

PLAINTIFF S10/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S10/2011)

Date application referred to the Full Court: 13 September 2011

The Plaintiff is a citizen of Pakistan. In August 2007 he arrived in Australia on a maritime crew visa. He applied for a protection visa on the basis that he feared that he would be killed by an Islamic fundamentalist group if he returned to Pakistan. On 6 November 2007 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused the Plaintiff a protection visa. On 22 February 2008 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision. Successive applications by the Plaintiff to the Federal Magistrates Court of Australia, the Federal Court of Australia and to this Court were each dismissed.

On 30 October 2009 the Plaintiff wrote to the Minister requesting that the RRT's decision be substituted with a decision more favourable to him under s 417 of the *Migration Act 1958* (Cth) ("the Act"). The Plaintiff also requested that the Minister, were he to decline to substitute a new decision, determine that he could make a further application for a protection visa under s 48B of the Act. On 6 August 2010 an officer of the Department of Immigration and Citizenship ("DIAC") decided that the Plaintiff's case did not meet the Minister's Guidelines for requests for intervention under s 48B. Consequently (and in accordance with those Guidelines) his case was not referred to the Minister for a decision on whether he could make a repeat protection visa application. The Plaintiff's case was however referred to the Minister for a possible substitution of the RRT's decision under s 417 of the Act. For that purpose, DIAC provided the Minister with a summary of the Plaintiff's case. On 21 October 2010 the Minister personally decided not to exercise his power under s 417. In a letter dated 26 October 2010, DIAC informed the Plaintiff of both the Minister's decision (not to intervene under s 417) and of the non-referral of the request for consideration under s 48B.

The Plaintiff contends that DIAC, in deciding not to refer the s 48B request to the Minister, made certain mistaken conclusions concerning his case. He further submits that the resulting flawed decision infected the Minister's decision on the s 417 request. The Plaintiff contends that DIAC should have informed him of the material upon which adverse conclusions were proposed to be drawn and invited him to comment.

On 7 January 2011 the Plaintiff filed an Application for an Order to Show Cause in this Court. In a Further Amended Application for an Order to Show Cause filed on 1 September 2011, the Plaintiff seeks, inter alia, a declaration that he had been denied procedural fairness. He also seeks an order compelling the Minister to reconsider his request in accordance with the requirements of procedural fairness.

On 13 September 2011 Justice Gummow referred this matter for final hearing by the Full Court.

On 4 January 2012 the Plaintiff filed an Amended Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General for South Australia has advised this Court that he will be intervening in this matter.

The grounds said to justify the granting of relief include:

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit by decision notified on 26 October 2010 in exercising discretion under s 417 of the Act failed in his duty of procedural fairness to the Plaintiff.
- Jurisdictional error occurred notwithstanding the applicable privative clause s 474(2) relative to the exercise of s 417 and s 48B of the Act.