HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND KEANE JJ

PLAINTIFF S4/2014 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff S4/2014 v Minister for Immigration and Border Protection
[2014] HCA 34
11 September 2014
S4/2014

ORDER

The questions asked by the parties in the special case dated 29 April 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Was the grant of the TSH visa [Subclass 449 Humanitarian Stay (Temporary) visa] to the plaintiff invalid?

Answer

Yes.

Question 2

If the answer to question 1 is "yes", was the grant of the THC visa [Subclass 786 Temporary (Humanitarian Concern) visa] to the plaintiff invalid?

Answer

Yes.

Question 3

If the answer to question 2 is "yes", is the Minister bound to determine that s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa?

Answer

It is not appropriate to answer this question.

Question 4

If the answer to question 3 is "no", is the Minister bound to determine whether s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa?

Answer

It is not appropriate to answer this question.

Question 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?

Answer

Certiorari to quash the decision of the Minister dated 4 February 2014 to grant to the plaintiff a Subclass 449 Humanitarian Stay (Temporary) visa and a Subclass 786 Temporary (Humanitarian Concern) visa together with an order that the defendants pay the plaintiff's costs of the proceeding in this Court including the costs of the special case.

Question 6

Who should pay the costs of the proceeding?

Answer

The defendants.

Representation

S B Lloyd SC with J B King for the plaintiff (instructed by Fragomen)

S P Donaghue QC with P D Herzfeld for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff S4/2014 v Minister for Immigration and Border Protection

Migration – Refugees – Minister decided to consider whether to exercise power under s 46A(2) of *Migration Act* 1958 (Cth) to permit plaintiff to apply for protection visa – Plaintiff detained while Minister's department inquired into plaintiff's eligibility for protection visa – Minister's department determined plaintiff satisfied requirements for protection visa – Minister made no decision to permit or refuse to permit plaintiff to apply for protection visa – Minister exercised power under s 195A(2) to grant plaintiff temporary safe haven visa and temporary humanitarian concern visa – Temporary safe haven visa engaged bar imposed by s 91K on making valid application for protection visa – Whether grants of temporary safe haven visa and temporary humanitarian concern visa invalid – Whether decision to grant temporary safe haven visa severable from decision to grant temporary humanitarian concern visa – Whether Minister bound to permit valid application for protection visa – Whether Minister bound to determine how s 46A(2) power will be exercised.

Migration Act 1958 (Cth), ss 46A, 91K, 195A.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND KEANE JJ.

The issue

1 The plaintiff had no visa permitting him to enter or remain in Australia. On arrival in Australia, at Christmas Island, the plaintiff was lawfully taken into immigration detention. His detention was authorised by, but subject to, the *Migration Act* 1958 (Cth) ("the Act"). Section 46A(1) of the Act prevented him from making a valid application for any visa.

2 The Minister decided to consider whether to exercise his power under s 46A(2) of the Act to permit the plaintiff to apply for a protection visa. The Minister's department, following procedures the Minister had approved, inquired into whether the plaintiff would be eligible for a protection visa. The plaintiff remained in detention for more than two years while those inquiries were made.

3 The department determined that the plaintiff was "grant ready". That is, the department determined that the plaintiff was a refugee[1] and satisfied relevant health and character requirements for the grant of a protection visa.

4 Although the plaintiff had been detained for more than two years while the Minister caused inquiries to be made about whether to permit the plaintiff to make a valid application for a protection visa, the Minister made no decision to permit or refuse to permit the making of a valid application. Instead, the Minister, acting of his own motion under s 195A(2)[2], granted the plaintiff two visas: a temporary safe haven visa[3] and a temporary humanitarian concern visa[4]. The temporary safe haven visa was valid for seven days. It is, therefore,

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1 Within the meaning of Art 1 of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Refugees Convention").

2 Section 195A(2) applies to a person who is in detention under s 189 and provides:

> "If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa)."

