
> (e) a competent authority in the overseas country has approved the departure of the applicant to Australia.

6 The second situation is where an adoptive parent brings a child into Australia for the purposes of adoption in Australia. In this case, there are further criteria

that must be satisfied before a visa will be granted, including that a competent authority (as defined in reg 1.03) in Australia has approved the prospective adoptive parent as a suitable adoptive parent for the visa applicant. That is, the prospective adoptive parent must first be approved by the relevant State or Territory child welfare authority before a visa can be granted. Where adoptive parents apply to bring a child into Australia for the purposes of adoption, either subcl (3) or (4) of cl 102.211 applies. Clause 102.211(3) deals with the circumstance in which the arrangements for the adoption are made between the competent authorities in each country. Clause 102.211(4) deals with the circumstance in which the arrangements for the adoption are in accordance with the *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, done at The Hague on 29 May 1993 (the Adoption Convention), or the adoption is of a kind referred to in reg 5 of the *Family Law (Bilateral Arrangements — Intercountry Adoption) Regulations 1998* (Cth). Presently, these Regulations apply only in the case of the People's Republic of China. Clause 102.211(3) provides as follows:

> (3) An applicant meets the requirements of this subclause if:
> (a) the applicant has not turned 18; and
> (b) the applicant is resident in an overseas country; and
> (c) either:
> (i) an unmarried person who is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen has undertaken in writing to adopt the applicant; or
> (ii) spouses, at least one of whom is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, have undertaken in writing to adopt the applicant; and
> (d) a competent authority in Australia:
> (i) has approved the prospective adoptive parent as a suitable adoptive parent for the applicant; or
> (ii) has approved the prospective adoptive parent and the spouse of the prospective adoptive parent as suitable adoptive parents for the applicant; and
> (e) a competent authority in the overseas country has approved the departure of the applicant:
> (i) for adoption in Australia; or
> (ii) in the custody of the prospective adoptive parent or parents;
> as the case requires.

7 Clause 102.211(4) provides:

> (4) An applicant meets the requirements of this subclause if:
> (a) the applicant has not turned 18; and
> (b) the applicant is resident in an overseas country; and
> (c) a competent authority in the overseas country has allocated the applicant for prospective adoption by a person who is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, or such a person and that person's spouse; and
> (d) either:
> (i) arrangements for the adoption are in accordance with the Adoption Convention; or

(ii) the adoption is of a kind that may be accorded recognition by regulation 5 of the *Family Law (Bilateral Arrangements — Intercountry Adoption) Regulations 1998*; and

(e) a competent authority in Australia:

(i) has approved the prospective adoptive parent as a suitable adoptive parent for the applicant; or

(ii) has approved the prospective adoptive parent and the spouse of the prospective adoptive parent as suitable adoptive parents for the applicant.

8 The third situation is where a child has been adopted in accordance with the Adoption Convention in an Adoption Convention country, as defined in reg 1.03, by an Australian citizen, a holder of a permanent visa, or an eligible New Zealand citizen when the adoption took place. This situation is the subject of cl 102.211(5).

9 In order to be eligible for a subclass 117 (Orphan Relative) visa, a visa applicant, at the time of application, must satisfy the criteria set out in cll 117.211 and 117.212. Clauses 117.211 and 117.212 state as follows:

117.211 The applicant:

(a) is an orphan relative of an Australian relative of the applicant; or

(b) is not an orphan relative only because the applicant has been adopted by the Australian relative mentioned in paragraph (a).

117.212 The applicant is sponsored:

(a) by the Australian relative, if the relative:

(i) has turned 18; and

(ii) is a settled Australian citizen, a settled Australian permanent resident, or a settled eligible New Zealand citizen; or

(b) by the spouse of the Australian relative, if the spouse:

(i) has turned 18; and

(ii) is a settled Australian citizen, a settled Australian permanent resident or a settled eligible New Zealand citizen; and

(iii) cohabits with the Australian relative.

