FEDERAL CIRCUIT COURT OF AUSTRALIA

PLAINTIFF B9/2014 v MINISTER FOR IMMIGRATION [2014] FCCA 2348

Catchwords:
MIGRATION – Judicial review of administrative decision – application for protection visa – whether application valid – whether applicant "unauthorised maritime arrival" – whether applicant "entered Australia by sea".

Legislation:
Australian Citizenship Act Amendment Act 1986
Migration Act 1958, s.4(2), 5AA, 5AA(1)(a)(i), 5AA(1)(a), 5AA(1)(a)(ii), 5AA(2), 5AA(2)(a), 5AA(2)(b), 5AA(2)(c), 5D, 5(23), 10, 29(1), 45, 46A(1), 46A(2), 47(1), 46A, 47(3), 166, 189, 198AH, 245F(9)
Migration Amendment Act 1986
Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013
Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012
Migration (Delayed Visa Applications) Tax Bill 1992
Migration Legislation Amendment Bill 1989
Migration Reform Act 1992

Cases cited:
Plaintiff M61/2010E v The Commonwealth (2010) 243 CLR 319

Applicant:	PLAINTIFF B9/2014 BY HIS MOTHER AS LITIGATION GUARDIAN
Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
File Number:	BRG 391 of 2014
Judgment of:	Judge Jarrett
Hearing date:	14 October 2014
Date of Last Submission:	14 October 2014
Delivered at:	Brisbane
Delivered on:	15 October 2014

REPRESENTATION

Counsel for the Applicant:	Mr Sofronoff QC with Mr Black and Mr Steele
Solicitors for the Applicant:	Maurice Blackburn Lawyers
Counsel for the Respondent:	Mr Johnson SC with Ms Wheatley
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) The application filed on 21 February, 2014 is dismissed.

(2) The applicant pay the respondent's cost of and incidental to the application to be agreed and failing agreement to be taxed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 391 of 2014

PLAINTIFF B9/2014
BY HIS MOTHER AS LITIGATION GUARDIAN
Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Respondent

REASONS FOR JUDGMENT

1. In broad terms, the issue for determination in this application is whether a child born in Australia to parents who have come to this country by boat and without a visa to permit them to enter or remain in Australia is able to make a valid application for the grant of a Protection (Class XA) visa.

2. More specifically, the answer to that inquiry depends upon whether, for the purposes of s.5AA of the *Migration Act 1958* (Cth), the applicant is an "unlawful maritime arrival".

3. At the outset I record my gratitude for the extensive written submissions filed by each of the parties. As will become apparent, I have drawn upon both the written submissions and the oral argument heavily in the preparation of these reasons.

Some Background

4. The question for determination arises in the context of the following uncontroversial facts.

5. The applicant's mother and father were born in Myanmar. They claim to be Rohingya and of the Islamic faith. They were living in Malaysia when they married but then moved to Indonesia. There they contacted a people smuggler to secure a boat to carry them to Christmas Island. They were successful in that endeavour.

6. The applicant's mother was pregnant with the applicant at the time of her voyage to Christmas Island.

7. The applicant's parents and two siblings arrived at Christmas Island on 15 September, 2013 by boat. At that time, none held a visa permitting them to enter, or remain, in Australia. As a result, on their arrival they all became both "unlawful non-citizens" and "unauthorised maritime arrivals" for the purposes of the Act. They were detained and on about 24 September, 2013 they were removed from Christmas Island and placed in detention on Nauru.

8. Whilst in detention on Nauru, the applicant's mother was told that she required a caesarean procedure for his birth. For that purpose, on about 11 October, 2013 she was flown to Brisbane and was hospitalised. The applicant's father and siblings were flown from Nauru to Brisbane on about 18 October, 2013, to be with the applicant's mother while she gave birth to the applicant.

9. The applicant's mother, father and siblings were not granted any visas to permit them to enter Australia lawfully, or remain here for the purposes of the applicant's birth. They were brought to Australia pursuant to s.198AH of the Act as "transitory persons". On arrival, they were detained pursuant to s.189 of the Act. They remain in detention on mainland Australia.

10. The applicant has remained on mainland Australia ever since his birth. He has no visa which would permit him to remain in Australia. He too, remains in detention.

11. On 3 December, 2013 the applicant's father signed an application for a Protection (Class XA) visa on behalf of the applicant. The application was lodged with the respondent's department.