3 A Subclass 449 Humanitarian Stay (Temporary) visa.

4 A Subclass 786 Temporary (Humanitarian Concern) visa.

convenient to refer to it as "the seven-day visa". The other visa ("the THC visa") was valid for three years.

5 The seven-day visa was of a type which engages the provisions of subdiv AJ (ss 91H-91L) of Div 3 of Pt 2 of the Act. One of those provisions, s 91K, prevents the plaintiff making, so long as he remains in Australia, a valid application for any visa other than a temporary safe haven visa. It was not disputed that the Minister granted the seven-day visa for the purpose of engaging the prohibition on making a valid application for any visa other than another temporary safe haven visa.

6 Was the grant of either or both of the seven-day visa and the THC visa lawful? Was the Minister obliged to decide whether to permit the plaintiff to apply for a protection visa? Did s 195A(2) empower the Minister, without deciding whether to permit the plaintiff to apply for a protection visa, to grant the plaintiff a visa which precluded his making a valid application for a protection visa?

Conclusions

7 The grant of the seven-day visa was invalid. The Minister's decision to consider whether to exercise his power under s 46A(2) to permit the plaintiff to make a valid application for a protection visa prolonged the plaintiff's detention for so long as was necessary to make relevant inquiries and then make a decision under s 46A. So long as the Minister had not decided, under s 46A, whether to permit the plaintiff to make a valid application for a protection visa, s 195A did not empower the Minister to grant a visa which precluded the plaintiff making a valid application for a protection visa.

8 The decision to grant both the seven-day visa and the THC visa was a single decision which cannot be severed and treated as if there had been two separate decisions. Accordingly, the grant of the THC visa falls with the grant of the seven-day visa.

9 Counsel for the plaintiff accepted that the consequence of these conclusions was that the plaintiff would revert to the status of an unlawful non-citizen, liable to detention. Regardless of whether the plaintiff is detained again, the decision whether to exercise power under s 46A(2) must be made as soon as reasonably practicable.

Issues not reached

10 Some issues which were touched on in argument need not be decided. It is not necessary to decide whether the proceedings, as now framed, permit consideration of whether the Minister's grant of the seven-day visa was for a purpose other than one permitted by the Act. Nothing in these reasons should be understood as assuming or deciding that the grant of that visa was for a proper purpose. Nor should these reasons be understood as assuming or deciding that the decision which the Minister should now be required to make under s 46A is unconstrained either by the fact and circumstances of the plaintiff's prolonged detention or by the particular decisions which were then made about the matters to be the subject of inquiry and decision. What matters may now lawfully be taken into account by the Minister when deciding whether it is in the public interest to exercise the power given by s 46A(2) is an issue that has not been argued, and is not decided, in this matter.

11 To explain the conclusions that are reached it is desirable to say something further about the proceedings and the facts.

The proceedings

12 The plaintiff has brought proceedings against the Minister and the Commonwealth in the original jurisdiction of this Court challenging the grant of the disputed visas. The parties have agreed to state, in the form of a special case, some questions of law for the opinion of the Full Court.

13 The first two questions ask whether the grants of the seven-day visa and the THC visa were invalid. Two further questions are then asked about s 46A. The first of those further questions is predicated upon a decision that the grant of the THC visa was invalid. In effect, it asks whether, if the grant of the THC visa was invalid, the Minister is bound to determine that the plaintiff may make a valid application for a protection visa. The second question about s 46A is predicated upon the conclusions that the grant of the THC visa was invalid and that the Minister is *not* bound to decide that the plaintiff may make a valid application for a protection visa. In effect, it asks whether the Minister is bound to determine how the s 46A power will be exercised. Further questions are asked about relief and costs.

