HIGH COURT OF AUSTRALIA

Plaintiff B15a

Vs.

Minister For Immigration & Border Protection & Anor.

[2015] HCA 24

(Kiefel J.)

19.06.2015

ORDER

Kiefel J.

1. Application is brought on behalf of the plaintiffs for an order that the Minister for Immigration and Border Protection show cause why there should not issue: a writ of certiorari quashing the Minister's decision of 12 February 2015 that the plaintiffs' applications for protection visas are invalid; a declaration that s 46A of the Migration Act 1958 (Cth) ("the Act") does not apply to the plaintiffs; and consequential orders.

2. The plaintiffs are infants born in Australia on 16 August 2013. The plaintiffs' father was an offshore entry person within the meaning of s 5(1) of the Act , because he entered Australia by sea at Christmas Island. The plaintiffs' mother entered Australia on the mainland and was not an offshore entry person. The term "offshore entry person" was later replaced with the term "unauthorised maritime arrival" ("UMA"). The plaintiffs' father was and the plaintiffs' mother was not a UMA.

3. Sections 10 and 78 of the Act have the effect, respectively, that the plaintiffs are taken to have entered Australia at the time of their birth, and to have been granted the same kind of visas held by their parents. They are to be taken as holders of a bridging visa on the same terms and conditions as the visa granted to their father. The plaintiffs were therefore, at birth, lawful non-citizens and not UMAs.

4. On 1 September 2014, applications made on behalf of the plaintiffs for protection visas were received by the Minister's Department. The plaintiffs' litigation guardian, their father, was notified on 12 February 2015 that the applications were invalid because of s 46A of the Act.

5. Section 46A(1) creates a bar to a person lodging a valid visa application if that person is both a UMA and an unlawful non-citizen. Section 46A would not appear to apply to

the plaintiffs. However, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) ("the RALC Act") inserted further provisions into the Act. Section 5AA(1A) of the Act now provides that a person is a UMA if:

> "(a) the person is born in the migration zone; and
> (b)a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection (1) (no matter where that parent is at the time of the birth); and

(c) the person is not an Australian citizen at the time of birth." It will be recalled that the plaintiffs' father is a UMA. In the notes to s 5AA(1A), which form part of the Act , it is said that a parent may be a UMA even if they hold a visa, and that the sub-section applies where a person is taken, under s 78, to have been granted a visa on birth.

6. Section 5AA(1A) is taken to have applied to an application for a visa made before or after the commencement day , which is 16 December 2014 , but not to an application which had been finally determined before the commencement day . If s 5AA(1A) applies, the plaintiffs are UMAs for the purposes of s 46A.

7. Section 46A also provides that its bar applies to unlawful non-citizens, which the plaintiffs were not at birth. However, the RALC Act also provides, by item 13(2)(a) of Sched 6, that s 46A(1) is taken to apply to certain persons despite the fact that they were lawful non-citizens if they held that status only by reason of the fact that they held a bridging visa. Such is the case with the plaintiffs.

8. The effect of these provisions is not disputed. If they apply, the plaintiffs' applications for a protection visa are invalid. It is submitted for the plaintiffs that they do not apply for two reasons. The first is that s 23 of the Acts Interpretation Act 1901 (Cth) has the effect that the reference to "a parent" in s 5AA(1A) should be read as "both parents". The Minister does not deny that s 23 applies, but submits that it applies so as to permit the plural as well as the singular but not so as to exclude the singular as the plaintiffs contend. The Minister's submission is plainly correct.

9. The plaintiffs' submission that the scheme of the Act is to treat a child's status as referable to the position of both parents does not affect the construction of s 5AA(1A), which is clearly expressed in terms that address the situation of a child born in Australia to a person who is a UMA. It is addressed to the very position of the plaintiffs.

10. The plaintiffs' submission concerning the effects that the conferral of this status may have on a child does not identify an anomaly in the statutory scheme which supports the construction for which the plaintiffs contend. These effects merely reflect policy decisions inherent in the legislation concerning UMAs.

11. The second matter raised is that it is possible that the plaintiffs' applications were finally determined before the commencement of s 5AA(1A), so that it does not apply. On

the basis that there is an arguable case that this may be so, the plaintiffs contend that their application to show cause should not be dismissed but proceed to trial following remitter to the Federal Circuit Court of Australia.

12. The evidence relied upon is that of their father and of the Director of the Protection Visa Procedures Section of the Onshore Protection Branch of the Commonwealth Department of Immigration and Border Protection. As to the latter, it is said that her affidavit as to the procedural history of the matter does not expressly reject the possibility that a decision on the plaintiffs' applications was made prior to 16 December 2014. The Director in fact says "The plaintiffs' applications for protection visas were found to be invalid on 12 February 2015." This is consistent with the terms of the letter of the same date which notified the plaintiffs' father of that decision. Without more, the inference to be drawn from the letter, the records appended to the Director's affidavit and the Director's reading of those records, is clearly enough that the decision was made on the day that the letter of notification was sent. There is no other record of any decision at an earlier point.

13. The plaintiffs' father's evidence is to the effect that in a conversation which was had, via a telephone interpreter, with the plaintiffs' mother's caseworker he was told something about "section 46A" being the reason that the applications had been refused. In a telephone conversation in October 2014, preceding the conversation just referred to, the caseworker had told him that the applications had been refused. He did not hear anything further from the Department and, in the belief that the decisions were made, he submitted freedom of information requests concerning them on 5 February 2015.

14. This evidence certainly discloses that the plaintiffs' father may truly believe that a decision had been made at an earlier point. It is not, however, evidence which is cogent. The plaintiffs submit that this evidence is sufficient, in effect, to create a controversy which should be resolved by litigation. In this regard, the fact that the decision maker has not given evidence might be thought to be a point in their favour.

15. It does not, however, seem to me that there is a sufficient evidentiary basis to warrant a trial on this matter. In any event, there would be no utility in that course. If the plaintiffs are correct, and a decision holding their applications to be invalid was made prior to the commencement date of s 5AA(1A), the decision would itself be invalid and liable to be set aside. In that event, their matter would not have been finally determined as yet and therefore not exempt from the provisions of s 5AA(1A). All that could be achieved by the plaintiffs is the setting aside of that earlier decision in order for the same decision to be made in light of s 5AA(1A).

16. The final point raised is that it is possible that the plaintiffs' applications could have been deliberately delayed so that the new provisions would apply to them. There is no evidence to support such an allegation. It cannot even be inferred that there was any delay in processing the plaintiffs' applications. The submissions for the plaintiffs frankly acknowledge that there is presently no evidence to support what would be a serious

allegation of misconduct, for they are premised upon the possibility that evidence at trial might show there to have been such a strategy.

17. There is no sufficient basis for the matter to proceed to trial and no utility in making orders to that end. The application to show cause is dismissed with costs.