PLAINTIFF S61/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (S61/2016)

Date application for an order to show cause filed: 10 March 2016

Date special case referred to Full Court: 6 July 2016

The plaintiff, a national of Afghanistan who resides in Australia, holds a permanent protection visa that was granted to him in December 2012. Seven months prior to that grant, the plaintiff entered Australia by sea at Christmas Island. As he did not hold a valid visa at that time, he was an "unlawful non-citizen" under the *Migration Act* 1958 (Cth).

On 1 June 2013, amendments to the Migration Act introduced s 5AA, which provided that a person who had entered Australia by sea as an unlawful non-citizen was an "unauthorised maritime arrival" ("UMA"). As the status of the plaintiff's entry into Australia falls within that description, the plaintiff is a UMA.

Applications for any of certain types of visa, where the applicant is sponsored by a partner or near relative who is a citizen or a permanent resident of Australia, are known as "Family Stream" visa applications. On 19 December 2013, the Minister for Immigration and Citizenship ("the Minister") gave a written direction ("the Direction") under s 499 of the Migration Act. Section 8(1) of the Direction formulates seven categories of Family Stream visa applications, based on various underlying attributes, and prescribes an order of priority for the determination of such applications. The lowest priority is given to applications in which the applicant's sponsor is a person who holds a permanent visa and who entered Australia as a UMA.

In a Family Stream visa application lodged in February 2015 ("the Application"), the plaintiff is the sponsor of his wife, their daughter and the plaintiff's siblings, all of whom are living illegally in Pakistan (after fleeing Afghanistan in fear of the Taliban). On several occasions in 2015 and 2016 the Minister's Department informed the plaintiff that the Application could not be further processed, due to a combination of the volume of Family Stream visa applications and the Direction.

The plaintiff then commenced proceedings in this Court, challenging the validity of the Direction. In the alternative, the plaintiff seeks orders to prevent the Minister or his delegates from further delaying the Application by reason of the Direction.

The parties filed a special case, which Justice Gageler referred to the Full Court for hearing. The special case states the following questions:

1. Was the Direction a legislative instrument, at the time it was made and subsequently, under the legislation now titled the *Legislation Act* 2003 (Cth)?

2. On its proper construction, and apart from any question of its enforceability under the legislation now titled the *Legislation Act* 2003 (Cth), does the Direction oblige delegates of the Minister to follow the order of priority set out in s 8 of the Direction in every case when determining whether to consider or dispose of a Family Stream visa application for which the sponsor, or proposed sponsor, of the applicant(s) is a UMA who holds a permanent visa (other than applications covered by s 4(2) of the Direction)?

3. If the answer to question 2 is yes, is the Direction invalid on the ground that it is inconsistent with:

   (a) the Minister's obligation under the Migration Act to consider and determine each Family Stream visa application within a reasonable time from the making of the application?

   (b) s 51(1) of the Migration Act?

4. What, if any, relief should be granted to the plaintiff?

5. Who should pay the costs of the special case and of the proceedings generally?

On 13 September 2016 (after the writing of these short particulars) the Direction was revoked and replaced with another written direction made by the Minister under s 499 of the Migration Act.