The facts

14 The plaintiff is stateless. In December 2011, he came to Australia by boat, first entering Australian territory at Christmas Island. He had no visa permitting

him to enter or remain in Australia. On arrival at Christmas Island, the plaintiff became[5] an "unlawful non-citizen" and what the Act then referred[6] to as an "offshore entry person". Because he was an unlawful non-citizen and an offshore entry person, the plaintiff, while in Australia, could not make[7] a valid application for any visa unless the Minister determined, under s 46A(2) of the Act, that the prohibition does not apply to an application by the plaintiff for a visa of a specified class. The Minister's power under s 46A(2) may only be exercised[8] by the Minister personally. Section 46A(7) provides that the Minister does not have a duty to consider the exercise of power under s 46A(2).

15 Upon arrival in Australia, the plaintiff was taken into immigration detention. While the plaintiff was in detention, the Act was amended[9], with effect from 1 June 2013. Thereafter, the plaintiff was what the Act referred[10] to as an "unauthorised maritime arrival". He remained unable to make a valid application for any visa unless the Minister made a determination under s 46A(2).

16 Before the plaintiff arrived in Australia, the Minister had established an administrative process (called the "Protection Obligations Determination process" or "POD process") for the assessment of claims by offshore entry persons that Australia owed them protection obligations under the Refugees Convention. This process was generally similar to the "RSA process" considered by this Court in *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*)[11]. As these reasons will show, however, it is not necessary to explore the nature or extent of the differences between the two sets of administrative arrangements. It is enough to record four matters.

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5 s 14.

6 s 5(1).

7 s 46A(1).

8 s 46A(3).

9 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth).

10 s 5AA.

11 (2010) 243 CLR 319; [2010] HCA 41.

The POD process and the plaintiff

17 First, it is agreed that, at least by the time the POD process commenced in March 2011, the Minister had decided that he would consider the exercise of his power under s 46A(2) in respect of (among others) all offshore entry persons who entered Australia on or after 1 March 2011. It is further agreed that the POD process "was undertaken for the purpose of informing the possible exercise by the Minister ... of his personal intervention powers under s 46A".

18 Second, it follows that, because the plaintiff arrived in Australia in December 2011, the plaintiff was a member of the class of persons in respect of whom the Minister had decided that he would consider exercising his power to make determinations under s 46A(2).

19 Third, it is agreed that the department determined that the plaintiff was a person to whom Australia owed protection obligations and there was no dispute that he met the health and character requirements for a protection visa.

20 Fourth, so far as the plaintiff was concerned, once the department determined, by the POD process, that the plaintiff was a person to whom Australia owed protection obligations, the only other inquiries required by that process were about the health and character requirements for a protection visa. That is, in the plaintiff's case, the *only* inquiries which the Minister required the department to make were about eligibility for a protection visa. The POD process identified no other matter as relevant to the Minister's consideration of whether the Minister could or should decide, under s 46A(2), that "it is in the public interest" to determine that s 46A(1) does not apply to an application by the plaintiff for a visa of a class specified in the Minister's determination.

Detention

21 As was noted at the start of these reasons, there was no dispute that the plaintiff was lawfully taken into immigration detention upon his arrival at Christmas Island. Nor was there any dispute that the plaintiff's detention was thereafter justified as detention under and for the purposes of the Act. Hence, there was no dispute that the plaintiff could lawfully be, and was, detained for the purposes of the Minister deciding whether to permit the plaintiff to make a valid application for a protection visa. Central to the decision of the issues in this case is an understanding of what follows from the observation that the plaintiff's detention for the purposes of the Minister considering whether to exercise that power was lawful.

22 The defendants rightly accepted that the Act does not authorise detention at the unconstrained discretion of the Executive. In this case, however, it is useful to begin by identifying when detention under the Act is authorised.

23 The object of the Act, stated in s 4(1), is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. Both the text and the structure of the Act show that regulation of the coming into, and presence in, Australia of non-citizens is effected by providing that the Act – and the visas for which it provides – are to "be the only source of the right of non-citizens to so enter or remain"[12] in Australia, and by further providing that non-citizens whose presence in Australia is not permitted by the Act shall be removed or deported[13]. More particularly, the Act gives[14] the Executive power to detain non-citizens in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen. The statutory power to remove an unlawful non-citizen is coupled with the statutory obligation[15] to effect that removal "as soon as reasonably practicable".

