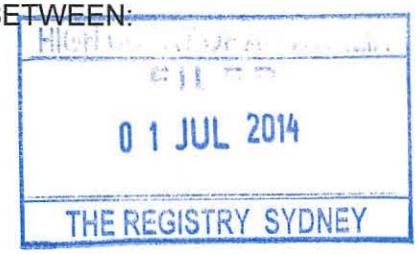
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S4/2014

BETWEEN:



PLAINTIFF S4/2014

Plaintiff

and

10 **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

20

DEFENDANTS' ANNOTATED WRITTEN SUBMISSIONS

Filed on behalf of the defendants by:
Australian Government Solicitor
Level 42 – MLC Centre
19 Martin Place
SYDNEY NSW 2000
DX 444 SYDNEY
Sydney NSW 2000

Date of this document: 1 July 2014

Contact: Andras Markus / Louise Buchanan
File ref: 14002181
Telephone: (02) 9581 7472 / (02) 9581 7325
Facsimile: (02) 9581 7650
Email: andras.markus@ags.gov.au /
louise.buchanan@ags.gov.au

PART I: CERTIFICATION

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

PART II: ISSUES

2. The defendants do not accept the statement in the plaintiff's annotated written submissions filed 3 June 2014 (**PS**) at [4] as to the key issue in this case.

3. Contrary to the plaintiff's submissions, the central issue concerns the validity of the exercise by the first defendant (**the Minister**) on 4 February 2014 of the power conferred by s 195A(2) of the *Migration Act 1958* (Cth) (**the Act**) to grant the plaintiff two visas: a Temporary Safe Haven (Class UJ subclass 449) visa (**TSH visa**) and a Temporary (Humanitarian Concern) (Class UO subclass 786) visa (**THC visa**).

4. On the grant of these visas the plaintiff became a lawful non-citizen, and he was released from immigration detention. The effect of the grant of the THC visa is that the plaintiff can reside lawfully in Australia for a period of three years, that being something that he was not previously entitled to do. The effect of the grant of the TSH visa is that, by reason of ss 91J and 91K of the Act, any application by the plaintiff for a visa of a different class is invalid. That continues the position that previously applied by reason of s 46A(1) of the Act.

5. The plaintiff attacks the validity of the Minister's exercise of power to grant him the TSH visa, whilst seeking to leave undisturbed the grant of the THC visa. For the reasons addressed shortly, that position is untenable. The visas stand or fall together.

6. Crucially, and notwithstanding the plaintiff's focus on s 46A, the true issue in the case concerns the scope of the power conferred by s 195A(2). It is that power that was actually exercised to grant the TSH visa the validity of which is challenged. If, as a matter of statutory construction, the power conferred by s 195A(2) is not limited by s 46A, then most of the issues that the plaintiff seeks to raise would fall away.

7. Accordingly, the Court should focus first upon the validity of the Minister's exercise of power under s 195A(2). It is only in the event that the plaintiff's arguments have the result that both of the visas that he was granted on 4 February 2014 are invalid that it would be necessary to consider the issues that the plaintiff seeks to raise concerning s 46A(2).

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

8. The defendants consider that no notice need be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CONTESTED FACTS

9. The facts are to be drawn from the special case which has been filed (**SC**).

PART V: LEGISLATION

10. In addition to the provisions identified in PS [86], the provisions set out in the annexure are relevant.

PART VI: ARGUMENT

11. In summary, the defendants submit that:

(a) the validity of the grant of the TSH visa cannot be severed from the validity of the grant of the THC visa;

(b) the power conferred by s 195A(2) is not limited by s 46A;

(c) nothing in the Protection Obligations Determination (**POD**) process while the plaintiff was detained precluded the grant of a TSH visa to him under s 195A(2); and

(d) the grant to the plaintiff of a TSH visa under s 195A(2), without prior notice, did not involve a denial of procedural fairness.

(a) THE VISAS STAND OR FALL TOGETHER

12. Prior to the grant of the TSH visa and the THC visa to the plaintiff, he was in immigration detention (SC [8]). The visas were granted to him pursuant to an exercise by the Minister of his power under s 195A(2).

13. The grant of both visas to the plaintiff was made by a single instrument (SC 200). If the grant of the TSH visa was invalid, whether the grant of the THC visa survives involves a question of severance. The grant of the TSH visa cannot be severed if it forms part of an inseparable context, or if the remaining instrument would operate differently or produce a different result from that which was intended.[1] Put another way, the grant of the TSH visa cannot be severed if the instrument would not have been made without it.[2] Such circumstances manifest a contrary intention sufficient to displace the operation of s 46(2) of the *Acts Interpretation Act 1901* (Cth).[3] For the following reasons, it is clear that that is so in this case.

14. *First*, and decisively, the special case records the agreed fact that "[i]f the Minister had not granted the plaintiff the TSH visa, he would not have granted the plaintiff the THC visa" (SC [26]). In light of that agreed fact, severance is impossible.

15. *Secondly*, the facts leading up to the grant of the visas on 4 February 2014 in any event plainly demonstrate that the THC visa would not have been granted without the simultaneous grant of a TSH visa to prevent any application being made for a permanent protection visa. Thus:

---

1 *Love & Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 (CA) at 41 per McHugh JA (Kirby P agreeing) approved in *Malubel Pty Ltd v Elder (No 2)* (1999) 73 ALJR 269 (HCA) at 269 [2] per *curiam*. See also *Coco v The Queen* (1994) 179 CLR 427 at 443–4 per Mason CJ, Brennan, Gaudron and McHugh JJ: "an integral and essential element"; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 441 per Mason and Wilson JJ, 445 per Aickin J; *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580 at [20] per *curiam*; *Parker v Churchill* (1986) 9 FCR 334 (FC) at 350 per Jackson J: "the good and bad parts of the warrants may be so interlinked that one cannot stand without the other". See further *R v Ng* (2002) 5 VR 257 (CA) at [57], [59] per *curiam*; *Von Amim v Health Insurance Commission* [2004] FCAFC 33 at [25] per *curiam*; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 (CA) at [92] per McLure JA (Buss JA and Murray AJA agreeing).

2 *Love & Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 (CA) at 42 per McHugh JA (Kirby P agreeing); *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 (CA) at [92] per McLure JA (Buss JA and Murray AJA agreeing). See further Aronson and Groves, *Judicial Review of Administrative Action* (5th ed, 2013) at 713–714 [10.470]–[10.480].

