IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M79 of 2012

BETWEEN

M79 / 2012

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

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PLAINTIFF'S REPLY (ANNOTATED)

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Filed on behalf of: The Plaintiff

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Part I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

Part II: Reply

(a) *Section 195A of the Act*

2. The Minister's submission is that the nature and extent of the power in s 195A, and the purpose for which it may be exercised, are to be ascertained by reference only to the terms of that provision.[1] The Minister's submission should not be accepted.

3. The nature and extent of any power depends on construction of the Act read as a whole.[2] The expression "*in the public interest*" does not render the power unlimited.[3] Subject matter, scope and purpose, to be ascertained by construing the provision in the context of the Act read as a whole, limit every discretionary power no matter how broadly conferred. Further, the Minister's discretionary power in s 195A is expressly limited "*by all other provisions of this Act*", save for those in Subdivisions AA, AC and AF of Div 3 of Part 2. The Minister's submissions fail to give any effect to that express limitation. (See also [6] below).

4. Apart from relying on the terms of s 195A construed in isolation, the Minister does not contradict the Plaintiff's submission[4] that all the powers of the Minister to grant a visa (ss 65, 73, 159 and 195A), are to be exercised only for the purpose of permitting a non-citizen to be a lawful non-citizen when in the migration zone. In the case of s 195A, that sole purpose is to be beneficially exercised, unconstrained by some requirements (eg, criteria for visas prescribed in the Regulations), to achieve a particular result, namely that the person, who is both an unlawful non-citizen and in detention under s 189, will be released from detention upon becoming a lawful non-citizen. Nothing in the Act supports the existence of a power in s 195A to fashion the "*regime*"[5] under or the "*terms*"[6] by which a person, who must be released from detention upon becoming a lawful non-citizen (s 196(1)(c) read with s 13), may be so released.

5. In the exercise of the power in s 195A(2), the Minister is not bound by the obligation in s 47 to consider a valid application for a visa.[7] If s 65 had not been excluded, it would have imposed an obligation upon the Minister to reach a state of satisfaction, one way or the other,[8] as to whether to grant a visa; it would also have re-imposed an obligation, and a precondition upon the exercise of the power, to consider a valid application for a visa. The effect of s 195A(3) upon s 65 travels no further than to remove the obligation to reach a state of satisfaction and not impose a precondition. Nothing said in *Plaintiff S10-2011 v Minister for Immigration and Citizenship*,[9] by way of general remarks on the nature of the various "*dispensing (or enabling) provisions*", supports the Minister's contention that the effect of subs (3), in excluding the provisions in Subdiv AC, is to free up the Minister from having to comply with other provisions of the Act in respect of which subs (3) expressly states that he remains bound.

6. There is nothing incongruous about s 195A(3) obliging the Minister to comply, in the exercise of the power in subs (2), with requirements for visas found in Subdiv A of Div 3, including, should he be considering the grant of a protection visa, the criterion in s 36(2).[10] Further, it is incorrect to state that provisions that create visa criteria "*derive their legal effect only through the operation of s 65*".[11] There is no suggestion by the Minister (nor could there be) that he

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1 Minister's Submissions dated 11 January 2013 at [20], [24], [25], [29], [34], [37], [55].

2 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 186, citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033.

3 *O'Sullivan v Farrer* (1969) 168 CLR 210 at 216, citing *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505.

4 Plaintiff's Submissions dated 11 December 2012 at [67].

5 Minister's Submissions at [30].

6 Minister's Submissions at [31].

7 Section 47 is in Subdiv AA.

8 Cf Minister's Submissions at [21.2], only focusing on paragraph (b) of s 65(1).

9 (2012) 86 ALJR 1019; [2012] HCA 31.

10 Cf Minister's Submissions at [35]. Furthermore, it cannot be contended that the Minister can grant a special category visa to a person who is not a New Zealand citizen.

11 Minister's Submissions at [34].

would not be bound by ss 156, 157 and 158, should he consider the grant of a criminal justice visa pursuant to s 195A.

7. The Plaintiff has submitted that s 195A only permits the grant of one visa.[12] Even if the Court were to hold to the contrary, the ultimate result for him is unaffected.[13] It is similarly unaffected by whether, if the TSH Visa is invalid, the First Bridging Visa is also invalid because that part of the decision invalidly granting the TSH Visa cannot be severed.

