IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S4/2014

B E T W E E N:

PLAINTIFF S4/2014

Plaintiff

and

10

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First defendant

THE COMMONWEALTH OF AUSTRALIA

Second defendant

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PLAINTIFF'S ANNOTATED WRITTEN SUBMISSIONS

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I. CERTIFICATION

1. The plaintiff certifies that these submissions are suitable for publication on the internet.

II. ISSUES PRESENTED

2. The plaintiff was born in Myanmar and is Stateless. In April 2012, he was found to face systemic persecution in Myanmar involving forced labour, sexual violence and confiscation of property for reasons of his Rohingya ethnicity and Muslim beliefs.

3. The plaintiff is an offshore entry person and an unauthorised maritime arrival. Upon his arrival in Australia on 13 December 2011, the plaintiff was taken into immigration detention, and a process was undertaken to assess his refugee status with a view to permitting the plaintiff to apply for a protection visa should he be found to be a refugee. Although the plaintiff was detained for several years while that process was undertaken, and was found to be a refugee, on 4 February 2014 the first defendant (**Minister**) stopped the process and did not permit the plaintiff to apply for a protection visa. Instead, temporary visas were granted.

4. The issue at the heart of this proceeding is whether the legal questions to be answered and the legal principles to be applied during the process of assessing the refugee status of a person detained for that purpose are in the discretion of the Minister. It raises the "more fundamental questions" adverted to by Hayne J in *Plaintiff M76* at [86].

5. The special case states six questions of law for the opinion of the Full Court, which the plaintiff submits should be answered as follows:

   (1) Was the grant of the temporary safe haven visa to the plaintiff invalid? **Yes.**

   (2) If the answer to question 1 is "yes", was the grant of the temporary humanitarian concern visa to the plaintiff invalid? **No.**

   (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? **Does not arise; alternatively, yes.**

   (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? **Does not arise; alternatively, yes.**

   (5) What, if any, relief should be granted to the plaintiff? **The plaintiff is entitled to the relief sought at [68]-[71] of the further proposed statement of claim filed 8 April 2014.**

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

III. SECTION 78B NOTICES

6. The plaintiff considers that there is no need for notices to be given under s 78B of the *Judiciary Act 1903* (Cth).

IV. MATERIAL FACTS AND BACKGROUND

7. The plaintiff is a Stateless person who was born in Myanmar. (**SC [4]**) He arrived in Australia on 13 December 2011 as an offshore entry person. (**SC [6]**)

8. Upon the plaintiff's arrival, he was taken into immigration detention, and completed the applicable health checks.[1] (**SC [8]**) On the following day, he made a claim for protection. (**SC [15]**) On 28 February 2012, while in detention, the plaintiff prepared and lodged a request for a Protection Obligations Determination (**POD**). (**SC [16]**)

9. The establishment of the POD process had been announced on 7 January 2011 by the then Minister in response to the decision of this Court in the *Offshore Processing Case*. (**SC [10]**) The then Minister decided to consider the possible exercise of power under s 46A in respect of all offshore entry persons who entered Australia on or after 1 March 2011, including the plaintiff. (**SC [12]**)

10. While the plaintiff remained in detention, the POD process was undertaken for the purpose of informing the possible exercise by the Minister responsible for the administration of the Migration Act of power under s 46A of the Migration Act. (**SC [13]**)

11. On 13 April 2012, the departmental officer who conducted the plaintiff's Protection Obligations Evaluation (**POE**) was satisfied that the plaintiff is a person to whom Australia owes protection obligations, and the plaintiff was notified of that outcome. (**SC [17]-[18]**)

12. On 18 April 2012, the Department referred the plaintiff's case to ASIO for security assessment. (**SC [19]**) The plaintiff remained in detention.

13. On 6 January 2014, the plaintiff commenced this proceeding.

14. On 21 January 2014, the Department received advice that a "non-prejudicial (clear) security assessment" had been furnished and that the security assessment process was finalised with respect to the plaintiff. (**SC [20]**)

15. On 4 February 2014, while the plaintiff was in detention, and without giving notice to the plaintiff, (**SC [24]**) the Minister exercised power under s 195A(2) of the Migration Act to grant a Temporary Safe Haven (Class UJ subclass 449) visa (**temporary safe haven visa**) and a Temporary (Humanitarian Concern) (Class UO subclass 786) visa (**THC visa**) to the plaintiff. (**SC [22]-[23]**)

16. Although the temporary safe haven visa only remained in force for seven days, the grant of that visa was sufficient to enliven the bar imposed by s 91K of the Migration Act. The plaintiff challenges the validity of that exercise of power. The plaintiff also seeks consequential relief in the form of mandamus or a mandatory injunction requiring the Minister to exercise power under s 46A(2).

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1 SC at 215.16, 197 [2].

V. ARGUMENT

A THE MINISTER WAS BOUND TO MAKE A DECISION UNDER SECTION 46A(2)

1. The Minister made a decision to consider whether to lift the bar to permit the plaintiff to make a valid application for a protection visa

17. In 2008, the then Minister established and implemented the Refugee Status Assessment (**RSA**) and Independent Merits Review (**IMR**) processes detailed in the *Offshore Processing Case*.[2] (**SC [9]**) This Court held that, by detaining offshore entry persons while those processes were conducted, the then Minister had decided to consider exercising power under either s 46A or s 195A of the Migration Act in every case where an offshore entry person claimed to be a person to whom Australia owes protection obligations.[3]

(a) The announcement of the POD process

18. On 7 January 2011, the then Minister announced the Government's response to the *Offshore Processing Case*, which involved the Minister establishing and implementing the Protection Obligations Determination (**POD**) process with effect from 1 March 2011.[4] Like the RSA and IMR processes which it replaced, the implementation of the POD process involved the detention of offshore entry persons while that process was conducted.

