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Details of Filing

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Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **No NSD 1004 of 2020**

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Applicant

CBW20

Respondent

Submissions of the Australian Human Rights Commission (appearing as amicus curiae)

A. INTRODUCTION

1. The Australian Human Rights Commission (**Commission**) appears in this proceeding as amicus curiae, pursuant to the orders of the Court on 8 January 2021.

2. Section 195A of the *Migration Act 1958* (Cth) (**the Act**) confers a power on the Minister to grant a visa of a particular class to a person who is in detention under s 189 of the Act, whether or not the person has applied for the visa, if the Minister thinks that it is in the public interest to do so.

3. Pursuant to s 195A, on or about 15 October 2014, the then Minister for Immigration purported to grant the respondent two visas: a bridging visa and a temporary safe haven (TSH) visa (valid for seven days). The effect of the Minister's decision to grant the respondent a TSH visa was that the respondent became subject to a bar which prevented him from making a valid visa application (other than another TSH visa), pursuant to s 91K.

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4. The Commission submits that the Minister's decision was invalid on the basis that the power in s 195A cannot be used to grant a visa, where the consequence of the grant of the visa is to preclude the person from being able to make a valid application for a protection visa, where no such bar previously applied. Having regard to the statutory purpose and the text and context of the Act as a whole, such a result is *ultra vires* the power conferred by s 195A.

B. BACKGROUND

5. The respondent is a national of Vietnam. On 14 April 2013, the respondent arrived in Australia by boat at the Western Lagoon of Ashmore Reef.

6. At the time of his arrival, the Western Lagoon had purportedly been appointed as a "proclaimed port" by notice published in the Commonwealth Gazette on 23 January 2002. However, that purported appointment was found to be invalid by a decision of a Full Court of this Court in August 2018: *DBB16 v Minister for Immigration and Border Protection* (2018) FCR 447 (**DBB16**).

Effect of (valid) proclamation as a proclaimed port

7. In broad terms, the effect of the appointment of the Western Lagoon at Ashmore Reef as a "proclaimed port" (if valid) was that a person arriving at that place would be taken to have entered Australia by sea at an "excised offshore place" (see *DBB16* at [15]-[22]). A person who had arrived in Australia at an "excised offshore place" and became an unlawful non-citizen because of that entry was an "offshore entry person".

8. At the time of the respondent's arrival, s 46A(1) of the Migration Act imposed a bar on an "offshore entry person" present in Australia, and who was an unlawful non-citizen, from making a valid visa application. That bar could be lifted by the Minister, if he or she thought that it was in the public interest to do so (s 46A(2)).

9. As noted above, the Minister for Immigration exercised his power under s 195A of the Migration Act to grant the respondent two visas: a bridging visa, and a TSH visa.

10. At the time that that decision was made, it was (incorrectly) thought that, pursuant to s 46A,[1] the respondent was not able to make a valid application for a visa, including a

[1] As explained in AS fn1, amendments to the Migration Act in June 2013 repealed the definition of "offshore entry person" in s 5(1) and replaced this with a new conception of "unauthorised maritime arrival". Relevantly for present purposes, to be an "unauthorised maritime arrival", a person must have entered Australia by sea at an "excised offshore place" and become an unlawful non-citizen because of that entry. Except where otherwise specified, references to legislative provisions in these submissions are references to the Act as at the time of the decision in October 2014.

valid application for a protection visa. The effect of granting a bridging visa to the respondent was that he was no longer an "unlawful non-citizen" and therefore: (a) he was entitled to release from immigration detention (s 196(1)(c)), and (b) the s 46A bar to the making of a valid application for a protection visa would no longer apply.

11. However, the effect of the grant of the TSH visa was that the respondent became subject to a different bar on making a valid application for a visa, pursuant to s 91K. Section 91K provided that if a person holds a TSH visa (or previously held a TSH visa and had not left Australia since ceasing to hold the TSH visa), the person cannot validly apply for a visa, other than another TSH visa.