12. On 21 January, 2014 a delegate of the respondent notified the applicant, by his father, that the application for a protection visa was

invalid because of s.46A(1) of the Act. There has been no determination or written notice, under s.46A(2) of the Act, by the respondent, that s.46A(1) of the Act did not apply to the applicant. The respondent, by his delegate, contended that he was therefore precluded from considering the application by the operation of s.47(3) of the Act.

13. On 21 February, 2014 the applicant (by his mother as litigation guardian) filed an application for an order to show cause in the High Court of Australia seeking to challenge the respondent's decision.

14. The grounds of the Application are set out therein as follows:

> *1. The defendant (respondent) is under a duty to consider a valid application for a visa: Migration Act 1958 (Cth) ("the Migration Act"), s47(1).*
>
> *2. An application for a visa is not a valid application if, relevantly, it is made by a person who is an "unauthorised maritime arrival": Migration Act, s46A(1).*
>
> *3. A person is an "unauthorised maritime arrival" if the person falls within the criteria specified in s5AA(1) of the Migration Act.*
>
> *4. The question of whether a person is an "unauthorised maritime arrival" for the purposes of ss5AA(1) and 46A(1) of the Migration Act is a jurisdictional fact.*
>
> *5. The plaintiff (applicant) was born in Brisbane, Queensland, on 6 November 2013, and thereby, is not an "unauthorised maritime arrival".*
>
> *6. The defendant (respondent) fell into jurisdictional error by wrongly concluding that the plaintiff (applicant) is an "unauthorised maritime arrival".*

15. The matter has been remitted from the High Court to this Court for hearing and determination. No issue is taken with this Court's jurisdiction to hear and determine this application.

The Statutory Framework

16. The objects of the Act are to regulate the coming into, and presence in, Australia of non-citizens. The Act does that by way of a system of visas. A visa is the only source of rights for non-citizens to enter or remain in Australia. Section 4(2) of the Act makes it clear that

Parliament intends that the Act be the only source of the right of non-citizens to enter or remain in Australia.

17. A visa is permission granted by the respondent to a non-citizen allowing that person to "travel to and enter Australia" or to "remain in Australia": see s.29(1) of the Act. Subject to the Act and the regulations made thereunder, a non-citizen who wants a visa must apply for a visa of a particular class: see s.45 of the Act. And, in most cases the respondent is bound to consider the application: s.47(1) of the Act.

18. However, s.46A of the Act circumscribes the entitlements of certain non-citizens to make a valid application for a visa. When s.46A(1) is engaged, the respondent is not to consider a visa application made by a person to whom s.46A(1) applies: s.47(3) of the Act. Section 46A(1) of the Act operates to remove from a non-citizen, who falls within the term "unauthorised maritime arrival", the entitlement otherwise granted by the Act, to make a valid application for a protection visa.

19. In December, 2013, the relevant time for the purposes of this application, s.46A relevantly provided:

> ***46A Visa applications by unauthorised maritime arrivals***
>
> *(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:*
>
> *(a) is in Australia; and*
>
> *(b) is an unlawful non-citizen.*
>
> *(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.*
>
> *(3) The power under subsection (2) may only be exercised by the Minister personally.*
>
> *…*
>
> *(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any unauthorised maritime arrival whether the Minister is requested*

to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

20. There is no dispute between the parties that for the purposes of s.46A(1), the applicant is in Australia and is an unlawful non-citizen. They are in dispute about whether the applicant is an "unauthorised maritime arrival" for the purposes of s.46A(1).

21. The phrase "unauthorised maritime arrival" is defined in s.5AA of the Act which in December, 2013 relevantly provided:

> *(1) For the purposes of this Act, a person is an unauthorised maritime arrival if:*
>
> > *(a) the person entered Australia by sea:*
> >
> > > *(i) at an excised offshore place at any time after the excision time for that place; or*
> >
> > > *(ii) at any other place at any time on or after the commencement of this section; and*
> >
> > *(b) the person became an unlawful non-citizen because of that entry; and*
> >
> > *(c) the person is not an excluded maritime arrival.*
>
> *(2) A person entered Australia by sea if:*
>
> > *(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or*
> >
> > *(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or*
> >
> > *(c) the person entered the migration zone after being rescued at sea.*

22. The argument before me focussed upon whether the applicant "entered Australia by sea" for the purposes of the above sections. In that respect, it was common ground that:

a) s.5AA(1)(a)(i) was not relevant;

b) s.5AA(1)(a)(ii) was engaged if I was otherwise satisfied that the applicant entered Australia by sea;

c) the applicant was, upon his birth, an unlawful non-citizen; and

d) the applicant was not, and is not, an excluded maritime arrival.

