



HIGH COURT OF AUSTRALIA

11 September 2014

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

[2014] HCA 34

Today the High Court unanimously held invalid the grant by the Minister for Immigration and Border Protection of a temporary safe haven visa to the plaintiff which had the effect of precluding the plaintiff making a valid application for a protection visa, in circumstances where the plaintiff's detention had been prolonged for the purpose of the Minister considering the exercise of power to allow the plaintiff to make a valid application for a visa of his choice.

The plaintiff arrived at Christmas Island without a visa to enter or remain in Australia and was lawfully taken into immigration detention. Section 46A(1) of the *Migration Act* 1958 (Cth) prevented the plaintiff from making a valid application for any visa unless the Minister determined, under s 46A(2), that the prohibition in s 46A(1) did not apply to an application by the plaintiff.

The Minister decided to consider whether to exercise his power under s 46A(2) to permit the plaintiff to apply for a protection visa. The plaintiff remained in detention for more than two years while the Minister's department inquired into the plaintiff's eligibility for such a visa. The department determined that the plaintiff satisfied the requirements for the grant of the visa. However, the Minister made no decision to permit or refuse the making of a valid application. Instead, the Minister, acting of his own motion under s 195A(2) – which gives the Minister power to grant a visa to a person in immigration detention if the Minister thinks it is in the public interest to do so – granted the plaintiff a temporary safe haven visa and a temporary humanitarian concern visa. Although the prohibition in s 46A(1) no longer applied once the plaintiff became a lawful non-citizen by reason of the grant of the visas, the grant of the temporary safe haven visa engaged a similar prohibition in s 91K.

In proceedings commenced in the High Court, the plaintiff claimed that the grants of the visas were invalid and that, that being so, the Minister must determine under s 46A(2) that the plaintiff may make a valid application for a protection visa or, alternatively, determine how the s 46A(2) power will be exercised. A special case stated questions of law for determination by the Full Court.

The High Court held that where a person's detention is prolonged for the purpose of considering the exercise of power under s 46A(2), other powers given by the Act do not permit the making of a decision which would foreclose the exercise of the power under s 46A(2) before a decision is made, thus depriving the prolongation of detention of its purpose. The Court quashed the decision to grant both visas and held that it was not appropriate to answer the questions stated about whether and how the Minister is bound to exercise his power under s 46A(2).

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*