24 An alien within Australia, whether lawfully or not, is not an outlaw[16]. An alien within Australia, whether lawfully or not, cannot be detained except under and in accordance with law[17]. The detention which the Act authorises in respect of an alien who is an unlawful non-citizen can be described most generally as detention under and for the purposes of the Act. Detention under the Act is not

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12 s 4(2).

13 ss 4(4) and 198.

14 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; [1992] HCA 64. See also *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556 per Latham CJ (McTiernan and Webb JJ concurring); [1949] HCA 65.

15 s 198.

16 *Chu Kheng Lim* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ.

17 *Chu Kheng Lim* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ.

an end in itself. It is not detention in execution of any conviction[18]. Detention under the Act is in aid of the object stated in s 4(1) of the Act.

25 The detention which the Act authorises is detention by the Executive without judicial order or warrant. In *Chu Kheng Lim v Minister for Immigration*[19] this Court held that laws providing for the mandatory detention of certain aliens were valid and did not infringe Ch III of the Constitution. The Court held[20] that the statutory conferral on the Executive of authority to detain an alien, when conferred in the context of an executive power of deportation or expulsion, constitutes an incident of that executive power. Likewise, the Court held[21] that authority to detain an alien in custody, when conferred in the context and for the purpose of executive powers to receive, investigate and determine an application by that alien for permission to enter and remain in Australia, constitutes an incident of those executive powers.

26 Importantly, the Court further held[22] that the provisions of the Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in

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18 cf Short and Mellor, *The Practice on the Crown Side of the Queen's Bench Division*, (1890) at 340.

19 (1992) 176 CLR 1.

20 (1992) 176 CLR 1 at 10 per Mason CJ, 32 per Brennan, Deane and Dawson JJ, 53 per Gaudron J.

21 (1992) 176 CLR 1 at 10 per Mason CJ, 32 per Brennan, Deane and Dawson JJ, 53 per Gaudron J.

22 (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ, 53 per Gaudron J, 65-66 per McHugh J.

Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

27 Because those who are designated as unauthorised maritime arrivals cannot make a valid application for a visa, the primary purpose for detaining those persons is for effecting their removal from Australia. In this case, however, once the Minister decided that he would consider whether he would exercise his power to permit the plaintiff (and others) to make a valid application for a visa, the detention was for a more complex purpose: for determining whether to permit a valid application for a visa (by making inquiries into matters relevant to the exercise of the power under s 46A and then deciding whether to exercise that power), and thereafter (according to the decision about exercising power under s 46A(2)) either for removal or for the processing of the permitted application.

28 Because detention under the Act can only be for the purposes identified, the purposes must be pursued and carried into effect as soon as reasonably practicable. That conclusion follows from the purposive nature of detention under the Act. But it is a conclusion that is reinforced by consideration of the text and structure of the Act, understood against the background of fundamental principle.

29 The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced[23] by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the Executive, it must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes. These criteria, against which the lawfulness of detention is to be judged, are set at the start of the detention. No doubt, the facts to which these criteria are to be applied may, and often will, vary according to the course of inquiries and decisions that are made along the way. In cases like the present, where inquiries were made about whether to permit the plaintiff to apply for a protection visa, application of the criteria which fix the duration of detention varies according to such matters as whether the detainee is found to be a refugee within the meaning of Art 1 of the Refugees Convention.

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23 *Crowley's Case* (1818) 2 Swans 1 at 61 per Lord Eldon LC [36 ER 514 at 531].

But the criteria to be applied at any time during the currency of the detention in determining its lawfulness do not, and may not, vary.

30 Section 196(1) prescribes the duration of immigration detention. It provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of four events: removal from Australia under s 198 or s 199; an officer beginning the process under s 198AD(3) for removal to a regional processing country; deportation under s 200; or the grant of a visa. Of those four events, it is the first – removal from Australia under s 198(2) – which fixed the outer limit to the plaintiff's detention. It is necessary to explain that conclusion.