3 *Acts Interpretation Act 1901* (Cth), s 2(2).

(a) Upon the plaintiff's entry into Australia on 13 December 2011 he became an "offshore entry person" within the meaning of s 5(1) of the Act as it then stood (SC [6]). On 1 June 2013, upon the commencement of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth), he became an "unauthorised maritime arrival" within the meaning of s 5AA(1) of the Act (SC [7]).

(b) Between November 2013 and March 2014, the Minister and the Government made numerous public statements setting out the Government's policy that unauthorised maritime arrivals would not obtain permanent protection visas. The statements include those set out at SC [33(a)]–[33(d)].

(c) In light of this policy, the Minister received a submission from his Department as to how to address the circumstances of the cohort of unauthorised maritime arrivals who arrived prior to 13 August 2012, which included the plaintiff (SC 191 ff). For those, like the plaintiff, who had been subject to a Protection Obligations Evaluation[4] but remained in detention, the submission proposed that the Minister exercise his power under s 195A to grant a TSH visa and a THC visa simultaneously (SC 194 [13]). The submission made it clear that the grant of a TSH visa had the effect of barring the visa holder from applying for a substantive visa other than another TSH visa (SC 193 [9]). In light of the Government's stated policy, it is plain that the engagement of this bar was directed to precluding applications for protection visas by those in the position of the plaintiff.[5]

(d) The Minister agreed to the course proposed in the submission on 4 February 2014 (SC 191 [3(b)]). Consistently with this, the Minister received a submission specifically concerning the plaintiff (SC 197 ff). It proposed the grant of both a TSH visa and a THC visa pursuant to s 195A and noted (SC 198 [8]):

> Granting the Humanitarian Stay (Temporary) visa (subclass 449) [ie a TSH visa] at the same time as the Temporary Humanitarian Concern visa (subclass 786) imposes a 91K bar, which will prevent [the plaintiff] from applying for a visa other than another subclass 449 visa, unless you lift that bar. The subclass 449 visa will remain "out of effect" during its one week validity, but its grant means that while he is lawfully residing in the community on the subclass 786 visa, he will be barred from applying for a permanent visa.

The second sentence of this quote explicitly draws the link between the grant of the TSH visa and the Government's stated policy, referred to above.

(e) On 4 February 2014, the Minister agreed to grant the visas as proposed (SC 196 [1]) and signed the instrument granting the visas.

(f) The grant of the two visas simultaneously gave effect to the Government's policy that unauthorised maritime arrivals, like the plaintiff, would be precluded from obtaining permanent protection visas only because of the grant of the TSH visa. It was only the grant of that visa which engaged the bar imposed by s 91K. Without the grant of that visa, the plaintiff, as the holder of a THC visa, would have ceased to be an unlawful non-citizen[6] and thus ceased to be subject to

---

4 The Protection Obligations Evaluation is part of the POD process.

5 That course was accepted as valid by the Court in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 (***Plaintiff M79***).

6 See ss 13–14 of the Act.

the bar imposed by s 46A(1). Accordingly, he would have been permitted to apply for *inter alia* a protection visa. The grant of the THC visa alone would thus have been entirely inconsistent with the Government's stated policy.

16. In the circumstances summarised above, to invalidate the decision to grant the TSH visa, while leaving the decision to grant the THC visa in place, is impossible. As Hayne J held in *Plaintiff M79*,[7] in the context of a challenge to a different ministerial decision under s 195A(2) to grant a TSH visa and another visa simultaneously, the:

> decision recorded in the Decision Instrument was one composite decision: to effect the plaintiff's release from detention by granting him visas of two classes with identified conditions attached to one of those visas ... It cannot be severed into two separate decisions without radically recasting its nature and effect.

17. For the above reasons, if the plaintiff is successful in his challenge to the Minister's decision under s 195A(2), then unless he is also successful in persuading the Court that the Minister is obliged to lift the bar under s 46A(1) the consequence will be that he will once again be required to be detained, as he will have invalidated a visa that would have entitled him to live lawfully in Australia for a period of three years.

(b) SECTION 195A

18. The plaintiff's argument is based on the unexpressed premise that a decision by the Minister to consider the exercise of his power under s 46A(2) is capable of limiting the power conferred by s 195A(2). However, as a matter of statutory construction, the powers conferred by those two sections are distinct. Section 195A(2) confers a power, to be exercised in the public interest, to grant a visa to any person who is in detention. By contrast, s 46A(2) confers a power to lift a prohibition that applies to prevent certain unlawful non-citizens from making a valid application for any visa. As Hayne J said in *Plaintiff M76/2012 v Minister for Immigration, Multicultural Affairs and Citizenship* ***(Plaintiff M76)***:[8] "The fields of operation of ss 46A and 195A were distinct. There is no basis for reading them as overlapping in any way."

19. That being so, the legal basis upon which a decision by the Minister to consider the exercise of one power could fetter the capacity of the Minister to exercise a different power is elusive. The plaintiff's argument amounts to the contention that the Minister cannot exercise a power to grant a visa on any basis that differs from a prior decision to think about exercising a different power to allow a non-citizen to apply for a visa. That would be an astonishing result, particularly as it would confine a beneficial power to release non-citizens from detention.

20. The plaintiff's argument is inconsistent with the terms of s 195A(2). The use in that sub-section of the phrase "public interest" to identify the constraint on the power reveals a legislative choice to confer a power of broad import.[9] As French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*:[10]

---

7 (2013) 87 ALJR 682 at 699 [83]. The other members of the Court did not need to express any view in relation to severance, as they considered the grant of the TSH visa to be valid.

8 (2013) 88 ALJR 324 at 342 [85].

9 *ICM Agriculture Ltd v The Commonwealth* (2009) 240 CLR 140 at 162 [20] per French CJ, Gummow and Crennan JJ.

10 (2012) 246 CLR 379 at 400–401 [42] (footnotes omitted). See also *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view".

