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

20 **PLAINTIFF'S REPLY**

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A. The relationship between sections 46A(2) and 195A(2)

1. The defendants' annotated written submissions filed 1 July 2014 (**DS**) mischaracterise the plaintiff's case. The plaintiff's argument is not "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)" (DS [18]), but rather that where the Minister engages a statutory process which prolongs detention under and for the purposes of the Act, the Act requires that the Minister complete that statutory process in a manner consistent with the purposes for which detention was prolonged. In other words, the powers conferred by ss 46A(2) and 195A(2) must be read and construed together in light of constraints imposed by ss 189, 196 and 198 and the Act as a whole.

2. The defendants incorrectly submit that the POD process was "directed only to the exercise of power under s 46A(2)" but correctly acknowledge that "the POD process envisaged an exercise of power under s 195A(2)" where non-refoulement obligations were owed other than under the Refugees Convention. (DS [31], [60]) Accepting that the fields of operation of ss 46A and 195A were distinct, the special case reveals that both sections formed part of the POD process established and implemented by the Minister in this case during the period for which the plaintiff's detention was prolonged.

3. In the POE manual, the Minister expressly identified the issues which bore upon the decision whether to lift the bar under s 46A(2) or grant a visa under s 195A(2):

   a. Section 46A was to be used to assess whether a claimant satisfied the criteria for a protection visa in s 36(2) of the Migration Act and, if so, to permit that person to make a valid application for a protection visa. For a summary of the evidence in that regard, see the plaintiff's submissions at [22]-[32]. By legislative amendment commencing on 24 March 2012, there was added to the refugee criterion in s 36(2)(a) the complementary protection criterion in s 36(2)(aa).[1]

   b. Section 195A was to be used for "unique and exceptional" cases and for complementary protection. If a claimant was found not to be entitled to protection during the first stage as above, the person would be "automatically referred" for an International Treaties Obligation Assessment.[2] If "unique and exceptional circumstances" were identified, or if a non-refoulement obligation was owed under the ICCPR, CAT or CROC (the precise scope of which might differ to the protection obligations enshrined in s 36(2)(aa)), the claimant's case "will be referred" for consideration against the Minister's guidelines respecting s 195A.[3]

4. Having identified only those issues as relevant to the decisions to lift the bar under s 46A(2) or grant a visa under s 195A(2), and having prolonged the plaintiff's detention while inquiries were made for those purposes, the Minister could not make those decisions by reference to any other consideration. The plaintiff did not reach the stage of the POD process in which s 195A(2) was to be considered because he was found to be a refugee under the Refugees Convention at the s 46A(2) stage.

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1 *Migration Amendment (Complementary Protection) Act 2011* (Cth). The special case reveals that the POD process was at all times directed to the criteria stated in s 36(2): SC at 194 [15]; cf SC at 182.25, 188.1-10.

2 SC at 60.27.

3 SC at 61.1-10.

B. The decision in *Plaintiff M79*

5. The defendants submit that, by reason of this Court's decision in *Plaintiff M79*, the Minister may grant a temporary safe haven visa "irrespective of" the stage reached by the Minister in considering the exercise of power under s 46A(2). (DS [24], [26]) But as previously submitted by the plaintiff (PS [60]), that reliance fails to take account of the legal premise essential to *Plaintiff M79* that "the Minister could appropriate to the exercise of that power [under s 91L] the outcome of an assessment or review process originally directed to the exercise of his power under s 46A(2)".[4] The Minister had in that case made a decision to consider whether to lift the bar under s 91L. It was only by making that decision that the statutory process that had been commenced (under s 46A) retained a statutory foundation (under s 91L). No such decision has been made here.[5]

6. In addition, the plaintiff in *Plaintiff M79* had sought judicial review of the RSA process, which left open the possibility of further steps being taken as part of that process. By contrast, the plaintiff in this case had as early as 13 April 2012 been found to be a refugee, and the assessment process had been completed.