23. It was also common ground that if my ultimate conclusion is that the applicant "entered Australia by sea", this application must fail. If I conclude that the applicant is not caught by the phrase "entered Australia by sea", the parties agree that this application should succeed.

24. Before passing to a consideration of the parties arguments, two further sections of the Act require notation. The first is s.10 of the Act. In December, 2013 it provided as follows:

> *A child who:*
>
> *(a) was born in the migration zone; and*
>
> *(b) was a non-citizen when he or she was born;*
>
> *shall be taken to have entered Australia when he or she was born.*

25. Section 5(23) of the Act is also of some moment. In December, 2013 it provided:

> *(23) To avoid doubt, in this Act **is taken**, when followed by the infinitive form of a verb, has the same force and effect as **is deemed** when followed by the infinitive form of that verb.*

Consideration

26. The phrase "entered Australia by sea" in s.5AA(1) of the Act on its literal and ordinary meaning would be inapt to describe the circumstances in which the applicant came to be present in Australia. For most purposes Australian law still takes the view that a child is not a legal entity until he or she is born. Until then, a child *en ventre sa mere* has no legal standing and no separate existence from his or her mother.

27. It was not suggested that the applicant entered Australia when his mother, with the applicant nestled in her womb, flew from Nauru to Australia for the purposes of his birth.

28. The arrival of the applicant into this world upon his birth marks the first possible point in time at which the applicant might be said to have

entered Australia. However, his arrival by birth does not fit, even awkwardly, within the ordinary meaning of the words used in the phrase "entered Australia by sea".

29. But the phrase "entered Australia by sea" does not bear, or perhaps does not *just* bear, its ordinary meaning in s.5AA(1) of the Act. That must be so because s.5AA(2) of the Act works to define the meaning of that phrase, either exhaustively or by way of extension. Whether it defines the phrase exhaustively or whether it adds to it by way of extension is not necessary to decide. What is relevant is that s.5AA(2) specifies three separate circumstances in which a person will have entered Australia by sea. For present purposes, two of those circumstances are irrelevant, but the other is central to this case.

30. According to s.5AA(2)(a), a person entered Australia by sea if the person entered the migration zone except on an aircraft that landed in the migration zone. Assuming just for the moment that the applicant entered the migration zone by reason of his birth in Australia, he clearly falls within that definition because he entered the migration zone except on an aircraft that landed in the migration zone.

31. But did he "enter" Australia? The applicant says that he did not in the sense that it is inapt or inappropriate to speak of a child "entering" Australia upon his or her birth. As the applicant's case puts it, it is only by doing violence to the English language that one could say that a child "enters" a place by being born, let alone enters that place by sea. Moreover, the applicant argues that it is inapt or inappropriate to speak of a child "entering" Australia upon his or her birth because s.5AA is not concerned with the status of children born here; it is concerned with the status of people who come here from overseas.

32. Despite the applicant's submissions to the contrary, I think that s.10 of the Act is relevant to a determination of this issue. Reading s.10 in the way in which one is invited to do by s.5(23) of the Act, a child who was born in the migration zone and was a non-citizen when he or she was born, shall be deemed to have entered Australia when he or she was born.

33. Section 10 performs a number of functions in my view. First, it defines the class of persons in respect of which it operates by confining its

operation to a child who was born in the migration zone and who was a non-citizen when he or she was born. Then, in respect of such persons, the section deems the person to have entered Australia when he or she was born. The expression "to have entered Australia when he or she was born" is a compound expression conveying information about both the fact of entry into Australia and the time at which the entry into Australia occurred. In my view, it operates to supply two facts namely:

a) the fact of entry into Australia; and

b) the time at which that entry occurred.

34. The applicant argues that s.10 of the Act is irrelevant when it comes to determining whether the applicant entered Australia, by sea or otherwise. It is irrelevant, the applicant argues, because it is focussed upon determining the *time* at which a child born in Australia entered Australia, rather than the *place* at which the child entered Australia or the fact of entry itself. To understand the proposition fully, the applicant says that an examination of the legislative history of s.10 of the Act is necessary.

