SHORT PARTICULARS OF CASES
TO BE HEARD BY THE FULL COURT

COMMENCING TUESDAY, 6 MAY 2014

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WILLIAMS v COMMONWEALTH OF AUSTRALIA & ORS (S154/2013)

Writ of summons filed: 8 August 2013

Date special case referred to the Full Court: 13 December 2013

In carrying out its National School Chaplaincy and Student Welfare Program ("the Program") the First Defendant ("the Commonwealth") provides funding for schools to have the services of a school chaplain or a student welfare worker. In December 2011 Scripture Union Queensland ("SUQ") entered into an agreement ("the SUQ Funding Agreement") with the Commonwealth under which SUQ receives payments under the Program until January 2015 for the chaplaincy and student support services that it provides to many schools.

One of the schools to which SUQ provides services is the Darling Heights State School, whose students include four children of Mr Ronald Williams ("the Plaintiff"). The Plaintiff opposes the spending of Commonwealth funds on school chaplains. In August 2013 he commenced proceedings in the Court, challenging the validity both of the SUQ Funding Agreement and of payments made under it by the Commonwealth. The Plaintiff also challenges the constitutional validity of certain legislative provisions which purportedly authorise the Commonwealth to make payments under the Program. (In previous proceedings in this Court, the Plaintiff successfully challenged the constitutional validity of an earlier funding agreement between the Commonwealth and SUQ: *Williams v Commonwealth of Australia* [2012] HCA 23.)

A Notice of a Constitutional Matter was filed on 9 August 2013. The Attorney-General of every State is intervening in these proceedings.

The parties filed a Special Case, which Chief Justice French referred to the Full Court for hearing. The parties filed, by leave, an Amended Special Case on 1 May 2014.

The questions stated in the Amended Special Case for the opinion of the Full Court are:

1. Was the SUQ Funding Agreement:
   (a) as made, and as varied by the First to Fourth Variation Deeds, authorised by *Appropriation Act (No 1)* 2011-2012 (Cth)?
   (b) as varied by the Fifth to Tenth Variation Deeds, authorised by *Appropriation Act (No 1)* 2012-2013 (Cth)?
   (c) as varied by the Eleventh to Fourteenth Variation Deeds, authorised by *Appropriation Act (No 1)* 2013-2014 (Cth)?
2. If not, are:
   (a) s 32B of *Financial Management and Accountability Act* 1997 (Cth) ("FMA Act");
   (b) Part 5AA and Schedule 1AA of the *Financial Management and Accountability Regulations* 1997 ("FMA Regulations"); and
   (c) item 9 of Schedule 1 to the *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth) ("Financial Framework Amendment Act");

   wholly invalid?

3. If not, is the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, authorised by:
   (a) s 32B of the FMA Act; and
   (b) Part 5AA of, and item 407.013 of Schedule 1AA to, the FMA Regulations; and
   (c) where applicable, Item 9 of Schedule 1 to the Financial Framework Amendment Act?
4. Was the Commonwealth's entry into, and expenditure of monies under, the SUQ Funding Agreement, as varied by the First to Fourteenth Variation Deeds, supported by the executive power of the Commonwealth?
5. Does the Plaintiff have standing to challenge the making of:
   (a) the January 2012 Payment; and
   (b) the June 2012 Payment?
6. Was the making of the January 2013 Payment and the February 2014 Payment and, to the extent that the answer to question 5 is "Yes", the January 2012 Payment and the June 2012 Payment, unlawful because it was not authorised by statute and was beyond the executive power of the Commonwealth?
7. What, if any, of the relief sought in the Writ of Summons should the Plaintiff be granted?
8. What orders should be made in relation to the costs of this Special Case and of the proceedings generally?

PLAINTIFF S156/2013 v THE MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S156/2013)

Date writ of summons filed: 20 August 2013

Date case stated and questions reserved for Full Court: 10 February 2014

These proceedings challenge the constitutional validity of provisions in the *Migration Act* 1958 (Cth) ("the Act") that permit the removal of a certain class of non-citizens from Australia to a "regional processing country". The validity of certain administrative decisions made under those provisions is also challenged.