19. The special case indicates that by no later than 1 March 2011, the then Minister had decided to consider the possible exercise of power under s 46A of the Migration Act in respect of, amongst other persons, all offshore entry persons who entered Australia on or after 1 March 2011. (**SC [12]**) The plaintiff arrived on 13 December 2011. (**SC [6]**)

20. Between 2012 and 2014, the POD process was undertaken in respect of the plaintiff for the purpose of informing the possible exercise by the Minister responsible for the administration of the Migration Act of power under s 46A. (**SC [13]**)

(b) The POD process was directed to protection visas

21. The POD process was undertaken for the purpose of informing the possible exercise by the Minister responsible for the administration of the Migration Act of power under s 46A of that Act. (**SC [13]**) The exercise of power under s 46A on the footing that Australia owed protection obligations to the plaintiff "would be pointless" unless that determination was made "according to the criteria and principles identified in the Migration Act".[5] That explains why in respect of the RSA process the Minister had "committed himself to a process which foreshadows the process to be followed and the criteria to be applied in determining an application for a protection visa".[6]

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2 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319. (***Offshore Processing***)

3 *Offshore Processing* at [9], [66]; *Plaintiff M76* at [28](vii)-(viii) (French CJ), [53]-[55] (Hayne J), [215] (Kiefel and Keane JJ with whom Crennan, Bell and Gageler JJ agreed at [134]).

4 SC at 7.11-32, 16.10-35, 18, 19.

5 *Offshore Processing* at [88].

6 *Plaintiff M76* at [26] (French CJ).

22. The same commitment was made in respect of the POD process. That is to be inferred from two circumstances:

    a. First, in announcing the establishment of the POD process, the then Minister expressly stated as much.

    b. Secondly, the POD process was conducted in accordance with the "Protection Obligations Evaluation Manual" (**POE manual**). (**SC [14]**) The terms of that manual reveal that the process was directed to the criteria and principles then pertaining to protection visas, with a view to applications being made for protection visas. In that respect, the POD process was substantially the same as the RSA and IMR processes.

23. In announcing the establishment of the POD process, the then Minister stated: "Where a DIAC officer is able to conclude that protection is owed, *a recommendation will be made to me or successive Ministers to enable a protection application to be lodged.*"[7] The media release published with the announcement confirmed that "irregular maritime arrivals whom a departmental officer concludes clearly meets the criteria for protection under the Refugees Convention *will be considered for the grant of a protection visa*".[8] The flowchart attached to the media release labelled the outcome: "*Permanent visa*".[9]

24. The POE manual was expressed in similar terms. It referred to the *Offshore Processing Case*, noting that this Court had stated that "the 'fundamental question' to which the refugee assessment and review processes are directed, is 'whether the criterion stated in s 36(2), *as a criterion for grant of a protection visa*, was met."[10] The POE manual thereby adopted the same "fundamental question" to which the RSA and IMR processes had been directed. Other parts of the POE manual observed that this Court had determined that "certain provisions in the Migration Act apply to the RSA" process and that "as a consequence" those provisions also applied to the POD process.[11]

25. In a section addressing the interpretation of the Refugees Convention, the POE manual stated: "Australia meets its obligations under the Refugees Convention through the provision, under the Migration Act and Migration Regulations, *of Protection visas* to those who satisfy the relevant criteria set out in the Australian law."[12]

26. The plaintiff signed and returned a client information sheet about the POD process.[13] His POD request also included a departmental information sheet which emphasised that by reason of s 46A(1) the request "is not an application for a Protection visa (PV)", but stated that the Minister "may allow you to lodge *a PV application* if a POD officer finds that you meet all requirements for grant of a PV and are a person to whom Australia has protection obligations".[14] He also gave permission to the department "to disclose any personal information supplied by me in relation to *my application for refugee status/a*

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7 SC at 7.16-18.

8 SC at 16.24-28.

9 SC at 19.5.

10 SC at 24.5.

11 SC at 33.23.

12 SC at 26.5.

13 SC at 129-132.

14 SC at 136.8.

protection visa (PV) in Australia" to certain authorities for the purpose of making certain inquiries, and consented to any information received from those authorities being used "in the decision on my refugee/*PV application*".[15]

27. The POE officer who assessed the plaintiff regarded "the fundamental question to which this assessment process is directed" as being "whether the criteria in the Migration Act *for the grant of a Protection visa* are met", referring to the criteria then stated in s 36(2).[16] The notification letter stated that the plaintiff's case may be referred to the Minister "so he can decide whether to allow you to apply *for a Protection (Class XA) visa*".[17]

28. Upon a positive POE outcome and health and character checks, a submission will "ordinarily" be provided to the Minister for consideration under s 46A(2) of whether "to allow a Protection (or other) visa application to be made".[18] If the Minister lifts the bar, "the letter at Annex 7 must be provided to the claimant", who "will then be invited to lodge *a Protection visa application* using Form 866", to be "assessed with reference to the claims made during the POE stage", followed "ordinarily" by the grant of a protection visa.[19] The consequences of a positive IPA outcome were similar.[20]

