PLAINTIFF S297/2013 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S297/2013)

Date writ of summons filed: 16 December 2013

Date special case referred to Full Court: 22 April 2014

The Plaintiff arrived in Australia without a visa in May 2012. He was immediately placed in immigration detention, which is where he remains. As an "offshore entry person" under the *Migration Act* 1958 (Cth) ("the Act") as it then stood, the Plaintiff was initially prevented by s 46A(1) from lodging a valid application for a protection visa. In September 2012 however he made such an application, after the First Defendant ("the Minister") made a determination under s 46A(2) of the Act that he could do so.

In February 2013 a delegate of the Minister refused the Plaintiff's application for a protection visa. On 17 May 2013 however the Refugee Review Tribunal remitted the matter for reconsideration by the Minister, after finding that the Plaintiff fulfilled the visa criterion prescribed by s 36(2)(a) of the Act.

On 18 October 2013 a new subclass of protection visa, the Subclass 785 temporary protection visa ("TPV"), was introduced by the *Migration Amendment (Temporary Protection Visas) Regulation* 2013 (Cth) ("TPV Regulation"). Immediately prior to that date, the Subclass 866 permanent protection visa ("PPV") was the only type of protection visa available. By the insertion of clause 866.222 in Schedule 2 of the *Migration Regulations* 2004, the TPV Regulation imposed criteria such that persons in certain circumstances (which included the Plaintiff's) could only obtain a TPV instead of a PPV. On 2 December 2013 however the Senate disallowed the TPV Regulation.

On 14 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) ("UMA Regulation") again inserted a clause 866.222 in Schedule 2 of the *Migration Regulations* 2004. That clause imposed criteria, which were also in the previous 866.222, that must be satisfied for the Minister to decide upon an application for a PPV. They are:

> *The applicant:*
> (a) *held a visa that was in effect on the applicant's last entry into Australia; and*
> (b) *is not an unauthorised maritime arrival; and*
> (c) *was immigration cleared on the applicant's last entry into Australia.*

The Plaintiff does not satisfy any of those criteria.

On 16 December 2013 the Plaintiff commenced proceedings in this Court, both challenging the validity of the UMA Regulation and seeking an order that the Minister determine his application for a protection visa forthwith. He claimed, initially at least, that s 48 of the *Legislative Instruments Act* 2003 (Cth) operated to invalidate the UMA Regulation. This was on the basis that the UMA Regulation was substantially the same as the TPV Regulation (and was made within six months of the latter's disallowance by the Senate). The Plaintiff also claimed invalidity on the basis that, because it deprives unauthorised maritime

arrivals of eligibility for a protection visa, the UMA Regulation was inconsistent with s 36(2) of the Act. The Defendants initially demurred to the Plaintiff's amended statement of claim.

On 4 March 2014 the Minister made a determination under section 85 of the Act that the maximum number of protection visas that may be granted in the 2013/14 financial year was 2773. That figure was reached on 24 March 2014.

On 27 March 2014 the Senate disallowed the whole of the UMA Regulation. Following that disallowance, the Plaintiff then filed a further amended writ of summons and a further amended statement of claim.

The Plaintiff's application for a protection visa remains outstanding.

On 22 April 2014 the parties filed a special case, the questions of law stated for the determination of the Full Court being:

- Is the Minister's determination made on 4 March 2014 pursuant to s 85 of the Act invalid?

- What, if any, relief sought in the further amended writ of summons and further amended statement of claim, dated 1 April 2014, should be granted to the Plaintiff?

- Who should pay the costs of the proceedings?