PLAINTIFF M79/2012 ..... PLAINTIFF;

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP ..... DEFENDANT.

[2013] HCA 24

HC of A 2013

Feb 8; *May* 29 2013

French CJ, Hayne, Crennan, Bell and Gageler JJ

Immigration — Refugees — Application for refugee status — Offshore entry person precluded from making valid application for protection visa unless Minister exercised dispensing power — Minister exercised power to grant person a temporary safe haven visa permitting stay of seven days and a bridging visa permitting stay of six months — Temporary safe haven visa granted to engage statutory bar on making valid application for protection visa — Whether decision to grant temporary safe haven visa made without power — Whether decision to grant temporary safe haven visa made for improper purpose — Migration Act 1958 (Cth), ss 29, 31, 37, 37A, 46A, 65, 91H, 91J, 91K, 91L, 195A.

Section 46A(1) of the *Migration Act 1958* (Cth) provided that an application for a visa was not a valid application if it was made by an offshore entry person who was in Australia and was an unlawful non-citizen. Sub-section (2) conferred power on the Minister, "if the Minister thinks that it is in the public interest to do so", to determine that sub-s (1) did not apply to an application by a person for a visa of a specified class. An "offshore entry person" was defined by s 5 to mean a person who entered Australia at an excised offshore place and became an unlawful non-citizen because of that entry. The Territory of Christmas Island was an excised offshore place. Section 189(3) required an immigration officer who knew or reasonably suspected that a person in an excised offshore place was an unlawful non-citizen to detain that person. Section 195A(2) conferred power on the Minister, "if the Minister thinks that it is in the public interest to do so", to grant a person to whom s 195A applied a visa of a particular class (whether or not the person had applied for the visa). Sub-section (1) applied that section to a person who was in detention under s 189. Sub-section (4) provided that the Minister did not have a duty to consider whether to exercise the power under sub-s (2).

Section 37A(1) of the Act created a class of temporary visas known as temporary safe haven visas. Section 91H (which was in subdiv AJ of Div 3 of Pt 2 of the Act) stated that subdiv AJ was enacted because Parliament considered that a non-citizen who held a temporary safe haven visa should not be allowed to apply for a visa other than another temporary safe haven visa. Section 91J(a) applied subdiv AJ to a non-citizen who held a temporary safe haven visa. Section 91K provided

that, despite any other provision of the Act but subject to s 91L, if subdiv AJ applied to a non-citizen at a particular time and, at that time the non-citizen applied for a visa (other than a temporary safe haven visa), the application was not valid. Section 91L(1) conferred power on the Minister, "if the Minister thinks that it is in the public interest to do so", to determine that s 91K did not apply to an application for a visa by a particular non-citizen within a specific period.

A Sri Lankan national claiming to be a refugee entitled to protection by Australia arrived at Christmas Island by boat without a visa. Being an unlawful non-citzen, that person was held in detention pursuant to s 189 of the Act. The Minister decided to exercise his power under s 195A(2) to grant that person a temporary safe haven visa permitting a stay for seven days and a bridging E visa permitting a stay of six months. One consequence of the grant of the bridging E visa, if granted on its own, would have been to enable the non-citizen to make a valid application for a protection visa, because s 46A(1) would no longer apply. The effect of the grant of the temporary safe haven visa was to engage s 91K. The non-citizen applied for a protection visa which was refused on the ground that s 91K made the application invalid. The non-citizen contended that the Minister's grant of the temporary safe haven visa had been made without power and, alternatively or additionally, had been made for an improper purpose.

Held, by French CJ, Crennan, Bell and Gageler JJ, Hayne J dissenting, that the temporary safe haven visa had been validly granted. The purposes for which the Minister might grant such a visa of a particular class under s 195A were those purposes that would serve the public interest as the Minister judged it, within the scope and purposes of the Act. It was permissible for the Minister to grant a temporary safe haven visa under s 195A, unconstrained by the purpose for which that class of visa was created under s 37A(1). The purposes identified by the Minister were within the scope and purposes of the Act. They were not improper purposes. The temporary safe haven visa being valid, ss 91J and 91K applied to make the application for a protection visa invalid.

REFERENCE under *High Court Rules 2004*, r 25.03.3(b).

Plaintiff M79/2002, a Sri Lankan national claiming to be a refugee entitled to protection by Australia, arrived at Christmas Island by boat without a visa in February 2010. In April 2010 he made a request for refugee status assessment. The assessment processes were completed on 17 May 2011, and an independent merits reviewer concluded that M79 was not a refugee and recommended to the Minister that he not be recognised as a person to whom Australia owed protection obligations. He commenced proceedings in the Federal Magistrates Court in July 2011 for the review of that recommendation. In April 2012, the Minister granted M79 both a temporary safe haven visa and a bridging E visa. On 28 September 2012, he applied for a protection visa, but on

8 October he was advised by the Department that his application was not valid. On 22 August 2012 he applied to the High Court for certiorari and mandamus directed against the Minister and for associated declarations. The separate judicial review proceedings remained pending. On 30 October, Hayne J referred a special case agreed upon by the parties to a Full Court.

M R Pearce SC (with him *L G De Ferarri*), for the plaintiff. This case is about the Minister's power under s 195A of the *Migration Act 1958* to grant a visa "of a particular class", in particular, whether this authorised the grant to M79 of a temporary safe haven visa. Section 195A confers a wide discretion on the Minister, but it is constrained by the subject matter, scope and purpose of the Act (1). This directs attention to the context of s 195A. The Act contains a complex and interconnected set of provisions providing an exhaustive regime regulating the rights of non-citizens to come to and remain in Australia. The key mechanism for that system is the visa, which is permission to non-citizens to enter or remain in Australia. The primary mechanism for obtaining a visa is s 65, which places a duty on the Minister to either accept or reject an application and provides for the way in which that duty is to be carried out. Section 195A is an exception to the normal mechanisms for obtaining a visa under the Act.

In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2) it was decided that the criteria in s 195A are to be adopted in a flexible manner, not focusing on the individual circumstances of the recipient or the proposed recipient of the visa, but rather on the public interest. On the present facts the criteria could not have been met. However liberally and flexibly one might want to impose or apply the criteria under s 195A(2), that could not result in the grant of a temporary safe haven visa to the plaintiff because he did not need temporary safe haven. [FRENCH CJ. So it is really a question of the relevance of the "particular class" of visa to the circumstances confronting the Minister?] Yes. On the Minister's argument, which is that he is not bound by any criteria in exercising the power under s 195A, he could give a protection visa to an English backpacker who has outstayed his visa. [FRENCH CJ. But you are saying a constraint is found in the term "particular class" by reference at the least to the purposes for which the visa of the particular class being contemplated is ordinarily granted?] Yes. [GAGELER J. Is it any part of your argument to say that the purpose of granting the temporary safe haven visa was really not to

(1) *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216.

(2) (2012) 246 CLR 636.

allow M79 to stay in Australia – that was obtained by the bridging visa – but to invoke the bar in s 91K?] That is the argument. Nowhere in the Act is the Minister invested with a power to impose a statutory bar. An improper purpose, even if only a substantial purpose of the exercise of the power, vitiates the exercise (3).

J T Gleeson SC, Acting Solicitor-General for the Commonwealth, (with him *S P Donaghue* SC and *K L Walker*), for the defendant. It is critical to characterise what the Minister was seeking to do in the public interest under s 195A. There were three public interest goals that the Minister brought to account: first, to release a substantial number of persons from detention to ease pressure on the system and confer a benefit on those who were released; second, to seek to preserve the refugee processing which had already taken place and to not waste the resources of the Department and the courts that had already been expended; and third, to enable such persons, while at liberty in community, to work and enjoy certain other benefits. Relevant to the second purpose, if a visa other than a temporary safe haven visa had been granted, the result would have been that the recipient would have a right to lodge an application for a visa with the consequence that any statutory assessment process would start anew. To an extent, all of the processes that had gone before would become irrelevant. The rationale of what is being done by the Minister is the maintenance of the status quo by different means. The extant assessment process had – as its statutory endpoint – consideration by the Minister of whether to lift the statutory bar under s 46A(2). That has as its analogue a potential exercise of power under s 91L. It was open for the Minister to consider it to be in the public interest within s 195A, to create the result that the extant processes continued in respect of persons released from immigration detention. [GAGELER J. My understanding of the *Offshore Processing Case* (4) is that the assessment process is properly characterised as one that is entirely statutory within the confines of s 46A. So once a person is released from detention that statutory process necessarily comes to an end. Is it open to the Minister to consider it in the public interest to continue by non-statutory means an entirely statutory process?] The continued process is statutory in the same character, directed towards the new endpoint: s 91L(2). [CRENNAN J. Are you saying that the Minister is empowered under s 195A to grant a temporary safe haven visa – with all that would usually mean – for a period of seven days for administrative purposes?] Yes. He is not bound to consider as a

(3) *Thompson v Randwick Municipal Council* (1953) 90 CLR 449; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

(4) *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 348 [63].

relevant mandatory consideration such criteria or purposes that the Act might otherwise indicate for the class of visa selected. He may take them into account, but is not bound to. It is not the case that the Minister must start, as it were, and say how close would this person go to satisfying the criteria and then to the extent he does not satisfy them, does the public interest ameliorate and provide some countervailing reason why I will allow him to get something he is not strictly entitled to? It is not that sort of framework under s 195A. One starts with what is in the public interest.

[He also referred to *Bread Manufacturers (NSW) v Evans* (5); *Coco v The Queen* (6); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (7); and *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (8).]

L G De Ferrari, in reply.

Cur adv vult

29 May 2013

The following written judgments were delivered: —

FRENCH CJ, CRENNAN AND BELL JJ.

Introduction

1 The mandatory detention in Australia of asylum seekers without visas who have tried to enter Australia from the sea is a matter of intense public interest and debate. Most if not all of such arrivals seek protection visas under the *Migration Act 1958* (Cth) (the Act) on the basis that they are refugees under the Refugees Convention (9) to whom Australia, as a party to that Convention, owes protection obligations.

2 The Act provides that such asylum seekers who have arrived in designated "excised offshore places" cannot make a valid application for a protection visa unless the Minister exercises a statutory dispensing power. An administrative assessment and independent review process has been created to determine their claims for refugee status so that the Minister can then decide whether or not to consider exercising that dispensing power.

3 In order to enable a number of such persons to be released from detention pending completion of the assessment and review processes,

(5) (1981) 180 CLR 404 at 441.
(6) (1994) 179 CLR 427.
(7) (2006) 228 CLR 566 at 581-582 [36], 604-605 [118].
(8) (2012) 246 CLR 379 at 400 [42].
(9) Convention Relating to the Status of Refugees (1951) as amended by the Protocol Relating to the Status of Refugees (1967).

the Minister, exercising a special power applicable to persons in detention under the Act, decided it was in the public interest to grant each of them two visas: a seven-day temporary safe haven visa and a bridging visa of a duration between three and twelve months. The duration of the bridging visa varied according to different categories of asylum seeker. The purpose of granting the seven-day temporary safe haven visas was to enliven a statutory bar, which would survive the expiry of those visas, preventing the asylum seekers from making a valid application for a protection visa unless the Minister exercised another dispensing power. The purpose of granting the bridging visas was to enable the asylum seekers to remain in the community, to work and to access services pending completion of the assessment and independent review of their claims for protection.