31 First, s 199 must be put aside from consideration. Its operation is dependent upon the engagement of s 198 or s 198AD and provides for the voluntary removal of family members of an unlawful non-citizen who has been or is to be removed. Section 199 had, and has, no application relevant to this case.

32 Second, if it is assumed, for the purposes of argument, that each of the last three events identified in s 196(1) as marking the end of immigration detention (removal to a regional processing country, deportation and the grant of a visa) was an event that could happen in the plaintiff's case, none was an event that had to happen. If one of those events did happen, immigration detention would end. But if none of the three events occurred, removal under s 198(2) had to occur "*as soon as reasonably practicable*" (emphasis added).

33 The duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable. It was bounded in this way because the requirement to remove was the only event terminating immigration detention which, all else failing, must occur.

34 It follows that the Executive's consideration (while the plaintiff was in immigration detention) of whether he might seek and be granted a protection visa had to be undertaken within that framework. As already observed, the authority to detain the plaintiff is an incident of the power of the Executive to remove the plaintiff or to permit him to enter and remain in Australia, and the plaintiff's detention is limited to what is reasonably capable of being seen as necessary to effect those purposes. The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement

would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind.

35 In the Act's operation with respect to the plaintiff, the requirement to remove unlawful non-citizens as soon as reasonably practicable is to be treated[24] as the leading provision, to which provisions allowing consideration of whether to permit the application for, or the grant of, a visa to an unlawful non-citizen who is being held in detention are to be understood as subordinate. The powers to consider whether to permit the application for, and the grant of, a visa had themselves to be pursued as soon as reasonably practicable. Unless those powers were to be exercised in a way that culminated in the plaintiff's successfully applying for the grant of a visa, his detention had to be brought to an end by his removal from Australia as soon as reasonably practicable. That is, the decision to exercise the power under s 46A, any necessary inquiry, and the decision itself, must all be made as soon as reasonably practicable. Otherwise, the plaintiff's detention would be unlawful.

Section 195A

36 As has already been noted, the Minister relied on s 195A(2) of the Act as empowering the grant of the disputed visas. Section 195A applies[25] only to a person who is in detention under s 189 of the Act. The plaintiff was such a person. Section 195A(2) gives the Minister power to grant a person to whom the section applies "a visa of a particular class (whether or not the person has applied for the visa)". The only condition expressly stated[26] for the exercise of the power is "[i]f the Minister thinks that it is in the public interest to do so". In *Plaintiff M79/2012 v Minister for Immigration and Citizenship*[27] this Court held that s 195A permits the Minister to grant a visa of a particular class whether or not the criteria which an applicant for that visa would have to satisfy are met.

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24 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]; [1998] HCA 28.

25 s 195A(1).

26 s 195A(2).

27 (2013) 87 ALJR 682; 298 ALR 1; [2013] HCA 24.

37 The defendants submitted that the power given by s 195A(2) was not constrained by the earlier decision to consider the exercise of power under s 46A(2) to permit the plaintiff to make a valid application for a protection visa or by the consequent prolongation of the plaintiff's detention. That is, they submitted, in effect, that the lawful detention of the plaintiff for the purposes of considering the exercise of power under s 46A to permit the plaintiff to make a valid application for a visa could be brought to an end by the supervening exercise of power under s 195A. A necessary step in the defendants' argument was that the Minister could not be compelled to exercise the power given by s 46A(2) and that the Minister could therefore stop consideration of the exercise of that power at any time and for any reason or no reason.

38 In support of their argument, the defendants emphasised that this Court has said[28] that mandamus will not go to compel the Minister to decide to consider exercising power under s 46A or to compel the Minister to decide whether to determine that a valid application may be made.

