**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

**No. S51 of 2011**

**BETWEEN:**

**PLAINTIFF S51/2011**
Plaintiff

and

**MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First respondent

**SECRETARY FOR DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**
Second respondent



# PLAINTIFF'S OUTLINE OF SUBMISSIONS

## Part I Certification

1. These submissions are in a form suitable for publication on the Internet.

## Part II Issues

2. The plaintiff in this matter has at all material times been in immigration detention.

3. There are four principal issues to be considered in that context:

   a) were the assessment processes pursued in respect of each plaintiff taken under and for the purposes of the *Migration Act*, or were they undertaken in the exercise of non-statutory executive power under s 61 of the Constitution?

   b) were the officers who made the inquiries as part of the assessment processes bound to afford procedural fairness to the plaintiffs?

   c) were the inquiries made according to law and were they procedurally fair?

   d) what is the appropriate relief?

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Filed on behalf of the plaintiffs on 21 November 2011:

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## Part III *Judiciary Act 1903*

4. The plaintiff will give notice to the Attorneys-General of the Commonwealth and of the States in compliance with s 78B of the *Judiciary Act 1903* (Cth).

## Part IV Citations

5. This application for an order to show cause is brought in the original jurisdiction.

6. On 10 November 2011, Gummow J ordered that the application be referred for final hearing in the first instance by the Full Court.

## Part V Facts

7. Plaintiff S51 is a non-citizen. He is a national of Nigeria who arrived in Australia on 29 August 2009. He sought to engage Australia's protection obligations upon arrival, and formally applied for a protection visa on 25 September 2009.[1]

8. The plaintiff has at all material times been held in immigration detention. He is presently being held in community detention under s 197AB of the Act.

9. The procedural history of Plaintiff S51 is as follows:

| | s 48B | s 195A | s 417 |
|---|---|---|---|
| 29 Aug 2009 | *Plaintiff arrived in Australia and was placed in immigration detention* | | |
| 2 Sep 2009 | | Case manager initiated request by referring matter to CELS[2] | |
| 3 Nov 2009 | *Minister's delegate refused application for protection visa* | | |
| 1 Dec 2009 | | Officer decides that request meets guidelines[3] | |
| Feb 2010 | | Officer prepared submission for referral | |
| 11 Feb 2010 | *RRT affirmed decision to refuse to grant protection visa* | | |
| 5 Jul 2010 | *Federal Magistrates Court dismissed application for judicial review* | | |
| 3 Sep 2010 | *Full Federal Court dismissed appeal from Federal Magistrates Court* | | |
| 30 Sep 2010 | Initial request | | Initial request |
| 11 Nov 2010 | Not referred on basis that guidelines not met[4] | Finalised as 'inappropriate to consider'[5] because s 417 was available | Schedule referred[6] |

1 S51 at 155.
2 S51 at 223 L. 'CELS' is an abbreviation of 'Case Escalation Liaison Section'.
3 S51 at 218-219.
4 S51 at 439-443.
5 S51 at 355-359.

| | s 48B | s 195A | s 417 |
|---|---|---|---|
| 16 Nov 2010 | | | Minister decided to consider[7] |
| 14 Dec 2010 | | | Submission referred[8] |
| 16 Dec 2010 | | | Minister decided not to exercise power[9] |
| 1 Feb 2011 | *Application for order to show cause filed in High Court of Australia* | | |
| 3 Feb 2011 | Repeat request | | Repeat request |
| 9 Feb 2011 | Not referred on basis that guidelines not met | | Not referred on basis that guidelines not met |
| 18 Aug 2011 | | New submission referred to Minister under ss 195A and 197AB[10] | |
| 29 Aug 2011 | | Minister exercised power under s 197AB and decided not to exercise power under s 195A[11] | |

10. The facts pertaining to the defendants are as stated in S10, Kaur and S49.

## Part VI Argument

*Summary of argument*

11. The plaintiff adopts the submissions filed in S10, Kaur and S49 on 28 October 2011.

12. The application must be allowed for two reasons:

a) the Secretary and his officers were required, in assessing the plaintiff's requests, to afford procedural fairness to the plaintiff because;

i) the inquiries undertaken in assessing the plaintiff's requests were made under and for the purposes of the *Migration Act*;

ii) in the alternative, the inquiries were made pursuant to non-statutory executive power under s 61 of the Constitution; or

iii) in any event, they were exercising public functions;

b) the plaintiff was denied procedural fairness.