21. That understanding of the meaning of the "public interest" was applied to the power conferred by s 195A(2) in both *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (***Plaintiff S10***)[11] and *Plaintiff M79*.[12] As French CJ, Crennan and Bell JJ observed in *Plaintiff M79*: "the purposes for which a visa may be granted under s 195A are to be found in the statutory criterion of the public interest. That is a matter which, within the general scope and purposes of the Act, it is left for the Minister to judge."[13]

22. A power granted by reference to the "public interest" is of particularly broad width when conferred upon a Minister. As Hayne J pointed out in *Minister for Immigration and Ethnic Affairs v Jia Legeng*, "[c]onferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject".[14] Heydon J made a similar point in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, stating:[15]

> The only criterion for the exercise of the powers in ss 46A and 195A is the "public interest". This is an extremely broad and diffuse criterion. The correct interpretation of legislation conferring a non-compellable discretionary power in those terms, on a political officer who is obliged to table in the Parliament exercises of the power under ss 46A(6) and 195A(6), and to submit to questioning and debate about them, is that the issues to be considered or not considered in connection with possible exercises of the discretions are to be a matter for the repository of the power.

23. The circumstances in which s 195A was introduced into the Act further support a broad construction of the provision, because it demonstrates that s 195A is remedial in nature: it was designed to equip the Minister with a wide power to effect the release of unlawful non-citizens from detention. Thus, the Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2005 (Cth) stated:[16]

> Subsection 195A(2) empowers the Minister to grant to a person who has been detained in accordance with section 189 a visa of a particular class ... if the Minister thinks that it is in the public interest to do so. This is a non-compellable, discretionary power dependent upon the Minister's consideration that such grant of a visa would be in the public interest. It is intended that it will be used to release a person from detention where it is not in the public interest to continue to detain them.

---

[11] (2012) 246 CLR 636 at 648-9 [30] per French CJ and Kiefel J, 667 [99(v)] per Gummow, Hayne, Crennan and Bell JJ.

[12] (2013) 87 ALJR 682 at 692 [39] per French CJ, Crennan and Bell JJ, 706 [127] per Gageler J.

[13] (2013) 87 ALJR 682 at 690 [32].

[14] (2001) 205 CLR 507 at 565 [187]. See also at 528 [61] per Gleeson CJ and Gummow J.

[15] (2011) 244 CLR 144 at 218 [190].

[16] Explanatory Memorandum at [20]–[21].

24. For the above reasons, as a matter of the proper construction of s 195A(2), the power it confers is not limited by any decision by the Minister to consider the exercise his power under s 46A(2). The Minister has power under s 195A(2) to grant a visa to a non-citizen, and thus to release that person from detention, whether or not the Minister has decided to consider allowing the non-citizen to apply for any other visa and, if such consideration has commenced, irrespective of the stage it has reached.

25. Once the plaintiff was granted a visa and became a lawful non-citizen, the bar under s 46A(1) of the Act ceased to apply to him. That rendered redundant any further consideration of whether to exercise the power under s 46A(2) to lift that bar.

26. In truth, the plaintiff's complaint relates not to the cessation of the process that was previously underway under s 46A(2), but to the decision to grant him a TSH visa (and thus to attract the operation of s 91K). But that complaint cannot stand with *Plaintiff M79*, where this Court decided that "in the exercise of his power under s 195A(2) the Minister may decide to grant a particular class of visa because its legal characteristics and legal consequences serve a purpose which he has adjudged to be in the public interest".[17] The Court specifically held that the Minister may properly exercise his power under s 195A(2) to grant a TSH visa, and thereby to attract the bar under s 91K, if the legal consequences of that grant "would serve the public interest as the Minister judged it".[18] The fact that the plaintiff is presently unable to make a valid application for a protection visa is a lawful consequence of the Minister's selection of the visas to be granted pursuant to s 195A(2) to allow the plaintiff to be released from immigration detention.

27. The Minister has not commenced to consider whether to exercise his power under s 91L(1) to lift the bar imposed by s 91K (SC [28]).[19] That being the factual position, there is no occasion for the Court to consider the correctness of the plaintiff's submissions concerning the significance of the commencement of such consideration (noting, in any event, that the legal issues relevant to s 91L may well differ from the issues relevant to s 46A, given that any such process of consideration of s 91L takes place against a background where the non-citizen is not in detention).

28. For the above reasons, the plaintiff's application should be dismissed, without the Court reaching the operation of s 46A. The questions posed in the special case concerning s 46A are unnecessary to answer.

(c) THE EFFECT OF THE POD PROCESS ON ss 46A AND 195A

29. If it is necessary to address the plaintiff's argument as to the effect of the POD process on ss 46A and 195A, that argument may be reduced to the following propositions:

(i) by establishing the POD process, the Minister decided to consider exercising power under s 46A(2) to permit the plaintiff to apply for a visa (PS [17]–[36]);

(ii) because the Minister had begun considering the exercise of power under s 46A(2), he was under a duty to complete that process of consideration by deciding whether to exercise the power (ie by deciding whether or not to permit the plaintiff to apply for a visa) (PS [37]–[44]);

---

[17] (2013) 87 ALJR 682 at 692 [41] per French CJ, Crennan and Bell JJ, see also at 706 [131] per Gageler J.

[18] (2013) 87 ALJR 682 at 692 [42] per French CJ, Crennan and Bell JJ, see also at 706 [132], 707 [136] per Gageler J.

[19] cf *Plaintiff M79* (2013) 87 ALJR 682 at 706–707 [134] per Gageler J.

(iii) because the Minister had chosen, through the POD process and while the plaintiff was detained, to base his consideration of the exercise of power under s 46A(2) on whether the criterion stated in s 36(2) for the grant of a protection visa was met, that became the only criterion by which the Minister could determine whether to exercise the power and he was bound to exercise the power if the criterion was satisfied (PS [45]–[53]);

(iv) the Minister could only exercise his power under s 195A(2) consistently with the manner in which he could exercise his power under s 46A(2) (PS [54]–[61]); and

(v) the grant of a TSH visa pursuant to s 195A(2), which precluded the plaintiff from applying for a protection visa, was inconsistent with the manner in which the Minister was required to exercise his power under s 46A(2) in circumstances where the plaintiff satisfied the criterion in s 36(2), and was therefore invalid (PS [62]–[63]).

30. For the following reasons, that chain of reasoning should not be accepted. Indeed, both steps (ii) and (iii) are contrary to both *Plaintiff M61/2010E v The Commonwealth* (***Plaintiff M61***)[20] and *Plaintiff M76*.[21] It is convenient to consider each step in turn.