8. Given the importance of the issue presented by the Minister's contention that there exists under the Act a power simultaneously to grant two visas, the Plaintiff makes the further submissions below, in support of the proposition that s 195A, like all other provisions in the Act conferring a power to the Minister to grant a visa (namely, ss 65, 73 and 159), permits only the grant of one visa at a time. This is not to gainsay that the power may be validly exercised more than once.[14]

9. A number of considerations support the conclusion that, under the Act, the Minister's powers to grant a visa are limited to the grant of one visa:

   (a) the nature of what is being granted by the exercise of the power, namely a permission (s 29);

   (b) assuming circumstances did exist for the grant, validly, of more than one visa, the power can be exercised more than once to achieve that result;

   (c) the principal scheme under the Act is that a person who wants a visa must apply for a visa of a particular class (s 45), and an application is valid only if it is for a visa of a class specified in the application (s 46(1)(a)) – under the principal scheme of the Act, the Minister will have before him, for the purposes of the one exercise of the power in s 65, only one application for one visa;

   (d) it is difficult to contemplate a sensible operation of s 65, and of the review processes under the Act in respect of a decision under s 65, if that power permitted the simultaneous grant of two visas;

   (e) it would be nonsensical to construe the powers in s 73 and in s 159 as permitting the simultaneous grant of two visas of the same class; and

   (f) in the case of s 195A, the result that the person will be released from detention is achieved by the grant of just one visa.

10. Regarding severance:

   (a) The Minister's contention,[15] that there is one decision instrument evidencing the grant of two visas to the Plaintiff, is factually incorrect. The decision instrument[16] evidences the grant of more than one visa to many persons. It cannot sensibly be argued that the power in s 195A may be validly exercised just once in respect of multiple persons. The fact that there is a singular decision instrument is not evidence as to how many times the power was exercised, including in respect of the Plaintiff.

   (b) The dicta in *Bread Manufacturers of NSW v Evans*[17] do not lead to the result that the First

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12 Plaintiff's Submissions at [22].

13 This is because he now holds a Second Bridging Visa, whose validity is not in question, which would permit him to re-lodge his application under the Act for the protection visa.

14 See s 33(1) of the *Acts Interpretation Act* 1901 (Cth) **(the AIA)**.

There is no preclusion on the exercise of the power in subs (2) of s 195A twice, in a relatively short period of time, by reason of the precondition in subs (1). Cf Minister's Submissions at [64]. Release from immigration detention does not occur immediately upon the grant of a visa pursuant to s 195A; it requires that the officers detaining the person cease to hold the state of mind required by s 189, upon knowledge that the detention must come to an end by reason of s 196(1)(c).

If, to the contrary, the power in s 195A may be exercised only once and it may be exercised to grant only one visa, then the following position obtains. If the visa purportedly granted first in time was the TSH Visa, it is invalid because of no power to grant that type of visa and because of improper purpose. If the visa that was granted first in time was the First Bridging Visa, the TSH Visa is invalid because of no power to grant any subsequent visa (as well as no power to grant that type of visa and improper purpose).

15 Minister's Submissions, footnote 58.

16 At **SCB 033-035**. In making the decision instrument, the Minister complied with s 67 (even though compliance with that provision is not mandated when exercising the power in s 195A, given its location in Subdiv AC).

17 (1981) 180 CLR 404 at 441 per Mason and Wilson JJ, at 445 per Aickin J.

Bridging Visa must fall with the TSH Visa. In that case, severance would have led to a nonsensical result. Here, the First Bridging Visa can sensibly operate apart from the TSH Visa. Striking out the TSH Visa does not alter the character of the rest of the decision, which remains the granting of a permission (see s 29). Severance of the TSH Visa may be done pursuant to s 46 of the AIA or at common law.[18] Further, the Minister's subjective intention is neither decisive nor relevant. Absent bad faith, the intention in making any administrative decision must be, in every case, of making a decision that is, as to each constituent part, a lawful exercise of the power, meaning relevantly an exercise for proper purposes. The decision-maker cannot rely on an improper purpose as a basis for later saying that, subjectively, he would not have made that part of the decision which can sensibly stand apart and was made for a proper purpose.[19] The result of undoing that part of the decision is to be achieved, if it can be, by revocation.

(b) ***Section 37A of the Act***

11. Section 37A creates a requirement that, for the visa to be granted to a person, that person needs temporary safe haven. The note "*A temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia*" forms part of the Act. It follows that the words "*temporary safe haven*" are not simply a "label"[20] for a class of visas, but they must be given some meaning. That meaning is that the person must need a place of safety or refuge, to be afforded on a temporary basis by the grant of the visa. The person has that need because, unless he is able to come to (in the first instance), or subsequently remain in, Australia, he would face grave risk in his country of origin, where he would have to remain, or be forced to return, but for obtaining the permission under s 37A(1). Section 37A, in particular subs (3), makes clear that the circumstances in the country of origin are generalised ones, constituting a humanitarian emergency (capable of subsiding once there have been "*changes of a fundamental, durable and stable nature*)", not ones personal to the individual such as may lead to the owing by Australia of protection obligations under the *Refugees Convention*. The Plaintiff's claim that he is owed protection obligations therefore casts no light on whether he required temporary safe haven within the meaning of s 37A.