6 S51 at 479-483, 355-356.
7 S51 at 480, 483.
8 S51 at 514-520.
9 S51 at 520.
10 S51 at 591-595.
11 S51 at 591.

13. The plaintiff seeks mandamus, certiorari, injunctions and declaratory relief as set out later in these submissions.

*Jurisdiction*

14. The court has jurisdiction pursuant to ss 75(iii) and 75(v) of the Constitution. The first and second defendants are parties being sued on behalf of the Commonwealth and the plaintiff seeks mandamus and injunctions directed to the Secretary, an officer of the Commonwealth.

*The statutory scheme*

15. The statute contemplates that a person in immigration detention under s 189 may prepare and make a "request" to the Minister to exercise his or her power to grant a visa of a particular class to that person under s 195A.[12] That section was considered by this court in *Plaintiff M61/2010E v Commonwealth.*[13]

16. Where a person has made or proposes to make a "request" under that section, the statute also contemplates that another person may, on their behalf, "make[] representations to, or otherwise communicate[] with, the Minister, a member of the Minister's staff or the Department" about the "request".[14]

17. Subsection 195A(4) provides that the Minister does not in any circumstances have a duty to consider the exercise of the power under s 195A(2), including where the Minister is requested to do so. Necessarily, however, that subsection envisages that the Minister may be requested to consider the exercise of the power.

18. Together, these provisions provide a framework to enable the Minister to decide whether, in a particular case, the public interest favours granting a visa to a person in immigration detention.

*Under and for the purposes of the Act*

19. The plaintiff's primary submission is that all material steps taken in relation to the "requests" assessed by departmental officers were taken under and for the purposes of the Act.

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12 Sections 276(2A)(aa) and 277(5).
13 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 (**M61**).
14 Section 282(4)(f).

20. This submission proceeds by analogy with *M61*.[15] In *M61*, this court unanimously held that the decision to establish and implement the RSA and IMR procedures, announced by the Minister in July 2008, was to be understood in two ways:[16]

a) *first*, as a direction to provide the Minister with advice about whether his personal non-compellable powers under s 46A or s 195A can or should be exercised;

b) *secondly*, as a decision by the Minister to consider whether to exercise either of those powers in respect of any offshore entry person who makes a claim that Australia owes the claimant protection obligations.

21. In the present case, on 18 October 2007,[17] the Minister decided to consider exercising the power under s 195A of the Act in every case:

a) where a person is in immigration detention and is subject to the ongoing review mandated by the guidelines;[18] or

b) alternatively, where a person's case is assessed by the department as falling within the Minister's guidelines.[19]

22. In *M61*, there were three principal matters which showed that the Minster had begun the task of considering whether to exercise power under s 195A:[20]

a) *first*, the powers under ss 46A and 195A may *only* be exercised by the Minister *personally*;

b) *secondly*, the assessment and review were made in consequence of a ministerial direction;

c) *thirdly*, in the circumstances of those cases, the continued detention of an offshore entry person, while an assessment and review were conducted, was lawful only because the relevant assessment and review were directed to whether powers under either s 46A or s 195A could or should be exercised.

23. All three of those matters also existed in this case.

24. For those reasons, the assessment processes pursued by the Secretary and his officers were carried out under and for the purposes of the Act. There being no plain words of

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15 (2010) 272 ALR 14.
16 M61 at [66].
17 S51 at 759.
18 S51 at 750 [6.2].
19 S51 at 750 [6.2].
20 M61 at [62] and [67].

necessary intendment such as might exclude an obligation to afford procedural fairness, the Secretary and his officers were required to comply with that obligation.

*The terms of the guidelines*

25. On 18 October 2007, the Minister issued guidelines titled "Guidelines on Minister's detention intervention power (section 195A of the *Migration Act 1958*)".