35. The applicant points out that s.10 was originally inserted into the Act as s.6AAA(a) by the *Migration Amendment Act* 1986. The purpose of the section, it is said, was to provide that "an Australian-born non-Australian citizen shall be deemed to have entered Australia at the time of his or her birth". The applicant points out that it was linked to changes to Australian citizenship laws introduced by the *Australian Citizenship Act Amendment Act* 1986. Subsections 6AAA(b), 6AAA(c) and 6AAA(d), inserted at the same time, provided that where the child's parent or parents held a temporary entry permit at the time of the child's birth, the child was taken to be included in the permit.

36. The explanatory memorandum accompanying the *Migration Amendment Act* 1986 provides:

> *Section 6AAA will provide for the status of children born in Australia who, once the Australian Citizen Citizenship Amendment Act 1986 commences, will not be Australian citizens because neither of their parents is an Australian citizen or permanent resident in Australia.*

> *The new section will provide a non-citizen child born in Australia will be deemed to be included in the temporary entry permit or to have the same immigration status as his or her parents or, if the entry permits or the status of the parents differs, to be included in the permit or have the status most favourable to the child.*

37. As to paragraph 6AAA (a) the explanatory memorandum provides:

> *The paragraph provides that an Australian-born non-Australian citizen shall be deemed to have entered Australia at the time of his or her birth. It is intended that the status of such children will follow that of the parents as set out in paragraphs 6AAA (b), (c) or (d). Where both parents are prohibited non-citizens, the child will similarly assume that status.*

38. Through successive amendments to the Act, s.6AAA(a) became the present s.10 of the Act. The purpose of the section apparently remained the same. For example, the explanatory memorandum to the *Migration Legislation Amendment Bill* 1989 which moved s.6AAA(a) to s.5D of the Act provides (at p.7):

> *This section* [5D] *transposes those provisions contained in the former paragraph 6AAA(a) to provide that a child who is born in Australia and is a non-citizen is taken to have entered at the time of birth.*

39. However, the references to s.6AAA(a) and the explanatory memoranda set out above are not helpful. They merely repeat the phrase under consideration without any explanation of it. It is apparent, however, from those explanatory memoranda that it was clearly the intention of Parliament to establish a regime whereby the immigration status of a non-citizen child born in Australia followed or aligned with that of his or her parents.

40. The applicant argues that s.10 creates a legal, but not an actual, fact for the purposes of certain provisions of the Act. It does nothing more than establish a notional *time* of entry of a newborn non-citizen child into Australia. The time of entry, thus established by statute, can then be engaged by other provisions of the Act for certain purposes. The applicant argues that the heading to s.10, "Certain children taken to enter Australia at birth" confirms that approach. "Birth" it is said, is an occasion which occurs at a time; "birth" is not a place. The applicant argues that the text of s.10 itself is likewise limited to a temporal

expression: "when he or she was born". Accordingly, the section has nothing to say about whether the child is or is not an unauthorised maritime arrival or the place of that child's entry into Australia.

41. By contrast, the applicant argues, s.5AA imposes a legal status upon a person as an unauthorised maritime arrival by virtue of the existence of actual facts, not legal fictions constructed by the Act. The status as an unauthorised maritime arrival is imposed if certain actual (as opposed to legally constructed) facts are established. Thus:

    a) s.5AA(1)(a) requires the fact of actual entry by sea; and

    b) s.5AA(2) also refers to a category of actual entries, as matters of fact, and not by virtue of a legal fiction.

42. The applicant argues that this is evident from the text of s.5AA(2)(b) and (c), which refers to the fact of being found on a ship and actual entry after being rescued, respectively. Subparagraph (a) must, therefore, the applicant argues, be read as referring to an *actual* entry by a person from outside the migration zone into the migration zone by a method of travel other than by aircraft. The applicant argues that recourse to the relevant explanatory memorandum demonstrates that s.5AA is only intended to cover those who, as a matter of fact, enter Australia by sea.

