

PLAINTIFF M150/2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M150/2013)

Date application for an order to show cause filed: 19 December 2013

Date special case referred to the Full Court: 22 April 2014

Plaintiff M150/2013 (“the Plaintiff”) is a 15-year-old Ethiopian citizen who entered Australia (as a ship’s stowaway) without a visa. Upon his arrival on 29 March 2013, the Plaintiff was refused immigration clearance. He was also placed in detention, from which he was later transferred to community detention.

The Plaintiff lodged an application for a protection visa, which a delegate of the First Respondent (“the Minister”) refused in July 2013. Upon a review however, the Refugee Review Tribunal remitted the matter to the Minister on 3 October 2013. That remittal included a direction that the Plaintiff was owed protection obligations by Australia under the Refugees Convention such that the visa criterion prescribed by s 36(2)(a) of the *Migration Act* 1958 (Cth) (“the Act”) was fulfilled.

On 18 October 2013 a new subclass of protection visa, the Subclass 785 temporary protection visa (“TPV”), was introduced by the *Migration Amendment (Temporary Protection Visas) Regulation* 2013 (Cth) (“TPV Regulation”). Immediately prior to that date, the Subclass 866 permanent protection visa (“PPV”) was the only type of protection visa available. By the insertion of clause 866.222 in Schedule 2 of the *Migration Regulations* 2004, the TPV Regulation imposed criteria such that persons in certain circumstances (which included the Plaintiff’s) could only obtain a TPV instead of a PPV. On 2 December 2013 however the Senate disallowed the TPV Regulation.

On 14 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) (“UMA Regulation”) again inserted a clause 866.222 in Schedule 2 of the *Migration Regulations* 2004. That clause imposed criteria, which were also in the previous 866.222, that must be satisfied for the Minister to decide upon an application for a PPV. They are:

The applicant:

- (a) held a visa that was in effect on the applicant's last entry into Australia; and
- (b) is not an unauthorised maritime arrival; and
- (c) was immigration cleared on the applicant's last entry into Australia.

The Plaintiff could not satisfy either criteria (a) or (c).

On 19 December 2013 the Plaintiff’s litigation guardian commenced proceedings in this Court, challenging the validity of the UMA Regulation and seeking an order prohibiting the Defendants from giving effect to it. The Plaintiff claimed that subclauses 866.222(a) and (c) were inconsistent with the s 36(2)(a) criterion for a protection visa, namely that the visa applicant is “a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol”. The Plaintiff also claimed that clause 866.222 imposed exclusionary criteria in a manner inconsistent with the Act.

On 10 February 2014 the Minister’s delegate again refused the Applicant’s application for a protection visa. That second refusal was based on the Applicant’s failure to meet the criteria in clause 866.222. The Applicant was however granted a temporary humanitarian visa and was released from community detention.

The Defendants initially demurred to the Plaintiff's statement of claim before ultimately consenting to the issue of a writ of certiorari, quashing the delegate's decision of 10 February 2014. The Plaintiff's protection visa application however remains undetermined.

On 4 March 2014 the Minister made a determination under s 85 of the Act that the maximum numbers of Protection (Class XA) visas that may be granted in the financial year 2013/14 is 2773.

On 22 April 2014 the Plaintiff filed a special case, the questions of law stated for the determination of the Full Court being:

- Is the Minister's determination made on 14 March 2014 pursuant to s 85 of the Act invalid?
- What, if any, relief should be granted to the Plaintiff?
- Who should pay the costs of the special case?