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HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER AND KEANE JJ

PLAINTIFF S297/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff S297/2013 v Minister for Immigration and Border Protection
[2015] HCA 3
11 February 2015
S297/2013

ORDER

The questions asked by the parties in the special case dated 22 September 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Is clause 866.226 of Sch 2 to the Migration Regulations invalid?

Answer

It is not necessary to answer this question.

Question 2

Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the plaintiff made according to law?

Answer

No.

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Question 3

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

Answer

A peremptory writ of mandamus should issue commanding the first defendant to grant the plaintiff a permanent protection visa forthwith.

Question 4

Who should pay the costs of this special case?

Answer

The defendants.

Representation

S B Lloyd SC with J B King for the plaintiff (instructed by Fragomen)

S P Donaghue QC with P D Herzfeld for the defendants (instructed by Australian Government Solicitor)

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CATCHWORDS

Plaintiff S297/2013 v Minister for Immigration and Border Protection

Migration – Refugees – Protection visas – Power of Minister under Sched 2, cl 866.226 of Migration Regulations 1994 (Cth) to decide application for protection visa if Minister satisfied that grant of visa "is in the national interest" – Whether cl 866.226 invalid – Whether cl 866.226 permitted Minister to refuse to grant protection visa solely on ground that application for visa made by unauthorised maritime arrival.

Administrative law – Judicial review – Mandamus – Return of writ insufficient – Plaintiff sought order issuing peremptory writ of mandamus – Reg 2.08F of Migration Regulations 1994 (Cth) applied where court quashed decision of Minister in relation to application for protection visa and ordered Minister to reconsider application in accordance with law – Whether reg 2.08F applied.

Words and phrases – "is in the national interest", "peremptory mandamus", "unauthorised maritime arrival".

Migration Act 1958 (Cth), ss 45AA, 46A.
Migration Regulations 1994 (Cth), reg 2.08F, Sched 2, cl 866.226.

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1 FRENCH CJ, HAYNE, KIEFEL, BELL, GAGELER AND KEANE JJ. The issues which this Court must now decide arise out of the return which the Minister made to a writ of mandamus directed to the Minister. The writ issued by consent after this Court's decision[1] of questions which the parties had stated for the opinion of the Full Court in the form of a special case.

The issues

2 The *Migration Act* 1958 (Cth) ("the Act") provides[2] that an unauthorised maritime arrival[3] may not make a valid application for a visa but that the Minister may determine[4] that it is in the public interest to lift that bar and permit an unauthorised maritime arrival to apply for a visa of a class specified in the determination. The plaintiff is an unauthorised maritime arrival. In 2012, the Minister determined that it was in the public interest that the plaintiff be permitted to make a valid application for a Protection (Class XA) visa.

3 At relevant times, the Act and the Migration Regulations 1994 (Cth) ("the Regulations") prescribed criteria for the grant of a Protection (Class XA) visa which included[5] that the Minister be satisfied that the grant of the visa "is in the national interest" ("the cl 866.226 criterion"). In 2014, in intended satisfaction of a writ of mandamus commanding the Minister "to consider and determine the Plaintiff's application for a Protection (Class XA) visa according to law or show cause why it has not been done", the Minister decided that he was not satisfied that it was in the national interest to grant the plaintiff the visa he sought. The only reason given for that conclusion was that the plaintiff was an unauthorised maritime arrival.

4 There are three issues. On its true construction, did the cl 866.226 criterion authorise a decision made by reference only to the plaintiff being an

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1 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722; 309 ALR 209; [2014] HCA 24.

2 s 46A(1).

3 s 5AA.

4 s 46A(2).

5 Regulations, Sched 2, cl 866.226.

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unauthorised maritime arrival? If it did, is the cl 866.226 criterion valid? Does the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) ("the 2014 Amendment Act") convert the plaintiff's application for a Protection (Class XA) visa into an application for a Temporary Protection (Class XD) visa?

A summary of the principal conclusions

5 The construction issue should be resolved in the plaintiff's favour. The Act prescribes consequences that follow from being an unauthorised maritime arrival. In particular, the Act provides that no unauthorised maritime arrival may make a valid application for any visa unless the Minister, acting personally, determines that it is in the public interest to permit the person to make a valid application for a visa of a class specified in the determination. The cl 866.226 criterion does not permit the Minister to attach an additional consequence to being an unauthorised maritime arrival beyond those fixed by the Act. It does not authorise application of a general rule that a valid application by an unauthorised maritime arrival for a visa of the class specified in the Minister's determination must be refused. This being so, the validity issue is not reached.