4 The plaintiff was granted a seven-day temporary safe haven visa and a six-month bridging visa under those arrangements. He subsequently lodged an application for a protection visa. He maintains that there is no bar against him lodging that application because the Minister's special power did not extend to the grant of a temporary safe haven visa to a person who would not have qualified under the provisions of the Act relating to such visas. He also says that the grant of the temporary safe haven visa was for an improper purpose: in effect, to prevent him from making a valid application for a protection visa.

5 The plaintiff applied to this Court seeking certiorari to quash the Minister's decision to issue him with a temporary safe haven visa and mandamus requiring the Minister to consider the plaintiff's application for a protection visa. A special case has been referred to the Full Court posing the questions whether the grant of the temporary safe haven visa was valid and whether the plaintiff's application for a protection visa was valid. For the reasons that follow the answers, adverse to the plaintiff, are "yes" and "no" respectively.

Factual and procedural outline

6 The plaintiff, a Sri Lankan national claiming to be a refugee entitled to protection by Australia, arrived at Christmas Island by boat and without a visa in February 2010. Because he had no visa, he was an "unlawful non-citizen" within the meaning of s 14 of the Act (10). Because Christmas Island is designated as an "excised offshore place" under the Act, the plaintiff was classified by the Act as an "offshore entry person" (11). So classified, he was prevented by s 46A(1) of the Act from making a valid application for a protection visa. That bar

(10) The Act, ss 13(1), 14(1).
(11) The Act, s 5.

could be lifted if the Minister were to exercise a non-compellable dispensing power under s 46A(2).

7 The plaintiff requested assessment under an administrative refugee status assessment process established by the Government for offshore entry persons and described in the judgment of this Court in *Plaintiff M61/2010E v The Commonwealth* (12). The assessment process and an associated independent merits review process were established so that the Minister could, on the basis of the assessment or review of an offshore entry person's claim for protection, determine whether to exercise his dispensing power under s 46A(2). The plaintiff was found by an officer of the Department, who carried out the requested assessment, not to be a refugee within the meaning of the Refugees Convention. A reviewer appointed to carry out an independent merits review of that determination recommended to the Minister, on 17 May 2011, that the plaintiff not be recognised as a person to whom Australia owes protection obligations under the Refugees Convention. The plaintiff applied to the Federal Magistrates Court on 5 July 2011 for judicial review of that recommendation. At that point he had no prospect of being considered for the exercise of the Minister's dispensing power under s 46A(2) unless he were successful in his judicial review application. In the ordinary course, success would result in an order requiring that he be reassessed.

8 Being an unlawful non-citizen, the plaintiff was held in detention pursuant to s 189 of the Act from the time of his arrival in Australia. A mechanism by which he could be, and eventually was, released from detention was the grant of a visa by the Minister pursuant to a power conferred on him by s 195A, a section which is expressed to apply to persons in detention under s 189 (13). It allows the Minister, if he thinks it is in the public interest, to grant such a person a visa of a particular class (14), whether or not the person has applied for a visa (15).

9 On 12 April 2012, the Minister decided to exercise his power under s 195A to grant the plaintiff a temporary safe haven visa (16) permitting a stay for seven days and a bridging E visa (17) permitting a stay of six months. The latter was the first of two bridging visas granted to the plaintiff.

(12) (2010) 243 CLR 319.
(13) The Act, s 195A(1).
(14) The Act, s 195A(2).
(15) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 663 [82] per Gummow, Hayne, Crennan and Bell JJ.
(16) Class UJ Subclass 449.
(17) Class WE Subclass 050.

10 The plaintiff was one of 2,383 offshore entry persons to whom that combination of visas was issued between 25 November 2011 and 25 October 2012. The purposes of the dual grants were:

- The grant of the short-term temporary safe haven visas would render the offshore entry persons to whom they were granted lawful non-citizens and thereby able to be released from detention.
- The grant of temporary safe haven visas would engage a statutory bar preventing the grantee from making a valid application for any other visa.
- The Minister could then consider by reference to existing assessment and review processes whether to lift the statutory bar.
- The simultaneous grant of the bridging E visa would also render the holder a lawful non-citizen during the currency of that visa and would enable the holder, under conditions attached to the visa, to work and to have access to support services and programs while living in the community (18).

11 In the Minister's affidavit filed in these proceedings he said:

> "If I had not been able to grant a Temporary Save Haven visa to the Plaintiff simultaneously with the grant of a Bridging E visa, I would not have exercised my power under s 195A of the Act to grant to the Plaintiff a Bridging E visa. This is because the grant of a Bridging E visa on its own would have enabled the Plaintiff to lodge a valid application for a protection visa without the restriction in s 46A of the *Migration Act 1958*, in circumstances where the Plaintiff's protection claims had been assessed through an existing process."

12 The grantees of the temporary safe haven visas and bridging E visas who were subject to refugee status assessment and independent merits review processes which were incomplete were intended to remain subject to those processes. The original end point of the incomplete assessment and review process no longer applied. That end point would have been a decision by the Minister whether or not to consider, under s 46A(2), lifting the bar to a valid application for a protection visa. It no longer applied because the grantees of the visas ceased to be unlawful non-citizens. However, the grant of the temporary safe haven visas engaged a new bar imposed by s 91K, which prevents the holder of such a visa, or a former holder who had not left Australia since the

(18) There was a question whether, in the case of the plaintiff, the bridging E visa which he was granted came into effect concurrently with the temporary safe haven visa or only upon its expiration. In the event, nothing turns on the resolution of that question.

visa expired, from making a valid application for any other visa (19). That bar, like the bar created by s 46A(1), can be lifted. Section 91L confers upon the Minister a power, if he thinks it in the public interest to do so, to determine by written notice given to a particular non-citizen that s 91K does not apply to an application for a visa made within a seven-day period from when the notice is given.

13 The Minister's stated purpose for granting the temporary safe haven visas to offshore entry persons who claim to be refugees and were subject to incomplete assessment and review processes was to enable him to consider, having regard to the outcome of those processes, whether to exercise his dispensing power under s 91L. The implementation of that purpose with respect to the plaintiff was complicated by the fact that by 12 April 2012, when the Minister granted him a temporary safe haven visa and a bridging E visa, the assessment and review processes which he had undertaken had been completed. The outcome of the review process was subject to a judicial review proceeding in the Federal Magistrates Court, but a threshold question, agitated in that Court, namely whether the proceeding had become moot because of the grant of the temporary safe haven and bridging visas, was unresolved at the time of this hearing. The Magistrate had evidently reserved judgment on the question of whether, having regard to the grant of visas to the plaintiff, he lacked jurisdiction to hear the application for judicial review.

14 The Acting Solicitor-General of the Commonwealth submitted that the judicial review proceedings were not moot. In the event that they were successful, the Minister would consider the possible exercise of his power under s 91L. That submission rested upon the premise that the Minister could appropriate to the exercise of that power the outcome of an assessment or review process originally directed to the exercise of his power under s 46A(2). There is no reason why the Minister could not inform the decision whether to consider the exercise of his power under s 91L by reference to the outcomes of that assessment and review process. An exercise of power under s 91L depends on the Minister forming a view as to the public interest, informed by relevant matters. It may be that for persons in the plaintiff's circumstances, where the issue of a temporary safe haven visa and a bridging visa raised a question mark about pending judicial review proceedings, the Minister could simply direct that a fresh assessment process be undertaken for the purposes of informing his consideration whether or not to exercise his power under s 91L. It is not necessary, in order to answer the questions posed in the special case, to express a concluded view on the status of the judicial review

(19) The Act, s 91K read with s 91J.

proceedings or options which may be available to the Minister to deal with the plaintiff's claim for protection as a refugee.

15 The plaintiff's application to the Federal Magistrates Court for judicial review of the recommendation of 17 May 2011 adverse to his claim for recognition as a refugee came on for hearing on 13 April 2012 and again on 10 July 2012. Judgment was reserved and remains reserved.

16 On 22 August 2012, the plaintiff applied to this Court for certiorari to quash the Minister's decision to grant him a temporary safe haven visa. He also sought associated declaratory relief. On its face, the application did not engage the jurisdiction conferred on the Court by s 75(v) of the *Constitution* defined by reference to matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The plaintiff applied on 18 September 2012 for a protection visa and on 28 September 2012 amended his application to seek mandamus. On 30 October 2012, Hayne J made an order referring for consideration by a Full Court a special case agreed upon by the parties.

The relief claimed by the plaintiff

17 In his amended application, the plaintiff seeks a declaration that the decision of the Minister to grant him a temporary safe haven visa was made without power and alternatively or additionally was made for an improper purpose. He seeks a writ of certiorari to quash the decision, a declaration that his application for a protection visa was a valid application under the Act and mandamus directing the Minister to determine that application according to law.

The grounds for relief

18 The plaintiff identified two jurisdictional errors said to have been committed by the Minister in granting him a temporary safe haven visa:

- s 195A of the Act did not authorise the grant of the temporary safe haven visa to the plaintiff; and
- the decision to grant the temporary safe haven visa was made for an improper purpose.

The questions on the special case

19 The questions stated for the opinion of the Full Court on the special case were:

1. Was the plaintiff validly granted the temporary safe haven visa?
2. Is the plaintiff's application for a protection visa a valid application?
3. Who should pay the costs of this special case?

The legislative framework and temporary safe haven visas

20 The challenge to the Minister's decision to grant the plaintiff a temporary safe haven visa directs attention to the scope of the power to grant a visa conferred upon the Minister by s 195A. As Hayne J observes in his reasons (20) that section must be considered in the context of the Act as a whole.

21 The Minister is empowered by s 29(1) of the Act to "grant a non-citizen permission, to be known as a visa" to travel to and enter and/or remain in Australia. The Act and the *Migration Regulations 1994* (Cth) (the Regulations) provide for different classes of visa (21). Some classes of visa are set out in the Act itself. These are referred to in s 31(2). Others are prescribed by the Regulations (22). The Regulations may prescribe criteria for each class (23). A visa is a visa of "a particular class" if the Act or the Regulations specify that it is a visa of that class (24). All classes of visa share a common purpose reflected in the definition of "visa" in s 29(1). They are granted in order to permit non-citizens to travel to and enter and/or remain in Australia. Subject to specific provisions of the Act and the Regulations, a person who wants a visa has to apply for it and has to apply for a visa of a particular class (25). The Minister is obliged by the Act to consider a valid application for a visa (26). The Act also provides specifically that the Minister is not to consider an application that is not a valid application (27).