Step (i): The POD process

31. The facts concerning the POD process are set out in SC [9]–[14] and the documents referred to there. It may be accepted that the establishment of the POD process was a decision by the Minister to consider whether to exercise the power under s 46A(2) in respect of any offshore entry person who made a claim that Australia owed protection obligations in respect of the person. It is, in that respect, similar to the process described in *Plaintiff M61*.[22] However, unlike the process described there, the POD process is directed only to the exercise of power under s 46A(2). It is not directed to the exercise of power under s 195A(2).[23]

32. Accordingly, the defendants accept the correctness of step (i) in the chain of reasoning advanced by the plaintiff. However, that acceptance is subject to two observations.

33. *First*, contrary to PS [17], neither in *Plaintiff M61*, nor in this case, was the decision of the Minister to consider exercising power under s 46A(2) by undertaking processes of inquiry made "by detaining offshore entry persons while those processes were conducted". In *Plaintiff M61*, the Court identified the decision to consider exercising power under s 46A(2) as having been made by the Minister's July 2008 announcement that consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations.[24]

34. Once that decision was made, s 198(2) accommodated the making of inquiries for the purpose of considering the exercising of power under s 46A(2). The result was that the time at which removal may otherwise have been required was deferred, and the period of time in which detention was authorised by s 196(1) was thereby extended (subject

---

[20] (2010) 243 CLR 319.

[21] (2013) 88 ALJR 324.

[22] (2010) 243 CLR 319 at 349 [66] per *curiam*.

[23] See SC 59–61.

[24] *Plaintiff M61* (2010) 243 CLR 319 at 350–351 [70]. See also *Plaintiff M79* (2013) 87 ALJR 682 at 701 [96].

to the non-citizen choosing at any time to bring that detention to an end by asking to be removed pursuant to s 198(1)).[25] But the fact that a person is detained in itself says nothing as to whether consideration is being given to the exercise of power under s 46A(2). In the absence of the grant of a visa, detention of an unlawful maritime arrival is required by s 189 regardless of whether any consideration is being given to exercising power under s 46A(2). Such detention is to end only on the occurrence of one of the events specified in s 196(1). It is therefore wrong to speak of a decision to consider exercising power under s 46A(2) as resulting in a "conferral" of "authority to prolong detention" (PS [57]). The true position is that the Act confers authority to detain until one of the events in s 196(1) occurs, but that it contemplates that the occurrence of one of those events (removal) may be deferred while inquiries are undertaken for the purpose of considering whether to exercise the power under s 46A(2) even if removal would otherwise be reasonably practicable.

35. *Secondly*, contrary to PS [31], the materials connected with the POD process referred to by the plaintiff do not show that in establishing the process "the Minister indicated that offshore entry persons found to be refugees would be permitted to apply for protection visas" (emphasis added). To the contrary, the materials show only that the cases of offshore entry persons found to be persons in respect of whom Australia owed protection obligations would ordinarily be referred to the Minister for him to consider whether to exercise power under s 46A(2).[26]

Step (ii): Duty to decide whether to exercise the power in s 46A(2)

36. The next step in the plaintiff's chain of reasoning is that, because the Minister had decided to consider whether to exercise the power in s 46A(2), the Minister was under a duty to complete that process of consideration and decide whether to exercise that power (ie to decide whether or not to permit the plaintiff to apply for a visa) (PS [40]). That step should not be accepted.

37. The acceptance of such a duty is contrary to the unanimous statement of the Court in *Plaintiff M61*:[27]

> Exercise of the powers given by ss 46A and 195A is constituted by two distinct steps: first, the decision to consider exercising the power to lift the bar or grant a visa and secondly, the decision whether to lift the bar or grant a visa. The Minister is not obliged to take either step. (emphasis added)

The word "either" in the emphasised sentence in the above passage recognises that there is no duty to make a decision whether to lift the bar even when the Minister had decided to consider whether to lift the bar.

38. Two other aspects of the reasoning in *Plaintiff M61* support the above conclusion.

39. *First*, the Court unanimously held that, if the Minister had decided to consider exercising the power under s 46A(2) but that consideration miscarried, the Minister nevertheless could not be compelled to re-exercise the power.[28] In such a case, by definition the

---

[25] This Court has previously, and correctly, regarded the existence of the option to request removal as significant, even for persons claiming protection: see, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 34 per Brennan, Deane and Dawson JJ, 72 per McHugh J; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 16 [30] per Gleeson CJ, 38 [95] per McHugh J.

[26] See SC 58, 136, 190.

[27] (2010) 243 CLR 319 at 350 [70] per *curiam*.

[28] (2010) 243 CLR 319 at 358 [99] per *curiam*. That *Plaintiff M61* so held was recognised in *Plaintiff M76* (2013) 88 ALJR 324 at 361 [237] per Kiefel and Keane JJ.

Minister would not have completed the process of consideration upon which he had embarked. It follows that if, as the plaintiff contends, having commenced considering whether to exercise the power the Minister is required to complete that process by deciding whether or not to lift the bar, it would necessarily follow that in a case where the process miscarried the Minister could be compelled to complete the exercise of power. The unanimous holding in *Plaintiff M61* to the contrary necessarily establishes that the fact that the Minister has commenced considering the exercise of power under s 46A does not create any duty to complete that process.

40. *Secondly*, the power conferred by s 46A(2) must be exercised by the Minister personally (s 46A(3)). If a decision by the Minister to consider exercising the power under s 46A(2) has the consequence that the Minister is required to decide whether to lift the bar, that decision would have to be made personally by the Minister in every case. Plainly, however, the Court in *Plaintiff M61* did not consider that to be required. On the contrary, the Court recognised that one possible outcome of the (then) "Refugee Status Assessment" (**RSA**) process was that "no submission would go to the Minister" and that, after any merits review process, "the process for removal of the person from Australia would begin".[29] It was to that aspect of the process that the Court was referring when it observed: "That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers."[30] That passage acknowledges that the RSA process would not lead in every case to a decision by the Minister whether or not to lift the bar, notwithstanding the fact that in such a case the Minister had, by the RSA process, begun considering whether or not to do so. Instead, the process of consideration would terminate at a point prior to any reference to the Minister for a personal decision whether or not to lift the bar.

Step (iii): Duty to exercise power in s 46A(2) upon satisfaction of protection obligations

41. The third step in the plaintiff's chain of reasoning is that, because the Minister had chosen, through the POD process and while the plaintiff was detained, to base his consideration of the exercise of power under s 46A(2) on whether the criterion stated in s 36(2) for the grant of a protection visa was met, that became the only criterion by which the Minister could determine whether to exercise the power. That is then said to have the consequence that the Minister was bound to exercise the power if that criterion was satisfied (PS [45]–[53]).