26. In the guidelines, the Minister described their purpose as being to "inform officers of the Department ... when to refer a case to me so that I can decide whether to consider exercising this power in the public interest".[21]

27. The guidelines also contained an instruction from the Minister that "[t]he procedures set out [in the guidelines] are to be followed in order to ensure the efficient administration of my detention intervention power".[22] (Emphasis added.)

28. On the subject of requests, the guidelines provided that:

a) the Minister will *not* consider exercising the detention intervention power when requested to do so directly by a detainee or by a person on their behalf;

b) requests for the exercise of the power "may only be made and referred by the Department" as set out in the guidelines; and

c) clients can request intervention under any other intervention power.[23]

29. It was no doubt for those reasons that the guidelines prescribed mandatory ongoing assessments for all detainees "in accordance with case management principles and review practices adopted by the Department".[24] The guidelines nevertheless contemplated the possibility of a subsequent request being made to the department.[25]

30. Paragraph 6.2.1 of the guidelines relevantly provided:

> *If it is determined as part of this ongoing review of the person's circumstances that the case falls within the ambit of these Guidelines, the case must be brought to my attention in a submission so that I may consider exercising my detention intervention power.*[26] (Emphasis added.)

31. There is no discretion reserved to case officers not to refer such matters to the Minister.

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21 S51 at 746 [1.1.1].
22 S51 at 750 [6.1].
23 S51 at 750 [6.3].
24 S51 at 750 [6.2.1].
25 S51 at 751 [6.4].
26 S51 at 750 [6.2.1].

32. The guidelines also outlined the ministerial policy concerning the intersection of the power under s 195A with the Minister's other intervention powers:

> *The officer preparing a submission under s 195A must check whether there is any parallel preparation of a submission in progress using my other intervention powers. In such instances consideration should be given to a joint submission.*[27]

33. This paragraph shows that the reference to "general powers" in paragraph 2.4.1[28] must be read as referring to departmental powers to grant a visa and not to ministerial intervention powers.

34. It follows that the availability of a ministerial intervention power other than s 195A could never justify a departure from mandatory referral in a submission under paragraph 6.2.1 if the case otherwise falls within the ambit of the guidelines. The only question for the officer is whether there is a joint submission or separate submissions.

35. For the reasons advanced in S10, Kaur and S49, a decision not to refer in contravention of the guidelines necessarily involves unlawful executive action.

*Denial of procedural fairness under s 195A*

36. In the present case, even though a favourable assessment under the Minister's guidelines had been made by a responsible officer within the department in December 2009, contrary to the guidelines, the matter was not referred for the Minister's consideration. From February 2010, after the Refugee Review Tribunal had made an adverse decision such that the Minister's power under s 417 became available, the positive s 195A assessment was still not referred to the Minister either alone or jointly with a submission under s 417 (as contemplated by the guidelines).

37. In the recent 2011 submission to the Minister under s 195A (and s 197AB), the following was stated after a note that the assessment had been finalised in November 2010:

> *Given the section 417 power became available in* [Plaintiff S51's] *case following the RRT decision of February 2010, the section 195A request should have been finalised at that time. It appears that the delay in finalising the section 195A request was a result of administrative drift on the Department's behalf.*[29]

38. There is some evidence to support a conclusion that a decision was made in November 2010 not to refer the plaintiff's circumstances to the Minister under s 195A because

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27 S51 at 751-752 [6.5.3].
28 S51 at 747.
29 S51 at 592 [4].

the client had access to s 417.[30] What is not clear is why access to s 417 was considered to be a bar on referring a positive assessment to the Minister under s 195A.

39. In any event, the anodyne characterisation in the recent submission to the Minister of the delay between February and November 2010 (during which time the plaintiff remained in detention) as "administrative drift", giving the impression that the later decision should have been made earlier, is flawed for two reasons.