10 Clause 117.111 provides that the expression "Australian relative" means "a relative of the applicant who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen". Regulation 1.03 relevantly provides that "relative", in relation to a person, means "a close relative" or "a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-uncle, step-niece or step-nephew". The expression "close relative" is defined in reg 1.03, in relation to a person, as meaning:

(a) the spouse of the person; or

(b) a child, adopted child, parent, brother or sister of the person; or

(c) a step-child, step-parent, step-brother or step-sister of the person.

11 The expression "orphan relative" is defined in reg 1.14. Regulation 1.14 provides:

An applicant for a visa is an orphan relative of another person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen if:

(a) the applicant:
   (i) has not turned 18; and
   (ii) does not have a spouse; and
   (iii) is a relative of that other person; and
(b) the applicant cannot be cared for by either parent because each of them is either dead, permanently incapacitated or of unknown whereabouts; and
(c) there is no compelling reason to believe that the grant of a visa would not be in the best interests of the applicant.

Pursuant to reg 1.03, "parent" includes an adoptive parent and a step-parent. The concept of adoption is defined in reg 1.04.

The Tribunal's decision

12 Before the Tribunal, the adoptive parents contended that the visa applicant met the criteria for a subclass 102 (Adoption) visa and a subclass 117 (Orphan Relative) visa. They submitted documentary material and gave oral evidence. The Tribunal summarised this evidence as follows:

> In the hearing the review applicant said that he was born in Australia and his wife said that she came to Australia when she was about 3 years of age and became an Australian citizen when she was about 16 years of age. He said that the adoption arose out of his wife meeting up with Jennifer La'au at a pharmacy in Australia where his wife worked. He said that Jennifer La'au worked for a law firm in Vanuatu. He said that later they received a phone call from Jennifer who said that there was a mother who was going to give up her child for adoption. He confirmed that the visa applicant was born on 25 November 2001. He said that in April 2003 they went to Vanuatu which was the first time he had been out of Australia. The review applicant said that he [had] been in Vanuatu for the 17 days. He said that his wife had only been out of Australia on short cruises when she was younger. He agreed that they had not met the requirement of having resided overseas for more than 12 months at the time of application. In respect to the requirement of approval by a competent authority in Australia the review applicant confirmed that there was no such approval in Australia and that the adoption all took place in Vanuatu. It was also pointed out Vanuatu was not an Adoption Convention country. The review applicant said that they have not had contact with the natural mother of the visa applicant and neither of them has met the natural mother or father of the visa applicant. He also confirmed that the only relationship they have to the visa applicant is as a result of the adoption order. He also confirmed that, to his knowledge, the natural mother and father of the visa applicant are citizens of Vanuatu and not citizens or permanent residents of Australia or New Zealand. He said that he was unaware of any attempts to contact the natural father of the visa applicant.
>
> The review applicant's wife said that she first met Jennifer La'au in August 1999, who was a barrister in Vanuatu, and that in August 2001 Jennifer rang her and told her that the baby was available for adoption. She said that earlier back she had gone to the Catholic Adoption Centre to inquire about adoption and they were offered a family of three and agreed but could not go ahead because they did not have their home at that time. She said that they had since had a home built. She said that in respect to the adoption of the visa applicant, after agreeing to adopt, she decided to wait a year to give the natural mother time to consider her position but Jennifer said that the mother was very happy for the couple to adopt her child.

13 Having regard to the matters before it, the Tribunal found (and it is not disputed) that the adopted child could not satisfy cl 101.211(1)(c), because she was neither the "natural child" or "step-child" of the adoptive parents within

para (i); nor had she been adopted by a person who satisfied the description in para (ii), since her adoptive parents were Australian citizens at the time of her adoption. Accordingly, the adopted child was not eligible for a subclass 101 (Child) visa.

