HIGH COURT OF AUSTRALIA

FRENCH CJ

PLAINTIFF S297/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff S297/2013 v Minister for Immigration and Border Protection
[2014] HCA 39
8 September 2014
S297/2013

ORDER

1. *The plaintiff is to file and serve a pleading to the return in accordance with these reasons on or before 15 September 2014.*

2. *The parties are to file an agreed special case in accordance with these reasons on or before 22 September 2014, which, subject to the order of a Justice of the Court, may be referred to the Full Court for hearing and determination.*

3. *The parties are to file an agreed minute of further directions as to the filing of submissions.*

4. *Costs today in the cause.*

Representation

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

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

CATCHWORDS

Plaintiff S297/2013 v Minister for Immigration and Border Protection

Practice and procedure – Writ of mandamus – Sufficiency of return – Court ordered writ of mandamus issue directing Minister to consider and determine plaintiff's protection visa application according to law – Minister refused plaintiff's application and certified compliance with writ – Plaintiff alleged Minister's decision not made according to law – Plaintiff sought to plead to return of writ.

High Court Rules 2004 (Cth), rr 6.01.1, 25.08.5, 25.08.7.
Migration Regulations 1994 (Cth), Sched 2, cl 866.226.

1 FRENCH CJ. On 4 July 2014, a writ of mandamus issued out of this Court to the Minister for Immigration and Border Protection ("the Minister") commanding that he consider and determine the plaintiff's application for a Protection (Class XA) visa according to law or state why it had not been done. The Minister was further required to make a return to the writ by filing a notice on or before 21 July 2014 stating whether he had done what he was commanded to do by the writ or stating why it had not been done.

2 The orders so made[1] gave effect to the judgment of this Court on questions referred to it by way of special case in proceedings brought by the plaintiff against the Minister and the Commonwealth[2]. 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. That question was answered in the affirmative. A further question in the special case was what relief should be granted to the plaintiff. The Court identified the appropriate relief as:

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

3 Rule 25.08.5 of the High Court Rules 2004 (Cth) ("the Rules") provides that:

> "The person or persons to whom a writ of mandamus is directed shall within the time allowed by the writ, file the writ or a copy of it in the office of the Registry from which it was issued, together with a certificate indorsed on or attached to the writ or copy signed by that person or those persons certifying that the act commanded by the writ has been done or stating the reason why it has not been done."

4 On 21 July 2014, the Minister filed a certification as to compliance with the writ of mandamus which stated:

> "I certify that I have done what was commanded of me by the Writ of Mandamus, dated 4 July 2014, to which this certification is attached."

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1 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection (No 2)*; *Plaintiff S297/2013 v Minister for Immigration and Border Protection (No 2)* (2014) 88 ALJR 775; 311 ALR 154; [2014] HCA 27.

2 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722; 309 ALR 209; [2014] HCA 24.

5 It is not in dispute that by a letter from the Department of Immigration and Border Protection dated 18 July 2014, the plaintiff was informed that the Minister had refused the plaintiff's application for a Protection (Class XA) visa. The letter of refusal included the following statements:

> "After careful consideration of all of the information you have provided, the Minister for Immigration and Border Protection, the Hon Scott Morrison MP (the Minister), was not satisfied that you met all of the relevant criteria for the grant of this visa as set out in Australian migration law.
>
> In particular, your application was refused because you did not satisfy clause 866.226 of Schedule 2 of the *Migration Regulations 1994* (the Regulations) which requires that the Minister is satisfied that the grant of the visa is in the national interest.
>
> After careful consideration of the facts and information relevant to your case, including the information provided by you, the Minister has decided that he is not satisfied that it is in the national interest to grant you a Protection visa, therefore your application for a Protection (Class XA), Subclass 866 (Protection) visa has been refused."

6 By the same letter, the plaintiff was informed that the Minister had decided that it was not in the national interest for his refusal decision to be changed or reviewed by the Refugee Review Tribunal ("the Tribunal"). The Minister had therefore decided to issue a conclusive certificate under s 411(3) of the *Migration Act* 1958 (Cth) ("the Act"). This meant that the decision to refuse the application could not be reviewed by the Tribunal in accordance with s 414(2) of the Act. A detailed decision record was attached to the letter.

7 The decision record indicated that the Minister found that the plaintiff had been assessed as engaging Australia's protection obligations, as had been previously found by the Tribunal. The Minister was satisfied that the plaintiff met health, security and character requirements. The decision record indicated that the plaintiff had been invited to comment on the possible refusal of his application on the basis of not satisfying the national interest criterion, as well as the possible issuing of a conclusive certificate in the event of a decision to refuse. The Minister stated that he had had regard to the plaintiff's response, which was Attachment C to the decision record. The response was summarised. The Minister's reasons for decision in relation to the application of cl 866.226 were set out in part by way of response to the plaintiff's submission that the national interest criterion was not valid and, if valid, should not be applied adversely to him.