Section 198AD of the Act applies to persons who are subject to immigration detention as "unlawful non-citizens" who are also "unauthorised maritime arrivals" within the meaning of the Act. The section requires such persons to be taken to a "regional processing country". If there are two or more such countries, s 198AD(5) requires the Minister for Immigration and Border Protection ("the Minister") to give a written direction specifying the country to which a particular person or class of persons is to be taken.

Section 198AB of the Act permits the Minister to declare that a country is a "regional processing country". The only condition for the making of such a declaration is that the Minister thinks it is in the national interest. That is after the Minister has had regard to whether the country has given any assurances, in respect of a person taken under s 198AD, that: (1) it will not expel the person to a country where his or her life or freedom would be threatened (on account of certain criteria); and (2) it will permit an assessment of whether the person is a refugee within the meaning of Article 1A of the Refugees Convention. Any such assurances need not be legally binding.

On 10 September 2012 the Minister designated Nauru a regional processing country under s 198AD(1) of the Act. On 9 October 2012 the Minister also designated Papua New Guinea ("PNG") a regional processing country ("the Designation").

The Plaintiff is a citizen of Iran. On 23 July 2013 he arrived on Christmas Island by boat, as both an "unlawful non-citizen" and an "unauthorised maritime arrival" within the meaning of the Act. The Plaintiff claimed refugee status on the basis of his fear of persecution in Iran as a member of a certain Sufi order. He was prevented however from applying for a protection visa by s 46A(1) of the Act.

On 29 July 2013 the Minister issued a direction under s 198AD(5) of the Act that persons such as the Plaintiff should be taken to either PNG or Nauru ("the Taking Direction"). On 2 August 2013 a decision was made by a relevant officer under the Act that the Plaintiff be taken from Australia to PNG ("the Taking Decision"). He was then taken to Manus Island in PNG.

On 20 August 2013 the Plaintiff commenced proceedings for orders to set aside the Designation and to compel the Minister and/or the Commonwealth to return him to Australia. By further amended statement of claim filed on 23 December 2013, the Plaintiff also seeks to set aside the Taking Direction and the Taking Decision.

On 10 February 2014 Chief Justice French stated a case and reserved for the consideration of the Full Court the following questions:

1. Is s 198AB of the *Migration Act* 1958 (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?

2. Is s 198AD of the *Migration Act* 1958 (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?

3. Is the Minister's designation that PNG is a regional processing country made on 9 October 2012 under s 198AB of the *Migration Act* 1958 (Cth) invalid?

4. Is the Minister's direction made on 29 July 2013 under s 198AD(5) of the *Migration Act* 1958 (Cth) invalid?

5. Are these proceedings otherwise able to be remitted for determination in the Federal Court of Australia or the Federal Circuit Court of Australia?

6. Who should pay the costs of and incidental to this Stated Case?

On 27 February 2014 the Plaintiff filed a Notice of a Constitutional Matter. At the time of writing, no Attorney-General had informed the Court of an intention to intervene in these proceedings.

WELLINGTON CAPITAL LTD v AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION & ANOR (S275/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 52

Date of judgment: 28 May 2013

Special leave granted: 8 November 2013

Wellington Capital Ltd ("Wellington") is the Responsible Entity of a managed investment scheme, the Premium Income Fund ("the Fund"). Such schemes are subject to the requirements of Chapter 5C of the *Corporations Act* 2001 (Cth) ("the Act"). The Fund is also governed by its own constitution ("the constitution"). Clause 13.1 of the constitution relevantly provides that the Responsible Entity has all powers legally possible for a corporation as if it were the absolute owner of the Fund's property and acting in its personal capacity. Clause 13.2.5 of the constitution relevantly provides that the Responsible Entity has power to dispose of or otherwise deal with the Fund's property as if it were the absolute and beneficial owner. Section 601FC(2) of the Act however provides that a responsible entity holds scheme property on trust for scheme members. The Fund's members are its unit holders.

In September 2012 Wellington sold 41% of the Fund's assets, receiving as payment all of the issued shares in Asset Resolution Ltd ("ARL"). Wellington then transferred those shares to the Fund's unit holders (without their consent) in proportion to their respective unit holdings ("the Transfer"). The First Respondent ("ASIC") applied to the Federal Court for declarations that the Transfer had contravened both the constitution and the Act.