40. First, access to s 417 is not a justification for not referring a positive assessment under s 195A in accordance with the guidelines. Secondly, the characterisation fails to provide any insight into the true reasons why the positive assessment had not been referred, as shown by:

a) Email dated 18 February 2010: "I'm not sure what is happening with the s195a sub – it looks like it was with CELS but if [Plaintiff S51]'s removal is imminent, not sure that they will progress the sub anymore."[31]

b) Emails dated 16 March 2010:

i) "On 12/03/2010 CELS advised the [case manager] that due to the negative RRT decision a s195A MI would probably not be referred."

ii) "this is the case that unfortunately was commenced in December and had been progressed to a draft submission. Approx 2 weeks ago ... I suggested the best course of action was to close the case as not referred due to impending removal."[32]

c) Email dated 22 September 2010: "I have spoken to CELS and they indicated due to lack of staff the submission was not progressed."[33]

d) Email dated 26 September 2010: "On Friday I spoke with Merdan as to what was happening with this case and she advised me that Dermot had decided that it should not be referred to the minister a[s] it was too late in the process."[34]

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30 S51 at 357-358. There is some indication in the computer record that an officer has recorded that the "[c]lient has access to s417 and it is inappropriate to consider under s195A". There is no evidence in the computer record to suggest the relevant officer turned his or her mind to paragraph 6.2.1 of the guidelines as requiring the finalisation of the s 195A submission. Nor does the computer record of 11 November 2010 contain any reference to the existing assessment that Plaintiff S51 met the s 195A guidelines in December 2009, let alone any analysis of whether the recommendation in that assessment that the plaintiff met the guidelines could be disregarded. There is no reference in that record to any consideration by the officer of preparation of a joint s 417 and s 195A submission to the Minister.

31 S51 at 259.

32 S51 at 268-269.

33 S51 at 337.

34 S51 at 340.

e) Emails dated 12-13 October 2010:

i) "[Plaintiff S51] lodged s417 on 30/09/2010."[35]

ii) "We will not be doing a further guidelines assessment unless he applies to the HC dur to the delay that wound entail."[36]

41. The true position was that the referral was deliberately deferred on multiple occasions between February 2010 and November 2010 because of a perception within the department that Plaintiff S51's removal was imminent. It may be observed that the guidelines do not indicate that this is a justification for not referring a positive assessment to the Minister. The plaintiff's case was not referred to the Minister as required by paragraph 6.2.1 of the guidelines.[37]

42. The result was that from December 2009 until August 2011, the plaintiff was kept in an immigration detention centre (and, subsequently, is still in detention, albeit community detention). This is of significance because, using the language from the department's first s 195A assessment, the clinical psychologist of the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) considered that Plaintiff S51 had "*a diagnosis of Post Traumatic Stress Disorder (PTSD) with depressive features consistent with trauma experienced in his home country, Nigeria.*"[38] The STARTTS report itself[39] is a compelling independent analysis which must have been relevant to the issues under both s 417 and s 195A. It provides support for the plaintiff's expressed fear of torture on return and is of obvious significance to the assessment under the s 417 guidelines in relation to the Convention Against Torture.

43. The STARRTS report was only ever put forward to the Minister in the context of the second s 195A/197AB request on 19 August 2011, well after the consideration of his first s 417 request and even after his second s 417 request was rejected.

44. It should also be observed that at no point, in respect of either the first or second assessments under s 195A, was the plaintiff given any opportunity to address or provide evidence by reference to the criteria that were assessed under the Minister's guidelines. Notwithstanding that this Court in *M61* concluded that procedural fairness can attach to exercises of power under s 195A (including administrative assessments under guidelines pertaining to that power), at no time was the plaintiff given an

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35 S51 at 361.
36 S51 at 360, 364.
37 S51 at 355-356.
38 S51 at 218 O-Q.
39 S51 at 201-212.

opportunity to address the relevant issues, even when a decision to carry out an assessment had been taken and even when the plaintiff was legally represented.

45. These circumstances reveal the following failures to accord procedural fairness to the plaintiff.

46. First, it was a denial of procedural fairness in the circumstances of the present case for the plaintiff not to have an opportunity to make a submission at all in support of a favourable outcome under s 195A.