6 The 2014 Amendment Act does not convert the plaintiff's application for a Protection (Class XA) visa to an application for a Temporary Protection (Class XD) visa.

7 The Minister must grant the plaintiff what the Act now calls a permanent protection visa. A peremptory writ of mandamus to that effect should issue. The Minister and the Commonwealth should pay the plaintiff's costs.

The facts and procedural history

8 It is necessary to refer to the principal events in the factual and procedural history that yield the issues identified at the outset of these reasons.

9 In May 2012, the plaintiff entered Australia by sea at Christmas Island without a visa. He was what the Act then called[6] an "offshore entry person". Because he had no valid visa, he was[7] an "unlawful non-citizen". With effect

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6 s 5(1).

7 s 14.

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from June 2013 the Act was amended[8], and an offshore entry person became an "unauthorised maritime arrival"[9].

10 Because the plaintiff was an unlawful non-citizen and an offshore entry person (and later, was an unauthorised maritime arrival), he could not make[10] a valid application for a visa. But in September 2012, the Minister determined, under s 46A(2) of the Act, that it was in the public interest that the bar to the plaintiff making a valid application for a visa should not apply to an application by the plaintiff for a protection visa. (At that time this was a reference to what the Regulations identified as a Protection (Class XA) visa.) In February 2013, a delegate of the Minister refused to grant the plaintiff a Protection (Class XA) visa. The plaintiff sought the review of that decision by the Refugee Review Tribunal. In May 2013, the Tribunal remitted the plaintiff's visa application to the Minister for reconsideration in accordance with the Tribunal's direction that the plaintiff satisfied s 36(2)(a) of the Act. That is, the Tribunal was satisfied that the plaintiff was "a non-citizen in Australia in respect of whom ... Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

11 The Minister did not decide the plaintiff's application. As this Court has previously explained[11], various regulatory and other steps were taken between October 2013 and March 2014 which, it may be inferred, were thought to permit the Minister not to make a decision whether to grant or refuse the application. And in December 2013 the plaintiff began proceedings, in the original jurisdiction of this Court, seeking to have some of those steps declared invalid, or at least ineffective to prevent him being granted the visa for which he had applied. In June 2014, the Court answered questions reserved for its consideration in the form of a special case in the proceedings which the plaintiff had brought. (The argument in that special case was heard at the same time as argument in a special case in another proceeding brought by another plaintiff –

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8 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth).

9 s 5AA(1).

10 s 46A(1).

11 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 724 [3]-[5], 725 [10]; 309 ALR 209 at 211, 212.

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Plaintiff M150 of 2013 – and the decisions in the two special cases were published at the same time[12].)

12 The answers to the questions asked in the special case in the plaintiff's proceedings were treated by the parties as resolving the controversy between them. No trial was had. Instead, on 1 July 2014, French CJ ordered, by consent, that a writ of mandamus issue directing the Minister to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law. On 3 July 2014, French CJ ordered[13] that the writ should be returnable[14] by 21 July 2014.

13 On 17 July 2014, the Minister decided to refuse to grant the plaintiff a Protection (Class XA) visa. The parties agree that the only reason the Minister refused to grant the plaintiff a protection visa was that the Minister was not satisfied that the cl 866.226 criterion was met. (It will be recalled that this criterion required the Minister to be satisfied that the grant of the visa "is in the national interest".) The Minister's decision record shows that he saw "the national interest" as requiring refusal of a Protection (Class XA) visa to any and every unauthorised maritime arrival. That is, even though the Act provided, at all times relevant to these proceedings, that the Minister could decide that it is "in the public interest" to permit an unauthorised maritime arrival to make a valid application for a permanent protection visa, the Minister's decision in this case was that the national interest required that no such application should be granted. (It will be observed that s 46A(2) referred to "the public interest" and the cl 866.226 criterion referred to "the national interest". No party suggested, however, that anything turns upon any distinction between "the public interest" and "the national interest".)

14 On 21 July 2014, the Minister filed a certificate stating that he had "done what was commanded of [him] by the Writ of Mandamus". The plaintiff pleaded to that return alleging, among other things, that the cl 866.226 criterion is invalid

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12 See *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735; 309 ALR 225; [2014] HCA 25.

13 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection (No 2)* (2014) 88 ALJR 775; 311 ALR 154; [2014] HCA 27.

