PLAINTIFF M64/2015 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (M64/2015)

Date Special Case referred to Full Court: 27 August 2015

The plaintiff was born in 1994 in Jaghori, Afghanistan. He and his family fled to Iran in 2003 following the disappearance of his father. In 2010, the plaintiff was arrested in Iran as an undocumented immigrant and was deported to Afghanistan. He subsequently fled Afghanistan and arrived in Australia on 29 May 2010. He was granted a protection visa on 18 August 2011. His family remained in Iran. On 5 December 2011, his mother and three brothers ('the visa applicants') lodged an application for Class XB visas as members of the immediate family of the plaintiff. As a "split family" application, the visa applicants were not required to establish that they were subject to substantial discrimination amounting to a gross violation of human rights in their home country. Further, the application attracted a "concession" under which it would have been treated as meeting the "compelling reasons" criterion in clause 202.222 of Schedule 2 to the *Migration Regulations* 1994 (Cth) ('the Regulations') on the basis of the strength of the visa applicants' family connection with Australia.

On 12 December 2013, when the visa application had been pending for more than two years, the Minister made a decision to remove the prevailing concession for visa applications proposed by unaccompanied minors who held protection visas, and to adjust the policy in relation to "processing priorities" for visa applications in the Special Humanitarian Programme ('SHP'). These changes came into effect on 22 March 2014. On 16 September 2014, the Delegate refused the visa application on the grounds that the application did not satisfy sub-clause 202.222(2) of the Regulations. Although the delegate accepted that the visa applicants were subject to a significant degree of discrimination in their home country, that they had strong links to Australia, and that there was no other suitable country available for resettlement, he also relevantly found:

- "Australia does not have the capacity to resettle all applicants who apply for a humanitarian visa at this time";
- " ... the limited number of visas available and the high demand for them mean that only a small proportion of applicants can be successful"; and
- "As we can accept only a small number of applicants, the government has set priorities within the SHP. Only the highest priority applications will be successful because there are not enough visas available. Australia does not have the capacity to provide for permanent settlement of all close family proposed applicants at this time ".

The plaintiff submits that the Delegate made a jurisdictional error in connection with the application of the Government's administrative policy in relation to priorities within the SHP. In particular, the plaintiff contends: (a) the Delegate misconstrued clause 202.222(2)(d) of Schedule 2 to the *Regulations*; (b) the Delegate took into account irrelevant considerations (the number of "places" available in the SHP, or the "priorities" set by the Government within the SHP); (c) the Government's policy in relation to "processing priorities" is inconsistent with the *Migration Act 1958* and the Regulations; and (d) the Government's policy in relation to "processing priorities" was rigidly or inflexibly applied by the Delegate.

The Minister submits that the central issue in this case is whether the legislative framework that governs Australia's offshore humanitarian program permits the Minister to promulgate policies for the purposes of guiding individual delegates as to the Minister's intentions concerning the overall size of the humanitarian program, and priorities within it. The Minister submits that there is nothing unlawful about the Minister making, and delegates giving effect to, policies of that kind. Such policies are necessary in order to produce consistency in the implementation of the broadly expressed statutory criteria.

The questions reserved by the Special Case signed by the parties include:

- Did the delegate:
  (a) construe clause 202.222(2)(d) of Schedule 2 to the *Migration Regulations* 1994 (Cth) as requiring or permitting him to consider the capacity of Australia to resettle all applicants who apply for a humanitarian visa ;
  (b) fail to construe clause 202.222(2)(d) as requiring him to consider the capacity of the Australian community to provide for the permanent settlement of each of the visa applicants, or persons such as each of the visa applicants, having regard to their individual circumstances; or
  (c) fail to construe clause 202.222(2)(d) as requiring him to assess whether or not there were compelling reasons for giving special consideration to grant permanent visas to the visa applicants in the circumstances of the particular case, having regard to all of the matters in 202.222(2)(a) to (d) both individually and cumulatively?
- If so, did the delegate thereby make a jurisdictional error?