42. In an attempt to cut down the broad language of s 46A(2), the plaintiff contends that his detention during the pendency of the POD process "fixes" the matters by which the Minister must exercise his power under s 46A(2) as being whether the criterion stated in s 36(2) is met (PS [47]). The argument is that the matters which the Minister may permissibly consider are limited to those matters about which he made or directed inquiries at the "outset" (PS [50]): ie those inquiries which "prolonged" the detention of the subject of the inquiries. It therefore seeks to confine the power of the Minister at the second of the two steps identified in *Plaintiff M61* by reference to the matters considered at the first step.

43. For the following reasons, the plaintiff's argument should not be accepted.

---

[29] (2010) 243 CLR 319 at 343 [44] per *curiam.*

[30] (2010) 243 CLR 319 at 354 [78] per *curiam.*

44. *First*, the argument is contrary to the unanimous holding in *Plaintiff M61*. That case concerned two plaintiffs whose detention had been prolonged by a process directed to the possible exercise of power under s 46A(2). But notwithstanding that fact, the Court held that the Minister was not required even to take the outcome of that process into account when deciding whether to lift the bar imposed by s 46A(1), let alone to make a decision in accordance with the outcome of that process. The Court expressly held:[31]

> In considering the exercise of power under either s 46A or s 195A, the Minister might, but need not, take account of the recommendations made by those who had conducted an assessment or review of an ... offshore entry person's claim ...

45. In *SZQDZ v Minister for Immigration* (***SZQDZ***), Keane CJ (as his Honour then was), Rares and Perram JJ, recognised that *Plaintiff M61* established that the Minister did not "have any obligation to take the reviewer's assessment or recommendation into account in deciding whether, and if so how, to exercise" the powers under ss 46A and 195A.[32] Their Honours continued:[33]

> The Minister was not bound to act on the assessment or recommendation; he did not even have to take them into account at any stage of his consideration, and he did not have to make a decision even if the recommendations had been favourable to the applicants.

46. In *SZQRB*, Lander, Besanko, Gordon, Flick and Jagot JJ rejected a challenge to *SZQDZ*, with Lander and Gordon JJ describing that case as an "orthodox application of the reasons and decision of the High Court in *Plaintiff M61*".[34] Lander and Gordon JJ went on to observe that in *Plaintiff M61* the "High Court plainly said the Minister is not bound to exercise the powers, whatever the result of the RSA or IMR. The offshore entry person has no right to have the Minister exercise the powers in that person's favour."[35]

47. Those Full Federal Court authorities are likewise consistent with *Plaintiff M76*, another case where detention was prolonged while inquiries were undertaken as part of the Minister's consideration whether to lift the bar imposed by s 46A(1). Kiefel and Keane JJ,[36] with whom Crennan, Bell and Gageler JJ agreed,[37] accepted that "by reference to s 46A(7) ... the Minister was under no duty to decide to lift the bar".

48. The above holdings cannot be reconciled with the plaintiff's argument that the criteria selected by the Minister at the time of a decision to consider whether to exercise power under s 46A(2) to lift the bar imposed by s 46A(1) thereafter limit the matters that can be considered by the Minister in deciding whether or not to lift the bar. They are also directly contrary to his submission that the Minister is obliged to make a decision to lift

---

[31] (2010) 243 CLR 319 at 359 [100] per *curiam*. See also at 353 [77] per *curiam*: "Because the Minister was not bound to exercise power under either s 46A or s 195A, no matter what conclusion was reached in the assessment or review, it cannot be said that a decision to consider exercising the power affected some right of the offshore entry person to a particular outcome" (emphasis added). See also *SZQRB v Minister for Immigration and Citizenship* (2013) 210 FCR 505 (FC) (***SZQRB***) at 546 [205] per Lander and Gordon JJ, with whom Besanko and Jagot JJ relevantly agreed.

[32] (2012) 200 FCR 207 (FC) at 216 [34]. See also at 219 [44]: "The Minister can ignore entirely a reviewer's assessment and recommendation".

[33] (2012) 200 FCR 207 (FC) at 218 [39] (emphasis added).

[34] (2013) 210 FCR 505 (FC) at 546 [203].

[35] (2013) 210 FCR 505 (FC) at 546 [204].

[36] (2013) 88 ALJR 324 at 360 [229].

[37] (2013) 88 ALJR 324 at 348 [134].

the bar if those inquiries find that any such criteria are satisfied. As noted above, in both *Plaintiff M61* and *Plaintiff M76*, the plaintiffs were detained while consideration was given to whether the Minister would exercise his power under s 46A(2), so the statements in those cases cannot be distinguished by reference to the fact that the plaintiff's detention was prolonged by the inquiries that occurred.

49. *Secondly*, while the POD process was directed to determining whether Australia had protection obligations in respect of offshore entry persons, for the reasons explained in paragraph 35 above nothing in that process disclosed that the exercise of the Minister's power under s 46A(2) would be determined solely by the outcome of that process. It is easy to conceive that, while the Minister may wish to know whether or not a person is a refugee in considering whether to exercise power under s 46A(2), other matters (whether relevant to character, security risk, health, or foreign relations) might also be considered by the Minister to relevant. It is further easy to conceive that the Minister may not wish inquiries to be undertaken about those matters unless and until inquiries first show that the person is a refugee. In any event, because the Minister had not limited his consideration of whether to exercise his power under s 46A(2) to satisfaction of the criterion in s 36(2), the factual premise for the plaintiff's submission is absent. That was a prospect contemplated by Hayne J in *Plaintiff M76*.[38]

50. The factual premise for the plaintiff's submission is absent for another reason, not present in some of the other cases. The plaintiff is, and was at all material times, a person who is not considered as a national by any State under the operation of its law (PC [4]). He is "stateless" within the meaning of art 1(1) of the *Convention relating to the Status of Stateless Persons*.[39] In the case of a stateless person, it is not to be assumed that the period of time spent by the person in detention has been longer than it would have been but for the POD process. There is no evidence in the special case that there is any country that would accept the plaintiff if Australia seeks to remove him. That being so, there is no basis to infer that he could have been removed from Australia under s 198(2) at any earlier time, even had the POD process not been undertaken.