29. The letter at "Annex 7" was headed "S46A(2) BAR LIFTED LETTER".[21] It attached a notification letter which stated that the Minister "has now exercised his power under section 46A(2) of the Act *to allow you to lodge a Protection visa application*", and "[y]our migration agent has been asked to prepare your *Protection visa application*".[22]

30. In the event of a negative POE outcome and negative IPA outcome, neither of which apply to this case, consideration was to be given to whether there were circumstances that might warrant the exercise of power under s 195A, such as satisfaction of what was later to be enacted as the complementary protection criterion in s 36(2)(aa).[23]

31. In summary, the position may be stated as follows. The POD process replaced the RSA and IMR processes which shadowed the then criterion for a protection visa in s 36(2). In establishing the POD process, the Minister indicated that offshore entry persons found to be refugees would be permitted to apply for protection visas, being permanent visas. The POE manual also channelled claimants towards the making of protection visa applications. In implementing the POD process, the POE officers acted upon those indications, and assessed claimants against s 36(2) as it then stood. From beginning to end the POD process was directed to whether the bar should be lifted to permit the plaintiff to apply for a protection visa, having regard to the criterion then stated in s 36(2) of the Migration Act.

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15 SC at 174.10-12.

16 SC at 181.18-36.

17 SC at 190.20.

18 SC at 58.45.

19 SC at 59.1-5.

20 SC at 59.48, 60.1-10.

21 SC at 108.3.

22 SC at 109.13.

23 SC at 60.30-40, 61.1-10. The complementary protection amendments commenced on 24 March 2012: *Migration Amendment (Complementary Protection) Act 2011* (Cth).

32. The POE manual made no provision for an offshore entry person to make an application for any visa other than a protection visa, or for the evaluation of claimants against the criteria for other visas. It should be inferred that the POE manual sought to give effect to the POD process announced by the then Minister on 7 January 2011: that persons such as the plaintiff who meet the criteria for protection under the Refugees Convention "*will be considered for the grant of a protection visa*".[24]

(c) That the power is personal does not alter the character of the decision

33. The condition imposed by s 46A(3) that "power under subsection (2) may only be exercised by the Minister personally" reflects the general proposition that a statutory power may only be exercised by the person upon whom it is conferred unless the statute authorises the delegation of the power or the exercise of the power by an agent.[25] Section 46A(3) provides for an exception to the authority to delegate given by s 496(1) of the Migration Act,[26] and excludes the possibility of acting through an agent.[27]

34. There is no significance to a change in the identity of the person who from time to time holds or occupies the office of "the Minister" or performs its duties. The expression "the Minister" refers to any of the Ministers for the time being administering the provision in respect of the relevant matter.[28] Between the ministerial announcement of the establishment of the RSA and IMR processes in July 2008 and the delivery of judgment in the *Offshore Processing Case* in November 2010, the office of "the Minister" was held and its duties performed by different people at different times spanning a federal election and two governments led by different Prime Ministers.[29] At least three people have held the office of "the Minister" or performed its duties since that judgment was delivered.[30]

35. The current Minister has also proceeded on that basis. A departmental submission to the current Minister dated 4 February 2014 sought clarification in relation to a statement made by the current Minister on 4 December 2013 about his intention not to exercise power under s 46A in respect of a certain class of unauthorised maritime arrivals. The submission stated that "High Court cases suggest that the courts would find that you have already commenced considering exercising your power under s 46A with respect to UMAs in the POE cohort", including the plaintiff, and that "it is probably now too

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24 SC at 16.24-28.

25 *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460 at 481 (Gibbs J with whom Stephen, Mason and Wilson JJ agreed at 484).

26 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [176] (Gummow and Hayne JJ).

27 *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11-12 (Gibbs CJ with whom Murphy J agreed at 27), 19-20 (Mason J), 30-31 (Wilson J), citing *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563 (Lord Greene MR).

28 *Acts Interpretation Act 1901* (Cth), s 19A; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [182] (Gummow and Hayne JJ). The Minister may but need not be a member of the Parliament: *Egan v Willis* (1998) 195 CLR 424 at [45] (Gaudron, Gummow and Hayne JJ), although the period of office in those circumstances is limited to three months: *Constitution*, s 64.

29 The Hon Chris Evans (3 December 2007 to 24 June 2010 under Prime Minister Rudd; 24 June 2010 to 14 September 2010 under Prime Minister Gillard); The Hon Chris Bowen (14 September 2010 to 4 February 2013 under Prime Minister Gillard).

30 The Hon Brendan O'Connor (4 February 2013 to 27 June 2013 under Prime Minister Gillard; 27 June 2013 to 1 July 2013 under Prime Minister Rudd); The Hon Tony Burke (1 July 2013 to 18 September 2013 under Prime Minister Rudd); The Hon Scott Morrison (18 September 2013 to present).

late to decide not to consider the exercise of your power" under s 46A with respect to those persons.[31] Consistently with the plaintiff's legal analysis in this case, the submission then stated: "The question is whether you will decide to exercise that power to permit a valid visa application to be made."[32]

36. In commenting on that submission, the current Minister explained that the reference to the bar imposed by s 46A in his announcement of 4 December 2013 was "in relation to post August [20]12 arrival cohort for whom processing has not commenced",[33] implicitly accepting that no decision had yet been made in respect of the plaintiff's cohort, and that such decisions could now be made for that cohort as per departmental recommendation 3(b) with which the Minister indicated his agreement.[34] For the cohort for whom processing had not commenced, detention had not been prolonged in the manner described in the *Offshore Processing Case*.