22 Regulation 2.01 of the Regulations provides in para (a) that, for the purposes of s 31 of the Act, the prescribed classes of visa are (28): "such classes (other than those created by the Act) as are set out in the respective items in Schedule 1." The Regulations do not purport to redefine the particular classes of visa created by the Act itself. They do, however, define "subclasses" of such visas for the purpose of attaching, as the Act contemplates they may, different sets of criteria conditioning the grant of such visas in different circumstances or for different purposes.

23 The temporary safe haven visa is a particular class of visa created by s 37A(1) of the Act, which provides: "There is a class of temporary

(20) Reasons of Hayne J at [62].
(21) The Act, s 31.
(22) The Act, s 31(1).
(23) The Act, s 31(3).
(24) The Act, s 31(5).
(25) The Act, s 45.
(26) The Act, s 47(1).
(27) The Act, s 47(3).
(28) Paragraph (b) refers to additional transitional classes which are not material for present purposes.

visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas." A note to s 37A(1) states that a "temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia". It is a characteristic of the visa that the Minister may, by notice in the Gazette, extend its period (29). The Minister may also shorten its period (30): "if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned." The term "country concerned" means the country or countries in which circumstances exist that gave rise to the grant of temporary safe haven visas (31).

24 Section 37A is to be read in conjunction with subdiv AJ of Div 3 of Pt 2 of the Act, which comprises ss 91H-91L. The operation of those provisions, barring the holders of temporary safe haven visas or former holders still in Australia from making a valid application for another visa, and the Minister's non-compellable power to lift that bar, have already been discussed. The purpose of the subdivision, stated in s 91H, is to impose the bar.

25 Also relevant to temporary safe haven visas is s 500A, which authorises the Minister to refuse to grant such a visa, or to cancel it if granted. The grounds set out in that section are related to past or present criminal conduct and associations on the part of the applicant or holder of the visa and/or an assessment that the person constitutes a threat to national security or could prejudice Australia's international relations.

26 Section 37A identifies the purpose of the class of temporary safe haven visas which it creates. The evident purpose, not confined by any criteria specified in the Act, is to provide a temporary refuge for non-citizens who would be at risk of some form of harm if returned to another country. The kinds of harm are not specified in the Act. They could reasonably be expected to include the risk of persecution, the risk of death or injury arising out of ongoing civil disorder or armed conflict and perhaps the risk of starvation or disease arising out of natural disasters. The wide range of circumstances which might give rise to a need for such a visa means that the Minister, subject to any constraints imposed by the Regulations, has a broad discretion in determining circumstances under which it is appropriate to grant it.

27 The purpose of the temporary safe haven visa is also made clear by its legislative history. The provisions of the Act relating to temporary

(29) The Act, s 37A(2).
(30) The Act, s 37A(3).
(31) The Act, s 37A(7).

safe haven visas were inserted by the *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999* (Cth). Their initial purpose was to provide temporary safe haven to Kosovars displaced in the Balkan conflict of the late 1990s (32). The then Minister described the amendment as a "short-term humanitarian measure" to "assist in alleviating the massive suffering and human tragedy that has developed in Kosovo" (33). It was not to become a means of obtaining permanent residence in Australia. As temporary safe haven was to be provided at short notice in circumstances where extensive character checking was not possible, it was necessary to have effective powers to withdraw temporary safe haven visas (34). The purpose of the temporary safe haven visa, derived from that history and the text of s 37A, is not confined to the provision of temporary safe haven to Kosovars. It is a class of visa which, as defined by the Act, could be granted to anyone in need of temporary safe haven.

28 The plaintiff submitted that the purpose of the temporary safe haven visa and the words "to travel to, enter and remain in Australia" in s 37A indicated that an applicant for a temporary safe haven visa had to be outside Australia at the time of application. That submission should not be accepted. Plainly there may be cases in which, by reason of events in a non-citizen's country while that person is in Australia, the grant of a temporary safe haven visa would fall within the scope and purpose of s 37A. To construe the words "travel to, enter and remain in Australia" conjunctively is to impose an inexplicable limit upon the broad discretion conferred by the section. It follows that there is nothing about the grant of a temporary safe haven visa under s 195A, to a person who is already in Australia, which is on that account inconsistent with the power conferred by s 37A. In any event, as appears below, once the Minister has identified a "visa of a particular class" which he wishes to grant pursuant to s 195A, the relevant power is to be found in that provision.

29 For the purposes of these reasons, the legal characteristics and consequences of the temporary safe haven visa may be distinguished

(32) Explanatory Memorandum to the *Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999* (Cth), para [1]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1999, p 5022.

(33) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1999, p 5022.

(34) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1999, p 5023.

from its purpose (35). The characteristic and consequence relevant to the Minister's decision to make a grant of the visa pursuant to s 195A(2) are respectively:

- it can be granted for a short time albeit that time can be extended by notice by the Minister; and
- its grant prevents the visa holder or a grantee who has not left Australia since the visa expired from making a valid application for any other kind of visa unless the Minister exercises his dispensing power under s 91L.

30 The class of temporary safe haven visa is created by the Act. Two "subclasses", UJ(448) and UJ(449), have been designated by the Regulations (36). The Regulations do not thereby define the particular class of visa created by s 37A. They specify alternative sets of criteria which have to be satisfied for its grant. As appears below, however, those criteria do not bind the Minister in the exercise of his power under s 195A. For completeness, it may be noted that Subclass 448 visas are designated in the Regulations as Kosovar Safe Haven (Temporary) and Subclass 449 as Humanitarian Stay (Temporary) (37). It is a time of decision criterion of the Subclass 448 visa that the applicant was resident in Kosovo in the Federal Republic of Yugoslavia on 25 March 1999 and has been displaced from Kosovo since that date (38). It is a time of decision criterion of the Subclass 449 visa that the applicant has been displaced or that there is a strong likelihood that the applicant will be displaced from his or her place of residence and that the applicant is in grave fear of his or her personal safety because of the circumstances in which or reasons why the applicant has been or may be displaced (39).

31 The temporary safe haven visa granted to the plaintiff by the Minister was stated in the ministerial Decision Instrument signed on 12 April 2012 to be a temporary safe haven (Subclass 449) visa. While accepting that it was not necessary to the exercise of ministerial power under s 195A that the criteria in the Regulations for the grant of the visa be satisfied, the plaintiff nevertheless submitted that "it must still be a visa to give temporary safe haven in response to a humanitarian emergency". The plaintiff's argument that the Minister had exceeded

(35) It may be accepted that the characteristics of a visa can be defined widely enough to encompass its purpose and the circumstances of its grant: reasons of Hayne J at [70].

(36) Subclass UJ(448) created in April 1999 by *Migration Amendment Regulations 1999 (No 2)* (Cth) and Subclass UJ(449) created in June 1999 by *Migration Amendment Regulations 1999 (No 7)* (Cth).

(37) The Regulations, Sch 1, item 1223B.

(38) The Regulations, Sch 2, cl 448.221(2).

(39) The Regulations, Sch 2, cl 449.221(2).

the power conferred upon him by s 195A converged with his argument that the Minister had exercised the power for an improper purpose. In substance, the plaintiff's submission was that s 195A did not authorise the Minister to grant a temporary safe haven visa to a person who did not require temporary safe haven in response to a humanitarian emergency and that, in this case, the Minister had purported to do so for another purpose.

32 The proposition that a temporary safe haven visa may be granted under s 195A, without application, for a purpose foreign to that for which it was created appears to be in tension with the legislative scheme for the grant of visas generally. The same is true of the related proposition that such a visa may be granted in order to prevent a person from seeking the grant of another kind of visa. However, the purposes for which a visa may be granted under s 195A are to be found in the statutory criterion of the public interest. That is a matter which, within the general scope and purposes of the Act, it is left for the Minister to judge. Neither that criterion nor the mechanism which the section creates for the grant of visas by personal ministerial decision without application are in terms confined by the general scheme of the Act for the grant of visas. It is necessary now to consider whether s 195A authorises the grants made by the Minister in this case.

The scope of the power conferred by s 195A

33 As one of a number of dispensing provisions in the Act, s 195A stands apart from the regime of tightly controlled official powers, duties and discretions relating to applications for and grants of visas. The dispensing provisions confer upon the Minister a degree of flexibility by authorising him to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements and to do so in the absence of an application for the visa granted, or indeed for any visa (40).

34 The relevant parts of s 195A are in the following terms:

> "*Persons to whom section applies*
>
> (1) This section applies to a person who is in detention under section 189.
>
> *Minister may grant visa*
>
> (2) 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).

(40) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648-649 [30] per French CJ and Kiefel J.

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act."

The Minister is under no duty to consider whether to exercise his power under s 195A(2) (41). If the Minister exercises the power and grants a visa, he must cause to be laid before each House of Parliament a statement that says that he has granted a visa under the section and that sets out his reasons for doing so, referring in particular to his reasons for thinking that the grant is in the public interest (42).

35 Subdivision AA, comprising ss 44-51, which does not bind the Minister when exercising his powers under s 195A(2), deals with applications for visas. It imposes the requirement for a valid application for a particular class of visa (43) and imposes an obligation on the Minister to consider a valid application (44). Subdivision AF, comprising ss 72-76, also disapplied by s 195A(3), deals with the grant of bridging visas. Subdivision AC comprises ss 65-69 and deals with the grant of visas generally. In particular, s 65(1) provides:

"After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa."

A note to s 65(1) refers the reader to s 195A and the disapplication of subdivs AA, AC and AF and the Regulations.

36 Section 195A was introduced into the Act by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). The Explanatory Memorandum for the Bill stated, conformably with the text of the provision (45): "It is intended that it will be used to release a person

(41) The Act, s 195A(4).
(42) The Act, s 195A(6).
(43) The Act, s 45(1).
(44) The Act, s 47(1).
(45) Explanatory Memorandum to the *Migration Amendment (Detention Arrangements) Bill 2005* (Cth), para [20].

from detention where it is not in the public interest to continue to detain them." The exemption from the requirements of subdivs AA, AC and AF was, according to the Explanatory Memorandum, intended (46):

> "to clarify that in the exercise of the section 195A power, the Minister is not bound by the usual requirements that apply to the grant of visas. The Minister will have the flexibility to grant any visa that the Minister considers is appropriate to the individual's circumstances."

37 It was submitted for the Minister that, if he thinks it is in the public interest to do so, by exercising his power under s 195A he can grant any class of visa whether or not the person to whom he grants it satisfies criteria otherwise controlling such a grant. The fact that some criteria, including those relating to the grant of temporary safe haven visas, are found in parts of the Act not disapplied by s 195A(3) was said to be irrelevant because they are given effect by s 65, which is expressly disapplied. In any event there are no relevant "criteria" in the Act governing the grant of temporary safe haven visas. The purpose served by the grant of such a visa is apparent by inference from the text of s 37A, the explanatory memorandum and the Second Reading Speech for the amendment which introduced it into the Act. That purpose is not in form or substance a "criterion" for its grant. There are provisions of the Act which prescribe criteria for the grant of certain classes of visa created by the Act (47). Section 37A is not one of them.

