

PLAINTIFF S4/2014 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S4/2014)

Date application for an order to show cause filed: 6 January 2014

Date special case referred to Full Court: 30 April 2014

The Plaintiff is a stateless person originally from Myanmar. He arrived in Australia on 13 December 2011 without a visa. A Protection Obligations Evaluation (“POE”) carried out by the department of the First Defendant (“the Minister”) determined that the Plaintiff had refugee status. The Plaintiff however was prevented from making a valid application for a protection visa by s 46A(1) of the *Migration Act 1958* (Cth) (“the Act”).

On 6 January 2014 the Plaintiff commenced proceedings in this Court, seeking orders to compel the Minister to exercise his power under s 46A(2) of the Act to enable the Plaintiff to make a valid application for a protection visa.

On 4 February 2014 the Minister granted the Plaintiff both a temporary safe haven (“TSH”) visa and a temporary humanitarian concern (“THC”) visa. The THC visa lasts for three years, whereas the TSH visa was in force for only seven days. The Minister gave no prior notice to the Plaintiff of his intention to grant those visas.

As the Plaintiff has held a TSH visa, ss 91J and 91K of the Act operate to prevent him from making a valid application for any other type of visa, including a protection visa. The Plaintiff now challenges the validity of the Minister’s decision to grant him a TSH visa. The Plaintiff contends that since the POE process involved an assessment against the criteria for a protection visa set out in s 36(2) of the Act, it was not open to the Minister to take a step that has resulted in his failure to consider whether to permit the Plaintiff to apply for a protection visa. The Plaintiff contends that the Minister, instead of granting him a TSH visa, should have given him an opportunity to make submissions that he be granted a different type of visa (resulting in his being able to apply for a protection visa).

The parties to the proceeding in this Court filed a special case, which Chief Justice French referred to the Full Court for hearing.

The questions of law stated in the special case are:

1. Was the grant of the TSH visa to the Plaintiff invalid?
2. If the answer to question 1 is “yes”, was the grant of the THC visa to the Plaintiff invalid?
3. If the answer to question 2 is “yes”, is the Minister bound to determine that s 46A(1) of the Act does not apply to an application by the Plaintiff for a protection visa?

4. If the answer to question 3 is “no”, is the Minister bound to determine whether s 46A(1) of the Act does not apply to an application by the Plaintiff for a protection visa?
5. What, if any, relief sought in the Plaintiff’s further proposed statement of claim filed 8 April 2014 should be granted to the Plaintiff?
6. Who should pay the costs of the proceeding?