8 On 25 August 2014, the plaintiff filed a summons seeking an order that the matter be listed for directions and that the parties confer with a view to

agreeing a special case. In written submissions filed on 5 September 2014, the plaintiff observed that there is no specific procedure prescribed under the Rules for a challenge to the sufficiency of a return made to a writ of mandamus. The plaintiff indicated that he wished to adopt the procedure of pleading to the Minister's return and denying that what was done was in compliance with the writ of mandamus[3]. Annexed to the written submissions was a pleading which the plaintiff proposes to file in this proceeding.

9 As appears from the answers to the questions given by the Full Court and its reasons for judgment, the direction that the Minister decide the plaintiff's application according to law was made to give effect to the Court's finding that the Minister's refusal to consider and determine the plaintiff's application was based upon the invalid determination of a cap, purportedly pursuant to s 85 of the Act, on the number of protection visas that could be issued in the year ended 30 June 2014. On the face of it, the Minister has considered and determined the plaintiff's application for a Protection (Class XA) visa. The plaintiff says the Minister has not done so according to law because he has invoked an invalid criterion as a sufficient basis for his refusal. He contends that it may be inferred for various reasons that the Minister was satisfied that he met all other relevant criteria for the grant of the visa.

10 It appears from statements by the Minister's counsel that that contention is not in dispute. The lawfulness of the refusal therefore turns entirely, for present purposes, on the validity of the national interest criterion. The plaintiff contends that the criterion is invalid generally in its application to the grant of protection visas and specifically in relation to an application for a protection visa by an "unauthorised maritime arrival", within the meaning of the Act.

11 The proposed pleading is, as presently framed, more expansive than is necessary, particularly having regard to the common ground that the plaintiff satisfied all criteria for grant other than the national interest criterion. The relief sought on that basis is a peremptory writ of mandamus. In the circumstances, the

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3 The statutory foundation for that procedure was provided by s 2 of *The Municipal Offices Act* 1710 (9 Ann c 25), the application of which was extended by s 3 of the *Prohibition and Mandamus Act* 1831 (1 Wm 4 c 21). The repeal of those provisions did not destroy the created practice: *R v Marshland Smeeth and Fen District Commissioners* [1920] 1 KB 155 at 168–169 per McCardie J. See also *R v Justices of Pirehill* (1884) 13 QBD 696 at 698 per Mathew J, 698–699 per Day J; Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, (1887) at 393, 410–411; Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus*, (1848) at 358, 372–373; Impey, *A Treatise on the Law and Practice of the Writ of Mandamus*, (1826) at 142, 158–161.

pleading could be substantially contracted particularly with respect to paragraphs 22 to 53, which plead matters supportive of that uncontested proposition.

12 Rule 25.08.7 deals with the case in which the return does not certify that the act commanded by the writ has been done. In that event, any further proceeding in the matter, whether for a peremptory writ or otherwise, is to be as directed by a Justice. In this case the return on its face does certify that the act commanded by the writ has been done. The plaintiff's objection to the return does not appear to be covered by r 25.08.7. Attention is therefore directed to r 6.01.1, which provides:

> "Where the manner or form of procedure for commencing or taking any step in a proceeding or exercising the jurisdiction of the Court is not prescribed by these Rules or there is any doubt about the manner or form of that procedure the Court, a Justice or the Registrar shall determine what procedure is to be adopted and may give directions."

13 In the circumstances, that rule may be applied to support a direction that the plaintiff plead to the return. The pleading would be directed to the proposition that, by reason of the asserted invalidity of the national interest criterion, the Minister's decision to refuse the plaintiff's application for a protection visa, based upon that criterion, was not a decision made "according to law" as required by the writ of mandamus. The plea of satisfaction of all other criteria is also appropriate as it is not in contest. The pleading therefore raising questions of law on what should be undisputed facts, a special case is appropriate to enable those questions to be determined by the Full Court.

14 A proposed special case has been attached to the plaintiff's submissions. That special case is appropriate for referral, subject to the following:

- No basis is shown for bringing in the facts stated and documents identified in the earlier special case dated 22 April 2014 — the reason for their proposed inclusion evidently being to support an argument that the Minister was actuated by improper purposes, an allegation which is said to support a claim for indemnity costs in this case. Such an argument is not apposite to the resolution of the question of law in the special case. The last sentence in paragraph 4 of the proposed special case should be deleted.

- Paragraph 15 should be amended to reflect the common ground that all other relevant criteria for the grant of a protection visa were satisfied.

- Question 3 in paragraph 21 of the proposed special case should be deleted. It goes to whether the Minister was under a duty to issue the protection visa sought by the plaintiff. It therefore goes to the particular relief sought and is subsumed in the question as to what relief should be ordered.

15 I make the following directions:

1. The plaintiff is to file and serve a pleading to the return in accordance with these reasons on or before 15 September 2014.

2. The parties are to file an agreed special case in accordance with these reasons on or before 22 September 2014, which, subject to the order of a Justice of the Court, may be referred to the Full Court for hearing and determination.

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