39 It is not necessary to examine whether what was said on these issues by the whole Court in the *Offshore Processing Case* is to be understood by reference to the Court's observation[29] that the statutory and historical context then described by the Court demonstrated "the importance attached to the performance of the relevant international obligations by both the legislative and executive branches of the Government of the Commonwealth". It may be observed, however, that the statutory context now differs from the context as it stood at the time those observations were made. And the large question, left unresolved[30] by the Court in the *Offshore Processing Case*, about the availability of the constitutional writs in cases where "the right that is affected by conducting the impugned process of decision making is a right to liberty", need not be answered.

40 These issues need not be addressed because it is not necessary to decide whether to accept the defendants' submission that the Minister can stop

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28 *Offshore Processing Case* (2010) 243 CLR 319 at 347 [59], 350 [70], 358 [99]. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 461 [48], 474 [100]; [2003] HCA 1.

29 (2010) 243 CLR 319 at 359 [103].

30 (2010) 243 CLR 319 at 359 [100].

consideration of whether to permit a detainee to make a valid application for a visa at any time and for any reason or no reason. The first relevant question in this case is not whether the Minister can be *compelled* to exercise power under s 46A. The first relevant, and in this case the determinative, question is whether, the Minister having decided to *consider* the exercise of that power but not having decided *how* the power will be exercised, s 195A(2) of the Act gives the Minister power to grant a visa which forbids the very thing which was the subject of uncompleted consideration (making a valid application for a protection visa). As foreshadowed at the outset of these reasons, this question should be answered "No".

41 Where, as here, an unlawful non-citizen is detained for the purpose of considering the exercise of power under s 46A, thereby prolonging detention, other powers given by the Act are to be construed as not permitting the making of a decision which would foreclose the exercise of the power under s 46A before a decision is made, thus depriving the prolongation of detention of its purpose.

Construing the Act

42 The proposition just stated is a conclusion about the proper construction of the Act. As was said[31] by four members of this Court in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he meaning of [a] provision must be determined 'by reference to the language of the instrument viewed as a whole'[32]". And an Act must be read as a whole "on the prima facie basis that its provisions are intended to give effect to harmonious goals"[33]. Construction should favour coherence in the law.

43 It is these fundamental principles which underpin what is sometimes called the "*Anthony Hordern* principle"[34] and the proposition on which that

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31 (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

32 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ; [1981] HCA 26. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617 per Lord Scarman, "in the context of the legislation read as a whole".

33 *Project Blue Sky* (1998) 194 CLR 355 at 381-382 [70].

34 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9. See also *Minister for Immigration*

(Footnote continues on next page)

principle depends: "that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course"[35].

44 Section 46A provides both a prohibition and the means by which the Minister may release a person from the effect of the prohibition. Sub-section (1) provides, in effect, that an unauthorised maritime arrival may not make *any* valid application for a visa. Sub-sections (2)-(7) provide the means by which that bar or prohibition may be lifted and the course that must be followed if it is. There are two steps[36] in the process provided by s 46A(2)-(7) for permitting a person to whom the section applies to make a valid application for a visa: first, deciding whether to consider the exercise of the power and, second, deciding whether to permit the making of a valid application. As has already been noted, in this case, the Minister had taken the first of those steps and had directed inquiries about the matters which the Minister identified as relevant to whether to permit the plaintiff to make a valid application for a protection visa.

45 Section 46A governs whether and when an unauthorised maritime arrival may make a valid application for a visa. By contrast, the power given by s 195A(2) is to grant a visa whether or not the person has applied for the visa. Whether an unauthorised maritime arrival may or may not make a valid *application* for a visa is, therefore, the province of s 46A. If the Minister has decided, as here, to consider the exercise of power under s 46A, s 195A should be construed as not permitting the Minister to grant a visa which prevents the person making an application for any visa other than a visa of a specified class.

46 Reading s 195A as empowering the grant of a visa of the kind described wrongly assumes that the powers given by ss 46A and 195A are to be understood as wholly independent of each other. They are not. The Minister may not circumvent the provisions of s 46A by resort to s 195A. Not least is that so when, as in this case, the grant of a visa of the kind just described would deprive the prolongation of the plaintiff's detention of its purpose.