2. The Minister must decide whether to lift the bar to permit the plaintiff to make a valid application for a protection visa

(a) The Minister must make a decision whether to lift the bar

37. Exercise of the power given by s 46A is constituted by two distinct steps:

a. first, the decision whether to consider exercising the power to lift the bar; and

b. secondly, the decision whether to lift the bar.[35]

38. Although s 46A(7) expressly provides that the Minister does not have a duty to take the first step, the Migration Act does not expressly make provision for whether the Minister, having taken the first step, must also take the second step.

39. This Court has accepted that, where a non-citizen is detained for the purpose of steps being taken by the Minister under s 46A, those steps must be taken "promptly",[36] "reasonably promptly",[37] "within a reasonable time"[38] or within "such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to" the purposes of considering and granting permission to remain in Australia or removal if permission is not granted.[39] Those conclusions have textual and contextual foundations in the expression "as soon as reasonably practicable" in s 198(2) and in the requirement that the non-citizen must be detained under ss 189 and 196.

40. Necessarily implicit in those conclusion are two propositions: first, that steps must be taken towards the end of the process, and second, that the end of the process must be reached. That is sufficient to demonstrate that the Minister has a duty to bring the

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31 SC at 193 [4].

32 SC at 193 [4].

33 SC at 192.10. It may also be noted that the Minister clarified the class of persons who were the subject of his 4 December 2013 announcement after the plaintiff commenced this proceeding seeking to challenge what was then perceived to be a ministerial decision that the bar would never be lifted for the plaintiff.

34 SC at 191 [3(b)]. The plaintiff was in the POE cohort, in detention, and "grant ready".

35 *Offshore Processing* at [70].

36 *Offshore Processing* at [35].

37 *Plaintiff M76* at [28](v), [30] (French CJ).

38 *Plaintiff M76* at [93], [100] (Hayne J),

39 *Plaintiff M76* at [140] (Crennan, Bell and Gageler JJ).

process to an end. The question then is whether the Minister can end the process other than by making a decision whether to lift the bar. If the Minister need not make a decision whether to lift the bar, the Minister can end the process at any time.

41. In *Plaintiff M76*, French CJ and Hayne J expressly rejected the proposition that the Minister "could terminate the process of consideration at any time".[40]

42. The Chief Justice held: "Once the Minister has decided to consider whether or not to exercise his power under s 46A(2), he must decide to exercise it or not to exercise it."[41] Justice Hayne held that "having decided to determine whether or not to lift the bar, the Minister should be held to be bound to make that decision and to do so within a reasonable time."[42] Justices Kiefel and Keane observed, in terms with which Crennan, Bell and Gageler JJ agreed, that s 46A(7) "is beside the point" once "a decision had been made to consider" the exercise of power.[43]

43. Context is also important: "there would be detention at the unconstrained discretion of the Executive if the Commonwealth parties were right to submit that the Minister could decide, at any time, to refuse to conclude, or to stop, consideration of whether to lift the bar".[44] Once the Minister has decided to consider whether to exercise the power, "neither s 46A(7) nor any other provision of the Act" permits or requires the conclusion that "the Minister may, at will, decline to make any decision under s 46A(2) even though the subject of consideration has been detained" for the purpose of inquiries relevant to the exercise of that power.[45] That construction should not be adopted.[46]

44. It follows that the Minister is bound to decide whether to lift the bar.

(b) Constraints on the decision-making process under s 46A

45. If the Minister has a duty to decide whether to lift the bar, a question then arises as to the manner in which that duty is to be performed. Recognised constraints on the decision-making process under s 46A circumscribe the manner of performance of that duty and show that, in this case, the duty may be performed in only one way.

46. The power conferred by s 46A is conditioned on the observance of the principles of natural justice.[47] The decision whether to lift the bar "must address the relevant legal question or questions", "must be procedurally fair" to the detainee in respect of whom the decision is made, and "must proceed by reference to correct legal principles, correctly applied".[48]

47. The "relevant legal question or questions", and the "correct legal principles" to be "correctly applied", were not at large: they were set by the Minister at the start of the process. It was a statutory process. The relevant legal questions and principles were set

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40 *Plaintiff M76* at [24] (French CJ), [90]-[91] (Hayne J).

41 *Plaintiff M76* at [24] (French CJ).

42 *Plaintiff M76* at [93] (Hayne J).

43 *Plaintiff M76* at [134] (Crennan, Bell and Gageler JJ), [229] (Kiefel and Keane JJ).

44 *Plaintiff M76* at [93] (Hayne J), citing *Offshore Processing* at [64].

45 *Plaintiff M76* at [94] (Hayne J).

46 *Offshore Processing* at [64].

47 *Offshore Processing* at [78].

48 *Offshore Processing* at [78].

by "the fundamental question to which the assessment and review processes were directed", which "had to be understood as whether the criterion stated in s 36(2), as a criterion for grant of a protection visa, was met."[49] That was "the question that the Minister had to consider when deciding whether to lift the bar under s 46A",[50] because answering that question was the purpose for which detention had been prolonged.

48. For the reasons which follow, although the statute gave an initial discretion to the Minister as to the legal questions to be answered and the legal principles to be applied during the statutory process, it did not give the Minister a discretion to modify those questions or principles in circumstances where the subject of consideration has been detained for the purposes of the original legal questions being answered and the original legal principles being applied.