14 The Tribunal also found (and it is no longer disputed) that the adopted child could not meet the criteria in cl 102.211(2) because, at the time of application, neither of the adoptive parents had been residing overseas for more than 12 months. Further, the adopted child could not meet the criteria in cl 102.211(3) or (4) because the adoptive parents had not been approved as suitable adoptive parents for the visa applicant by a competent authority in Australia, as required by cl 102.211(3)(d) or (4)(e). Since Vanuatu was not an "Adoption Convention country" within the meaning of cl 102.211(5), the adopted child could not meet the criteria set out in cl 102.211(5).

15 Lastly, the Tribunal found that the adopted child was not eligible for a subclass 117 (Orphan Relative) visa. In considering the criteria for a subclass 117 (Orphan Relative) visa, the Tribunal referred to the Procedures Advice Manual 3 (PAM 3) and the Explanatory Statement that accompanied the *Migration Amendment Regulations 2002 (No 2)* (Cth), by which the present cl 117.211 was inserted. The Tribunal found that:

> Having regard to [the Explanatory Statement], as well as the guidance in PAM 3, and taking into account all the evidence presented, the Tribunal is satisfied that the *Australian relative* link to the visa applicant under clause 117.211 in this case must exist other than as a consequence of the adoption referred [to] in paragraph (b). Paragraph (b) refers back to the *Australian relative mentioned in* paragraph (a) and *the Australian relative* link requirement is then reflected in clause 117.212, in that the visa applicant must be sponsored by *the Australian relative*. The Tribunal finds on the evidence presented that neither the review applicant nor, for that matter, his wife at time of application came within [the] definition of *relative* vis-à-vis the visa applicant other than as a consequence of the adoption. Other than as a consequence of the adoption, there is no evidence to conclude that at the time of application the visa applicant was the orphan relative of any *Australian relative of the applicant*. The Tribunal is not, therefore, satisfied that the visa applicant meets the criteria under clause 117.211 or clause 117.212 at time of application.

16 The Tribunal indicated that, if the matter were one of discretion, then it would have exercised the discretion in the applicant's favour. As the matter was not one of discretion, however, it had "no alternative but to affirm the decision under review". The Tribunal observed:

> The Tribunal found the review applicant and his wife very genuine and honest in their efforts to have the visa applicant with them. They have provided documentation which strongly supports them in the pursuit of carrying through the adoption. The Tribunal accepts that they have approached the adoption endeavouring to comply with legal requirements and in an open and caring way, both in respect to the natural mother of the visa applicant, as well as the child herself. Had the Tribunal a discretion in respect to the 12 months overseas residence requirement under clause 102.211 it would have exercised it in favour of the visa applicant.

17 The applicant in this proceeding seeks orders in the nature of certiorari and mandamus on the sole ground that the Tribunal erred in construing cll 117.211 and 117.212 by "requiring that the applicant come within the definition of 'relative' of the visa applicant other than as a consequence of the adoption". The

applicant in the proceeding contended that, by reason of the Tribunal's misconstruction of these clauses, the Tribunal erred in concluding that the adopted child could not be an "orphan relative" of the applicant in the proceeding.

The parties' submissions

18 In written contentions, which were augmented at the hearing, the applicant submitted that the Tribunal's construction imposed a requirement that did not exist, namely, a requirement that the link between the adopted child and his or her sponsor must exist other than as a consequence of the adoption. The applicant contended that cl 117.211 should be read "top down" in the following manner. "Orphan relative" is defined in reg 1.14 as requiring, amongst other things, that the visa applicant is "a relative of that other person" (the sponsor). Regulation 1.03 provides that "relative" includes "a close relative". Regulation 1.03 also defines "a close relative" as including a "parent", and "parent" as including "an adoptive parent". The "Australian relative" requirement is, therefore, satisfied if the Australian relative is the adopted parent of the visa applicant. Having been adopted, however, the adopted child in this case was no longer "an orphan relative", with the consequence that para (b) of cl 117.211 applied (ie, the adopted child was not an orphan relative only because she has been adopted by the Australian relative).

