

HIGH COURT OF AUSTRALIA

FRENCH CJ

Matter No M150/2013

PLAINTIFF M150 OF 2013 BY HIS LITIGATION
GUARDIAN SISTER BRIGID MARIE ARTHUR

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER
PROTECTION & ANOR

DEFENDANTS

Matter No S297/2013

PLAINTIFF S297/2013

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER
PROTECTION & ANOR

DEFENDANTS

Plaintiff M150 of 2013 v Minister for Immigration and Border Protection

Plaintiff S297/2013 v Minister for Immigration and Border Protection

[2014] HCA 27

3 July 2014

M150/2013 & S297/2013

ORDER

In each matter:

1. *The writ of mandamus is to issue by close of business on 4 July 2014.*
2. *Service of the writ of mandamus may be effected by delivery to the office of the Australian Government Solicitor.*

2.

3. *Pursuant to r 25.08.3 of the High Court Rules 2004 (Cth) the writ of mandamus shall be returnable by 21 July 2014.*
4. *In addition to the costs of the special case the defendants are to pay the plaintiff's costs of the balance of the proceeding, save as to the challenge to the validity of the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth).*

Representation

S M Keating for the plaintiff in M150/2013 (instructed by Allens Lawyers)

F Varess for the plaintiff in S297/2013 (instructed by Fragomen)

P D Herzfeld for the defendants in both matters (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

**Plaintiff M150 of 2013 v Minister for Immigration and Border Protection;
Plaintiff S297/2013 v Minister for Immigration and Border Protection**

Practice and procedure – Court ordered writs of mandamus issue directing Minister to consider and determine plaintiffs' protection visa applications – Minister sought extension of return date to consider criterion for grant of protection visa in cl 866.226 of Sched 2 to Migration Regulations 1994 (Cth).

High Court Rules 2004 (Cth), rr 25.08.3, 25.08.4.

Migration Regulations 1994 (Cth), Sched 2, cl 866.226.

FRENCH CJ.

Introduction

1 On 20 June 2014, the Court delivered its judgment on questions referred to it by way of special case in separate proceedings brought by Plaintiffs M150 and S297 against the Minister for Immigration and Border Protection ("the Minister") and the Commonwealth¹. The Court was asked whether a determination made by the Minister on 4 March 2014, limiting the number of protection visas that could be granted in the year ending 30 June 2014, was invalid. In each case that question was answered in the affirmative. The remaining questions concerned the relief to be granted to each of the plaintiffs, the costs of the special case and the costs of the proceedings.

2 The Court identified the appropriate relief in each case as:

"A writ of mandamus directing the first defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law."

In each case the Court said that the defendants should pay the costs of the special case. In relation to Plaintiff S297, the Court stated that the costs of the balance of the proceeding should be determined by a single Justice. The orders of the Court left unresolved the question of the costs of the balance of the proceeding brought by Plaintiff M150.

3 On 1 July 2014, I ordered, by consent, in each matter, that:

"1. A writ of mandamus issue directing the first defendant to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law.

2. The defendants pay the plaintiff's costs of the special case."

In the case of Plaintiff S297, I also ordered that the costs of the balance of the proceeding be determined by a single Justice.

4 Both matters have now come back before the Court with further orders being sought as to:

- the return date for the writs of mandamus; and

1 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25.

2.

- the costs of the balance of the proceedings.

The return date for the writs

5 Rule 25.08.3 of the High Court Rules 2004 (Cth) ("the Rules") provides that:

"Unless otherwise ordered by the Court or a Justice a writ of mandamus shall be returnable within 14 days after service."

Rule 25.08.4 provides:

"Unless otherwise ordered by the Court or a Justice a writ of mandamus shall be served personally."

As to the latter rule, I shall direct that in each case the writ of mandamus issue by close of business tomorrow, 4 July 2014, and that service of the writ may be effected by delivery to the Australian Government Solicitor.

6 The Minister seeks an extension of the return date, in the case of Plaintiff S297, to a date shortly after 21 July 2014 and, in respect of Plaintiff M150, to a date shortly after 18 August 2014. Those extensions are sought because of the Minister's need to consider the criterion for the grant of a protection visa, Subclass 866, set out in cl 866.226 of Sched 2 to the Migration Regulations 1994 (Cth) ("the Migration Regulations"). That criterion, to be satisfied at the time of decision, is that:

"The Minister is satisfied that the grant of the visa is in the national interest."

7 On 30 June 2014, an officer of the Department of Immigration and Border Protection sent to each plaintiff, by email, a letter inviting their comments on the possible adverse application of cl 866.226. Each plaintiff was invited to make comments, specifically relating to his personal circumstances, that he would like the Minister to take into account in determining whether it would be in the national interest, despite the factors listed in that letter, for him to be granted a Subclass 866 visa. Plaintiff M150 will be providing his comments to the Minister by close of business tomorrow. It is not in dispute that Plaintiff S297 will have to provide his comments by Monday, 7 July 2014.

8 In each case the officer also foreshadowed the possibility that, if the Minister refuses to grant a Subclass 866 visa, he may issue a conclusive certificate under s 411(3) of the *Migration Act* 1958 (Cth) ("the Act") on the basis that it would be contrary to the national interest to change the decision or for the decision to be reviewed. Again, each plaintiff was invited to provide comments on that foreshadowed decision.

3.

9 Each plaintiff seeks a direction that the writ of mandamus issued in his case be returnable by a date earlier than the return date of 14 days provided for by the Rules.

10 It is important to observe that the writs of mandamus to be issued pursuant to the Court's order of 26 June 2014 do no more and no less than require the Minister to consider and determine each plaintiff's application for a Protection (Class XA) visa according to law. The Migration Regulations, as they presently stand, require the Minister to consider the national interest criterion in cl 866.226. On the other hand, the Court's answer in each special case to the question of appropriate relief and the terms of the consent order suggest that a reasonable return date of the writ can be assessed at least by reference to the date upon which the consent orders were made.

11 It would be reasonable in the circumstances to direct the issue of writs of mandamus by close of business tomorrow, with a return date of 10 July 2014. On the other hand, it is desirable that the Minister, who will decide the applications personally, have adequate time to consider each plaintiff's response before making a decision. Plaintiff S297 suggests that the writ be made returnable on 10 July 2014, on the basis that, inter alia, it would provide three to five working days from the date of his response to the Minister's invitation to comment.

12 In my opinion, the writ of mandamus to be issued in each case should be made returnable on 21 July 2014. The orders in relation to each of the writs will therefore be:

1. The writ of mandamus is to issue by close of business on 4 July 2014.
2. Service of the writ of mandamus may be effected by delivery to the office of the Australian Government Solicitor.
3. Pursuant to r 25.08.3 of the High Court Rules 2004 (Cth) the writ of mandamus shall be returnable by 21 July 2014.

Costs

13 I am not inclined to delay making an order as to the costs in these matters, pending the outcome of proceedings in *Plaintiff S89 of 2014 v Minister for Immigration and Border Protection*, nor to engage in some proleptic process of assessing the chances of success of a challenge to the validity of the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth). It seems to me that that particular issue in each case fell away for reasons extraneous to the conduct of the parties, and that as an event which in a sense was beyond the control of all parties, it is a matter in respect of which the parties should bear their own costs.

4.

- 14 Having heard submissions from the parties as to the costs of the balance of the proceedings, other than the special case, in respect of which orders have already been made by the Court, I will order in each case that:

In addition to the costs of the special case the defendants are to pay the plaintiff's costs of the balance of the proceeding, save as to the challenge to the validity of the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (Cth).