14 High Court Rules 2004 (Cth), r 25.08.3.

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and claiming a peremptory writ of mandamus directing the Minister to grant the plaintiff the visa for which he had applied.

15 The parties agreed in stating questions of law in the form of a special case for the opinion of the Full Court.

16 Shortly before the special case came on for argument, the 2014 Amendment Act was passed by both Houses of the Parliament. The 2014 Amendment Act was given Royal Assent on 15 December 2014. Relevant provisions of the 2014 Amendment Act, to which it will be necessary to make further reference, came into operation[15] on the day following the Royal Assent.

Construing the cl 866.226 criterion

17 Although the plaintiff commenced his argument by alleging that the cl 866.226 criterion is invalid, it is neither necessary nor desirable to enter upon that controversy. Nothing in these reasons should be understood as suggesting that the validity of the criterion is or is not open to doubt.

18 In *Hot Holdings Pty Ltd v Creasy*[16] three members of this Court noted that "[i]t has been said that 'the whole object' of a statutory provision placing a power into the hands of the Minister 'is that he may exercise it according to government policy'[17]". And where, as here, the criterion to be applied by the Minister requires the Minister to be satisfied that the grant of the visa is "in the national interest", the decision-maker "may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office"[18].

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15 s 2.

16 (2002) 210 CLR 438 at 455 [50] per Gaudron, Gummow and Hayne JJ; [2002] HCA 51.

17 Wade and Forsyth, *Administrative Law*, 8th ed (2000) at 464.

18 *Hot Holdings* (2002) 210 CLR 438 at 455 [50] per Gaudron, Gummow and Hayne JJ.

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19 Some of those considerations may admit of the formulation of rules of more or less general application which can be understood as expressing some aspect of the Minister's understanding of what may or may not be "in the national interest". This Court's decision in *Minister for Immigration and Multicultural Affairs v Jia Legeng*[19] (about the Minister's application of "the character test" in the Act) illustrates how there may be "elements of the decision-making process about which a decision-maker may legitimately form and hold views before coming to consider the exercise of a power in a particular case"[20]. But, as was pointed out in *Jia Legeng*[21], those views cannot proceed from, or be based in, an error of law.

20 Hence, in the present matter, observing that the Minister applied a publicly stated government policy (that no unauthorised maritime arrival should be granted a Protection (Class XA) visa) when deciding that it was not in the national interest that the plaintiff be granted a visa of that class directs attention to how the cl 866.226 criterion should be construed. The application of the policy does not invoke, in this case, notions of prejudgment or bias[22]. Nor does the application of the policy invoke notions of fettering discretion[23]. Rather, the application of the policy directs attention to whether, in applying the cl 866.226 criterion, the Minister could attach determinative and adverse significance to the plaintiff's status as an unauthorised maritime arrival in addition to those consequences which the Act expressly attributes to that status. That is, did the criterion permit the Minister to treat the plaintiff's status as an unauthorised maritime arrival as sufficient to justify the conclusion that it was not in the national interest to grant the plaintiff the visa which he sought?

21 The cl 866.226 criterion should not be construed as permitting that course. A criterion operating in that manner would be inconsistent with the Act and invalid, at least to the extent to which it permitted the Minister to refuse to grant

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19 (2001) 205 CLR 507 at 538 [100] per Gleeson CJ and Gummow J, 565-566 [188]-[191] per Hayne J; [2001] HCA 17.

20 *Jia Legeng* (2001) 205 CLR 507 at 566 [192].

21 (2001) 205 CLR 507 at 565 [188]-[189].

22 See *Jia Legeng* (2001) 205 CLR 507 at 566 [190], [192].

23 See *Jia Legeng* (2001) 205 CLR 507 at 566 [191].

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a valid application for a visa only because the applicant is an unauthorised maritime arrival. By providing in s 46A that an unauthorised maritime arrival may not make a valid application for any visa unless the Minister personally determines to lift that bar in respect of a class of visa specified in the determination, the Parliament has exhaustively prescribed the visa consequences which follow from the relevant status. Because s 46A states exhaustively what visa consequences attach to being an unauthorised maritime arrival, the general words of cl 866.226 may not be construed as permitting the Minister to add to the consequences which the Parliament has identified. The affirmative statements in s 46A of those visa consequences appoint or limit an order or form of things in a way which has a negative force[24]. More particularly, the status of unauthorised maritime arrival cannot be treated as a sufficient reason in itself for refusing to grant the visa which the plaintiff lawfully sought in accordance with an earlier ministerial determination under s 46A. Yet that is what the Minister did when he decided that it was not in the national interest to grant the plaintiff a Protection (Class XA) visa. The bare fact of the plaintiff being an unauthorised maritime arrival was treated as determinative of the issue.