38 The kind of visa which the Minister may grant under s 195A(2) is "a visa of a particular class". The "particular class" may be a class provided for by one of the sections of the Act mentioned in s 31(2), which includes s 37A. Alternatively, the particular class of visa may be a class prescribed by the Regulations. Another relevant class, for which the Act itself provides in s 37, is the class of "bridging visas". As observed above, the creation by the Regulations of "subclasses" of those classes of visa for the purpose of attaching different sets of criteria and conditions to them does not define additional "particular" classes of visa within the meaning of s 195A. The particular classes of visa granted by the Minister in this case were a temporary safe haven visa for which s 37A provides and a bridging visa for which s 37 provides. The reference in the Decision Instrument to a temporary safe haven visa of Subclass 449 did not attract the time of decision criteria applying to the grant of that subclass of visa. Indeed, it would have

(46) Explanatory Memorandum to the *Migration Amendment (Detention Arrangements) Bill 2005* (Cth), paras [20]-[21].

(47) See, eg, s 32(2) relating to special category visas and s 36(2) relating to protection visas.

been sufficient for the Minister to have designated the visa which he was granting as a temporary safe haven visa without reference to the subclass designation created by the Regulations.

39 The key condition for the grant of a visa of a particular class under s 195A(2) is that "the Minister thinks that it is in the public interest to do so". That involves, as this Court has previously said (48):

> "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'."

40 It is significant that the section provides that the Minister, when exercising his power to grant a visa under it, must cause a statement to be laid before each House of the Parliament. Gummow, Hayne, Crennan and Bell JJ said of that obligation in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (49):

> "This is a particular manifestation of that aspect of responsible government which renders individual Ministers responsible to the Parliament for the administration of their departments."

That particular manifestation of responsible government in this case, over and above the general accountability that the Minister has to the Parliament for the administration of his Department, reflects the nature of the decisions made under s 195A(2) and the other dispensing provisions which were referred to in *Plaintiff S10*. They are decisions which depart from the detailed legislative scheme for the grant of visas of particular classes which has been created by the Parliament. Given their special dispensing character, it is not surprising that the Act provides a specific mechanism of accountability to the Parliament in relation to them.

41 In the exercise of his power under s 195A(2) the Minister may decide to grant a particular class of visa because its legal characteristics and legal consequences serve a purpose which he has adjudged to be in the public interest. In this case, he has selected the temporary safe haven visa primarily on the basis that, consistently with the Government's approach to protection claims by offshore entry persons in detention, it will maintain the position that, after release from detention, such persons continue to be barred from applying as of right for a protection visa but must await the application of the

(48) *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; see also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648-649 [30] per French CJ and Kiefel J.

(49) (2012) 246 CLR 636 at 656 [55].

ministerial dispensing power, albeit now to be exercised, if at all, under s 91L rather than as previously under s 46A(2).

42 It was open to the Minister, in this case, to grant a temporary safe haven visa by reference to its legal characteristics and consequences unconstrained by the purpose for which it was created under the Act. The purposes for which the Minister might grant such a class of visa were those purposes which would serve the public interest as the Minister judged it. In this case those purposes were not shown to be beyond the scope and purpose of the Act, nor the power conferred by s 195A. They were not improper purposes. The grant of the temporary safe haven visa to the plaintiff was a valid application of the power conferred by s 195A(2). It also follows, by operation of ss 91J and 91K of the Act, that the plaintiff's application for a protection visa made on 18 September 2012 was not a valid application.

Conclusion

43 For the preceding reasons, the questions stated for the opinion of the Court on the special case should be answered as follows:

- Question 1: Was the plaintiff validly granted the temporary safe haven visa?

  Answer: Yes.
- Question 2: Is the plaintiff's application for a protection visa a valid application?

  Answer: No.
- Question 3: Who should pay the costs of this special case?

  Answer: The plaintiff.

44 HAYNE J. The object of the *Migration Act 1958* (Cth) (the Act) "is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (s 4(1)). To advance that object, the Act "provides for visas permitting non-citizens to enter or remain in Australia" (s 4(2)) and records (s 4(2)) that "the Parliament intends that [the] Act be the *only* source of the right of non-citizens to so enter or remain" (emphasis added).

45 Section 31(1) provided that "[t]here are to be prescribed classes of visas". Some of those classes were provided (s 31(2)) for by the Act in ss 32-38B and some were prescribed (ss 31(1), 504(1)) by regulations made under the Act. This proceeding concerns a "temporary safe haven visa", which is a class of visa provided for by s 37A of the Act. The Minister, relying on the power given by s 195A(2), purported to grant the plaintiff a temporary safe haven visa. Section 195A(2) provided that:

> "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)."

In exercising that power, the Minister was not bound by specified provisions of the Act, or by regulations made under the Act, but was bound by all other provisions of the Act (s 195A(3)).

46 The central question in this proceeding is whether s 195A(2) empowered the Minister, if "the Minister thinks that it is in the public interest to do so", to grant a visa of a class provided for by the Act, regardless of whether any statutory requirements for that visa were met. In particular, did s 195A(2) give the Minister power to grant the plaintiff a s 37A temporary safe haven visa when the Minister neither considered whether, nor decided that, the plaintiff needed temporary safe haven in Australia? These reasons will show that the Minister did not have this power.

The present proceeding

47 The plaintiff commenced a proceeding in the original jurisdiction of this Court seeking, among other relief, certiorari to quash the Minister's decision made on 12 April 2012 to grant the plaintiff a temporary safe haven visa. The parties agreed in stating questions of law for the opinion of the Full Court in the form of a special case. Those questions asked about the validity of the grant of a temporary safe haven visa and the validity of an application the plaintiff had made for a protection visa. The special case set out agreed facts and documents on which the questions were to be determined.

Relevant facts and circumstances

48 On about 7 February 2010, the plaintiff entered Australian territory by entering the Territory of Christmas Island. The Territory of Christmas Island was what the Act called (50) an "excised offshore place". The plaintiff is a citizen of Sri Lanka and he did not have a visa to enter or remain in Australia. He was, therefore, "an unlawful non-citizen" (s 14(1)) and he was detained under s 189(3) of the Act.

49 Because the plaintiff entered Australia at an excised offshore place and became an unlawful non-citizen because of that entry, he was (51) an "offshore entry person". For so long as the plaintiff remained in Australia as an unlawful non-citizen, he could not make a valid application for a visa (s 46A(1)) unless the Minister personally decided to exercise the non-compellable power given by s 46A(2) to allow the plaintiff to apply for a visa.

(50) s 5(1), para (a) of the definition of "excised offshore place".
(51) s 5(1), definition of "offshore entry person".

50 The plaintiff claimed to be a person to whom Australia owed protection obligations under the Refugees Convention (52). While the plaintiff was in detention, a departmental officer considered that claim for the purpose of advising the Minister of a matter to which the Minister may wish to have regard in deciding whether to exercise the power under s 46A(2) to permit the plaintiff to apply for a visa. The officer determined that the plaintiff was not a refugee.

51 The plaintiff asked that the officer's decision be reviewed. An independent reviewer appointed by the Minister also concluded that the plaintiff was not a refugee and recommended to the Minister that the plaintiff not be recognised as a person to whom Australia had protection obligations under the Refugees Convention.

52 The plaintiff applied to the Federal Magistrates Court for a declaration that the recommendation of the independent reviewer had not been made according to law. That application has been heard but has not been determined.

53 In November 2011, after the plaintiff had made his application for judicial review of the independent reviewer's decision, the Minister announced that some offshore entry persons (or "irregular maritime arrivals") held in detention would be "considered for community placement on bridging visas while their asylum claims are assessed". On 5 April 2012, the Minister agreed with the Department's recommendation that he consider exercising the power under s 195A(2) of the Act with regard to the plaintiff and 288 other "irregular maritime arrivals". The Department proposed that each should be granted both a temporary safe haven visa (valid for seven days) and a bridging visa "with no work limitations". The Department told the Minister that the grant of temporary safe haven visas to these persons would "bar them from lodging further onshore visa applications".

54 On 12 April 2012, the Minister approved a Decision Instrument recording that he had determined that it is in the public interest to grant specified persons (including the plaintiff) each a temporary safe haven visa permitting a stay of seven days and a bridging visa. In the plaintiff's case, the bridging visa permitted a stay of six months. For so long as one of those visas was current, the plaintiff was a lawful non-citizen.

55 It was accepted that the Minister neither considered whether, nor decided that, the plaintiff was in need of temporary safe haven in Australia. Rather, argument in this Court proceeded on the footing that

(52) Convention Relating to the Status of Refugees (1951) as amended by the Protocol Relating to the Status of Refugees (1967).

the plaintiff was granted a temporary safe haven visa because s 91K of the Act would prevent him making a valid application for any visa other than a further temporary safe haven visa unless the Minister, exercising the personal power given by s 91L, permitted the plaintiff to do so. As the Minister affirmed in an affidavit attached to the special case, the simultaneous grant of a temporary safe haven visa and a bridging visa was made to "allow offshore entry persons to be released from detention *while at the same time avoiding the consequence that they would then be able to apply for protection visas* in circumstances where their protection claims had already been, or were already being, assessed through an existing process" (emphasis added). And, as the Department said in its letter to the plaintiff advising him of the Minister's decision, the temporary safe haven visa was "granted for administrative reasons and will keep the processing of your protection claims". The only remaining "processing" of the plaintiff's protection claims was determination of his application for judicial review of the independent reviewer's decision.

56 Having been granted the visas that have been described, the plaintiff was released from detention. On 18 September 2012, he applied for a protection visa. His bridging visa expired on 12 October 2012 and he was again taken into detention. On 15 October 2012, the Minister, acting under s 195A(2), granted the plaintiff a further bridging visa and again the plaintiff was released from detention.

The parties' arguments

57 The plaintiff submitted that the grant of a temporary safe haven visa was beyond power because a visa of that class can lawfully be granted only "to give temporary safe haven in response to a humanitarian emergency". Alternatively, the plaintiff submitted that the grant of a temporary safe haven visa was made for the purpose of imposing the bar to applications for visas provided by s 91K and thus for an improper purpose. The plaintiff submitted that, if the grant of a temporary safe haven visa was invalid, the grant of a bridging visa remained valid and that he could make a valid application for a protection visa (53).

58 The Minister's principal submission was that the power conferred by s 195A(2) was to be exercised in the "public interest", not by reference to the criteria that ordinarily governed the grant of any visa. That is, the Minister submitted that s 195A(2) hinged only on the Minister's

(53) While holding a current visa, the plaintiff was a lawful non-citizen and could apply for a protection visa. If the plaintiff did not hold a current visa, he was an unlawful non-citizen and s 46A(1) would prevent him, as an offshore entry person, making a valid application for a visa unless the Minister personally decided under s 46A(2) to permit him to apply.

view of what was in the public interest and empowered the Minister to grant a visa of *any* class to a person to whom the section applied, if the Minister thought it was in the public interest to do so. The Minister further submitted that s 37A did not provide any criterion for the grant of a temporary safe haven visa but that, if it did, the plaintiff did not demonstrate that the criterion was not satisfied in his case.