47. Secondly, it was a denial of procedural fairness for the plaintiff not to have an opportunity to respond to the department's adverse summary and characterisation of the flaws in the department's handling of the earlier departmental processes under s 195A. The department's characterisation was at best apt to mislead and at worst incorrect. The plaintiff, who by August 2011 had copies of most of the relevant documents, should have had an opportunity to contend that the department had misconstrued the guidelines leading to his being retained in (non-community) immigration detention for almost two years longer than might otherwise have been the case, especially when the department had expert evidence that detention was contributing to his psychological illness. In particular, he could have submitted that his case should have been referred to the Minister, in accordance with the guidelines, in December 2009. He could also have submitted that he had been denied the opportunity of having the STARRTS report considered in a joint submission with his first s 417 request at a time when he had the Minister's attention and the Minister was seeking additional information from the department about him.

48. Thirdly, in relation to the manner in which the first assessment was ultimately disposed of in November 2010, the plaintiff says he was denied procedural fairness in not having an opportunity to address the availability of the criterion (that access to s 417 allegedly precluded referrals under s 195A) used to justify not referring the matter to the Minister. He was entitled to know the case he had to meet. He was also denied the opportunity to put a case that he met the first criterion in paragraph 4.1.1 of the guidelines, and the ability to rely upon and supplement the STARTTS report. Further, the plaintiff, if given an opportunity to present his case at all, could have advanced these denials of procedural fairness in relation to the referral of the matter under s 195A in August 2011.

*Denial of procedural fairness under ss 48B and 417*

49. In relation to the initial request under s 48B:

a) Plaintiff S51 claimed that "[t]he Federal and State Governments of Nigeria, although they say they are doing something to stop the extremists, in reality they do virtually nothing to stop them"[40] and, in support of that proposition, provided a number of documents published after the tribunal's decision.

b) For example, one document dated 11 March 2010 cited the UN Special Rapporteur on Freedom of Religion or Belief, Ms Asma Jahangir, who, after consultations with the Nigerian government, concluded that "religious manipulation was a major root cause [of conflicts in Nigeria], but the government has been too scared to acknowledge that".[41]

c) The case officer was aware of Plaintiff S51's claim above[42] and relied on a US State Department Report (also dated 11 March 2010) to reach the contrary conclusion that "the government generally respects religious freedom in practice ...".[43]

d) Plaintiff S51 was not provided with an opportunity to comment on either the report or the contrary conclusion. Had he been given that opportunity, amongst other things, attention might have been drawn to the qualification in the next line of the report: "... although local political actors stoked sectarian violence with impunity".[44]

50. The officer's failure to provide Plaintiff S51 with an opportunity to be heard in relation to that adverse material constituted a denial of procedural fairness.

51. In relation to the initial request under s 417:

a) In a statutory declaration made on 25 November 2010, received by the department on 7 December 2010, Plaintiff S51 stated: "Last time I saw Dr Brown he told me that he hoped to operate on my right eye before the end of this year."[45]

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40 S51 at 384 [14].
41 S51 at 407 F.
42 S51 at 442 C-D.
43 S51 at 442 N-O.
44 S51 at 456 N.
45 S51 at 500 Q-U.

b) The case officer noted that Plaintiff S51's representative had also advised the department on 7 December 2010 that "his next appointment with Dr Brown would take place on 22/12/2010".[46]

c) Despite this, the case officer relied on a letter from Dr Brown dated 5 August 2010 to the effect that Plaintiff S51 "was fit to travel",[47] and a report from Dr Brown on 22 November 2010 that Plaintiff S51 "had been discharged from his care and that further eye surgery was no longer required".[48]

d) Both the letter and the report from Dr Brown predated and were inconsistent with Plaintiff S51's statutory declaration and with the advice provided by his representative. Neither the letter nor the report was put to Plaintiff S51.

52. There were two other denials of procedural fairness in relation to that request:

a) In response to Plaintiff S51's claim that he would not be able to receive treatment for the ptosis of his right eye in Nigeria,[49] the officer relied on a report of the UK Home Office Border Agency dated 9 July 2010 to conclude that "a wide variety of eye diseases and conditions, such as glaucoma and cataracts can be treated in Nigerian hospitals".[50] No opportunity to comment on that adverse material was provided.

b) In response to Plaintiff S51's statutory declaration to the effect that he is single, the officer referred to a departmental offshore record which "lists him as married, having cited a marriage certificate".[51] Whether Plaintiff S51 had a spouse who could seek a visa if one were to be granted to him was a matter which might have been considered unfavourably to him, and no opportunity to comment on that apparent inconsistency was provided.

