

**KAUR v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR**  
**(S43/2011)**

Date application referred to the Full Court: 13 September 2011

Ms Jasvir Kaur is a citizen of India. In July 2005 she arrived in Australia on a student visa ("the first visa"). After changing courses, Ms Kaur was granted a second student visa ("the second visa") in June 2006, valid until June 2008. After completing the second course (a diploma of accounting) in February 2008, she enrolled in a cookery certificate course. In April 2008 Ms Kaur consulted a migration agent as to which visa was valid. She was incorrectly advised that the first visa was valid and that it would expire on 31 August 2008. That visa had in fact been cancelled, unbeknownst to Ms Kaur. On 1 September 2008 Ms Kaur applied for a further student visa. On 26 September 2008 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused Ms Kaur's application. This is because it had been lodged more than 28 days after the second visa had expired. On 18 September 2009 the Migration Review Tribunal ("MRT") affirmed that decision.

On 16 October 2009 Ms Kaur requested that the Minister substitute a more favourable decision for the MRT's decision pursuant to s 351 of the *Migration Act 1958* (Cth) ("the Act"). DIAC then provided a summary of Ms Kaur's case to the Minister. On 14 January 2010 the Minister personally decided not to exercise his power under s 351, because it would not be in the public interest for him to intervene.

Ms Kaur then unsuccessfully applied to the Federal Magistrates Court for a review of the MRT's decision. On 26 November 2010 Justice Jacobson also dismissed her subsequent appeal. In his reasons for judgment however, his Honour observed that the letter from DIAC to Ms Kaur in June 2006 concerning the grant of the second visa was confusing. This was because it referred to the expiry date of the first visa, being the only visa label evidenced in her passport. It was therefore not unreasonable that she had received incorrect advice from the migration agent. His Honour then commented that the Minister might therefore be prepared to revisit Ms Kaur's case pursuant to s 351 of the Act.

On 20 December 2010 Ms Kaur made a further request to the Minister for intervention under s 351 of the Act. On 10 January 2011 DIAC, noting Justice Jacobson's comment, decided not to refer her request to the Minister. This was because Ms Kaur had not provided any fresh compelling information that would bring her case within the Minister's Guidelines for a repeat referral.

Ms Kaur contends that DIAC's summary of her case to the Minister mischaracterised the June 2006 letter (granting the second visa), as it stated that that letter clearly indicated the new visa's expiry date. She also contends that DIAC, in considering her second request to the Minister, referred only to Justice Jacobson's comment of possible revisitation and not to his Honour's observation that that letter was confusing. Ms Kaur contends that in both

instances she should have been invited to be heard on these issues before DIAC's summary was put to the Minister.

On 21 January 2011 Ms Kaur 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, she seeks a declaration that she had been denied procedural fairness. Ms Kaur also seeks an order compelling the Minister to reconsider (in accordance with the requirements of procedural fairness) whether he should intervene under s 351 of the Act.

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 of 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 10 January 2011 in exercising discretion under s 351 of the Act failed in their duty of procedural fairness to the Plaintiff.