PLAINTIFF S297/2013 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S297/2013)

Date writ of summons filed: 16 December 2013

Date special case referred to Full Court: 23 September 2014

The Plaintiff is a national of Pakistan who arrived in Australia by sea in May 2012 without a visa, whereupon he was placed in detention. Initially prevented from lodging a valid application for a protection visa by s 46A(1) of the *Migration Act* 1958 (Cth) ("the Act"), he was later permitted to lodge such an application after a determination by the First Defendant ("the Minister") under s 46A(2) of the Act that he could do so. The Plaintiff's application however was refused by a delegate of the Minister in February 2013.

Upon a review of that refusal, the Refugee Review Tribunal remitted the Plaintiff's visa application to the Minister for reconsideration. This was after finding that the Plaintiff satisfied the visa criterion prescribed by s 36(2)(a) of the Act.

Amendments to the *Migration Regulations* 1994 (Cth) ("the Regulations") then introduced criteria for a protection visa which the Plaintiff was unable to satisfy. In December 2013 the Plaintiff commenced proceedings in this Court, challenging the validity of the relevant amending instrument, the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) ("UMA Regulation"). He also sought an order that the Minister determine his application for a protection visa forthwith.

On 4 March 2014 the Minister made a determination under section 85 of the Act ("the Determination") that the maximum number of protection visas that could be granted in the 2013-2014 financial year was 2,773. When that figure came to be reached (on 24 March 2014), the Plaintiff's visa application still had not been determined and the Plaintiff remained in immigration detention.

The Plaintiff later amended his claim, after the Senate disallowed the UMA Regulation. A special case stated questions of law for determination by the Full Court. Those questions were answered on 20 June 2014, in *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24. In answering one of the questions, the Court held the Determination to be invalid.

In accordance with another of the answers given by the Court, a writ of mandamus was issued to the Minister, commanding him to determine the Plaintiff's application for a protection visa according to law. On 17 July 2014 the Minister refused the Plaintiff's application, on the ground that a certain criterion in Sch 2 to the Regulations had not been met. That criterion was clause 866.226, which provides "*[t]he Minister is satisfied that the grant of the visa is in the national interest.*" Although the Minister refused to grant a protection visa, he immediately granted the Plaintiff a seven-day safe haven visa and a three-year humanitarian visa (both under s 195A(2) of the Act) and released him from detention. The Minister then filed a notice certifying his compliance with the writ of mandamus.

The Plaintiff now challenges the sufficiency of the Minister's compliance with the writ of mandamus. The Plaintiff contends that clause 866.226 is invalid, on the basis that it is inconsistent with ss 501(3) and 501C of the Act. An alternative basis of the alleged invalidity of clause 866.226 is that it departs from the scheme of protection visas provided for by various provisions of the Act, including ss 36 and 501.

A second special case filed by the parties, and referred to the Full Court by Chief Justice French, states the following questions of law:

1. Is clause 866.226 of Sch 2 to the Regulations invalid?

2. Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the Plaintiff made according to law?

3. What, if any, relief should be granted to the Plaintiff?

4. Who should pay the costs of this special case?