43. Section 5AA was inserted into the Act by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2012. The relevant explanatory memorandum, at paragraph 48, provides:

> *Paragraph 5AA(2)(a) is intended to cover a person who arrived in Australia by sea and entered the migration zone, other than by an aircraft, whether on a ship or otherwise. This is intended to cover people who make their way to Australia by sea without being rescued or intercepted and who enter the migration zone.*

44. The applicant points out that the explanatory memorandum provides that s.5AA(2)(a) is "intended to cover all possible situations where a person can enter Australia by sea, apart from where they are being dealt with under subsection 245F(9) of the Act or are rescued at sea".

45. Moreover, paragraph 58 of the explanatory memorandum provides:

> *To negate any argument that by stepping onto a pier or a similar structure, or onto land above the mean low water mark, a person has not entered Australia by sea anywhere in the migration zone, whether at an excised offshore place or not, the only way that a person will not come within that definition is to enter the migration zone on an aircraft that landed in the migration zone.*

46. The applicant argues that both the text of the Act and the explanatory memorandum make plain that the intention of Parliament was to ensure that persons coming by sea could not argue against the application of s.5AA by exiting their boat and stepping onto land at the right spot. The legislation is aimed squarely at people who enter Australia by crossing the sea in a way other than by way of aircraft. The applicant argues that the text of the Act and the explanatory memorandum give no support to the proposition that s.5AA(2)(a) was intended to cover children who are born in Australia.

47. Thus, the applicant argues that the purpose revealed by the context of s.5AA(1) and (2) of the Act and the legislative history of s.10 must mean that a non-citizen child born in Australia does not "enter Australia by sea" for the purposes of s.5AA(1) or (2) of the Act.

48. The respondent points out that the usual, ordinary meaning of the word 'enter' is simply to come or go in or to be admitted: see the *Macquarie Dictionary*, definition of "enter", revised third edition, 2003 at page 628. I accept that there is no conceptual, literal or practical difficulty with a child, on being born, as "entering" the migration zone or Australia, in a legal sense for the purposes of the Act. Indeed, in common parlance, the birth of a child is often couched in terms of the child "entering" this world.

49. Notwithstanding the applicant's submissions, in my view, and as I have already stated, s.10 does more than simply deal with the temporal issue of when a non-citizen born in Australia might be said to have entered Australia. In my view, it works to deem a non-citizen child born in Australia to have:

    a) entered Australia; and

    b) to have done so when he or she was born.

50. In any event, if I am wrong about that, it does not matter. If s.10 deals only with the timing of when a non-citizen child born in Australia entered Australia, nonetheless the section clearly recognises that such a child has entered, or will upon their birth, enter Australia. To make provision for the *time* at which a relevant child is taken to have entered Australia presupposes that such a child has either entered, or shall enter Australia.

51. Once the conclusion is reached that the applicant has entered the migration zone except on an aircraft that landed in the migration zone, he must, by reason of s.5AA(2)(a), be said to have entered Australia by sea.

52. Rather than being inconsistent with the context and policy of the Act having regard to the way in which ss.5AA, 10 and 46A were introduced into the legislation, I am persuaded by the respondent that the above interpretation of ss.5AA(1) and (2) and s.10 is consistent with the context, structure and policy of the Act as a whole.

53. The respondent points out that certain reforms brought about by the *Migration Reform Act* 1992 and the *Migration (Delayed Visa Applications) Tax Bill* 1992 sought to provide for a single form of authority for entry, to be called a visa, and also made other changes bearing upon "entry" and the concept of the "migration zone". As a result, the Act recognises two categories of non-citizens, "lawful non-citizens" and "unlawful non-citizens". The visa system established under the Act is based on the grant of permission to travel to and enter Australia. Usually visa holders will enter Australia at a port and a person who enters Australia must (subject to some exceptions) present certain evidence. The Act provides when and where the evidence is to be presented and provides, for when these requirements are not required to be complied with, which includes "prescribed circumstances". Those "prescribed circumstances" relevantly include people to whom s.10 applies. Such an exemption would not be necessary, the respondent points out and I accept, if a child born in Australia who is a non-citizen was not deemed by s.10 to have entered Australia when born.

54. Section 46A of the Act was added by the *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth). The explanatory

memorandum to that Act provides that it was part of a package of reforms said to be designed to discourage unauthorised arrivals and people smuggling. The explanatory memorandum suggests that the bill was a response to the increased threats from the growth of organised criminal gangs of people smugglers who bypass normal entry procedures.