53. In addition, the principal reason for recommending that intervention under s 417 was not appropriate was that Plaintiff S51 had "been unable to provide any evidence of his integration in the community due to his detention since his arrival".[52] (Emphasis added.)

54. Plaintiff S51 was not provided with an opportunity to comment on whether his inability to provide evidence of integration "due to his detention" was a matter which should bear upon the Minister's discretion.

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46 S51 at 516 E.
47 S51 at 515 T-V.
48 S51 at 516 D.
49 S51 at 515 T-U, 516 F.
50 S51 at 516 F-G.
51 S51 at 517 T-V.
52 S51 at 519 C-D.

55. Indeed, the department had previously suggested to Plaintiff S51 that "letters of support from ... friends and community organisations" would be sufficient evidence of integration,[53] and the letters he provided in that regard were assessed as being "evidence of strong support".[54]

56. Had he been provided with an opportunity to comment on his inability to provide evidence of integration "due to his detention", he might well have referred to the fact that his only opportunity to be released from detention was via consideration under s 195A, and his favourable submission under that section was never referred to the Minister because he was considered to be eligible for s 417: "Client has access to s 417 and it is inappropriate to consider under s195A".[55]

57. Plaintiff S51 had no opportunity to comment on any of those matters.

*Mandamus against the Minister*

58. Single justices of this court have held in relation to ss 48B(6),[56] s 351(7)[57] and s 417(7)[58] that the words of those subsections are clear and were included in the Act "in order to relieve the Minister of the duty which would occasion applications by the constitutional process of Mandamus to require the Minister to exercise a duty".

59. This court has also confirmed that, in relation to ss 46A and 195A, mandamus will not issue to compel the Minister to consider the exercise of the powers conferred by those sections even where the Minister has previously decided to consider exercising those powers.[59]

60. The plaintiff does not seek mandamus directed to the Minister.

*Certiorari*

61. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, the majority observed, in relation to s 417, that a prosecutor who seeks mandamus or certiorari directed to the Minister faces "a fatal

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53 S51 at 485 R-T.
54 S51 at 515 D.
55 S51 at 358-359.
56 *Re Minister for Immigration & Multicultural Affairs; Ex parte Ordonez* (unreported, High Court of Australia, Callinan J, 22 March 2001); *Re Hutchinson; Ex parte Applicant P66 of 2003* (unreported, High Court of Australia, Heydon J, 21 October 2003).
57 *Re Nicholls; Ex parte Trinh* (unreported, High Court of Australia, Hayne J, 15 March 2004); *Re Minister for Immigration, Multicultural & Indigenous Affairs; Ex parte Gogna* (Unreported, High Court of Australia, Gaudron J, 17 October 2002).
58 *Re Ruddock; Ex parte Gomez-Rios* (unreported, High Court of Australia, Kirby J, 28 March 2000).
59 *M61* at [99].

conundrum".[60] In the absence of a duty to consider whether to exercise the power, mandamus would not issue to the Minister, and in the absence of mandamus, there would be no utility in granting certiorari.[61]

62. In *M61*, this court further held that "the unavailability of mandamus entails that there is no utility in granting certiorari to quash the recommendation which the reviewer made in each of these matters".[62]

63. In the present case, accepting that mandamus is unavailable against the Minister, there nevertheless remains utility in granting certiorari to quash the decisions of the Minister and the recommendations or decisions made by officers of the NSW Ministerial Intervention Unit under ss 48B and 417:

a) although the Minister does not have a duty to consider the exercise of the relevant powers, by reason of the distinction drawn between "initial requests" and "repeat requests" in the ministerial guidelines, the Secretary and his officers have been directed by the Minister to treat requests differently; and

b) the setting aside of decisions on prior requests (and in particular initial requests) will mean that the pending requests are liable to be assessed differently by case officers.