59 It is convenient to begin examination of these arguments by turning immediately to the text of s 195A itself. That section cannot, however, be understood in isolation. Its place in the context of the entire Act must also be understood.

Section 195A

60 It will be recalled that s 195A(2) provided that "[i]f 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)". Section 195A(3) provided that: "In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act." The three subdivisions referred to in s 195A(3) dealt respectively with applications for visas (subdiv AA (ss 44-51)), the grant of visas (subdiv AC (ss 65-69)) and bridging visas (subdiv AF (ss 72-76)).

61 Some aspects of the power given to the Minister by s 195A(2) were examined by this Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (54). The focus of argument in that case was whether, in deciding whether or not to exercise power under s 195A(2) (or under ss 48B, 351 or 417), the Minister was obliged to afford procedural fairness to the person seeking exercise of the power. Matters of construction were not in dispute except in so far as they touched upon that question of procedural fairness (55).

62 The Minister made much in this case of the fact that the power given by s 195A(2) was conditioned upon what the Minister "thinks … is in the public interest". The Minister's principal argument was that this "public interest" criterion, together with the exclusion of certain subdivisions and the regulations that was effected by s 195A(3), had the consequence that the Minister could grant *any* visa if the Minister thought it to be in the public interest to do so. No doubt the expression "public interest" "can have no fixed and precise content" in that it "involves a value judgment often to be made by reference to undefined

(54) (2012) 246 CLR 636.
(55) (2012) 246 CLR 636 at 664 [87].

matters" (56). But it is equally clear (57) that powers that are conditioned on notions of the public interest are not completely unlimited. These powers, like any other form of statutory power, can only be understood in the context of the Act in which they appear. And contrary to the Minister's submission, the context provided by s 195A(3) and its exclusion of subdivs AA, AC and AF and the regulations does not "free up" the Minister to ignore any statutory requirements for the grant of a visa imposed by the Act outside those subdivisions. Both the text of s 195A(3) and the content of the particular subdivisions which it excluded run directly counter to that submission.

63 Where requirements for the grant of a visa were to be excluded in exercising the power given by s 195A(2), the Act did so expressly. Section 195A(3) provided that, in exercising that power, the Minister was not bound by regulations made under the Act and thus any criteria for the grant of a visa that may be prescribed (ss 31(3), 40, 504(1), 505) by regulation. Section 195A(3) expressly excluded subdiv AF and thus the Minister was not bound by either the regulatory or the *statutory* requirements governing the grant of a bridging visa (in particular, that the person be an "eligible non-citizen" (ss 72, 73)). That a statutory requirement was expressly excluded where that exclusion was intended by the Parliament serves to reinforce what the words of s 195A(3) themselves make plain: "the Minister … is bound by all other provisions of this Act."

64 Nothing in the exclusion of subdiv AA suggests that the Minister could ignore statutory requirements not expressly excluded by s 195A(3). There is evident reason for s 195A(3) having provided that subdiv AA did not bind the Minister. Subdivision AA concerned applications for visas and s 45(1) provided that "[s]ubject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class". Because the power given by s 195A(2) could be exercised whether or not the person had applied for the visa which the Minister was to grant, the application of subdiv AA had to be excluded for s 195A(2) to operate according to its terms.

65 The exclusion of subdiv AC, and in particular the exclusion of s 65, was central to the Minister's case. Section 65 required the Minister, after considering a valid application, to grant the visa if satisfied of the

(56) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99(v)] (footnote omitted).

(57) See, eg, *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217; *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 at 329-330 [13]-[14].

matters set out in the section (including (s 65(1)(a)(ii)) the criteria for the visa prescribed by the Act or the regulations) and to refuse to grant the visa if not so satisfied. It was said in the Minister's written submissions that "[t]he exclusion of s 65 is particularly significant, because it has the consequence that the Minister is able to grant a visa irrespective of whether any criteria in the Act that would otherwise govern the grant of the visa are satisfied". And in oral argument, it was said that restraining exercise of the power given by s 195A(2) by reference to the statutory requirements for a particular class of visa (where those statutory requirements did not appear within subdivs AA, AC and AF) would have the consequence that "the disapplication of section 65 has been given no work to do at all".

66 Contrary to these submissions, nothing in the exclusion of subdiv AC and in particular s 65 suggests that the Minister could ignore statutory requirements in the Act other than those expressly excluded by s 195A(3). The Minister's submissions assumed (wrongly) that the statutory requirements for the grant of a particular class of visas can have effect only through s 65. Section 65 is of course the primary means by which practical effect is given to these requirements, if only because s 65 was evidently intended to be the most frequently exercised source of power for the grant of a visa. But the fact that s 65 is conditioned upon satisfaction of the statutory and regulatory requirements for the grant of a visa does not mean that, by excluding s 65, the grant of a visa under a different source of statutory power need not satisfy statutory requirements. And contrary to the Minister's submissions, this construction does not give the exclusion of s 65 no work to do. The exclusion of subdiv AC was necessary to permit s 195A to operate according to its terms.

67 Although the power given by s 195A(2) could be exercised when the person had not applied for a visa, it could also be exercised when the person had made a valid application for a visa. Providing that subdiv AC did not bind the Minister in exercising power under s 195A(2) was necessary to permit the Minister to exercise that power by deciding to dispose of a valid application for a visa otherwise than in accordance with s 65. In particular, to allow s 195A to operate according to its terms, it was necessary to permit the Minister to grant a visa in circumstances where the criteria prescribed by regulation were not met. The exclusion of subdiv AC generally, or s 65 in particular, does not entail that the statutory requirements for a visa made in provisions of the Act other than subdivs AA, AC and AF did not bind the Minister. Section 195A(3) expressly provided that those other statutory requirements bound the Minister.

68 The Minister's principal argument must therefore be rejected. In exercising the power given by s 195A(2), the Minister cannot ignore

those statutory requirements imposed by provisions outside subdivs AA, AC and AF. The Minister is bound by those other provisions. Neither the exclusion of the regulations and subdivs AA, AC and AF nor the conditioning of the power given by s 195A(2) upon the Minister's assessment of the "public interest" provides any basis for ignoring statutory requirements elsewhere in the Act. It is necessary therefore to consider what, if any, statutory requirements for the grant of a visa are imposed by the other provisions of the Act. That requires examination of the Act's provisions about visas.

The Act's provisions about visas

69 Subdivision A (ss 28-43) of Div 3 of Pt 2 of the Act made general provisions about visas. Section 29(1) provided that:

> "Subject to this Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:
>
> (a) travel to and enter Australia;
>
> (b) remain in Australia."

Section 31(1) provided that there are to be prescribed classes of visas and s 31(2) recognised that, "[a]s well as the prescribed classes" of visas (to be prescribed by regulation (s 504(1))), "there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B". Those classes were, respectively, "special category visas", "special purpose visas", "absorbed person visas", "ex-citizen visas", "protection visas", "bridging visas", "temporary safe haven visas", "criminal justice visas", "enforcement visas" and "maritime crew visas". Section 31(3) provided that "[t]he regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A)". Thus, the regulations could prescribe criteria for "special category visas", "protection visas", "bridging visas", "temporary safe haven visas" and "maritime crew visas" but not for any other statutorily created class of visas.

70 It follows from subdiv A of Div 3 that some classes of visas were provided for by the Act; some were prescribed by regulation. And it further follows that the characteristics of and criteria for different classes of visas could be found either in the Act or in regulations or in both the Act and regulations. (The word "characteristic" is adopted here to permit a distinction to be drawn between those features of a statutorily created class of visas which were specified by the Act and the "criteria" for grant which were prescribed by regulation.) Classes of visas prescribed by regulation had all of their characteristics and all of the criteria for their grant identified by regulation. Some classes of

visas provided for by the Act had all of their characteristics and all of the criteria for their grant identified by the Act. That must be so because the regulations could not prescribe criteria for the grant of those classes of visas (58). And some classes of visas provided for by the Act had their characteristics and some of the criteria for their grant identified by both the Act and by regulation. That must be so because the regulations could prescribe criteria for the grant of those classes of visas. Of course, any criteria prescribed by regulation could not be inconsistent with the Act (s 504(1)) and thus could not be inconsistent with the characteristics of the class that were identified in the Act.

71 All of the classes of visas provided for by the Act had statutorily identified characteristics even though, for *some* of those classes, further criteria for their grant, not inconsistent with the Act, could be prescribed by regulation. In many cases, these statutory characteristics were found in the section creating the class. So, for example, s 36 made elaborate provision for the characteristics of protection visas and s 38B identified the central characteristic of the class of visas for which it provided by describing it as "a class of temporary visas to travel to and enter Australia by sea, and to remain in Australia, to be known as maritime crew visas". In three cases (bridging visas (59), criminal justice visas (60) and enforcement visas (61)), the relevant characteristics of the class were set out elsewhere in the Act. In some but not all cases, further criteria for the grant of one of these statutorily created classes of visas could be prescribed. But all of the statutory classes of visas had statutorily identified characteristics.

72 The conclusion that all of the statutory classes of visas had statutorily identified characteristics is hardly surprising. The Act itself provided for some classes of visas and provided for the creation of other classes by regulation. It would be odd if provisions of the Act which created a class of visas did no more than provide a statutorily specified name for the class and left all questions of substance for prescription by regulation. If that were the desired result, why not simply create the relevant class of visas by regulation?

73 It follows from this understanding of subdiv A of Div 3 that, in exercising the power given by s 195A(2), the Minister remained bound by those provisions of the Act which specified statutory characteristics

(58) The classes of visas provided for by ss 33 (special purpose visas), 34 (absorbed person visas), 35 (ex-citizen visas), 38 (criminal justice visas) and 38A (enforcement visas).

(59) Section 37 provided that bridging visas were "to be granted under Subdivision AF".

(60) Section 38 provided that criminal justice visas were "to be granted under Subdivision D of Division 4".

(61) The note to s 38A provided that "Division 4A deals with these visas".

of classes of visas. There is no basis for reading s 195A(3) as qualifying in any respect the application of those provisions of the Act. Section 195A(2) gave the Minister power to grant "a visa of a particular class". That expression directed attention (s 31(5)) to what the Act and the regulations specified as classes of visas. The expression is not to be read as if it gave the Minister power to grant "a visa of any class".

74 Did s 37A differ from the other nine provisions of the Act which created classes of visas? That is, did s 37A have no statutory content other than to provide for the name of a class of visas which, if granted, would make the holder a lawful non-citizen and to provide for the steps which had to be taken to alter the visa's duration?

Section 37A

75 Section 37A created a class of visas. That class was described (s 37A(1)) as the "class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas". A central, and the determinative, point of difference between the parties was whether s 37A did more than create a class of visas. In particular, did s 37A define any characteristic of the class of visas it created?

76 The note to s 37A(1) provided that a "temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia". Section 37A(3) gave the Minister power, by notice in the Gazette, to shorten the visa period of a temporary safe haven visa "if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa *because of changes of a fundamental, durable and stable nature* in the country concerned". (Emphasis added.) Section 37A(4) required the Minister to cause a copy of a notice given under s 37A(3) to be laid before each House of the Parliament together with a statement of reasons "referring in particular to the Minister's reasons for thinking that changes of a fundamental, durable and stable nature have occurred in the country concerned". The expression "country concerned" was defined in s 37A(7) as "the country or countries in which the circumstances exist *that give rise to the grant of temporary safe haven visas*" (emphasis added).