22 It is unnecessary to decide whether other provisions of the Act dealing with unauthorised maritime arrivals, such as the regional processing provisions of subdiv B of Div 8 of Pt 2 (ss 198AA-198AJ), support the conclusion that the cl 866.226 criterion cannot be applied by attaching determinative significance to the applicant's status as an unauthorised maritime arrival. Those other provisions of the Act are at least consistent with that conclusion and do not detract from it in any way.

23 The issues about the validity of the cl 866.226 criterion which were agitated by the plaintiff are not reached. It is not necessary, therefore, to decide whether, as the plaintiff submitted, cl 866.226 is inconsistent with ss 501(3) and 501C of the Act. Section 501(3) permits the Minister to refuse to grant or to cancel a visa if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation "is in the national interest". Section 501C provides for the revocation of certain decisions, including a decision made under s 501(3).

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24 cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; [1956] HCA 10.

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French CJ
Hayne J
Kiefel J
Bell J
Gageler J
Keane J

24 Nor is it necessary to decide whether, as the plaintiff submitted, cl 866.226 "varies and departs from the scheme for protection visas provided for by ss 36, 500(1)(c), 501 and other provisions of the Act".

25 It is convenient to deal next with the 2014 Amendment Act.

The 2014 Amendment Act

26 The 2014 Amendment Act inserted[25] in the Act a new s 35A, providing that there is to be a class of permanent visas to be known as "permanent protection visas" and a class of temporary visas to be known as "temporary protection visas". The notes to both the definition of "protection visa" inserted[26] in s 5(1) and the newly inserted s 35A(2) record that, when those provisions commenced, permanent protection visas were classified by the Regulations as Protection (Class XA) visas. Amendments made[27] to the Regulations by the 2014 Amendment Act provided that the new class of temporary protection visas was to be classified as Temporary Protection (Class XD) visas. The Regulations still provide for those classes of visa.

27 The 2014 Amendment Act also inserted[28] in the Act a new s 45AA. That section provides for certain visa applications to be taken to be applications for a different visa. In particular, s 45AA(3) provides that a regulation, referred to as a "conversion regulation", may provide that, despite anything else in the Act, a "pre-conversion application" for a "pre-conversion visa":

> "(a) is taken not to be, and never to have been, a valid application for the pre-conversion visa; and
>
> (b) is taken to be, and always to have been, a valid application (a ***converted application***) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa."

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25 Sched 2, item 5.

26 Sched 2, item 1.

27 Sched 2, items 26, 30 and 31.

28 Sched 2, item 20.

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28 The 2014 Amendment Act inserted[29] in the Regulations a new reg 2.08F. Regulation 2.08F(1) is a conversion regulation of the kind provided for by s 45AA(3). Regulation 2.08F(1) provides for converting certain applications for Protection (Class XA) visas into applications for Temporary Protection (Class XD) visas. This conversion is to be made with respect to an application "made before the commencement of this regulation by an applicant prescribed by subregulation (2)". One of the classes of prescribed applicants is[30] unauthorised maritime arrivals.

29 Regulation 2.08F(3) provides for when the regulation starts to apply and it is this provision which is of central importance in the present matter. So far as relevant, it provides:

> "This regulation starts to apply in relation to a pre-conversion application immediately after the occurrence of whichever of the following events is applicable to the application:
>
> (a) if, before the commencement of this regulation, the Minister had not made a decision in relation to the pre-conversion application under section 65 of the Act—the commencement of this regulation;
>
> (b) in a case in which the Minister had made such a decision before the commencement of this regulation—one of the following events, if the event occurs on or after the commencement of this regulation:
>
> ...
>
> (iii) a court quashes a decision of the Minister in relation to the pre-conversion application and orders the Minister to reconsider the application in accordance with the law."

30 The defendants submitted that, if the cl 866.226 criterion was invalid, or the Minister had made an error of law in applying the criterion, either or both of par (a) and par (b)(iii) of reg 2.08F(3) applied, and that, accordingly, the plaintiff's application for a Protection (Class XA) visa was converted to an application for a Temporary Protection (Class XD) visa. Both aspects of this

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29 Sched 2, item 38.

30 reg 2.08F(2)(c).

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submission should be rejected. Regulation 2.08F does not apply and the plaintiff's application for a Protection (Class XA) visa has not been converted to an application for a Temporary Protection (Class XD) visa.