51. *Thirdly*, even if the factual premise for the plaintiff's argument were established and putting aside all contrary authority, the legal conclusion for which the plaintiff contends would not follow. The limited operation of s 46A(2) which the plaintiff advances is entirely contrary to the language of the provision. Further, such a narrow meaning is contrary to the evident purpose of the provision, to permit the considerations relevant to the exercise of power to be of the broad scope associated with the "public interest".

52. That broad scope is explained, by reference to the equivalent language in s 195A(2), in paragraphs 20–22 above. The breadth and flexibility of the "public interest" referred to in s 46A(2) is reinforced by ss 46A(4) to (6), which are "a particular manifestation of that aspect of responsible government which renders individual Ministers responsible to the Parliament for the administration of their departments".[40] The question of what is relevant to the public interest is left to the Minister, who is politically responsible for the judgement that is reached.

53. To fix upon the subject of considerations or inquiries which first causes the plaintiff's detention to be "prolonged" would not only deny the Minister the capacity to undertake considered changes of policy, but would also deny to the Minister the ability to consider,

---

[38] (2013) 88 ALJR 324 at 344 [106]–[108].

[39] Done at New York on 28 September 1954, which entered into force for Australia on 13 March 1974: [1974] *Australian Treaty Series* No 20.

[40] *Plaintiff S10* (2012) 246 CLR 636 at 656 [55] per Gummow, Hayne, Crennan and Bell JJ. See also at 648-649 [30] per French CJ and Kiefel J; *Plaintiff M79* (2013) 87 ALJR 682 at 692 [40] per French CJ, Crennan and Bell JJ, and 706 [131] per Gageler J.

and make inquiries upon, other subjects bearing upon the public interest which may have arisen subsequently, and which it was not foreseen should be the subject of initial inquiries. Indeed, the plaintiff goes so far as to submit that the Minister cannot even take into account changes in visa criteria that have occurred since he decided to consider exercising his power under s 46A(2) (although to require the Minister to ignore these changes would be to require the bar to be lifted even if a subsequent application would inevitably fail) (cf PS [70]). The conferral of a broad power referable to the public interest is designed precisely to avoid such constraints.

54. Contrary to the plaintiff's submissions, the implication of radical limits on the matters that may be considered in determining the public interest is not necessary to enable a court to determine and enforce the limits of the Minister's authority to "prolong detention" (cf PS [49]–[50]). In truth, the Minister has no authority to prolong detention, because (as explained in paragraph 34 above) the detention of unlawful non-citizens is required by, and the period of detention is fixed by, the Migration Act. The Migration Act contemplates that, if consideration is being given to the exercise of the power under s 46A(2), then the time at which removal is required will be deferred. But if that consideration does not occur reasonably promptly,[41] the Act will cease to accommodate those inquiries, with the result that removal will be required and detention will thereby end. The fact that the Minister has power to undertake inquiries and that the Act accommodates those inquiries by deferring the duty to remove does not mean that the Minister has authority to "prolong" detention. Any prolongation that occurs is simply a consequence of the operation of the Act (and the absence of a request from the non-citizen for removal prior to the completion of inquiries).

55. It may be accepted that the result is that the Migration Act authorises detention of an offshore entry person or unlawful maritime arrival for such period as is necessary for the Minister to obtain information and advice about whatever inquiries he or she considers may relate to the public interest, however disconnected they may be, provided they occur reasonably promptly (PS [50]). But that is precisely the scheme which is contemplated by the conferral by s 46A(2) of a personal power, turning on the Minister's satisfaction of a question of the public interest. That does not cause the Migration Act to authorise detention which is unconstrained.[42]

56. At all times when the Minister is giving consideration to the possible exercise of power under s 46A(2), the question of the lawfulness of the detention may be tested by reference to whether, as a matter of fact, that matter is being considered reasonably promptly. It is not necessary to give any greater specificity to the matters the subject of the considerations to enable that to be tested. Indeed, greater specificity could not be given if, as Hayne J contemplated in *Plaintiff M76*,[43] the Minister expressly chose unconfined considerations about which inquiries should be made. If a court concludes that the possible exercise of power under s 46A(2) is not being considered reasonably promptly, mandamus may issue to require removal. There would not, however, be any basis to order release from detention into the Australian community, because such an order would contradict ss 189 and 196.

57. For the above reasons, the Court should reject the proposition that, in deciding whether to exercise his power under s 46A(2), the Minister was bound to consider only the question of Australia's protection obligations in respect of the plaintiff and, further, was bound to exercise the power if those protection obligations were engaged.

---

41 *Plaintiff M61* (2010) 243 CLR 319 at 342 [35] per *curiam*.

42 *Plaintiff M76* (2013) 88 ALJR 324 at 349 [139] per Crennan, Bell and Gageler JJ,

43 (2013) 88 ALJR 324 at 344 [106]–[108].

Step (iv): Section 195A

58. The plaintiff's next proposition is that the Minister could only exercise his power under s 195A(2) consistently with the manner in which he could exercise his power under s 46A(2). That proposition should be rejected for several reasons.

59. *First*, for the reasons addressed in paragraphs 18–28 above, the power conferred by s 195A(2) is a distinct and different power from that conferred by s 46A(2).

60. *Second*, as noted in paragraph 31 above, unlike the RSA process considered in *Plaintiff M61*, the POD process is not directed to the exercise of power under s 195A(2). There is no evidence before the Court that the Minister has fixed any particular subjects of inquiry to be those which will inform the exercise of his power under s 195A(2). The plaintiff does not contend that this is so. The difference between the two powers is underscored by the fact that the POD process envisaged an exercise of power under s 195A(2) as a possibility when an offshore entry person was not a person in respect of whom Australia owes protection obligations.[44] Accordingly, even if the power under s 46A(2) were confined in the way asserted by the plaintiff, that would provide no basis to confine the Minister's exercise of power under s 195A(2).

61. *Thirdly*, and contrary to PS [56], an exercise of power under s 195A(2) cannot be assimilated to a decision to lift, or not to lift, the bar imposed by s 46A(1). An exercise of power under s 195A(2) results in the grant of a visa, not simply a lifting of the prohibition against making an application for any visa.[45] While an exercise of power under s 195A(2) will have the consequence that the bar under s 46A(1) no longer applies, that is a consequence of the fact that the recipient of a visa under s 195A(2) is no longer an unlawful non-citizen. The difference between the nature of the exercises of power is underscored by the fact that, when power is exercised under s 46A(2), it permits a valid application to be made only for the class of visa specified by the Minister, whereas when a visa is granted under s 195A(2), s 46A(1) would no longer prevent a valid application being made for a visa of any class.