64. For those reasons certiorari should be granted.

*Injunctions and mandamus*

65. The plaintiff seeks mandatory injunctions (or writs of mandamus) directed to the Secretary requiring him by his officers, agents or otherwise to consider the requests initiated by the Plaintiff or the department lawfully against the guidelines and restraining them from assessing the requests:

a) other than in accordance with the Minister's guidelines; and

b) other than in accordance with the requirements of procedural fairness.

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60 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, Gleeson CJ, McHugh, Gummow and Hayne JJ at 461 [48].

61 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, Gleeson CJ, McHugh, Gummow and Hayne JJ at 461 [46]-[48], Gaudron and Kirby JJ at 474 [100].

62 *M61* at [100].

*Declaratory relief*

66. Further and in the alternative to the above, the plaintiff seeks declaratory relief.

67. This court has recently emphasised that "[t]he reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the rule of law under the Constitution".[63]

68. In circumstances where Parliament has reduced the availability of other relief, the constitutional function assigned to this court requires that declarations be made concerning the lawfulness of the executive action challenged by the plaintiffs.

69. Moreover, this is not a case in which a declaratory order by the court will produce no foreseeable consequences for the plaintiff.[64]

70. The foremost consideration is "the significance that the Minister could be expected to attach to the declaration in the exercise of the special power conferred on the Minister".[65]

71. Finally, there is a considerable public interest in the observance of the requirements of procedural fairness in the exercise of the relevant powers.[66]

72. The Minister's guidelines expressly confirm that a person with a residence determination under s 197AB can still be referred for consideration under s 195A.[67]

## Part VII Legislation

73. The applicable constitutional, statutory and regulatory provisions as they existed at all material times are to be provided in a bundle to be agreed with the defendants.

## Part VIII Orders sought

74. Orders absolute for writs of certiorari:

    a) directed to the second defendant, quashing the decision made on 11 November 2010 not to refer the plaintiff's request to the Minister under s 48B;

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63 *M61* at [87], *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [158].

64 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180, Mason J at 188, Aickin J at 189.

65 *Ahmed v Minister for Immigration and Citizenship* (unreported, High Court of Australia, Gummow J, 14 February 2011); *Minister for Immigration and Citizenship v Ahmed* (unreported, High Court of Australia, Hayne and Crennan JJ, 6 October 2011).

66 *M61* at 39 [103], referring to *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at 134 [25].

67 S51 at 747 [2.4.3].

b) directed to the second defendant, quashing the recommendation to the first defendant of 14 December 2010 under s 417; and

c) directed to the first defendant, quashing the subsequent decision of the first defendant of 16 December 2010 under s 417.

75. Declare that, in making the decision of 11 November 2010 under s 48B, the defendants or their officers failed to observe the requirements of procedural fairness.

76. Declare that, in making the decision of 11 November 2010 under s 195A, the defendants or their officers failed to observe the requirements of procedural fairness.

77. Declare that, in making the recommendation of 18 August 2011 to the first defendant under s 195A, and in making the decision of 29 August 2011 (insofar as that decision was made under s 195A), the defendants and their officers failed to observe the requirements of procedural fairness.

78. Declare that, in making the recommendation of 14 December 2010 to the first defendant under s 417, and in making the decision of 16 December 2010, the defendants and their officers failed to observe the requirements of procedural fairness.

79. Issue a writ of mandamus or an injunction directing the second defendant by his officers and agents to make assessments of the plaintiff's or the department's requests for the exercise of the Minister's powers under ss 48B, 195A or 417 of the Act under the ministerial guidelines and not otherwise than in accordance with the requirements of procedural fairness.

80. Order that the defendants pay the plaintiff's costs.

Dated: 21 November 2011

**Counsel for the plaintiff**

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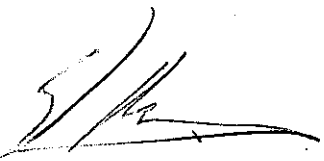

**S.E.J. PRINCE**
State Chambers
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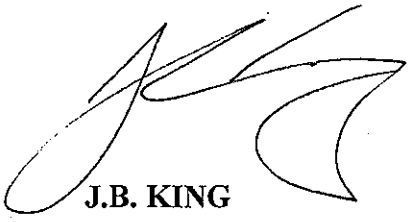

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