

**PLAINTIFF S51/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S51/2011)**

Date application referred to the Full Court: 10 November 2011

The Plaintiff is a citizen of Nigeria. He arrived in Australia in August 2009 on a short-stay business visa, supposedly to attend a medical conference. During an airport interview the Plaintiff admitted that he wished to claim refugee status. His short-stay business visa was immediately cancelled. He then applied for a protection visa on the basis that he feared being killed by Islamic fundamentalists if he returned to Nigeria. On 3 November 2009 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused to grant the Plaintiff a protection visa. On 23 November 2009 the Plaintiff was diagnosed with post-traumatic stress disorder. On 1 December 2009 the Department of Immigration and Citizenship ("DIAC") found that he met the documented guidelines for Ministerial intervention under s 195A of the *Migration Act 1958* (Cth) ("the Act"). (Under that section, the Minister may grant a visa to any person in detention even if that person has not applied for a visa.) On 10 February 2010 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision. The Federal Magistrates Court also dismissed the Plaintiff's application for a review of the RRT decision, while the Federal Court dismissed the Plaintiff's subsequent appeal on 3 September 2010.

DIAC's s 195A submission had been drafted by March 2010, but it was not forwarded to the Minister as the Plaintiff then had court proceedings pending. On 6 October 2010 DIAC accepted a letter from the Plaintiff as both a request for the Minister to substitute a more favourable decision for the RRT decision (under s 417 of the Act), and a request for the Minister to determine (under s 48B of the Act) that the Plaintiff could make a further application for a protection visa. On 11 November 2010 DIAC:

1. Determined that the Plaintiff's case did not meet documented guidelines for requests for intervention under s 48B;
2. Referred the case to the Minister for him to consider a substitution of decision under s 417; and
3. Recorded that the Plaintiff's case was inappropriate for consideration under s 195A because a decision under s 417 was available.

On 16 November 2010 the Minister requested that DIAC provide him with further information on the Plaintiff's case. On 16 December 2010, having considered a detailed submission prepared by DIAC, the Minister decided not to exercise his power under s 417.

The Plaintiff contends that DIAC was obliged under the relevant guidelines to have referred his case to the Minister under s 195A (either in December 2009 or jointly with the referral under s 417). He further submitted that DIAC should have given him an opportunity to make submissions both at that stage (on the merits of a decision under s 195A) and later on DIAC's view that access to s 417 precluded a referral under s 195A. The Plaintiff also contended that he

should have been given an opportunity to comment upon adverse material relating to his request for referral to the Minister under ss 48B and 417 of the Act.

On 1 February 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 a declaration that he had been denied procedural fairness. He also seeks an order that DIAC reconsider his requests under ss 48B and 417 in accordance with the requirements of procedural fairness. He further submits that both the Secretary of DIAC and the Minister show cause why the former should not be directed to forward to the latter any submission or assessment made under the s 195A guidelines.

On 10 November 2011 Acting Chief 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 in relation to the decision notified on 20 December 2010 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.