49. The legal questions to be answered and the legal principles to be applied during the statutory process determine in large measure the bounds of the jurisdiction conferred by the statute, in particular, the scope of the authority to prolong detention. If the questions to be answered and principles to be applied were always in the discretion of the Minister, and could be enlarged or modified at any time, it would be impossible for a court to determine and enforce the limits of the Minister's authority to prolong detention.

50. As Hayne J observed in *Plaintiff M76*, it is "essential" that the lawful boundaries for detention "be fixed at its outset", because "only if that is done can the lawfulness of detention be adjudged and enforced by a court, including this Court in exercise of its jurisdiction under s 75(v) of the Constitution, at any time during its continuance".[51] The determination and enforcement of such limits is of the essence of the "entrenched minimum provision of judicial review" effected by s 75(v).[52] The Act should not be read as authorising detention of an offshore entry person "for whatever number of successive periods of detention would be necessary for the Minister to obtain information and advice about a series of disconnected inquiries said to relate to questions of public interest governing the exercise of the power under s 46A(2)".[53]

51. As recognised by Crennan, Bell and Gageler JJ, existing authority of this Court requires the conclusion that a law cannot validly authorise the detention in custody by the executive of non-citizens unless "[t]he temporal limits and the limited purposes [of detention] are connected such that the power to detain is not unconstrained."[54] Where the purpose and duration of the prolongation of detention are fixed by the Minister at

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49 *Offshore Processing* at [89]. SC at 24.5.

50 *Offshore Processing* at [89].

51 *Plaintiff M76* at [99] (Hayne J).

52 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), citing *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

53 *Plaintiff M76* at [103] (Hayne J).

54 *Plaintiff M76* at [139] (Crennan, Bell and Gageler JJ), citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ with whom Mason CJ agreed).

the outset of the process,[55] the lawful boundaries of the prolongation of detention are ascertainable and enforceable. Such is the case with ss 46A and 198(2).

52. It is for those reasons that the administrative decision to prolong detention for the purpose of deciding whether to lift the bar, "once made, could not be undone",[56] and "limited the purpose of detention by identifying at its outset only one consideration which the Minister would take into account in exercising power under s 46A(2)".[57] The legal questions to be answered and the legal principles to be applied during the statutory process, once set by the Minister, were no longer in the discretion of the Minister.

53. This Court stated in the *Offshore Processing Case*: "The repository of the power given by s 46A does not determine the limits of the power. If the power is exercised, s 75(v) can be engaged to enforce those limits."[58] It follows that a construction of s 46A that allows the Minister to determine the limits of that power or of the authority to prolong detention has already been rejected by this Court, and should be rejected in this case.

(c) Exercise of power under s 195A may involve decision under s 46A

54. This Court has considered the possibility that power may be exercised under s 195A to grant a visa to an offshore entry person who has been detained for the purpose of assessment and review processes in consideration of the exercise of power under s 46A.[59] Like the exercise of power under s 46A, exercise of the power given by s 195A is also constituted by "two distinct steps": first, "the decision to *consider* exercising the power to … grant a visa" and secondly, "the decision whether to … grant a visa".[60] In this case, both steps occurred on 4 February 2014.[61]

55. The relationship between ss 46A and 195A was described by Hayne J in *Plaintiff M76* at [85]:

> *Section 46A(2) did not provide for, or permit, the establishment of a system for the* grant *of visas to offshore entry persons. The power under s 46A(2) concerned only the making of a valid* application *for a visa. Section 195A(2) of the Act gave the Minister discretionary power to grant a visa to any person in detention under s 189, including an offshore entry person. The fields of operation of ss 46A and 195A were distinct. There is no basis for reading them as overlapping in any way.* (Original emphasis.)

56. Although the fields of operation of ss 46A and 195A are distinct, the exercise of power under s 195A may reveal a decision whether to lift the bar under s 46A.

57. The source of the authority to prolong detention while the POD process was undertaken was s 198(2).[62] "The express reference in s 198(2)(c) to the possibility of making a valid application for a visa accommodates the consideration of whether to exercise the powers given by ss 46A and 195A."[63] With one exception, the exercise of power under

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55 *Plaintiff M76* at [102] (Hayne J).

56 *Plaintiff M76* at [101] (Hayne J).

57 *Plaintiff M76* at [102] (Hayne J).

58 *Offshore Processing* at [59].

59 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [82] (Gummow, Hayne, Crennan and Bell JJ).

60 *Offshore Processing Case* at [70].

61 SC at 191 [3](b), 200.

62 *Offshore Processing Case* at [23]-[27], [35].

63 *Offshore Processing Case* at [71].

s 195A to grant a visa to an offshore entry person has the consequence that the person may make a valid application for a full range of visas. The exercise of power under s 195A in that way is equivalent to a decision to lift the bar under s 46A: the bar imposed by s 46A(1) no longer applies to the person, because that section does not apply to a lawful non-citizen (s 46A(1)(b)).

58. The exception is the grant of a temporary safe haven visa. The grant of a temporary safe haven visa to an offshore entry person does not have the consequence that the person may make a valid application for that range of visas. Although the bar imposed by s 46A(1) no longer applies to the person, the grant of a temporary safe haven visa causes the person to satisfy the condition in s 91J(a) and enlivens the bar imposed by s 91K. The exercise of power under s 195A to grant a temporary safe haven visa to an offshore entry person therefore cannot be said to be equivalent to a decision to lift the bar under s 46A, either generally or to permit the person to make a valid application for a protection visa.