19 According to the applicant:

> The construction by the Tribunal effectively imposes a temporal order in how one should assess whether the various definitions used in the Regulations are satisfied, or not satisfied in the case of paragraph (b) of clause 117.211 only because of the statutorily identified reason. That is, [the adopted child] had to be a relative of the applicant before the adoption.

20 The applicant contended that, if the Tribunal were correct, then para (a) of cl 117.211 would require that the visa applicant was an orphan relative of an Australian relative, being a relative prior to any adoption, and this would render para (b) unnecessary since para (b) provides that a visa applicant may be eligible if he or she is not an orphan relative "only because the applicant has been adopted by the Australian relative mentioned in para (a)". The applicant maintained that para (b) thus contemplated that the interpretation of whether a sponsor is an "Australian relative" might be determined *after* any adoption.

21 In written submissions, elaborated at the hearing, the respondent submitted that para (b) of cl 117.211 required that:

> [T]he adoption be the only reason why the visa applicant is not an orphan relative of the sponsoring Australian relative. It could equally be expressed as requiring that the visa applicant "would be an orphan relative if the [visa] applicant had not been adopted by the Australian relative mentioned in paragraph (a)".

22 The respondent submitted that para (b) of cl 117.211 was directed towards ameliorating the situation in which an Australian relative, being a relative of an orphan child before his or her adoption, adopts the child and thereby becomes a "parent", with the consequence that the adopted child becomes unable to satisfy the requirement in reg 1.14 that he or she cannot be cared for by either parent for the specified reasons. According to the respondent, the Explanatory Statement, to which the Tribunal referred in its reasons, confirmed this interpretation.

23 The respondent contended that the applicant's interpretation "would have the

effect of replacing the words 'adopted by the Australian relative mentioned in paragraph (a)' with the word 'adopted'". Such a construction would allow the requirements specific to the grant of visas to adopted children, or to children who entered Australia for the purposes of adoption, to be readily circumvented. This would, so the respondent submitted, "set at nought the carefully drafted conditions" for the grant of subclass 102 (Adoption) visas.

24 It follows that, on the interpretation contended for by the respondent, the Tribunal correctly held that the visa applicant did not fall within para (b) of cl 117.211. Her adoption *enabled* her to satisfy an aspect of the definition of "orphan relative", whereas para (b) of cl 117.211 provides for the situation where an adoption *prevents* a person satisfying the definition, and I agree for the reasons stated below.

Consideration

25 The question for determination by this Court is a narrow one, concerning the proper construction of a criterion for a subclass 117 (Orphan Relative) visa, which is contained in cl 117.211.

26 As counsel for the applicant acknowledged, the adopted child in this case cannot satisfy cl 117.211(a) because she cannot satisfy the definition of "orphan relative" in reg 1.14. As already noted, it was her contention that the adopted child satisfies cl 117.211(b) since she was not an orphan relative "only because" the sponsoring Australian relative had adopted her. The submission was that the adopted child could not satisfy the definition of "orphan relative" in reg 1.14 "only because", following her adoption, she could not satisfy para (b) of this definition since her adoptive parents, who were within the definition of "parent" in reg 1.03, were not dead, permanently incapacitated or of unknown whereabouts.

27 I reject this submission. It is not correct to say that the adopted child is not an orphan relative "only because" she has been adopted. If the applicant and his wife had not adopted her, then she would have no relevant relationship with them. When cl 117.211(b) is read with cl 117.211(a), the meaning of cl 117.211(b) is patent. Clause 117.211(b) applies where the visa applicant would be "an orphan relative of an Australian relative of the applicant" if he or she had not been adopted by that Australian relative. The adopted child would not have been an "orphan relative" of either adoptive parent but for her adoption, because, but for her adoption, she would not be "a relative" of either of them and could not satisfy reg 1.14(a)(iii).