31 Paragraph (a) of reg 2.08F(3) is not engaged in this case. Before the commencement of the regulation, the Minister had made a decision in relation to the plaintiff's application for a visa. For the reasons which have been given, the Minister's decision to refuse to grant the plaintiff the visa which he sought was legally infirm. Because of the error of law which the Minister made, the decision involved jurisdictional error and "is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all"[31]. But contrary to the defendants' submission, observing that the decision was legally ineffective presents rather than concludes the question about the application of par (a) of reg 2.08F(3).

32 The condition stated in par (a) for its application is: "if, before the commencement of this regulation, *the Minister had not made a decision* in relation to the pre-conversion application under section 65 of the Act" (emphasis added). The words "had not made a decision" must be read in the context provided by the whole of reg 2.08F(3). And when it is observed that par (b)(iii) deals expressly with the quashing of a legally infirm decision, it becomes evident that the phrase "if ... the Minister had not made a decision" is to be construed as referring to whether the Minister had in fact made a decision, regardless of whether what had been done was legally effective. If the words are not read in that way, reg 2.08F(3)(b)(iii) has no work to do. The regulation should be read in a way which gives work for all of its provisions.

33 In this case, the Minister had in fact made a decision before the commencement of reg 2.08F. Paragraph (a) of reg 2.08F(3) was not engaged.

34 The defendants then submitted that, if that were so, par (b)(iii) of reg 2.08F(3) applied. That is, the defendants submitted that the plaintiff was seeking the quashing of the decision which the Minister had made (to refuse the grant of a visa) and an order that the Minister reconsider the application in accordance with the law. To explain why this submission must be rejected, it is necessary to say a little more about the nature of the proceedings.

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31 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51] per Gaudron and Gummow JJ; [2002] HCA 11.

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35 It will be recalled that the plaintiff (by consent of the defendants) obtained an order for the issue of a writ of mandamus. The writ that issued commanded the Minister to consider and determine the plaintiff's application for a Protection (Class XA) visa according to law or show cause why it has not been done. The order which French CJ made by consent of the parties, that a writ of mandamus issue, finally determined the matter then before the Court. By their consent to the order, the defendants accepted that the Minister had not determined the plaintiff's application in accordance with law and that the Minister was bound to do so. In response to the writ, the Minister did consider and determine the plaintiff's application and made a return to the writ certifying that he had done what was commanded of him by the writ. But the plaintiff challenges the return and alleges that the Minister has not done what was commanded of him. And, as these reasons have shown, the plaintiff's submission should be accepted.

36 What the plaintiff now seeks is compliance with the writ which the Court ordered to issue. If, as these reasons have shown, the Minister did not do what was commanded of him by the writ, the return to the writ is insufficient and the duty imposed by the writ remains unperformed. Performance of the writ's command at or before the time fixed for its return would have obliged the Minister to grant a Protection (Class XA) visa.

37 The plaintiff seeks to enforce compliance with the writ by having the Court issue a peremptory mandamus. Three points must be made in that regard.

38 First, and of critical importance to the application of reg 2.08F(3)(b)(iii), a peremptory mandamus is neither in form nor in substance an order which "quashes a decision of the Minister in relation to [the plaintiff's] pre-conversion application"[32] for a Protection (Class XA) visa.

39 Certiorari to quash the Minister's decision is not sought and is neither necessary nor appropriate. The issue of a peremptory mandamus is to enforce compliance with the writ which the Court had directed to issue in resolution of the matter then pending in the Court. A peremptory mandamus commands performance of the duty which was the subject of the writ but remains unperformed. What is important is that the Minister's return to the writ of

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32 reg 2.08F(3)(b)(iii).

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mandamus was legally insufficient. It is that insufficiency which grounds[33] the peremptory mandamus. As the editors of the first edition of *Halsbury's Laws of England* said[34]: "where the applicant obtains judgment upon the argument of a point of law raised in answer to a return or other pleading *or after pleading to the return*, the applicant is entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ" (emphasis added; footnotes omitted).

40 Second, the Minister should not be given a further opportunity to identify some reason for not granting the plaintiff the visa which is sought. In response to the writ, the Minister decided the application on the one basis that has been identified – that the national interest required that no unauthorised maritime arrival should be granted a Protection (Class XA) visa. That basis for the decision was legally wrong.