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and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566; [2006] HCA 50.

35 *R v Wallis* ("the *Wool Stores Case*") (1949) 78 CLR 529 at 550 per Dixon J; [1949] HCA 30. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; [1956] HCA 10.

36 *Offshore Processing Case* (2010) 243 CLR 319 at 350 [70].

47 The construction which has been identified is necessary in order to yield a harmonious operation of ss 46A and 195A and to achieve a construction of and operation for s 195A(2) which allows s 195A to take its place in a coherent statutory scheme for the detention of unlawful non-citizens. To adopt a metaphor used[37] in relation to the Commonwealth's power under s 51(xxxi) to make laws with respect to the acquisition of property, the power which the Act provides to the Executive to prolong the detention of a detainee for consideration of the exercise of power under s 46A must be understood as abstracting from the Minister's power under s 195A(2) any power to grant the detainee a visa which is repugnant to the purpose for which prolongation of that detention was justified. When a person's detention is prolonged for the purpose of considering the exercise of the power to permit the detainee to make a valid application for a visa, s 195A(2) does not give power to the Minister to grant a visa which, in effect, forbids the very thing which was the subject of uncompleted consideration warranting prolongation of the period of detention.

48 The apparent generality of the power given by s 195A(2) ("[i]f the Minister thinks that it is in the public interest to do so") must be read as subject to the prior exercise of power under s 46A. In this case there was a prior exercise of power under s 46A when the Minister decided to consider whether to permit the plaintiff to make a valid application for a protection visa and the plaintiff was detained for the purposes of inquiring into and deciding that question. Section 46A imports the negative proposition that the matter for which it provides (granting the ability to make a valid application for a visa) is not to be denied by exercise of power under s 195A(2).

49 The defendants submitted that there is no intersection or inconsistency between the Minister's exercising power under s 195A(2) to grant the disputed visas and the prolongation of the plaintiff's detention that had been brought about by the inquiries directed to the exercise of power under s 46A. The defendants submitted that the Minister's actions had left the plaintiff in a better position than he was in when first detained because the plaintiff now had permission to enter and remain in Australia when he then had none. The defendants further submitted that the grant of the seven-day visa erected a bar to his applying for a protection visa (under s 91K) which was no different, in any relevant way, from the bar that he had faced while in detention. In this respect, the defendants

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37 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445 per Aickin J; [1979] HCA 47. See also *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 197 [135]; [2009] HCA 51.

submitted that the plaintiff was no worse off than he was before the disputed visas were granted.

50 It is important to recognise the limited extent of the abstraction from the power conferred by s 195A(2). In this case, that abstraction is relevant only because one of the visas purportedly granted by the Minister under s 195A would, if valid, have engaged a prohibition on the plaintiff making a valid application for any other class of visa. Otherwise there would have been no relevant intersection between the two powers and the plaintiff's detention could lawfully have been brought to an end by the supervening exercise of power under s 195A.

51 The points which the defendants made, while factually and legally accurate as far as they went, do not resolve this tension between the Minister's exercise of power under s 195A(2) and the prior exercise of executive power in accordance with s 46A[38] which had prolonged the plaintiff's detention. The inconsistency between the exercise of those two powers remains. The comparisons which the defendants sought to draw were between the plaintiff's position when first detained and his position after the grant of the disputed visas. But the relevant comparison to make is between the plaintiff's positions immediately before and after the grant of the disputed visas. Only by making that comparison is it possible to determine whether the exercise of power under s 195A(2) was inconsistent with the exercise of the power to detain. And only then is account taken, as it must be, of the prolongation of detention brought about by the decision to consider the exercise of power under s 46A. The defendants' arguments that the plaintiff was not made any worse off by the grant of the disputed visas must be rejected.