28 As the respondent's counsel submitted, the Explanatory Statement, which accompanied the *Migration Amendment Regulations 2002 (No 2)* (Cth) that introduced cl 117.211(b), confirms that this subclause was intended to prevent "an orphan relative" from *losing* this status upon his or her adoption by a sponsoring Australian relative: see *Acts Interpretation Act 1901* (Cth), ss 15AB and 46. The Explanatory Statement said:

> The Regulations effect changes to the *Migration Regulations 1994* to:
>
> — correct anomalies in the Subclass 117 (Orphan Relative) offshore visa …; and *allow an applicant for an orphan relative visa to satisfy the criterion that they must be an orphan relative, despite the fact that they have been adopted by a specific relative*;
>
> …
>
> The main change to clause 117.211 is contained in paragraph 117.211(b). The new paragraph enables an applicant to satisfy clause 117.211 where he or she is

not an orphan relative only because he or she has been adopted by the Australian relative mentioned in paragraph 117.211(a).

In some situations where a child has become an orphan, an Australian relative of the orphan may adopt the child, feeling that this would be best for the child. However, to do so means that the child (the applicant) no longer fits within paragraph (b) of the meaning of "*orphan relative*" *in regulation 1.14.*

Under paragraph 1.14(b) of the Migration Regulations, an applicant for a visa is an "orphan relative" where he or she cannot be cared for by either parent because each of them is either dead, permanently incapacitated or of unknown whereabouts. *As the definition of parent in regulation 1.03 includes an adoptive parent, an applicant who has been adopted by his or her Australian relative has been unable to be granted a Subclass 117 (Orphan Relative) visa, and in most cases has also been unable to satisfy the criteria for any other visa subclass.*

However, as a result of new paragraph 117.211(b), the applicant is able to satisfy clause 117.211.

The new provision is not intended to provide for the adoption of children overseas by Australian relatives in ordinary circumstances.

(Emphasis added.)

29 The Explanatory Statement confirms that para (b) of cl 117.211 provides for the situation where an adoption *prevents* a person satisfying the definition of "orphan relative" and not for the circumstance where an adoption *enables* a person to satisfy the definition of "relative" but not "orphan relative".

30 Further, the construction for which the applicant contends would defeat the object of the provisions for subclass 102 (Adoption) visas, which form part of the Commonwealth, State and Territory arrangements for foreign and inter-country adoptions. This cannot have been the object of the introduction of cl 117.211(b). A construction that would promote the object of these provisions should be preferred to a construction that would not: *Acts Interpretation Act*, ss 15AA and 46.

31 In Australia, the laws of the respective States and Territories make provision for foreign and inter-country adoptions, although the Commonwealth is also necessarily involved because of the obligations it has assumed under international instruments and its other responsibilities, including those with respect to immigration.

32 Broadly speaking, the States and Territories have similar regimes with respect to foreign adoptions. In Victoria, where the adoptive parents reside, the *Adoption Act 1984* (Vic) provides, in Pt IVA, for the recognition of an adoption under the Adoption Convention. In the case of non-Convention adoptions outside Australia (other than in New Zealand), an adoption will not be recognised unless the adoptive parents have resided in the country where the adoption took place for a continuous period of at least 12 months immediately before the commencement of the adoption proceedings in that country, or, before the adoption in that country, the Secretary or other principal officer of an approved agency approved the placement of the child with the proposed adoptive parents (s 67(2)). Compare *Adoption Act 1993* (ACT), s 55; *Adoption Act 1994* (WA), ss 138 and 138A; *Adoption of Children Act* (NT), s 50; *Adoption Act 2000* (NSW), ss 31 and 116; *Adoption Act 1988* (SA), s 21; *Adoption of Children Act 1964* (Qld), s 38; *Adoption Act 1988* (Tas), s 60. There is, however, no provision for prior approval in New South Wales, Queensland, South Australia and Tasmania. Section 67(8) of the *Adoption Act 1984* (Vic) provides that, except as provided in s 67:

> [T]he adoption of a person (whether before or after the commencement of this Act) in a country, other than New Zealand, outside the Commonwealth and the Territories does not have effect for the purposes of the laws of Victoria.