77 Contrary to the submissions of the Minister, s 37A cannot be read as having created a class of visas the nature and criteria for the grant of which were to be found only in regulations. Section 37A did not provide a wholly empty vessel into which may be poured the whole of its content by the prescription of criteria for the grant of visas of this class. Section 37A did more than create a class of visas; it identified defining characteristics of the class. Those characteristics were found in the name given to the class and in the Act's specification of the

circumstances in which the visa period may be shortened. The visa was one which, as the note to s 37A(1) said, may be "granted to a person to give the person temporary safe haven in Australia". And its grant had to be occasioned by circumstances in one or more countries which made it necessary to grant the person temporary safe haven in Australia. So much is clear from the definition of "country concerned": "the country or countries in which the circumstances exist that *give rise to the grant of temporary safe haven visas*" (emphasis added). The kinds of circumstances that might be judged to necessitate the grant of the visa to provide temporary safe haven were not identified further in the Act.

78 The criteria prescribed (62) by the *Migration Regulations 1994* (Cth) for the grant of temporary safe haven visas referred (63) to persons being "displaced" from their place of residence. In the case of the Humanitarian Stay (Temporary) subclass, the prescribed criteria referred (64) to the visa applicant being "in grave fear of his or her personal safety because of the circumstances in which, or reasons why" he or she has been, or is likely to be, displaced from that place of residence. The prescribed criteria thus identified more precisely the circumstances in which a person might be judged to require temporary safe haven in Australia. The criteria that were prescribed were consistent with the defining characteristics of the class of temporary safe haven visas that s 37A created. Those criteria were founded in, and served only to give more particular content to the application of, those statutorily identified defining characteristics. But it was s 37A which identified those characteristics, namely, that temporary safe haven visas were to be granted to give a person temporary safe haven in Australia when the need for safe haven was occasioned by circumstances existing in one or more other countries.

79 It follows from this understanding of s 37A that the Minister could not grant a temporary safe haven visa under s 195A(2) except to give a person temporary safe haven in Australia when the need for safe haven was occasioned by circumstances existing in one or more other countries.

80 The plaintiff submitted that two further statutory characteristics of a temporary safe haven visa should be identified. These submissions should be rejected. First, the plaintiff submitted that a temporary safe haven visa can only be given "in response to a humanitarian emergency". Although it may sometimes, perhaps often, be accurate to

(62) reg 2.04, Sch 2, Subclass 448 (Kosovar Safe Haven (Temporary)) and Subclass 449 (Humanitarian Stay (Temporary)).

(63) Sch 2, cll 448.221(2)(b), 449.221(2).

(64) Sch 2, cl 449.221(2).

describe the grant of a visa of this class as "humanitarian", there is no textual basis in s 37A for adopting the description as one of the statutory characteristics of this class of visas. Secondly, the plaintiff submitted that a person can only apply for his or her first temporary safe haven visa (it being possible to apply for a second temporary safe haven visa (see ss 91H, 91K)) while outside Australia. As the plaintiff pointed out, s 37A(1) described the visas with which it dealt as "visas to travel to, enter and remain in Australia". But, contrary to these submissions, that expression does not provide any characteristic of the visa that is relevant to the present dispute. Nothing turns on the reference to the visa permitting "travel to" Australia. As the Minister correctly pointed out, s 91K expressly contemplated the possibility of a further grant of a temporary safe haven visa to a person already in Australia. This aspect of s 37A(1) may be put aside from consideration in this case.

Consequences

81 Because the decision to grant the plaintiff a temporary safe haven visa was made without consideration of whether he needed temporary safe haven occasioned by circumstances existing in one or more other countries, the grant of the visa was beyond power. It is, therefore, not necessary to consider whether it was made for an improper purpose. Nor is it necessary to consider whether it would have been open to the Minister to conclude that the plaintiff (a person to whom the Department and the independent reviewer had found Australia did not owe protection obligations) required safe haven in Australia because of circumstances in his country of origin or elsewhere, or required safe haven for a period as short as seven days.

82 The Minister submitted that, if the decision to issue a temporary safe haven visa was legally infirm, it followed that the whole decision made in respect of the plaintiff on 12 April 2012, including that aspect of it which dealt with granting the plaintiff a bridging visa, must be quashed. The plaintiff submitted that the Minister made two decisions concerning the plaintiff and that the decisions can and should be severed either by application of s 46 of the *Acts Interpretation Act 1901* (Cth) or by application of principles of the general law.

83 It is not necessary to decide whether s 46 of the *Acts Interpretation Act* applies to the Decision Instrument approved by the Minister. It is enough to observe that the decision recorded in the Decision Instrument was one composite decision: to effect the plaintiff's release from detention by granting him visas of two classes with identified conditions attached to one of those visas. For the reasons that have been given, that decision was legally flawed. It cannot be severed into

two separate decisions without radically recasting its nature and effect. The whole of the decision relating to the plaintiff should be quashed.

84 It was not suggested that quashing the 12 April 2012 decision made by the Minister in respect of the plaintiff affected in any way the subsequent grant to the plaintiff of a bridging visa. But because the decision made on 12 April 2012 was invalid, it follows that the plaintiff was not the holder of a valid visa when, on 18 September 2012, he made his application for a protection visa. It further follows that he was then an unlawful non-citizen and that, by operation of s 46A(1), his application for a protection visa was not a valid application.

More fundamental issues?

85 The conclusions that have been expressed about s 195A proceed wholly from construction of the Act according to established principles. It is important to notice, however, that, if the Act could be construed as permitting the Minister, exercising power under s 195A(2), to grant any class of visas and to do that guided only by public interest considerations, more fundamental issues may arise.

86 This construction, which was urged by the Minister, would give the Minister a very wide power to grant visas. Section 195A applied to a person who was in detention under s 189. Section 189 requires (65) the detention of *any* person known or suspected of being an unlawful non-citizen in the migration zone or in an excised offshore place. Section 195A could therefore apply to well-nigh every unlawful non-citizen. On the Minister's construction, the power given by s 195A was confined only by public interest considerations. Yet, as noted at the outset of these reasons, the Act records (s 4(2)) the Parliament's intention that the Act "be the only source of the right of non-citizens" to enter or remain in Australia. Section 195A(3) identified the only provisions of the Act which were not to bind the Minister in the exercise of power under s 195A(2).

87 Two points may follow from these considerations. First, it is not to be supposed that s 195A(2) (or s 195A as a whole) can be read as permitting the Minister to dispense with or relieve from the application of otherwise binding provisions of the Act. But secondly, it may well be that any ambiguity in or uncertainty about the reach of a provision like s 195A must be resolved in a way that confines rather than expands the relevant power. Whether that is so requires close consideration of fundamental questions about the relationship between

(65) s 189(1), (3). *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), s 3, Sch 1, item 12 omitted the words "may detain" in s 189(3) and substituted the words "must detain".

the Parliament and the Executive (66). And it may be that consideration of those questions would have to begin by examining the present significance of the protest recorded in *The Bill of Rights* (1 Will & Mar Sess 2 c 2) against the assumed "Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament" and the provisions of that Act declaring "That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall" and "That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall".

88 Secondly, reading the Act in the manner urged by the Minister would likely require examination of some issues touched on by five members of this Court, but not decided, in *Plaintiff S157/2002 v The Commonwealth* (67). The plurality recorded (68) that, in argument in that case, the Commonwealth had suggested that the Parliament might validly delegate to the Minister "the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia", subject only to this Court deciding any dispute as to the constitutional fact of alien status. The plurality said (69) of this suggestion:

> "The inclusion in the Act of such provisions to the effect that, notwithstanding anything contained in the specific provisions of that statute, the Minister was empowered to make any decision respecting visas, provided it was with respect to aliens, might well be ineffective. It is well settled that the structure of the *Constitution* does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of its legislative power. *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (70) may be cited for that proposition. But what may be 'delegated' is the power to make laws with respect to a particular head in s 51 of the *Constitution*. The provisions canvassed by the Commonwealth would appear to lack that hallmark of the exercise of legislative power identified by Latham CJ in *The Commonwealth v Grunseit* (71), namely, the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'."

(66) *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].
(67) (2003) 211 CLR 476.
(68) (2003) 211 CLR 476 at 512 [101] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
(69) (2003) 211 CLR 476 at 512-513 [102].
(70) (1931) 46 CLR 73.
(71) (1943) 67 CLR 58 at 82.

89 Having regard to the conclusions that I have set out earlier in these reasons about the construction and application of s 195A, I need not consider these more fundamental issues.

Conclusion and orders

90 The parties agreed that the costs of the special case should follow the answer that is given to the first question in the special case. For the reasons that have been given, the questions in the special case should be answered as follows:

Question 1: "Was the plaintiff validly granted the TSH Visa?"

Answer: No.

Question 2: "Is the plaintiff's application for a protection visa a valid application?"

Answer: No.

Question 3: "Who should pay the costs of this special case?"

Answer: The defendant.

GAGELER J.

Introduction

91 This special case in proceedings in the original jurisdiction of the High Court under s 75(v) of the *Constitution* asks questions the answers to which turn on an analysis of the scope and permitted purposes of the power conferred on the Minister for Immigration and Citizenship (the Minister) by s 195A of the *Migration Act 1958* (Cth) (the Act) to grant "a visa of a particular class" to a person in immigration detention "[i]f the Minister thinks that it is in the public interest to do so". The questions are set out by French CJ, Crennan and Bell JJ, with whose proposed answers I agree.

92 The answers determine as valid a Temporary Safe Haven (Class UJ subclass 449) visa (TSH visa) and a Bridging E (Class WE subclass 050) visa (Bridging visa) the Minister granted to the plaintiff, when in immigration detention, under s 195A of the Act in the implementation of a policy of "community placement" announced by the Minister in November 2011.

Facts

93 Community placement as announced by the Minister in November 2011 needs to be understood against the background of "mandatory detention", which had previously been the policy of successive Australian Governments. It also needs to be understood against the background of the decision of the High Court in *Plaintiff M61/2010E v The Commonwealth (Offshore Processing Case)* (72) in November 2010.

(72) (2010) 243 CLR 319.

94 Mandatory detention has since September 2001 been underpinned in part by provisions of the Act that apply to an "offshore entry person": a person who becomes an unlawful non-citizen by entering Australia at Christmas Island or another "excised offshore place" (73). Section 189(3) of the Act has the effect of requiring that an offshore entry person in an excised offshore place be taken into immigration detention. The offshore entry person must then be kept in immigration detention until the happening of an event which may be that the person is removed from Australia or may be that the person is granted a visa (s 196).