12. Nothing in the materials supports a finding that, at the time the Minister purported to grant the TSH Visa to the Plaintiff, the Plaintiff faced that type of grave, generalised risk in Sri Lanka. On 12 April 2012, the Plaintiff did not need safe haven because he was, had been for some two years, and would be for the foreseeable future,[21] safely in Australia. As s 37A binds the Minister in respect of any exercise of the power in s 195A and, further, the Plaintiff had not requested the grant of a temporary safe haven visa (hence, he has not sought to advance any positive case that s 37A could apply to him, or that the power in s 195A could be exercised to grant that visa to him), it is for the Minister to prove that the circumstances for the grant of that visa did exist.

(c) ***Sections 68(4) and 82(3) of the Act***

13. The Minister's evidence[22] and submissions[23] that the First Bridging Visa came into effect upon the expiry of the TSH Visa are inconsistent with his case that the two visas were granted simultaneously or, alternatively, that the TSH Visa was granted first in time.[24]

14. Section 68(4) provides that a bridging visa "*will come into effect **again** during the visa period*"

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18 See *R v Ng* (2002) 5 VR 257 at 280-286 [47]-[56], for severance pursuant to s 46(1) of the AIA (in the form it was prior to amendments in 2003), and at 286-288 [57]-[59], for severance at common law. In *Tervonen v Minister for Justice and Customs* (No.2) (2007) 98 ALD 589, Rares J considered that a notice under s 16 of the *Extradition Act 1988* (Cth) was an instrument for the purposes of s 46 of the AIA in its present form.

19 See *Crichton v City of Moorabbin* [1992] 2 VR 372 at 384-385, and *Kent County Council v Kingsway Investments (Kent) Ltd* [1971] AC 72.

20 Cf Minister's Submissions at [44].

21 Upon the Minister's own affidavit and submissions, there was (and is) no intention to force the Plaintiff's return to Sri Lanka until a process for considering his claims to be a person to whom Australia owes protection obligations comes to its ultimate conclusion. (But see [22]-[25] below, as to this process having been "*preserved*" even after the grant of the TSH Visa.)

22 Affidavit [7] at **SCB 089.**

23 Minister's Submissions at [9] and [57.4].

24 Minister's Submissions at [57.3] and [57.4].

if it had earlier been in effect and had ceased to be in effect by reason of s 82(3). Section 82(3) provides that a bridging visa "***ceases to be in effect if another visa ... comes into effect***". Plainly, s 83(3) requires that the bridging visa be in effect at the point in time when a later visa first comes into effect, and s 68(4) is consistent with that construction.

15. It is only if the First Bridging Visa was granted first in time that ss 68(4) and 82(3) of the Act would have operated as the Minister contends, namely by having the First Bridging Visa not in effect for the duration of the TSH Visa. But if either the TSH Visa and the First Bridging Visa were granted simultaneously, or the TSH Visa was granted first in time, as the Minister contends, the First Bridging Visa would have been in effect as soon as it was granted on 12 April 2012 (s 68(1)), and would have continued in uninterrupted effect until expiry on 12 October 2012. In any event, and whichever the sequence, the release of the Plaintiff from detention would be, and was, achieved by the grant of the First Bridging Visa.

(d) ***Improper purpose***

16. The evidence is unequivocal that the TSH Visa was not granted for the purpose of making the Plaintiff a lawful non-citizen and securing his release from immigration detention. Rather, it was granted for the purpose of imposing the statutory bar in s 91K so that, although the bar under s 46A(1) no longer applied, the Plaintiff would still be prevented from being able to make a valid application for a visa under the Act.[25]

17. There is no evidence at all that the Minister granted the TSH Visa for the purpose of securing the Plaintiff's release from detention – the Minister does not say so in his affidavit; the Department's letter to the Plaintiff[26] in clear terms asserts what were the respective purposes for which the two visas had been granted; and what the Minister told the Australian community, by the press release,[27] was that bridging visas would be granted to permit release into the community of a number of offshore entry persons, making no mention at all of temporary safe haven visas.

18. The fact that there were distinct purposes for the two visas, imposition of the statutory bar in s 91K for the TSH Visa, and release from detention for the First Bridging Visa, is also made clear by the differing periods of duration of the two visas, and by the statement in the Department's submission to the Minister[28] that any further period by which a person would be a lawful non-citizen (and thus not in detention) would be achieved through the grant of subsequent bridging visas.[29]

19. The Minister's submission,[30] that giving the Plaintiff the status of lawful non-citizen and securing his release from detention (albeit for a period of only 7 days) may have been achieved by granting only the TSH Visa, does not cure the lack of any evidence as to this being the purpose. To the contrary, the Minister's evidence, at paragraph 9 of his affidavit, that he would not have granted the First Bridging Visa if he could not have simultaneously granted the TSH Visa demonstrates that the sole purpose of granting the TSH Visa was imposition of the statutory bar in s 91K.