On 17 October 2012 Justice Jagot dismissed ASIC's application. Her Honour found that clauses 13.1 and 13.2.5 of the constitution conferred power on Wellington to carry out the Transfer. Justice Jagot held that clause 13.1 picked up the power in s 124(1)(d) of the Act to "distribute any of the company's property among the members, in kind or otherwise". Her Honour found that because the unit holders were bound by the constitution, they could be taken to have agreed to become members of ARL for the purposes of s 231 of the Act.

On 28 May 2013 the Full Court of the Federal Court (Jacobson, Gordon & Robertson JJ) unanimously allowed ASIC's appeal. Their Honours held that the constitution must be viewed through the prism of trust law, as Wellington held the Fund's property on trust pursuant to s 601FC(2) of the Act. The Full Court found that "members" in s 124(1)(d) of the Act meant only members of a company, not members of a managed investment scheme. Their Honours held that clause 13.2.5 of the constitution addressed Wellington's power (as trustee) to deal with commercial parties in respect of the Fund's property. It did not override the Act. The Full Court then declared that Wellington, by making the Transfer, had operated the Fund in contravention of both the Act and the constitution, thereby contravening s 601FB(1) of the Act.

On 29 January 2014 the Appellant filed a summons, seeking leave to rely upon an amended notice of appeal. The grounds of that amended notice of appeal include:

- The Full Court erred in holding that clauses 13.1 and 13.2.5 of the Constitution of the Fund did not authorise the Appellant to make an in specie distribution of the shares in ARL to the unit holders of the Fund.

- The Full Court erred in failing to hold that the unit holders of the Fund to whom the ARL shares were distributed became members of ARL at that time having prospectively assented to becoming members, for the purposes of s 231(b) of the Act, by acquiring units in the Fund.

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?

PLAINTIFF M150/2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M150/2013)

Date application for an order to show cause filed: 19 December 2013

Date special case referred to the Full Court: 22 April 2014

Plaintiff M150/2013 ("the Plaintiff") is a 15-year-old Ethiopian citizen who entered Australia (as a ship's stowaway) without a visa. Upon his arrival on 29 March 2013, the Plaintiff was refused immigration clearance. He was also placed in detention, from which he was later transferred to community detention.

The Plaintiff lodged an application for a protection visa, which a delegate of the First Respondent ("the Minister") refused in July 2013. Upon a review however, the Refugee Review Tribunal remitted the matter to the Minister on 3 October 2013. That remittal included a direction that the Plaintiff was owed protection obligations by Australia under the Refugees Convention such that the visa criterion prescribed by s 36(2)(a) of the *Migration Act* 1958 (Cth) ("the Act") was fulfilled.

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 could not satisfy either criteria (a) or (c).

On 19 December 2013 the Plaintiff's litigation guardian commenced proceedings in this Court, challenging the validity of the UMA Regulation and seeking an order prohibiting the Defendants from giving effect to it. The Plaintiff claimed that subclauses 866.222(a) and (c) were inconsistent with the s 36(2)(a) criterion for a protection visa, namely that the visa applicant is *"a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol*". The Plaintiff also claimed that clause 866.222 imposed exclusionary criteria in a manner inconsistent with the Act.

On 10 February 2014 the Minister's delegate again refused the Applicant's application for a protection visa. That second refusal was based on the Applicant's failure to meet

the criteria in clause 866.222. The Applicant was however granted a temporary humanitarian visa and was released from community detention.

The Defendants initially demurred to the Plaintiff's statement of claim before ultimately consenting to the issue of a writ of certiorari, quashing the delegate's decision of 10 February 2014. The Plaintiff's protection visa application however remains undetermined.

On 4 March 2014 the Minister made a determination under s 85 of the Act that the maximum numbers of Protection (Class XA) visas that may be granted in the financial year 2013/14 is 2773.

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

- Is the Minister's determination made on 14 March 2014 pursuant to s 85 of the Act invalid?

- What, if any, relief should be granted to the Plaintiff?

- Who should pay the costs of the special case?