The State and Territory "twelve month" residence provisions are reflected in cl 102.211(2) of Sch 2 to the Regulations.

33 The *Adoption Act 1984* (Vic) also makes specific provision for adoptions under the Adoption Convention, pursuant to bilateral arrangements, and pursuant to arrangements between the competent authorities in each country: see Pts IVA and IVB; also ss 20, 21, 23 and 51. The legislation in the other States and in the Territories makes similar provision for inter-country adoptions: see, eg, *Adoption Act 1993* (ACT), s 20; *Adoption Act 1988* (Tas), s 46; *Adoption Act 2000* (NSW), s 31. The criteria in cl 102.211(3) and (4) of Sch 2 to the Regulations reflect the Commonwealth's recognition of the arrangements made by the States and Territories with respect to inter-country adoptions, as well as its international responsibilities.

34 The need to regulate inter-country adoptions in order to protect children is recognised by international instruments to which Australia has subscribed. The Adoption Convention, which entered into force for Australia on 1 December 1998, and the United Nations *Convention on the Rights of the Child*, done at New York on 20 November 1989, which entered into force for Australia on 16 January 1991 (see Art 21), recognise that, although inter-country adoption may provide a child with the benefit of a permanent family where none is available in his or her birth country, inter-country adoption may also give scope for trafficking in children and create conditions for their abandonment: see, eg, Adoption Convention, Arts 1, 4 and 5 and the preamble; also New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 NSW*: Report 81, 1997, paras 10.11, 10.38, 10.58, 10.59 and 10.69. Amongst other things, the Adoption Convention defines internationally agreed minimum standards for inter-country adoption.

35 Some of the relevant criteria for a subclass 102 (Adoption) visa were introduced in response to Australia's adoption of the Adoption Convention. The Explanatory Statement that accompanied the *Migration Amendment Regulations 1998 (No 7)* (Cth), which amended the Regulations following Australia's ratification of the Adoption Convention, stated:

> The purpose of the Regulations is to amend the Migration Regulations with respect to children adopted overseas or seeking entry to Australia for adoption onshore.
>
> In particular, the Regulations will:
>
> — provide for the grant of permanent visas to children adopted overseas, or to be adopted in Australia, under adoptions to which the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption applies or which are recognised under the Family Law (Bilateral Arrangements — Intercountry Adoption) Regulations) (regulations 5, 6 and 7);
>
> — ensure that safeguards to protect the interests of children adopted overseas or being brought to Australia for adoption are consistent across all relevant visa subclasses (regulations 6 and 7); …

36 Other criteria for a subclass 102 (Adoption) visa also reflect the Commonwealth's recognition of the need to regulate inter-country adoptions in order to protect the interests of children who may be affected by such adoptions.

In summary, the State, Territory and Commonwealth legislative provisions that deal with inter-country adoptions recognise that arrangements for such adoptions should be such as to ensure that the adoption is in the best interests of the child.

37 If it were possible for a person to become a "relative" or "Australian relative" merely by obtaining an adoption order in a foreign jurisdiction and, by this means, to fulfil the condition in cl 117.211(b), the visa provisions that are designed to assist in the regulation of inter-country adoptions could be readily circumvented. I reject the applicant's submission that reg 1.14(c) would safeguard the best interests of a child in a manner equivalent to the more stringent criteria for a subclass 102 (Adoption) visa.

38 For these reasons, I would dismiss the application for judicial review that has been made to this Court.

39 As counsel for the respondent observed, it remains open to the adoptive parents and the adopted child to ask the Minister, acting under s 351 of the Act, to substitute for the Tribunal's decision a decision that is more favourable to them. The adoptive parents may also benefit from discussing their current circumstances with the competent authority in Victoria, namely, the Intercountry Adoption Service, Department of Human Services, Victoria.

Orders accordingly

Solicitor for the applicant: *Erskine Rodan & Associates*.

Solicitor for the respondent: Australian Government Solicitor.

NICHOLAS GOULIADITIS