20. It does not make any difference whether there was a single decision simultaneously to grant two visas or there were two decisions to grant one visa. In the latter case the sole purpose of the decision to grant the TSH Visa was to impose the statutory bar in s 91K. In the former case it was at least a substantial purpose and the power in s 195A would not have been exercised had there not been this purpose.[31]

21. Finally, it does not assist the Minister that he may have had "beneficial" motives in mind in

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25 The Minister explains this as preserving an existing process for considering the Plaintiff's claims for protection and not wasting resources used in that process ([7] and [9] of his affidavit at **SCB 089-090**), but it is the same thing.

26 **SCB 040**.

27 **SCB 018-019**.

28 **SCB 023 at [11]**.

29 As has in fact occurred in this case, by the grant to the Plaintiff of the Second Bridging Visa.

30 Minister's Submissions at [57.4].

31 *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water Sewarage and Drainage Board* (1982) 41 ALR 467 at 468-468.

agreeing to a scheme whereby the TSH Visa would only have a duration of 7 days, so that once that period had lapsed, the First Bridging Visa may have allowed the Plaintiff to access other benefits.[32] (But refer to [13]-[15] above, and see also [26] below.)

(e) ***Factual matters asserted by the Minister, but of which there is no evidence***

22. There is no evidence before the Court of a "*preserved*" process that would apply to the Plaintiff, to afford him the "*entitlement to have a procedurally fair decision*"[33] on whether to permit the Plaintiff to make a valid application for a protection visa, by the Minister lifting the statutory bar in s 91K, should the Plaintiff succeed in the reserved judicial review proceedings.

23. Two matters were crucial to this Court's conclusion in *Plaintiff M61/2010E v Commonwealth*[34] that the plaintiffs were entitled to a procedurally fair process in the review of their refugee status assessments: the Minister had decided to consider exercising his powers, under s 46A or s 195A, in every case where an offshore entry person claimed to be owed protection obligations by Australia, and the plaintiffs' detention was being prolonged by the process by which the Minister would be informed as to the exercise of his powers.

24. In the present case, the Minister has exercised his power under s 195A, and the power under s 46A(2) is no longer available. Thus, there is no extant decision by him to consider the exercise of either of those powers. Further, there is no evidence of a decision of the Minister to consider exercising his power under s 91L in every case where he has granted a temporary safe haven visa to an offshore entry person. Finally, the Plaintiff is not in detention.

25. Thus, contrary to the Minister's unsupported assertion, the imposition of the statutory bar in s 91K, in substitution for the one in s 46A(1), has had the consequence for the Plaintiff that the process by which he may ultimately have been allowed to make a valid application under the Act for a protection visa, upon the Minister's exercise of the power in s 46A(2), has been terminated, and there is no equivalent other process in its place.

26. There is no evidence that "*benefits of access to various support services ... including Medicare*"[35] are not available to a holder of a temporary safe haven visa. Read fairly, the Minister's evidence[36] does not state unavailability of those benefits to a person who is granted a temporary safe haven visa – the conditions of the First Bridging Visa do not give the Plaintiff "*access [to] various support services and programs*", any more than the conditions of the TSH Visa do. Importantly, as well, the Minister's evidence cannot be read to suggest that it was only upon expiry of the TSH Visa that the Plaintiff would be permitted to work[37] – the TSH Visa had no condition restricting the Plaintiff's ability to work. [38]

Dated: 21 January 2013

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32 See eg *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 at 717, 728, 733.

33 Cf Minister's Submissions at [30.3]; see also at [30.4], for the supposed lack of detriment.

34 (2010) 243 CLR 319.

35 Minister's Submissions at [57.4]; see also at [9].

With reference to footnote 52 to the Minister's Submissions, nothing in the materials before the Court explains the selection of a period of 7 days for the TSH Visa. The "beneficial" way in which the Minister suggests the grant of the two visas was intended to work would equally have been achieved by the TSH Visa having effect for only 1 day. The inference to be drawn is that 7 days was chosen as an arbitrary short period, because the purpose of granting the TSH Visa was to impose a bar, and that purpose would be achieved by any short period.

36 Affidavit [7] at **SCB 089.**

37 Cf Minister's Submission at [30.2], "*an almost immediate right to work*".

38 A Temporary Safe Haven (subclass UJ-449) Visa is subject only to condition 8506 (notification of change of address). See clause 449.611. Conditions 8101 (preventing all work) or 8104 (restricting the hours of work which a person may perform) may be imposed: see clause 449.612. However, neither was imposed: **SCB 041.**