C. The prolongation of the plaintiff's detention

7. The defendants submit that the Migration Act authorised the detention of the plaintiff for such period as was necessary for the Minister to make "whatever inquiries" into such matters he considered "may relate to the public interest", "however disconnected they may be"; that the only criterion governing the lawfulness of detention for the purpose of inquiring into such a matter is "whether, as a matter of fact, that matter is being considered reasonably promptly"; and, if not, that "mandamus may issue to require removal". (DS [55]-[56]) The defendants' construction necessarily involves unconstrained detention at the discretion of the Executive. That each matter must relate to the public interest and be considered reasonably promptly does not constrain the period or purpose of detention where existing matters may be enlarged or new matters added at any time and the relevant aspect of the public interest varied at will.

8. Whether there are circumstances in which mandamus can issue to require removal of a plaintiff who is a Stateless security-cleared refugee with no right to enter a safe third State (cf DS [56]) need not be decided. Mandamus will issue to enforce statutory requirements governing the prolongation of detention, such requirements being necessarily implicit in the Migration Act in this case as submitted by the plaintiff at paragraphs [46]-[53] of his submissions.

D. Duty to decide whether to exercise power under s 46A(2)

9. The defendants' reliance on the *Offshore Processing Case* is misplaced. (DS [37]-[40]) In the context of the *Offshore Processing Case*, the statement of this Court to the effect that the Minister was "not obliged to take either step" under s 46A was undoubtedly correct: the Minister had no obligation to decide whether to lift the bar in that case because the plaintiffs had not been found to be refugees in accordance with the process that the Minister had established and implemented. The process of consideration had miscarried; there had been no lawful refugee status assessment; and the purpose for

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4 *Plaintiff M79* at [14] (French CJ, Crennan and Bell JJ), [135] (Gageler J).

5 SC [28].

which the detention of the plaintiffs was prolonged had not been fulfilled. The Court never reached the premise which forms the starting point for this case.

10. In contrast to the *Offshore Processing Case*, the plaintiff in this case has been found to be a refugee, through a process of consideration that was not attended by error, which wholly fulfilled the purpose for which his detention was prolonged. His interests cannot be assimilated to those of the plaintiffs in the *Offshore Processing Case*. The Minister apparently does not contest the subsequent statements of members of this Court relied on by the plaintiff at paragraphs [41]-[43] of his submissions.

E. Section 195A(2) is attended by an obligation to afford procedural fairness

11. Contrary to DS [65]-[66], the exercise of the power given by s 195A(2) is conditioned on the observance of the requirements of procedural fairness. So much was expressly stated by this Court in the *Offshore Processing Case*:[6]

> *There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to consider the exercise of power, is to be understood as "conditioned on the observance of the principles of natural justice".*

12. The judgment delivered in *Plaintiff S10* does not detract from that conclusion. It was explained in *Plaintiff S10* that the *Offshore Processing Case* "applied only to detainees who were offshore entry persons",[7] and that the plaintiffs in *Plaintiff S10* were "not such persons".[8] The distinction between the plaintiffs in the *Offshore Processing Case* (and the present plaintiff) and the plaintiffs in *Plaintiff S10* was that it could be said of each of the latter that "the detainee has or could have applied for a visa and on refusal has engaged or could have engaged the review processes of the Act".[9] It is only where persons "have sought or could have sought, but have not established their right to, a visa" that there is revealed the "necessary intendment" to exclude procedural fairness.[10]

13. The defendants submit that "[t]here 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 ... had previously been able to make a valid application for a visa" (DS [68]). But as shown above, such a distinction was expressly found and relied upon by a majority of this Court in *Plaintiff S10*.

F. The plaintiff was denied procedural fairness

14. The defendants submit, in reliance on this Court's decision in *Stead*, that any submissions made by the plaintiff to the Minister "could not have altered the outcome" of the statutory process. (DS [74]) The defendants bear the burden of showing that any submissions made by the plaintiff "could not possibly have produced a different result",[11] and cannot discharge that burden on the special case.