Step (v): Grant of the visas to the plaintiff

62. If the other steps in the plaintiff's chain of reasoning were accepted, the final step — that the grant of the TSH visa to the plaintiff was invalid — would follow. However, for the reasons advance above, that step is never reached. Further, if it were to be reached, for the reasons in paragraphs 12 to 17 above the result would be that the THC visa granted to the plaintiff would also be invalid.

(d) PROCEDURAL FAIRNESS

63. The plaintiff advances an independent challenge to the grant of the TSH visa, on the ground that it involved a denial of procedural fairness. The denial is said to have been in the failure to give the plaintiff notice of the intention to grant the visa and the opportunity to make submissions (apparently to oppose that course). The ground appears to proceed independently of acceptance of the plaintiff's submission that the Minister was under a duty to exercise the power under s 46A(2). Accordingly, if the argument were accepted, the result would be to invalidate the grant of the visas under s 195A(2) which render the plaintiff a lawful non-citizen, even if the Minister is not under any duty to make a decision under s 46A(2).

---

[44] SC 60–61.

[45] *Plaintiff M76* (2013) 88 ALJR 324 at 342 [85] per Hayne J.

64. The plaintiff's submissions based on procedural fairness should be rejected. Procedural fairness did not require that the plaintiff be notified of the intention to grant him a TSH visa and an opportunity to make submissions, either because the exercise of power under s 195A(2) is not conditioned on affording procedural fairness at all or because there was no obligation to afford procedural fairness on the facts of this case. Further or alternatively, any submissions that the plaintiff could have made could not have made a difference as to whether he would be granted such a TSH visa.

(i) The Minister is not under any obligation to afford procedural fairness in exercising the power conferred by s 195A(2)

65. The first critical question is whether, in the exercise of the power under s 195A(2) to grant a TSH visa and a THC visa to the plaintiff, the Minister owed to the plaintiff an obligation to afford procedural fairness. That question should be answered in the negative.

66. In *Plaintiff S10*, precisely the same argument that the plaintiff now advances was made in relation to s 195A(2) and other such "dispensing provisions" in the Act.[46] That argument was rejected by all members of the Court.[47] In particular, after referring to the features of the dispensing provisions, Gummow, Hayne, Crennan and Bell JJ said:[48]

> Upon their proper construction and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness. In particular, there was no requirement to provide to the plaintiff the opportunities to be heard which they assert in their submissions.

67. What was at issue in *Plaintiff S10* was whether the Minister was required to afford procedural fairness in considering whether to exercise power under s 195A(2) or another dispensing provision. However, the matters which compelled a negative answer in that context that were identified by Gummow, Hayne, Crennan and Bell JJ[49] apply equally where, as in this case, the Minister has exercised the power to grant visas.

68. It may be accepted that there is one feature which is different in this case from *Plaintiff S10*. It is that, unlike the plaintiff here, the plaintiffs in *Plaintiff S10* were not unlawful maritime arrivals (or offshore entry persons) and, consequently, had been able to make valid visa applications. However, s 195A applies to any non-citizen who is in detention. There is nothing in the text of s 195A that supports a distinction as to whether procedural fairness is owed depending on whether the particular non-citizen who is detained under s 189 (being a non-citizen who — by definition — has not been able to obtain a visa) had previously been able to make a valid application for a visa.

(ii) No obligation to give notice and an opportunity to make submissions in this case

69. Further or alternatively, even if the power conferred by s 195A(2) is conditioned on compliance with the rules of procedural fairness in some cases, in this case the exercise of that power did not have a consequence that attracted the operation of those rules (assuming, on this branch of the argument, that the plaintiff has not succeeded in

---

[46] (2012) 246 CLR 636 at 656 [56] per Gummow, Hayne, Crennan and Bell JJ.

[47] (2012) 246 CLR 636 at 641 [2], 642 [4], 649 [32], 654 [50] per French CJ and Kiefel J, 668 [100] per Gummow, Hayne, Crennan and Bell JJ, 672 [118] per Heydon J.

[48] (2012) 246 CLR 636 at 668 [100].

[49] (2012) 246 CLR 636 at 667 [99].

establishing that the Minister was required to exercise his power under s 46A(2) to allow the plaintiff to apply for a protection visa).

70. Here, prior to the grant of the TSH visa and THC visa, the plaintiff was in detention. He could not apply for any class of visa without an exercise of power by the Minister pursuant to s 46A(2). The Minister was not required to exercise that power. The Minister could do so, if he chose, upon satisfaction that it was in the public interest. The plaintiff could make such submissions to the Minister as he wished seeking to persuade the Minister to permit him to apply for a protection visa.

71. Following the grant of the TSH visa and THC visa, the plaintiff is free from detention. He cannot apply for any class of visa (other than a TSH visa) without an exercise of power by the Minister pursuant to s 91L. The Minister is not required to exercise that power. The Minister can do so, if he chooses, upon satisfaction that it is in the public interest. Again, the plaintiff can make such submissions to the Minister as he wishes seeking to persuade the Minister to permit him to apply for a protection visa.

72. The plaintiff's position is thus substantively unchanged, save that his position has improved as he has been freed from detention. He has lost no opportunity to make submissions to the Minister that he should be permitted to apply for a protection visa (cf PS [66]). Each of the submissions which he contends he could have made before the grant of the TSH visa (PS [67]–[68]) could still be made. Both before and after the grant of the TSH visa, the circumstances informing the Minister's exercise of power in response to such submissions are identical.

73. In the circumstances, procedural fairness did not require that the plaintiff be given an opportunity to make submissions before the grant of the TSH visa. The grant has not adversely affected the plaintiff's interests in any way. In the absence of an adverse effect, no opportunity to make submissions was required.[50]

(iii) Submissions could have made no difference

74. Finally, even if there were an obligation to afford the plaintiff an opportunity to make submissions to the Minister prior to the grant of the TSH visa, on the facts the Court should conclude that those submissions could not have altered the outcome.[51]

75. The Court should proceed on the basis, agreed in the special case, that had he been given an opportunity to do so the plaintiff would have made a submission to the Minister contending that he should be permitted to apply for a protection visa in preference to being granted a TSH visa (SC [25]). However, the Court should not accept that any of the matters in PS [67]–[68] would have formed part of any submission by the plaintiff to the Minister. It is easy with the benefit of hindsight for a plaintiff to make claims about what they would have done. Such claims must be disregarded in the absence of anything in the special case to support them.