41 No other basis for the decision having been identified, the Minister cannot, and should not, now be given any further opportunity to consider the matter afresh. It is not suggested that, in the time between the issue of the writ of mandamus and this Court's determination of the present dispute about the sufficiency of the Minister's return to that writ, there has been any relevant change in any circumstances affecting the disposition of the plaintiff's application (apart from the 2014 Amendment Act). It is, therefore, not necessary to examine what consequences might follow if it were alleged that there had been some relevant change in circumstances. Rather, it is enough to observe that only one reason was given by the Minister for refusing the plaintiff's application. That reason was legally insufficient. And in his return to the writ, the Minister had the opportunity to identify any other reason for refusing the application. None was identified. The Minister should not now be given any further opportunity to identify a reason for refusing the plaintiff's application.

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33 *Foot v Prowse* (1726) 2 Strange 697 at 698 [93 ER 791 at 792]; *R v Fall* (1842) 1 QB 653 at 656 [113 ER 1282 at 1283].

34 *Halsbury's Laws of England*, 1st ed, vol 10, par 245. See also Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus*, (1853) ("Tapping") at 441, 443.

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42 Third, nineteenth century practice required[35] that a peremptory mandamus take the same form as the writ first granted, with the omission of the alternative permitting the person to whom the writ was directed to show cause why the command was not obeyed. Otherwise, the peremptory writ was not to differ from the original writ in any material particular. By directing performance of the duty in the terms of the original writ, it was made clear that the peremptory mandamus enforced[36] the original writ. But the rule appears[37] to have been adopted to ensure refusal of the peremptory writ in any case where the original writ was substantially defective. If the writ upon which it was founded was substantially defective a peremptory writ would be refused[38]; it would not be moulded to avoid the defect.

43 In this case, there is no suggestion that the writ of mandamus which issued was defective in any way. A peremptory mandamus commanding the Minister to grant the plaintiff the visa which he seeks would not seek to mould the command of the original writ in order to alter the effect of that original writ. It would be an order directing obedience to the command of the original writ.

44 By the end of the nineteenth century, the English practice of requiring a peremptory mandamus to follow the exact words of the original writ appears to have been treated as yielding, in at least some respects, to the provisions of the applicable rules of court[39]. Be this as it may, the practice to be adopted in this Court must accord with s 32 of the *Judiciary Act* 1903 (Cth)[40] and its provision

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35 See, for example, Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, (1887) ("Shortt") at 422.

36 *R v The Church Trustees of St Pancras* (1835) 3 Ad & E 535 at 542 [111 ER 517 at 520].

37 Tapping at 439.

38 Tapping at 439. See also *R v The Church Trustees of St Pancras* (1835) 3 Ad & E 535 at 542 [111 ER 517 at 520].

39 See Crown Office Rules 1886 (Eng), r 71. See also Shortt at 422-423.

40 Derived from the *Supreme Court of Judicature Act* 1873 (Eng), s 24(7). See *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 489; [1981] HCA 7; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 184-185 [11]-[12]; [2009] HCA 27.

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French *CJ*
Hayne *J*
Kiefel *J*
Bell *J*
Gageler *J*
Keane *J*

that this Court, in the exercise of its original jurisdiction, "shall have power to grant, and *shall grant*, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled ... so that as far as possible all matters in controversy between the parties regarding the cause of action ... may be completely and finally determined" (emphasis added).

45 The requirement that the Court provide such remedies as will finally quell the controversy between the parties permits, and in this case requires, the issue of a peremptory mandamus that does not follow the wording of the original writ. That course is required because the Minister gave only the one (legally infirm) reason for his refusal of the visa which the plaintiff sought and it is agreed that, apart from the cl 866.226 criterion, the other criteria prescribed for the visa by the Act and the Regulations had been satisfied.

46 Enforcement of the command made by the writ which issued on 4 July 2014 requires that the Minister now do what he should have done before making his return to the writ. That is, the Minister must grant the plaintiff a permanent protection visa.

47 A peremptory mandamus commanding the Minister to grant the plaintiff a permanent protection visa (being the visa called, at all material times, a "Protection (Class XA) visa") should issue forthwith. The defendants should pay the plaintiff's costs of the special case.

48 The questions asked in the special case should be answered as follows:

"1 Is clause 866.226 of Sch 2 to the Migration Regulations invalid?

Answer: It is not necessary to answer this question.

2 Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the plaintiff made according to law?

Answer: No.

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

Answer: A peremptory writ of mandamus should issue commanding the first defendant to grant the plaintiff a permanent protection visa forthwith.

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4 Who should pay the costs of this special case?

Answer: The defendants."

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