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6 *Offshore Processing Case* at [78].

7 *Plaintiff S10* at [42] (French CJ and Kiefel J).

8 *Plaintiff S10* at [79] (Gummow, Hayne, Crennan and Bell JJ).

9 *Plaintiff S10* at [80], [99(viii)] (Gummow, Hayne, Crennan and Bell JJ).

10 *Plaintiff S10* at [100] (Gummow, Hayne, Crennan and Bell JJ).

11 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147 (Mason, Wilson, Brennan, Deane and Dawson JJ).

15. To the extent that the defendants submit that the Minister would have necessarily and inflexibly applied government policy without regard to the submissions made by the plaintiff, and without giving any consideration to whether the Minister should depart from government policy in the particular case (DS [76]), that submission should be rejected as inconsistent with the requirements of procedural fairness. Observance of those requirements would have precluded the Minister from closing his mind to the plaintiff's submissions.

16. It is also wrong to say that the Minister "could only have accepted" the plaintiff's submissions had the Minister considered the UMA Regulation to be invalid. (DS [77]) The possibility that the UMA Regulation might be disallowed, just as the TPV Regulation had previously been disallowed, precluded a conclusion that lifting the bar would "necessarily" be futile. Indeed, a departmental submission to the Minister expressly recognised that the UMA Regulation might be disallowed with the consequence that an applicant "would meet the requirements for grant".[12]

17. In any event, the defendants' submissions are inconsistent with the evidence: the special case shows that the Minister agreed to exercise his powers to permit persons in other cohorts to make valid applications for protection visas,[13] despite the fact that some persons in those cohorts had not yet been found to be refugees,[14] or that some applications might ultimately be refused by reason of the UMA Regulation.[15]

18. The Minister has purported to terminate the process of considering the plaintiff's case under s 46A and has made no decision to consider the exercise of power under s 91L. It follows that the plaintiff's interests have been directly and adversely affected: the statutory process under s 46A for which the plaintiff's detention was prolonged has been terminated by the Minister without a hearing and on a basis inconsistent with the purpose for which his detention was prolonged.

G. The grant of the THC visa remains valid

19. The defendants suggest that the many factual circumstances to which they point "manifest a contrary intention sufficient to displace the operation of" s 46(2) of the *Acts Interpretation Act 1901* (Cth) (DS [13]), but a "contrary intention" within the meaning of s 2(2) of that Act is not to be found in the factual background to particular cases. The question is whether any provision of the Migration Act or the decision instrument manifests an intention contrary to s 46(2) of the *Acts Interpretation Act 1901* (Cth). The defendants do not point to any such provision.

20. In that regard, the provisions of the Migration Act are squarely against the defendants. The Migration Act speaks directly to the circumstances in which an exercise of power may be held invalid. Section 474(1) provides that decisions made under the Migration Act must not be "challenged, ... quashed or called in question in any court", which by reason of ss 474(3)(b) and 474(7)(a) includes decisions made under s 195A. The purpose of the privative clause, which is to ensure the validity of decisions and instruments made under the Migration Act to the maximum extent permitted by law, is

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12 SC at 193 [12].

13 SC at 191-192 [3(a)], [3(c)], [4].

14 SC at 194 [20].

15 SC at 193 [11].

wholly supportive of s 46(2) of the *Acts Interpretation Act 1901* (Cth). There is nothing in the decision instrument that purports to modify that regime.[16]

21. The Minister having shown no reason why the grant of the THC visa was not lawful and within power, both s 46(2) and the privative clause regime require that the grant of that visa remain undisturbed. The Minister's subjective intention[17] is irrelevant. In any event, the Minister retains the power to cancel the visa under s 116(1)(a) of the Act, subject to the natural justice requirements of ss 118A-127 and to the possibility of merits review under s 338(3) of the Act. Considerations as to whether the grant of the THC visa was the correct or preferable decision in the particular circumstances of the plaintiff are better addressed by those means.

Dated: 15 July 2014

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16 SC at 200.

17 SC [26].