12. ***If*** the respondent had been subject to the s 46A bar, the effect of the grant of the TSH visa was to replace one bar (the bar under s 46A) with another bar (the bar under s 91K).[2]

Effect of (invalid) proclamation of proclaimed port

13. As already noted above, in August 2018, a Full Court of this Court found that the proclamation of the Western Lagoon of Ashmore Reef was in fact invalid. As such, the respondent did not enter Australia by sea at an "excised offshore place", and therefore was not (and had never been) an "offshore entry person" or an "unauthorised maritime arrival". The correct legal position was therefore that the bar in s 46A never applied to the respondent.

14. As outlined above, the effect of the Minister's decision under s 195A to grant the respondent a TSH visa was to subject the respondent to the bar under s 91K. As the respondent had not previously been subject to the bar under s 46A, a legal consequence of the Minister's decision to grant the respondent a TSH visa was to subject the respondent to a bar against making a valid application for a visa, including a protection visa, where the respondent was previously entitled to make such a valid visa application.

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[2] Sections 46A and 91K have been subsequently amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth). Relevantly, s 46A was expanded so that it also applied to unauthorised maritime arrivals who held a bridging visa or a temporary protection visa, and s 91J was narrowed so that it no longer applied to unauthorised maritime arrivals. The effect of the amendments was that only one bar (under s 46A) applied to unauthorised maritime arrivals. The amendments do not affect the respondent, who is not an unauthorised maritime arrival.

C. ARGUMENT

The power under s 195A is subject to limitations imposed by the subject matter, scope and purpose of the Act

15. The Minister may exercise the power in s 195A to grant a visa if "the Minister thinks that it is in the public interest to do so". While it may be accepted that the sole express criterion of the "public interest" involves "a discretionary value judgment",[3] that discretion is not unfettered. The scope of the power must be considered in the context of the Act as a whole, including any limitations imposed by the subject matter, scope and purpose of the Act.[4] While it may not be possible to define exhaustively the permissible limits of a discretionary power, the scope and object of the Act may indicate exercises of discretion that are impermissible.[5]

16. It may be accepted that in *Plaintiff M79*, the High Court held that the Minister may grant a visa in the exercise of the power under s 195A because its legal character and consequences serve a purpose which he has judged to be in the public interest.[6] Contrary to the applicant's submissions (AS [37]), however, that case does not stand for some unqualified proposition that it is within the scope of the power in s 195A to grant a visa that engages the bar in s 91K in all circumstances.

17. The Court accepted that, in that case, it was open to the Minister to grant the applicant a TSH visa for the purpose of maintaining the position that the applicant (who was an offshore entry person) would continue to be barred from applying as of right for a protection visa. In *those circumstances*, the Minister's purpose in granting the TSH visa was not beyond the power conferred by s 195A.[7] The Court was careful expressly to confine its reasoning to the circumstances before it.[8]

18. The present case is readily distinguishable from *Plaintiff M79*. As outlined above, whatever the Minister's understanding of the respondent's status, the effect of the grant of the TSH visa to the respondent was not to maintain a previously existing bar which

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3 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at [30] (French CJ and Kiefel J); cited in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 (***Plaintiff M79***) at [39] (French CJ, Crennan and Bell JJ).

4 *Plaintiff M79* at [20] (French CJ, Crennan and Bell JJ) and [62] (Hayne J).

5 See, eg, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758 (Dixon J).

6 *Plaintiff M79* at [41] (French CJ, Crennan and Bell JJ).

7 *Plaintiff M79* at [42] (French CJ, Crennan and Bell JJ) and [133]-[135] (Gageler J).

8 *Plaintiff M79* at [42] (French CJ, Crennan and Bell JJ) ("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" (emphasis added)); see also [133] (Gageler J) where the "wider purpose" of the Minister was described by reference to continuation of the existing assessment processes commenced for the purposes of s 46A.

prevented an applicant from making a valid visa application (albeit under a different provision). Rather, it was to impose a new bar where none previously existed. The question whether s 195A confers power to grant a visa in the circumstances of the present case was not addressed in *Plaintiff M79*.[9]

Section 195A does not confer a power to grant a visa where the effect is to impose a bar on the making of a valid protection visa application, where no previous bar applied

19. Having regard to the purpose, subject matter and context of the Act as a whole, the power in s 195A should not be taken to allow the Minister to grant a visa where the effect of that decision would be to impose a bar on a person from validly applying for a protection visa, where no such bar previously applied. That is so for the following reasons.[10]

20. *First*, the making of valid visa applications, and in particular the circumstances in which a person may be prevented from making a valid visa application, is already the subject of detailed regulation under the Act.