59. That does not mean that power under s 195A(2) cannot be exercised to grant a temporary safe haven visa to an unauthorised maritime arrival detained for the purpose of the Minister deciding whether to lift the bar under s 46A(2). That may occur where the grant of the temporary safe haven visa is accompanied by or made in consequence of a ministerial decision to consider the exercise of power under s 91L(1) to lift the bar imposed by s 91K. The combination of those steps would not stop the process commenced under s 46A but would continue that process under s 91L for the same purpose, while allowing the person to be released from detention. That is the result which best gives effect to the purpose and language of ss 46A, 195A and 198(2) on the one hand, and ss 37A and 91H to 91L on the other hand, while maintaining the unity of all the statutory provisions.[64]

60. In *Plaintiff M79*, a temporary safe haven visa was selected because the Minister considered it in the public interest that "protection claims that were the subject of RSA and IMR processes begun under and for the purposes of ss 46A and 195A should be continued to completion under and for the purposes of s 91L".[65] The temporary safe haven visa was granted in consequence of a ministerial "decision to consider (through the existing RSA and IMR processes) whether to exercise the power conferred by s 91L in every case in which an offshore entry person released from detention had made claims to protection that were the subject of RSA processes begun before 24 March 2012".[66]

61. In this case, however, the Minister has at no time commenced to consider whether to exercise power under s 91L of the Migration Act in respect of the plaintiff.[67] It follows that the process commenced under s 46A has not been continued under s 91L but has purportedly been stopped.

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64 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

65 *Plaintiff M79* at [133]-[135] (Gageler J). See also at [13], [41] (French CJ, Crennan and Bell JJ).

66 *Plaintiff M79* at [134] (Gageler J).

67 SC at [28].

B THE EXERCISE OF POWER UNDER SECTION 195A WAS INVALID

1. The decision was inconsistent with the Minister's duty to decide

62. By reason of the foregoing submissions, having prolonged the detention of the plaintiff while the POD process was undertaken, the only lawful decisions available to the Minister under s 46A(2) in respect of the plaintiff were:

a. a decision to exercise power under s 46A(2) by determining that s 46A(1) does not apply to an application by the plaintiff for a protection visa; or

b. a decision to permit the plaintiff to make a valid application for a protection visa by exercising power under s 195A(2) to grant a visa or visas to the plaintiff not including a temporary safe haven visa; or

c. as occurred in *Plaintiff M79*, if there remained steps to be completed by the Minister in considering whether to exercise power under s 46A(2), a decision to stop considering the exercise of power under s 46A(2), accompanied by:

i. an exercise of power under s 195A(2) to grant a temporary safe haven visa to the plaintiff, such that he would no longer be subject to the bar imposed by s 46A(1) but would be subject to the bar imposed by s 91K; and

ii. a decision to consider the exercise of power under s 91L(1) in respect of the plaintiff on the same basis as the Minister had decided to consider the exercise of power under s 46A(2).

63. The grant of a temporary safe haven visa to the plaintiff in the manner described in the special case was not done in accordance with those constraints and was not lawful.

64. Although the grant of the temporary safe haven visa was not a lawful exercise of power, there were no constraints on the grant of the THC visa alone and the grant of that visa was therefore within power.[68]

2. The decision involved a denial of procedural fairness

65. The conferral of the powers given by ss 46A and 195A is conditioned on the observance of the principles of natural justice.[69] The Minister's decision to grant a temporary safe haven visa to the plaintiff directly affected the rights and interests of the plaintiff. The plaintiff is now barred from applying for a protection visa by s 91K, and no longer has the benefit of a ministerial decision to consider whether to lift the bar, or the possibility of a favourable exercise of power under s 195A.

66. The department had expressly recommended to the Minister that any decision to grant a temporary safe haven visa be "subject to your consideration of appropriate submissions on a case by case basis".[70] Had the plaintiff been given notice of the Minister's intention to grant a temporary safe haven visa to him, the plaintiff would have made a submission to the Minister contending that he should be permitted to apply for a protection visa instead. **(SC [25])**

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68 *Acts Interpretation Act 1901* (Cth), s 46(2); *Migration Act 1958* (Cth), s 67; SC at 200; *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284 at 299-300 (French J).

69 *Offshore Processing* at [78].

70 SC at 191 [3](b).

67. That submission could have been elaborated in a number of ways. First, the plaintiff could have requested that the Minister grant any visa other than a temporary safe haven visa, which would have permitted the plaintiff to apply for a protection visa.[71] Secondly, the plaintiff could have drawn to the Minister's attention the judgments of members of this Court in which it has been held that the Minister must decide whether to lift the bar. Thirdly, and perhaps most obviously, the plaintiff could have requested that the Minister exercise power under s 46A(2) to permit the plaintiff to apply for a protection visa, consistently with the basis upon which the plaintiff had been detained.

68. Additionally, the opportunity to make such a submission may have enabled the plaintiff to draw to the Minister's attention the following three matters of significance:

a. The plaintiff had been in immigration detention for 784 days. (**SC [8]**)

b. It was inappropriate for the plaintiff to be given only "temporary" safe haven in circumstances where the plaintiff was and would remain Stateless. (**SC [4]**) The decision instrument signed by the Minister erroneously stated that the plaintiff was a national of Myanmar.[72]

c. Unless the Minister permitted the plaintiff to apply for a protection visa and/or granted that visa, the plaintiff could remain indefinitely separated from his widowed mother and four siblings.[73]

69. To the extent that the grant of the temporary safe haven visa involved a denial of procedural fairness, the grant of that visa involved jurisdictional error. There was no practical injustice to the plaintiff in the grant of the THC visa, and as submitted at [64] above there were no other relevant constraints on the grant of that visa, with the result that the grant of that visa was within power.