55. Section 5AA was added and the definition of offshore entry person was repealed by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 which relevantly commenced on 1 June 2013. The amendments were to incorporate recommendations provided for in the Report of the Expert Panel on Asylum Seekers, dated August, 2012. According to the then Minister, in the second reading speech, (House of Representatives Bills, *Migrations Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill* 2012, Second Reading Speech, Wednesday 31 October 2012, Mr Chris Bowen (09:52) at page 12738) the previous framework prevented unauthorised arrivals, who arrived at an excised offshore place, from making a valid visa application. However, unauthorised arrivals who arrived at the Australian mainland were not then subject to those provisions.

56. The amendments envisaged that all unlawful non-citizens who arrived by irregular maritime means would be subject to the regional processing framework (House of Representatives Bills, *Migrations Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill* 2012, Second Reading Speech, Wednesday 31 October 2012, Mr Chris Bowen (09:52) at page 1273850) and not able unless excluded, or having the 'bar' in s.46A(1) lifted by the Minister personally pursuant to s46A(2) to make a valid application for a visa.

57. I accept that the context and purpose of those provisions of the above amendments, was to dissuade people from engaging people smugglers and taking a dangerous sea journey. It is consistent with that policy for persons such as the applicant to be included within the definition of "unauthorised maritime arrival". If that were not so, I accept the respondent's argument that there may be more incentive for pregnant women to engage people smugglers and make the dangerous journey across the seas, in the hope of a perceived advantage that their child

might become entitled to a visa once born. The respondent contends, and I accept that the removal of such an incentive is the object sought to be addressed by s.5AA of the Act.

58. Section 10 of the Act (formerly s.6AAA(a)) and s.78 of the Act (formerly s.6AAA(b) and (c)) see non-citizen children born in Australia granted visas corresponding with those of their parents. If their parents are unlawful non-citizens (that is to say they do not hold a visa), a newborn child is also an unlawful non-citizen. An approach which did not recognise that non-citizen children entered Australia upon their birth, and which therefore would mean that they were not within the definition of unauthorised maritime arrivals, would very possibly lead to the separation of newborns from their parents. As the respondent points out, and as I accept, the Act imposes a duty to transfer the "unauthorised maritime arrivals" to a regional processing country (s.198AD(2) of the Act), and if a child born to an "unauthorised maritime arrival" is not him or herself an "unauthorised maritime arrival", there would be, and there is no authority to transfer the child to such a country because the power to send a person to a regional processing country applies only to "unauthorised maritime arrivals". I accept the respondents argument that the Act should not lightly be read as imposing a duty to separate an infant from his or her parents.

59. The applicant argues that such a conclusion would lead to surprising results. He poses the example of a European backpacker who arrives in Australia by air on a valid visa. Assume she overstayed her visa and then gave birth to a baby in Australia, the applicant argues. On the interpretation of s.5AA(2)(a), contended for by the respondent and accepted by me, the applicant says that her baby would have entered Australia other than on an aircraft and so would be an "unauthorised maritime arrival" incapable of applying for a visa. And so she may be, depending upon the circumstances of that hypothetical case.

60. I accept that the entitlement of a non-citizen to apply for a protection visa is an important entitlement provided for by the Migration Act. "*The Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals*": see *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (at

339 [27]). But it is an entitlement that is conferred by the Act according to its terms. It is not a right conferred by the common law. It is a right conferred by statute and it is to the statute that one must look to see the metes and bounds of the right or entitlement. In this case the entitlement to make a valid application for a visa is circumscribed by s.46A(1) of the Act. Section 46A(1) of the Act is a valid enactment *Plaintiff M61 v Commonwealth* (above).

Conclusion

61. In my view the decision of the first respondent's delegate was not affected by jurisdictional error. On the applicant's birth he entered Australia and became an "unlawful non-citizen", given that neither of his parents held a valid visa. He did not enter on an aircraft, but he did enter after 1 June, 2013 at "any other place". He does not satisfy the requirements of an "excluded maritime arrival". The applicant is therefore, in my view, an "unauthorised maritime arrival" and s 46A(1) of the Act applies to him and his application for a protection visa was invalid.

62. The Application should be dismissed.

I certify that the preceding sixty-two (62) paragraphs are a true copy of the reasons for judgment of Judge Jarrett

Associate:

Date: 15 October 2014