95 Section 46A of the Act has the additional effect that an offshore entry person, while in Australia without a visa, is barred from making a valid application for a visa. That is so unless the Minister considers the exercise of a personal non-compellable power conferred by s 46A and, "[i]f the Minister thinks that it is in the public interest to do so", exercises that power to determine that the bar does not apply to an application by the person for a visa of a class specified by the Minister in the determination.

96 The *Offshore Processing Case* concerned the nature of Refugee Status Assessment (RSA) and Independent Merits Review (IMR) processes implemented by the Department of Immigration and Citizenship (the Department) following a ministerial announcement in July 2008 made in the wake of an earlier announcement by the Australian Government "that asylum claims of future unauthorised boat arrivals would be processed on Christmas Island" (74). The relevant finding was that "the effect of the [July 2008] announcement was that … consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations (75)". The relevant holding was (76):

> "Because the Minister has decided to consider exercising power under either s 46A or s 195A of the [Act] in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes taken in respect of each plaintiff were steps taken under and for the purposes of the [Act]."

97 The ministerial announcement in November 2011 was to the effect that some offshore entry persons would thereafter be "placed in the

(73) s 5(1) ("offshore entry person", "excised offshore place"), inserted by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).
(74) (2010) 243 CLR 319 at 342 [37].
(75) (2010) 243 CLR 319 at 350-351 [70].
(76) (2010) 243 CLR 319 at 334 [9].

community on bridging visas … as part of the new approach to asylum seeker management". The announcement referred to the Australian Government remaining "committed to maintaining a mandatory detention system, including using mandatory detention on Christmas Island for reception and initial checks" but having recently announced that "following initial health, security and identity checks, eligible boat arrivals who do not pose risks will be progressively considered for community placement on bridging visas while their asylum claims are assessed". The new approach referred to in the announcement is explained in more detail in an affidavit of the Minister filed for the purposes of the special case.

98 The Minister's affidavit discloses that the Australian Government decided shortly before the November 2011 announcement that, from 24 March 2012, new offshore entry persons would generally be permitted (through the exercise by the Minister of power under s 46A of the Act) to lodge applications for protection visas. In relation to offshore entry persons who had made claims to protection that were the subject of RSA processes begun before 24 March 2012, the Government decided that "the existing assessment processes would continue to completion for the purpose of [the Minister's] consideration whether to exercise [his] personal public interest powers to permit such persons to lodge valid applications for protection visas".

99 The Minister decided in light of that decision that he would consider the simultaneous grant to offshore entry persons who had made claims to protection that were the subject of RSA processes begun before 24 March 2012 of a Bridging visa and a TSH visa of short duration. His reasoning was that:

> "this would allow offshore entry persons to be released from detention while at the same time avoiding the consequence that they would then be able to apply for protection visas in circumstances where their protection claims had already been, or were already being, assessed through an existing process."

He took the view that, where an existing process was incomplete, "that process should continue following the grant of the visas for the purpose of [his] consideration whether to exercise [his] personal public interest power under s 91L of the [Act]".

100 The Minister's reference to avoiding the consequence that offshore entry persons released from detention would be able to apply for protection visas is a reference to the effect of s 91K of the Act. The effect of s 91K, subject to s 91L, is to bar the holder of a TSH visa (or a non-citizen who has not left Australia since ceasing to hold a TSH visa) from making a valid application for any other visa. Section 91L allows the Minister to consider the exercise of a personal non-compellable power conferred by that section and, "[i]f the

Minister thinks that it is in the public interest to do so", exercise that power to determine that the bar imposed by s 91K does not apply to an application by the person for a visa made by that person within the seven working day period after notice is given.

101 The Minister's purpose in granting Bridging visas was to allow offshore entry persons released from immigration detention to work and to access various support services and programs while living in the community until the completion of the existing RSA and IMR processes. The Minister's purpose in simultaneously granting TSH visas can be stated as follows. It was to ensure that s 91K would bar those offshore entry persons making valid applications for protection visas unless the Minister exercised the power conferred by s 91L to lift that bar. It was also to ensure that the existing RSA and IMR processes would continue in relation to those persons no longer for the purpose of the Minister considering the exercise of the powers conferred by ss 46A and 195A but for the new purpose of the Minister considering the exercise of the power conferred by s 91L.

102 The Minister's affidavit discloses that, in an eleven month period following the November 2011 announcement, the Minister made simultaneous grants of TSH visas and Bridging visas to over 2,383 offshore entry persons all of whom were in immigration detention at the time of grant and all of whom had made claims to protection that were the subject of RSA processes begun before 24 March 2012.

103 The plaintiff was one of 278 offshore entry persons then in immigration detention to each of whom the Minister granted a TSH visa and a Bridging visa on 12 April 2012. The plaintiff had by then been assessed under the RSA and IMR processes not to be a person to whom Australia owes protection obligations. However, the plaintiff had commenced proceedings in the Federal Magistrates Court in which he sought a declaration that the IMR recommendation was not made in accordance with law. Along with others in a similar position, the plaintiff was granted a TSH visa for seven days and a Bridging visa for six months and was immediately released from immigration detention.

104 On 18 September 2012, the plaintiff made an application for a protection visa. By reason of the plaintiff having been the holder of a TSH visa and in the absence of an exercise of power by the Minister under s 91L to determine that the application could be made, the Department treated the application as invalid under s 91K.

Arguments

105 The plaintiff argues that the Minister did not validly exercise the power conferred by s 195A to grant the TSH visa to the plaintiff with the result that s 91K did not apply to the plaintiff's subsequent application for a protection visa. That is because the Minister acted

beyond the scope of the power conferred by s 195A by ignoring statutory criteria for the grant of a TSH visa or because the Minister acted for a purpose not permitted by s 195A in granting the TSH visa to ensure that s 91K would bar the plaintiff from making a valid application for a protection visa unless the Minister exercised the power conferred by s 91L to lift that bar. A further argument that the power cannot be exercised to grant two visas simultaneously is put but faintly by the plaintiff; plainly, it can.

106 The Minister denies that the TSH visa was invalid for any of the reasons argued by the plaintiff. But if the TSH visa was invalid, argues the Minister, so was the Bridging visa: the simultaneous grant of the two visas was the product of a single process of reasoning. If both visas were invalid, then it was not s 91K but s 46A that applied to make the plaintiff's application for a protection visa invalid.

107 For reasons which follow, the grant of a TSH visa to the plaintiff in the implementation of the policy of community placement was within the scope of the power conferred by s 195A and was for a purpose permitted by that section. The TSH visa being valid, s 91K applied to make the plaintiff's application for a protection visa invalid. The Minister's alternative argument that the Bridging visa was invalid and that s 46A continued to apply need not be considered.

Section 195A: scope

108 Section 195A was inserted into Pt 2 of the Act in 2005 as part of a package of amendments the purpose of which was "to provide greater flexibility and transparency in the administration of the detention of persons known or reasonably suspected to be unlawful non-citizens" (77). The explanatory memorandum for the amending legislation expressed an intention that the section "will be used to release a person from detention where it is not in the public interest to continue to detain them" (78) and that "[i]n the exercise of this power the Minister will not be bound by the provisions of the [Act] or regulations governing application and grant requirements" and "will have the flexibility to grant any visa that is appropriate to [an] individual's circumstances" (79).

109 Section 195A is expressed to apply only to a person who is in detention under s 189 (s 195A(1)). It provides (s 195A(2)):

(77) Australia, House of Representatives, *Migration Amendment (Detention Arrangements) Bill 2005*, Explanatory Memorandum, p 2.

(78) Australia, House of Representatives, *Migration Amendment (Detention Arrangements) Bill 2005*, Explanatory Memorandum, p 8.

(79) Australia, House of Representatives, *Migration Amendment (Detention Arrangements) Bill 2005*, Explanatory Memorandum, p 3.

> "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)."

It provides further (s 195A(3)):

> "In exercising the power … the Minister is not bound by Subdivision AA, AC or AF of Division 3 of [Pt 2] or by the regulations, but is bound by all other provisions of [the] Act."

It states that the power can only be exercised by the Minister personally (s 195A(5)), and that the Minister does not in any circumstances have a duty to consider whether to exercise the power (s 195A(4)). It goes on to require the Minister promptly to inform each House of Parliament of the grant of a visa and of the reasons for that grant including in particular the Minister's reasons for thinking the grant to be in the public interest (s 195A(6)-(8)).

110 Preconditions to the exercise of the power conferred by s 195A to grant a visa of a particular class to a person who is in immigration detention are that: (a) the Minister has decided to consider whether to exercise that power and (b) the Minister, having considered whether to exercise the power, thinks that it is "in the public interest" to grant that person a visa of that particular class (80).

111 The plaintiff's argument that the Minister acted beyond the scope of the power by ignoring statutory criteria for the grant of a TSH visa raises issues as to what, if any, further preconditions to the exercise of the power conferred by s 195A arise from: (a) the power being limited to the grant of "a visa of a particular class"; and (b) the Minister "[i]n exercising the power" being "bound" by the provisions of the Act other than subdivs AA, AC and AF of Div 3 of Pt 2.

112 The reference in s 195A to "a visa of a particular class" must be read in light of the general provisions about visas in subdiv A of Div 3 of Pt 2. In particular, the reference must be read in light of the explanations in subdiv A that a visa "is a visa of a particular class if [the] Act or the regulations specify that it is a visa of that class" (s 31(5)) and that, "[a]s well as" the classes prescribed by regulations made under the Act, "there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B" (s 31(2)), all of which are located within that same subdivision.

113 The reference makes clear that the power conferred by s 195A is only to grant a visa from within the range of existing classes for which provision is already made either in the regulations or in ss 32-38B of the Act. The section confers no power to grant a visa of a new class or to grant a visa that is a modified version of an existing class.

(80) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99(iv)].

114 The significance of the reference in s 195A to the Minister "[i]n exercising the power" being "bound" by provisions of the Act other than subdivs AA, AC and AF of Div 3 of Pt 2 is best understood by examining first the significance of the Minister not being bound in exercising the power by subdivs AA, AC and AF of Div 3 of Pt 2.

115 The significance of the Minister not being bound by subdiv AA of Div 3 of Pt 2 in the exercise of the power conferred by s 195A is that it excludes, amongst other things, the general requirement of s 47 read in light of s 45 that the Minister must consider a valid application for a visa of a particular class and must not consider any other application for a visa. That exclusion reinforces the parenthetical statutory explanation of the power as being to grant a visa of a particular class to a person "whether or not the person has applied for the visa".

116 The significance of the Minister not being bound by subdiv AC of Div 3 of Pt 2 in the exercise of the power conferred by s 195A is that it excludes, amongst other things, the general requirement of s 65 that, after considering a valid application for a visa of a particular class, the Minister must grant the visa if the Minister is satisfied of matters that include that "criteria for it prescribed by [the] Act or the regulations have been satisfied" and must refuse to grant the visa if not so satisfied. The similar significance of the Minister not being bound by subdiv AF of Div 3 of Pt 2 is that, in relation to the power to grant a visa within a class of "bridging visas" provided for by s 37 whether or not there has been a valid application, it excludes, amongst other things, the specific requirement of s 73 that the Minister be "satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3)". Together, the exclusion of these requirements reinforces the exclusivity of the criterion set out in s 195A for the grant of a visa of a particular class: "[i]f the Minister thinks that it is in the public interest to do so."