52 Likewise, the submission made in writing, but not touched on in oral argument, that because the plaintiff is stateless his removal from Australia may have been difficult, does not resolve the tension which has been identified. The submission was founded on speculation about events that had not occurred and in respect of which there was no evidence (whether founded in some failed attempt to find a country willing to receive the plaintiff or otherwise). More fundamentally, however, the submission is irrelevant to the question of statutory construction upon which the case turns.

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38 *Offshore Processing Case* (2010) 243 CLR 319 at 351 [71].

The disputed visas

53 The Minister did not have power, in the events that had happened in this case, to grant the plaintiff the seven-day visa which engaged the bar under s 91K to making a valid application for any visa except a further temporary safe haven visa. The grant of that visa was invalid.

54 The plaintiff submitted that the decision to grant him the THC visa can and should be severed from the decision to grant him the seven-day visa. The plaintiff submitted that the decisions can be severed by application of s 46 of the *Acts Interpretation Act* 1901 (Cth).

55 It is not necessary to decide whether s 46 of the *Acts Interpretation Act* applies to the decision instrument which the Minister approved. The decision recorded in that instrument was a composite decision in the sense that to sever it into two distinct decisions would radically recast its nature and effect. Because that is so, if severance is possible, this is not a case in which the decision can be severed into two separate parts, one valid and the other beyond power.

56 It follows that the decision to grant both disputed visas should be quashed.

Exercising power under s 46A(2)

57 The plaintiff submitted that the Minister must now decide whether to permit the plaintiff to make a valid application for a protection visa and that the Minister must decide that question by determining that the plaintiff can make a valid application.

58 For the reasons which have been given, the Minister cannot exercise other powers under the Act in a manner which would defeat the Minister's consideration of the exercise of power under s 46A and thereby deprive the prolongation of the plaintiff's detention of its purpose. It follows that it is not open to the Minister to detain the plaintiff for any purpose other than the determination, as soon as reasonably practicable, of whether to permit the plaintiff to make a valid application for a protection visa. And, without the Minister deciding whether to permit the plaintiff to make a valid application for a visa, the powers to remove the plaintiff from Australia do not apply and may not be engaged.

59 Having regard to what this Court has previously said in relation to the availability of mandamus to compel the exercise of power under s 46A, this Court should not now answer the questions stated by the parties in a way which would permit the plaintiff to move at once for the grant of relief in that form

requiring the Minister to make a decision under s 46A. As has already been noted, whether relief of that kind could be granted raises large questions which it has not been necessary to explore in this case. It follows that the Court should not answer the questions stated by the parties in a way which would permit the plaintiff to move for mandamus or some other form of order requiring the Minister to exercise power under s 46A by determining that the plaintiff may make a valid application.

60 Given that the Minister may not exercise other powers under the Act in a manner which would defeat consideration of the exercise of power under s 46A, the questions stated by the parties about the exercise of that power should each be answered: "It is not appropriate to answer this question".

Conclusion

61 For these reasons, the questions stated by the parties should be answered as follows:

1. Was the grant of the TSH visa [Subclass 449 Humanitarian Stay (Temporary) visa] to the plaintiff invalid?

Answer: Yes.

2. If the answer to question 1 is "yes", was the grant of the THC visa [Subclass 786 Temporary (Humanitarian Concern) visa] to the plaintiff invalid?

Answer: Yes.

3. If the answer to question 2 is "yes", is the Minister bound to determine that s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa?

Answer: It is not appropriate to answer this question.

4. If the answer to question 3 is "no", is the Minister bound to determine whether s 46A(1) of the Migration Act does not apply to an application by the plaintiff for a protection visa?

Answer: It is not appropriate to answer this question.

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?

Answer: Certiorari to quash the decision of the Minister dated 4 February 2014 to grant to the plaintiff a Subclass 449 Humanitarian Stay (Temporary) visa and a Subclass 786 Temporary (Humanitarian Concern) visa together with an order that the defendants pay the plaintiff's costs of the proceeding in this Court including the costs of the special case.

6. Who should pay the costs of the proceeding?

Answer: The defendants.