PLAINTIFF M79/2012 v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M79/2012)

Date Special Case referred to Full Court: 30 October 2012

The Plaintiff arrived in Australia at Christmas Island on 7 February 2010 without a visa and was detained. In April 2010 he made a request for a Refugee Status Assessment; these processes were completed on 17 May 2011 and an Independent Merits Reviewer concluded that the plaintiff was not a refugee. The plaintiff commenced judicial review proceedings in the Federal Magistrates Court in July 2011. In April 2012, the Minister, acting pursuant to a policy to release certain groups from immigration detention while their asylum claims were being assessed or judicial review proceedings were on foot, exercised his power under s 195A of the *Migration Act* 1958 (Cth) (the Act) to grant to the plaintiff both a Temporary Safe Haven Visa (the TSH visa) (valid for 7 days only) and a Bridging E Visa (the First Bridging visa).

On 18 September 2012 the plaintiff made application for a protection visa, but on 8 October he was advised by the Department that his application was not a valid one. On 12 October 2012 the First Bridging visa expired and on 15 October the plaintiff was again taken into detention. However on this date the Minister granted a Second Bridging visa to the Plaintiff and he was released from immigration detention.

The Plaintiff filed an application for an order to show cause and Hayne J had, on 30 October 2012, referred the Special Case agreed by the parties to the Full Court. It is noted in the Special Case that similar decisions (to grant a TSH visa and a Bridging visa) were made at various times with respect to over 2,300 other offshore entry persons.

The issues arising are: whether the Minister had the power to grant the plaintiff the TSH visa under s 195A of the Act; and whether the decision of the Minister to grant the TSH visa was made for an improper purpose. The plaintiff submits there is a subsidiary question of whether the Minister made a single decision to grant 2 visas simultaneously or whether he made two separate decisions in respect of each visa.

The Plaintiff submits that the Act gives the Minister power to grant one visa only at any one time. If the TSH visa was validly granted, then s 91K of the Act prevented the plaintiff from applying for a protection visa and that his application was invalid. If the TSH visa was not validly granted then the application for a protection visa should not have been rejected by the Department and the Minister ought to be compelled to consider it. The Plaintiff contends that the legislative history and context show that the Act was amended in 1999 to create TSH visas to give effect to a commitment of the Australian Government to provide temporary safe haven to Kosovars who had been displaced in the Balkan conflict of the late 1990s. There is also speculation that one particular class of that type of visa was created in anticipation of a humanitarian crisis in East Timor in that period also. Since the Plaintiff was in Australia at the time of the TSH visa, and at that time did not need safe haven in response to any humanitarian emergency, the Minister had no power under s 195A to grant him a TSH visa. Thus the purpose of granting the TSH visa was to impose the statutory bar in s 91K , which the plaintiff submits is an improper purpose.

The Defendant submits that the Minister made a single decision under s 195A and maintains that the TSH visa was validly granted in the exercise of power under s 195A.

The Minister contends that there is no criterion applicable that a TSH visa can only be granted in response to a humanitarian emergency. It was open to the Minister to conclude that the grant of such a visa was "in the public interest". In the alternative the Defendant contends that if the TSH visa was invalid, the First Bridging visa was also invalid because its grant was not severable from the grant of the TSH visa. If both visas were invalid then s 46A(1) applied to prevent the Plaintiff from making a valid protection visa application when he did.

The questions reserved by the Special Case signed by the parties include:

- Was the plaintiff validly granted the TSH visa?

- Is the plaintiff's application for a protection visa a valid application?