117 There is also significance in the circumstance that the Minister *is* bound in the exercise of the power conferred by s 195A by subdiv D of Div 4 of Pt 2. That subdivision includes, amongst other things, the specific requirement of s 159 that, in relation to the Minister's power to grant a visa within a class of "criminal justice visas" provided for by s 38 "in his or her absolute discretion", the Minister, "after considering the grant of a criminal justice visa for a non-citizen, [be] satisfied that the criteria for it have been met". Maintenance of the s 159 precondition that the Minister be satisfied of the criteria for a criminal justice visa, and of the s 159 discretion unconstrained by considerations of the public interest where that precondition is satisfied, is inconsistent with the general power of the Minister under s 195A being capable of exercise to grant a visa of that particular class

simply "[i]f the Minister thinks that it is in the public interest to do so". The exception reinforces the general rule that the criterion is exclusive.

118 Doubtless, the Minister is also bound by the provisions of subdiv A of Div 3 of Pt 2 of the Act in the exercise of the power conferred by s 195A. However, contrary to the plaintiff's argument, the terms in which ss 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B provide for classes of visas cannot be read as independently binding the Minister to address any additional criteria in the exercise of the power conferred by s 195A. Sections 33, 34, 35 and 38A each provide for a class of visa that, apart from s 195A, is either granted or taken to be granted by force of the Act if specified circumstances exist. Sections 32, 36, 37, 37A, 38 and 38B each provide for a class of visa that can only be granted by the Minister in the exercise of a power to grant a visa of that class to be found elsewhere in the Act. Sections 32 and 36 each set out a criterion for the grant of a visa of the class for which they provide. Sections 37, 37A, 38 and 38B do not: the criteria for the grant of a visa of the class for which they provide depend on other provisions of the Act or on regulations made under the Act.

119 The plaintiff's argument that statutory criteria for the grant of a TSH visa are to be inferred from the terms of s 37A cannot be accepted. The mere provision for "a class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas" does not imply that the holder must be out of Australia at the time of initial grant. Nor are any criteria for the grant of a visa of that class to be inferred from the power of the Minister to shorten the period of a visa of that class once granted "if, in the Minister's opinion, temporary safe haven in Australia is no longer necessary for the holder of the visa because of changes of a fundamental, durable and stable nature in the country concerned" being "the country or countries in which the circumstances exist that give rise to the grant of temporary safe haven visas". The spelling out of criteria for the grant of TSH visas is left to regulations.

120 Be that as it may, the critical point for present purposes is that any requirement for the Minister to be satisfied of criteria as a precondition to granting visas of the classes for which provision is made by ss 32, 36, 37, 37A, 38 and 38B comes not from the terms of those sections but from the terms of the sections which confer power on the Minister to make the grants. For criminal justice visas of the class for which provision is made by s 38, the power to grant is to be found in s 159, the requirement of which for the Minister's satisfaction of the criteria for a visa of that class binds the Minister in the exercise of the power conferred by s 195A. For bridging visas of the class for which s 37 provides, the power to grant is ordinarily to be found in s 73, in which case satisfaction of criteria for the grant of a visa of that class is

required. For visas of the classes for which provision is made in ss 32, 36, 37A or 38B or in regulations made under the Act, the power to grant is ordinarily to be found in s 65, in which case satisfaction of criteria for the grant of visas of those classes is also required. However, for visas of the classes for which provision is made in ss 32, 36, 37, 37A and 38B or in the regulations, the power to grant can also be found in s 195A, the terms of which make clear not only that ss 65 and 73 have no application but that the criterion for making that grant is that "the Minister thinks that it is in the public interest to do so".

121 The "focus" of s 195A is therefore "upon the Minister's view of the public interest rather than upon the satisfaction of conditions for the issue of visas" (81). Subject only to the exception of criminal justice visas, the section allows the Minister "to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements" (82).

122 The reference in s 195A to the Minister not being bound by the regulations in the exercise of the power conferred by that section does not provide a basis for distinguishing between criteria prescribed by the Act (relevantly in ss 32 and 36) and criteria prescribed by regulations made under the Act. The reference to the Minister not being bound by the regulations in the exercise of the power is to be read in light of the provision the Act makes for regulations made under the Act not only to "prescribe criteria for a visa or visas of a specified class" (including a class provided for by ss 32, 36, 37, 37A or 38B) (s 31(3)) but also to "provide that visas or visas of a specified class may only be granted in specified circumstances" (s 40(1)) and to "provide that visas, or visas of a specified class, are subject to specified conditions" (s 41(1)) non-compliance with which may lead to the cancellation of a visa (s 116(1)(b)).

123 The reference to the Minister not being bound by the regulations is directed to regulations within the second of those categories. The reference makes clear that the Minister may exercise the power to grant a visa of a particular class outside and notwithstanding any circumstances that may be specified in the regulations as the only circumstances in which a visa of that particular class may be granted.

124 The reference has nothing to do with such criteria as the regulations may prescribe for a visa or visas of a specified class: those criteria do not bind the Minister in the exercise of a power to grant a visa other

(81) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99(ix)].

(82) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648-649 [30].

than through the terms in which the power is conferred preconditioning its exercise on the Minister's satisfaction of them.

125 Nor does the reference dispense with, or allow the Minister to dispense with, any conditions that may be prescribed by regulation for a visa of a particular class: such conditions as may be prescribed for a visa of a particular class are not conditions of the exercise of power by the Minister to grant the visa but conditions of the visa as granted.

126 The plaintiff's argument that the Minister acted beyond the scope of the power conferred by s 195A by ignoring statutory criteria for the grant of a TSH visa is therefore to be rejected. Section 195A empowers the Minister to grant visas of the particular class for which s 37A provides, and makes the sole criterion for a grant of a visa of that class that "the Minister thinks that it is in the public interest to do so".

Section 195A: permitted purposes

127 The sole criterion for the grant of a visa of a particular class under s 195A of the Act – that "the Minister thinks that it is in the public interest to do so" – requires (83):

> "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view'."

128 The plaintiff's argument that the Minister acted for a purpose not permitted by s 195A in granting the TSH visa to ensure that s 91K, subject to s 91L, would bar the plaintiff from making a valid application for a protection visa necessarily depends on characterising that purpose as "definitely extraneous to any object the legislature could have had in view" in inserting s 195A.

129 The argument takes too narrow a view both of the place of s 195A within the scheme of the Act and of the Minister's purpose in granting a TSH visa to the plaintiff in the implementation of the policy of community placement.

130 The Act identifies its object as being "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (s 4(1)) and explains that "[t]o advance its object" the Act "provides for visas permitting non-citizens to enter or remain in Australia" (s 4(2)). A visa amounts to permission for a non-citizen to enter or remain in Australia (s 29), and the holding of a visa granted or taken to

(83) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648-649 [30], quoting *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99(v)].

be granted by or under the Act distinguishes a lawful non-citizen from an unlawful non-citizen (ss 13, 14). However, the plaintiff goes too far to suggest that "all the powers of the Minister to grant a visa … are to be exercised only for the purpose of permitting a non-citizen to be a lawful non-citizen". The Act divides the visas that it grants or permits to be granted into particular classes. The Act then attaches different statutory consequences to the holding of visas of different classes. The attachment of different statutory consequences to the holding of visas of particular classes is the principal means by which the Act advances so much of its object as involves the regulation of the presence of non-citizens in Australia.

131 Section 195A does not dispense with, or allow the Minister to dispense with, any statutory consequence that may attach to the holding of a visa of a particular class. The Minister, in exercising the power, must rather choose from within the available range one or more particular classes of visa with their attendant statutory consequences. The choice is one that s 195A requires to be made by the Minister by reference to the public interest. The statutory consequences that attach to the grant of a visa of a particular class are considerations that the Minister is entitled to take into account in considering whether the Minister thinks that it is in the public interest to grant a visa of that class.

132 In thinking that it is in the public interest to exercise the power conferred by s 195A to grant to a person in immigration detention a visa of the particular class for which s 37A provides, the Minister is therefore entitled to take into account that a statutory consequence of the grant would be that s 91K, subject to s 91L, would bar the holder from making a valid application for a protection visa when released from immigration detention.

133 The purpose of the Minister in granting TSH visas in the implementation of the policy of community placement was not only to ensure the application of s 91K, subject to s 91L, but also to ensure that the existing RSA and IMR processes would continue for the purpose of the Minister's consideration of whether or not to exercise the power conferred by s 91L. That wider purpose of the Minister was entirely consistent with the statutory purpose of s 195A to provide flexibility and transparency in the administration of the detention of unlawful non-citizens including offshore entry persons to whom s 46A applied.

134 In common with the powers conferred by ss 46A and 195A, exercise of the power conferred by s 91L requires the Minister to decide to consider whether to exercise the power and, having considered whether to exercise it, to think that it is "in the public interest" to exercise the power. Just as the Minister's July 2008 announcement was found in the

Offshore Processing Case to involve a decision to consider whether to exercise the power conferred by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations, so the Minister's November 2011 announcement involved a decision to consider (through the existing RSA and IMR processes) whether to exercise the power conferred by s 91L in every case in which an offshore entry person released from detention had made claims to protection that were the subject of RSA processes begun before 24 March 2012.

135 There is no reason in principle why administrative processes of assessment and review begun under and for the purposes of ss 46A and 195A should not be continued under and for the purposes of s 91L. And it was entirely consistent with providing flexibility and transparency in the administration of the detention of unlawful non-citizens for the Minister to consider it to be in the public interest that protection claims that were the subject of RSA and IMR processes begun under and for the purposes of ss 46A and 195A should be continued to completion under and for the purposes of s 91L.

Conclusion

136 The Minister had power under s 195A of the Act to grant the TSH visa to the plaintiff solely by reference to the criterion that the Minister thought that it was in the public interest to do so. The Minister was entitled to take into account that a statutory consequence of the grant would be that s 91K, subject to s 91L, would bar the plaintiff from making a valid application for a protection visa.

137 The Minister's purpose of achieving that consequence, in the implementation of the policy of community placement in respect of offshore entry persons who were the subject of existing RSA or IMR processes begun under s 46A and to be continued under s 91L, was a purpose permitted by s 195A.

138 The TSH visa and the Bridging visa were both validly granted to the plaintiff. Section 91K applied to make the plaintiff's subsequent application for a protection visa invalid.

The questions asked by the parties in the amended special case dated 30 October 2012 and referred for consideration by the Full Court be answered as follows:

Question 1: Was the plaintiff validly granted the temporary safe haven visa?

Answer: Yes.

Question 2: Is the plaintiff's application for a protection visa a valid application?

Answer: No.

Question 3: Who should pay the costs of this special case?

Answer: The plaintiff.

Solicitors for the plaintiff, *Baker & McKenzie*.

Solicitors for the defendant, *Sparke Helmore*.

BWJ