76. In any case, having regard to the facts summarised in paragraph 15 above (and, in particular, to the Minister's public statements summarised in SC [33]), even if such submissions had been made it is clear that the Minister would not have accepted them, for the Minister could not have allowed the plaintiff to apply for a permanent protection visa without departing from a clearly articulated Government policy that had been regularly and forcefully publicly expressed.

---

[50] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Plaintiff S10/2011* (2012) 246 CLR 636 at 666 [97] per Gummow, Hayne, Crennan and Bell JJ.

[51] *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

77. Furthermore, at the time that any submissions could have been made by the plaintiff (being late January or February 2014), those submissions would necessarily have been rejected by the Minister for the additional reason that the Minister could only have accepted those submission had he considered the *Migration Amendment (Unauthorised Maritime Arrivals) Regulations 2013* (Cth) to be invalid. Those regulations were made in late December 2013, and they were not disallowed by the Senate until 27 March 2014. Whether or not those regulations were valid (that being a matter that the Court should not determine in this proceeding), unless the Minister acted on the footing that they were invalid, he would necessarily have considered it futile to allow the plaintiff to apply for a protection visa in place of being granted TSH and THC visas. It is inherently implausible that the Minister would have acted on that footing.

(e) RELIEF

78. For the reasons above, the plaintiff is not entitled to any of the relief claimed in his further proposed statement of claim (**SOC**).

79. If, to the contrary, the plaintiff is successful in relation to any of the matters which he advances, the relief to which he is entitled will depend upon the extent to which he has been successful.

(a) If the plaintiff succeeds in establishing that the grant to him of a TSH visa was invalid, he is entitled to relief in the nature of certiorari quashing that grant (SOC [68(a)]). If the grant of that visa can be severed from the grant of the THC visa, he is entitled to a declaration that his application for a protection visa made on 14 February 2014 was not barred by s 91K and is valid (SOC [68(b)]) and an order in the nature of mandamus commanding the Minister to consider and determine that application in accordance with law (cf SOC [68(c)] — no greater specificity as to timing should be directed).

(b) If the plaintiff succeeds in establishing that the grant to him of a TSH visa was invalid but that invalidity extends to the THC visa, it follows that the plaintiff is an unlawful non-citizen. In that case, *prima facie*, his application for a protection visa made on 14 February 2014 was barred by s 46A(1). In that event:

(i) if the plaintiff establishes that the Minister had a duty to decide whether or not to lift the bar imposed by s 46A(1), but does not establish that the Minister had a duty to lift that bar, then the plaintiff is entitled to an order in the nature of mandamus directing the Minister to decide whether or not to lift that bar (SOC [69(b)(i)]);

(ii) if, alternatively, the plaintiff establishes that the Minister had a duty to lift the bar, then the plaintiff is entitled to an order in the nature of mandamus directed the Minister to so exercise his power under s 46A(2) (SOC [69(a)]).

(c) Whether the plaintiff is entitled to a declaration that the grant to him of a TSH visa involved a failure to observe the requirements of procedural fairness (SOC [69(c)]) will depend on whether that is established by the plaintiff. The consequence of such a declaration for the THC visa would depend on the resolution of the severance issue.

(f) ORDERS

80. The questions in the special case (SC [34]) should be answered as follows:

(1) Was the grant of the TSH visa to the plaintiff invalid? No.

(2) If the answer to question 1 is "yes", was the grant of the THC visa to the plaintiff invalid? Unnecessary to answer. If necessary to answer, "yes".

(3) If the answer to question 2 is "yes", is the Minister bound to determine that s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa? Unnecessary to answer. If necessary to answer, "no".

(4) If the answer to question 3 is "no", is the Minister bound to determine whether s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa? Unnecessary to answer. If necessary to answer, "no".

(5) What, if any, relief sought in the plaintiff's further proposed statement of claim filed 8 April 2014 should be granted to the plaintiff? None.

(6) Who should pay the costs of the proceeding? The plaintiff.

PART VII: ORAL ARGUMENT

81. The defendants estimate that presentation of their oral argument will require approximately 1.5 to 2 hours.

Dated: 1 July 2014

Stephen Donaghue
Tel: (03) 9225 7919
Fax: (03) 9225 6058
s.donaghue@vicbar.com.au

Perry Herzfeld
Tel: (02) 8231 5057
Fax: (02) 9232 7626
pherzfeld@wentworthchambers.com.au

ANNEXURE
Additional relevant legislative provisions

Migration Act 1958 (Cth) as at 13 December 2011

5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

excised offshore place means any of the following:

(a) the Territory of Christmas Island;

...

excision time, for an excised offshore place, means:

(a) for the Territory of Christmas Island—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

...

offshore entry person means a person who:

(a) entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

...

Migration Act 1958 (Cth) as at 4 February 2014

5 Interpretation

(1) In this Act, unless the contrary intention appears:

...

excised offshore place means any of the following:

(a) the Territory of Christmas Island;

...

excision time, for an excised offshore place, means:

(a) for the Territory of Christmas Island—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

...

unauthorised maritime arrival has the meaning given by section 5AA.

...

5AA Meaning of unauthorised maritime arrival

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person entered Australia by sea if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an excluded maritime arrival if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

ship has the meaning given by section 245A.

...

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally.

Tabling of information relating to the granting of visas

(6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

(a) states that the Minister has granted a visa under this section; and

(b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

(7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

(a) the name of the person to whom the visa is granted; or

(b) any information that may identify the person to whom the visa is granted; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.

(8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

Acts Interpretation Act 1901 (Cth) as at 14 February 2014

46 Construction of instruments

(1) If a provision confers on an authority the power to make an instrument that is neither a legislative instrument for the purposes of the *Legislative Instruments Act 2003* nor a rule of court, then:

(a) this Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act; and

(b) expressions used in any instrument so made have the same meaning as in the enabling legislation as in force from time to time; and

(c) any instrument so made is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power of the authority.

(2) If any instrument so made would, but for this subsection, be construed as being in excess of the authority's power, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power.

Note: This provision has a parallel, in relation to legislative instruments, in section 13 of the *Legislative Instruments Act 2003*.