21. In respect of applications for visas generally, three specific classes of persons are prevented from making any valid visa application (subject to the Minister deciding to lift that bar), namely:

    a. unauthorised maritime arrivals (s 46A) – in broad terms, persons who entered Australia by sea without a valid visa at an "excised offshore place", or at any other place on or after 1 June 2013 (see the definition of "unauthorised maritime arrival in s 5AA);

    b. transitory persons who are in Australia (s 46B), which broadly includes various non-citizens who were taken to another place outside Australia, including a regional processing country, and are in Australia for a temporary purpose (see the definition of "transitory person" in s 5; see also s 198B); and

    c. persons who hold or have held TSH visas (s 91K). The class of visas known as TSH visas was created by s 37A, initially in order to fulfil the Government's

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9 See also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219: it was not disputed there that the Minister granted a seven-day TSH visa for the purpose of engaging the prohibition on making a valid application for any visa other than another temporary safe haven visa (at [5]). The matter was resolved on other grounds, but the Court was again careful to note that nothing in the reasons "should be understood as assuming or deciding that the grant of that visa was for a proper purpose" (at [10] (French CJ, Hayne, Crennan, Kiefel and Keane JJ)).

10 This submission does not depend upon the purposes of the Minister in granting the visa: cf AS [36].

commitment to bring to Australia and provide temporary safe haven to 4,000 persons who had been displaced from their homes in Kosovo.[11] The only remaining subclass of TSH visa is the Subclass 449 – Humanitarian Stay (Temporary) visa, the criteria for which are set out in the regulations.

22. More limited prohibitions on the making of a visa application also apply in some circumstances. For example, a holder of a criminal justice entry visa or an enforcement visa is prohibited from applying for a visa, other than a protection visa (see ss 161 and 164D). Persons who have already had an application for a visa refused or who have a visa cancelled on certain grounds are also restricted from making applications for some kinds of visa (see ss 48 and 501E).

23. That Parliament has only identified limited circumstances in which a person is to be prevented from making a valid visa application strongly suggests that s 195A was not intended by Parliament to confer on the Minister a broad discretionary power to impose such a bar upon a person not already falling within one of those categories through the exercise of the power conferred by s 195A.[12]

24. It may be noted that, in respect of applications for protection visas, the Act also prevents an applicant from making a valid application for a protection visa in some circumstances. An applicant is prohibited from making an application for a protection visa where the person has already had an application for a protection visa refused (s 48A), where a person has access to a safe third country (s 91E) and where a person has access to protection from another country (s 91P).

25. The reasons for such limitations are readily explicable. In the case of a person who has already had an application for a protection visa refused, the purpose is to prevent multiple applications in respect of the same matter. In the case of a person who has travelled through a safe third country, Parliament's view was that those persons should not be allowed to apply for a protection visa (or in some cases, any other visa) (s 91A). In the case of a person who can avail themselves of protection from a third country (because of nationality or some other right to re-enter and reside in the third country), Parliament's view was that the person should seek protection from the third country instead of Australia (s 91M). In each case, the Minister retains a discretion to lift the bar to allow a further application.

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11 Explanatory Memorandum, Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999 (Cth), at [1]; *Plaintiff M79* at [27] (French CJ, Crennan and Bell JJ).

12 See, by way of analogy, *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [21] (the Court).

26. Again, the fact that the Act contains detailed provisions that prevent the making of a valid protection visa application in limited specified circumstances suggests that s 195A was not intended to confer a power on the Minister effectively to prevent a person from making such a valid application outside those specified circumstances so as to disrupt that carefully designed statutory scheme.