3. The UMA Regulation was immaterial or invalid

70. The Minister could not rely on the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (**UMA Regulation**) as a reason for not lifting the bar. That was not an issue that the Minister had identified as being relevant to the public interest at the time the POD process was undertaken. Indeed, the UMA Regulation was not even made until after the plaintiff had been found to be a refugee and the process had almost completed. Valid statutory criteria for the grant of a visa other than those identified by the Minister at the outset of the POD process were left to be determined in the course of deciding whether a visa must be granted.[74]

71. Lifting the bar could not have been said with any certainty to be futile, because the UMA Regulation was subject to a disallowance motion in the Senate and was being challenged in this Court (including by the plaintiff in this proceeding[75]). The TPV Regulation had previously been disallowed on 2 December 2013. The UMA Regulation was ultimately disallowed by the Senate on 27 March 2014, which was well within the

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71 Section 46A(1) would no longer apply to the plaintiff in those circumstances.

72 SC at 200.10.

73 SC at 169, 217-218.

74 *Plaintiff M76* at [29] (French CJ), [86], [108] (Hayne J). Cf [230] (Kiefel and Keane JJ with whom Crennan, Bell and Gageler JJ agreed at [134]).

75 See the fourth prayer for relief in the plaintiff's application for orders to show cause filed 6 January 2014.

period of 90 days that would have been allowed to the Minister under s 65A to consider and determine a valid application for a protection visa made by the plaintiff.

72. In any event, for two reasons, the UMA Regulation was invalid.

73. First, the UMA Regulation being "the same in substance" as the TPV Regulation, it was made in contravention of s 48 of the *Legislative Instruments Act 2003* (Cth). The denial of protection visas to unauthorised maritime arrivals was a substantial object of both regulations, and the provision made for temporary visas does not alter that conclusion.[76]

74. Secondly, the prescription of criteria disentitling unauthorised maritime arrivals to protection visas by reason of the circumstances in which they arrived altered, impaired and detracted from the scheme of ss 46A and 36, that scheme being that circumstances of arrival would be able to be considered by the Minister under s 46A in deciding whether to permit an unauthorised maritime arrival to apply for a protection visa, and could not be a basis for refusing the application once it had been permitted to be made.[77]

C THE APPROPRIATE RELIEF

1. No authority forecloses the relief sought

75. In the *Offshore Processing Case*, this Court held that "mandamus will not issue to compel the Minister to consider or reconsider" exercising power under s 46A.[78] The issue in that case was whether the Minister could be required, by mandamus, "to make fresh inquiries about matters which had been examined imperfectly".[79]

76. The plaintiff in this case does not seek "fresh inquiries" or reconsideration. The outcome of the POD process was that the plaintiff "meets the definition of refugee within the meaning of the Refugees Convention and relevant provisions of the Migration Act, and is someone to whom Australia has protection obligations".[80] The plaintiff also satisfied any applicable health, character and security requirements.[81]

77. The plaintiff was detained while the POD process was undertaken to determine whether he should be permitted to apply for a protection visa. Although it may be inapt to describe the plaintiff as having a "right" to a particular outcome under s 46A(2)[82] given that the purpose of s 46A(1) is to deny a right to make a valid application for a visa, "[n]onetheless", "it follows from the consequence upon the claimant's liberty" that the process of considering and exercising power under s 46A(2) is not at large or unconstrained by legal requirements.[83] A decision must be made in accordance with the constraints referred to earlier in these submissions.

78. It was also not necessary in the *Offshore Processing Case* for the Court to examine whether submissions then made by the Commonwealth parties "might permit or require

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76 *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 347 at 361, 364, 369 (Latham CJ).

77 *Offshore Processing* at [27]; *NAGV* at [40], [54]-[59].

78 *Offshore Processing* at [99].

79 *Plaintiff M76* at [111] (Hayne J).

80 SC at 188.40.

81 SC at 197 [2].

82 *Offshore Processing* at [77].

83 *Offshore Processing* at [77].

modification to accommodate cases … where the right that is affected by conducting the impugned process of decision making is a right to liberty".[84] Those submissions do require modification to accommodate cases such as the present.

2. The plaintiff is entitled to mandamus or a mandatory injunction

79. In *Commissioner of State Revenue v Royal Insurance Australia Ltd*, Mason CJ referred to the principle that mandamus requires the exercise of a statutory discretion rather than its exercise in a particular way, and observed:[85]

> *However, if the administrator is required by the statute to act in a particular way and in particular circumstances, or if the exercise of a statutory discretion according to law in fact requires the administrator to decide in a particular way, so that in neither case does the administrator in fact have any discretion to exercise, then mandamus will also issue to command the administrator to act accordingly.*

80. To like effect, Brennan J stated, in terms with which Toohey and McHugh JJ agreed:[86]

> *When the power exists and the circumstances call for the fulfilment of a purpose for which the power is conferred, but the repository of the power declines to exercise the power, mandamus is the appropriate remedy even though the repository has an unfettered discretion in other circumstances to exercise or to refrain from exercising the power.*

81. As previously submitted, upon the proper construction of the relevant provisions of the Migration Act, the Minister is required to act in a particular way in the particular circumstances presented by the combination of the Minister's decision to consider exercising power on an identified basis and the plaintiff's satisfaction of that basis: namely, by permitting the plaintiff to make a valid application for a protection visa. The circumstance that the plaintiff was detained for that purpose calls for its fulfilment.

82. Should there be no statutory duty to exercise power under s 46A(2) enforceable by mandamus, the availability to the Minister of only one lawful course of action nevertheless provides a proper basis for a mandatory injunction.[87]

3. Alternatively, the plaintiff is entitled to declaratory relief

83. In *Plaintiff M76*, Hayne J would have made a declaration that the Minister "was and is bound to determine whether s 46A(1) of the Act does not apply to an application by the plaintiff for a protection visa".[88] The plaintiff in that case made no claim for mandamus; did not argue that only one lawful decision was open to the Minister; and had not been found to have satisfied any applicable character and security requirements.

84. The plaintiff is entitled to declaratory relief for the reasons given by the Court in the *Offshore Processing Case* at [101]-[104] and by Kiefel and Keane JJ in *Plaintiff M76* at [233]-[238] (with whom French CJ agreed at [29] and Crennan, Bell and Gageler JJ

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84 *Offshore Processing* at [100].

85 *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 81 (Mason CJ), citing *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188 (Kitto J), 203, 206 (Windeyer J); *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536-539 (Sheppard J with whom Beaumont and Burchett JJ agreed).

86 *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88 (Brennan J with whom Toohey and McHugh JJ agreed at 103).

87 *John Fairfax & Sons Ltd v Australian Telecommunications Commission* [1977] 2 NSWLR 400 at 405-406 (Moffitt P with whom Reynolds JA agreed at 409).

88 *Plaintiff M76* at [132] (Hayne J).

agreed at [134]). The declarations should be in the terms sought at [68]-[71] of the further proposed statement of claim.

4. Costs

85. If the plaintiff succeeds in obtaining any of the relief sought in the further proposed statement of claim, the defendants should pay the plaintiff's costs of the proceeding.

VI. LEGISLATION

86. The applicable statutory provisions as they existed at the relevant times are set out verbatim in the annexure, along with copies of subsequent amendments to those provisions where those provisions are not still in force.

VII. ORDERS SOUGHT

87. The special case questions should be answered as in paragraph 5 above.

VIII. ESTIMATE OF ORAL ARGUMENT

88. The plaintiff estimates that about two hours will be required for oral argument.

Dated: 3 June 2014

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ANNEXURE TO PLAINTIFF'S SUBMISSIONS

MIGRATION ACT 1958 (Cth)

Section 36—Protection visas

as at 1 March 2011

36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

am. No. 121/2011 (commenced 24 March 2012)

12 After paragraph 36(2)(a)

Insert:

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

13 At the end of subsection 36(2)

Add:

; or (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

14 After subsection 36(2)

Insert:

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

15 Subsections 36(4) and (5)

Repeal the subsections, substitute:

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

am. No. 113/2012

7 Paragraphs 36(2)(a) and (aa)

Omit "to whom", substitute "in respect of whom".

8 Subsection 36(3)

Omit "obligations to", substitute "obligations in respect of".

Section 46A—Visa applications by offshore entry persons

ad. No. 127/2001

46A Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

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

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the offshore entry person; or

(b) any information that may identify the offshore entry person; 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 matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

am. No. 35/2013

11 Subsections 46A(1) and (2)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

12 Subsection 46A(2)

Omit "the person", substitute "the unauthorised maritime arrival".

13 Paragraphs 46A(5)(a) and (b)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

14 Subsection 46A(7)

Omit "offshore entry person" (wherever occurring), substitute "unauthorised maritime arrival".

Subdivision AJ—Temporary safe haven visas

ad. No. 34/1999

91H Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

Note: For temporary safe haven visas, see section 37A.

91J Non-citizens to whom this Subdivision applies

This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:

(a) holds a temporary safe haven visa; or

(b) has not left Australia since ceasing to hold a temporary safe haven visa.

91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

91L Minister may determine that section 91K does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; 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 matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

Sections 189, 196 and 198

as at 13 December 2011

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of ***immigration detention*** in subsection 5(1).

196 Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

(4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.

(4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.

(5) To avoid doubt, subsection (4) or (4A) applies:

(a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and

(b) whether or not a visa decision relating to the person detained is, or may be, unlawful.

(5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.

(6) This section has effect despite any other law.

(7) In this section:

visa decision means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

am. No. 113/2012 (commenced 18 August 2012)

11 Subsection 189(3)

After "a person", insert "(other than a person referred to in subsection (3A))".

12 Subsection 189(3)

Omit "may detain", substitute "must detain".

13 After subsection 189(3)

Insert:

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is an allowed inhabitant of the Protected Zone; and

(b) is an unlawful non-citizen;

the officer may detain the person.

14 Subsection 189(5)

After "subsections (3)", insert ", (3A)".

16 Subsection 196(1)

Omit "he or she is".

17 Paragraph 196(1)(a)

Before "removed", insert "he or she is".

18 After paragraph 196(1)(a)

Insert:

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

19 Paragraph 196(1)(b)

Before "deported", insert "he or she is".

20 Paragraph 196(1)(c)

Before "granted", insert "he or she is".

21 Subsection 196(3)

Omit "for removal or deportation", substitute "as referred to in paragraph (1)(a), (aa) or (b)".

24 At the end of section 198

Add:

(11) This section does not apply to an offshore entry person to whom section 198AD applies.