27. *Secondly*, the Commission's suggested construction is supported by the apparent object of s 195A itself. Significantly, s 195A applies only to a person who is in immigration detention. Its purpose may thus readily be understood as an attempt by the Parliament to ameliorate individual hardship that might follow from the decision in *Al-Kateb v Godwin* (2004) 219 CLR 562.[13] That the obvious purpose of s 195A was to empower the grant of a visa to release a person from detention is also evident from the Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2015 (Cth), by which s 195A was inserted. The EM said of s 195A that: "It is intended that it will be used to release a person from detention where it is not in the public interest to continue to detain them".[14]

28. It is in that context that s 195A operates as a "dispensing provision"[15] that allows the Minister to grant a visa notwithstanding that a person does not meet the criteria for that visa,[16] in order for the person to be released from detention under s 189 of the Act. For a person who is already subject to a bar against applying for a visa, the Minister's exercise of the power under s 195A may be the only mechanism to enable the person to be released from detention. Such was the case, for example, for the plaintiff in *Plaintiff M79*.

29. The situation of a person such as the respondent, who was not subject to any bar against the making of a valid visa application, is very different. The respondent was entitled to apply for a protection visa, that, if granted, would have resulted in his release from detention because he would no longer be an unlawful non-citizen. In that context, the effect of the use of s 195A was to pre-emptively grant the respondent a different visa with fewer rights, and thereby to deprive him of the opportunity to apply for a protection visa and to have his application considered and determined in the ordinary way.

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13 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [197] (Hayne J).

14 Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2015 (Cth), at [20].

15 See, eg, *Plaintiff S10* at [27] (French CJ and Kiefel J).

16 *Plaintiff M79* at [33] (French CJ, Crennan and Bell JJ) and [121] (Gageler J), citing *Plaintiff S10* at [30].

30. *Thirdly*, the purpose of the Migration Act as a whole also supports a limitation on an exercise of power under s 195A that results in the imposition of a bar. It is clear that, "read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol".[17]

31. In that regard, protection visas are one of the mechanisms by which Australia discharges its international *non-refoulement* obligations. They enable an asylum seeker to have their claims for protection assessed, which is critical to fulfilment of Australia's obligations not to return an asylum seeker to a place in which they would be in likely danger of persecution.

32. Further, once a person has been granted a TSH visa and the bar under s 91K has been engaged, they are at risk of removal from Australia without assessment of their protection claims. That risk arises if, at any time in the future, they no longer hold a visa (for example, because their TSH visa expires) and are taken into immigration detention. Section 198(8) specifically provides for removal in circumstances where the non-citizen is a detainee, the non-citizen has previously been granted a TSH visa and the Minister has not given a notice to lift the bar. The potential risk of removal in such circumstances without a full assessment of a person's protection claims was identified in *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505.[18]

33. The express provisions of the Migration Act dealing with protection visas reflect their special purpose.[19] A construction of s 195A which allowed the Minister in effect to impose a unilateral bar on a person from applying for a protection visa "would be at odds with the purposes of the statutory scheme of which protection visas are a central part".[20]

34. *Fourthly*, it is no answer to the matters raised above that, pursuant to s 91L, the Minister has the power to lift the bar under s 91K. Rather than being able to exercise a right to apply for a protection visa, a prospective applicant would be forced to rely on the Minister's exercise of power to lift the bar.

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17 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27] (the Court). That remains the case, even after subsequent amendments: see *FCS17 v Minister for Home Affairs* [2020] FCAFC 68 at [7]-[10] and [17] (Allsop CJ).

18 *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at [101]-[103] (Lander and Gordon JJ).

19 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199 (***Plaintiff M150***) at [36]-[37] (French CJ).

20 *Plaintiff M150* at [38] (French CJ).

35. That power is a personal, non-compellable power (ss 91K(2), (6)): the Minister is not required even to *consider* the exercise of that power. Moreover, the exercise of that power may be based on matters extraneous to the applicant's own circumstances: as with the power under s 195A, it "is not based on any objective characterisation of a person's circumstances as 'deserving' [but] depends on the Minister's own view of what is in the public interest and while the power must be exercised rationally and without legal unreasonableness, a person whose circumstances are, objectively, 'deserving' may well not be the beneficiary of a favourable exercise of discretion".[21]

CONCLUSION

36. For the reasons above, the Minister's decision under s 195A of the Act to grant the respondent a bridging visa and TSH visa was invalid. The Tribunal did not err in reaching that conclusion (although its reasoning may have been differently expressed).

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[21] *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97 at [72] (Mortimer and Wigney JJ).