HIGH COURT OF AUSTRALIA

18 April 2018

PLAINTIFF M174/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR
[2018] HCA 16

Today the High Court unanimously held, answering questions stated in a special case, that a failure by a delegate of the Minister for Immigration and Border Protection ("the Minister") to comply with s 57(2) of the *Migration Act* 1958 (Cth) ("the Act") in the course of making a decision to refuse to grant a protection visa to a "fast track applicant" does not deprive the Immigration Assessment Authority ("the Authority") of jurisdiction to review the delegate's decision. The Court also held that, in this case, the delegate had not failed to comply with s 57(2) and the Authority had not acted unreasonably by not getting new information from the plaintiff, who was a "fast track applicant".

Section 57(2) of the Act provides that, in considering a visa application, the Minister or delegate must provide "relevant information" to the applicant and invite the applicant to comment on it. "Relevant information" includes information that would be the reason, or part of the reason, for refusing to grant the visa; that is specifically about the applicant; and that was not provided by the applicant.

Part 7AA of the Act provides for review of "fast track reviewable decisions" – decisions to refuse to grant protection visas to certain "fast track applicants", which includes persons who arrived in Australia as "unauthorised maritime arrivals" on or after 13 August 2012 and before 1 January 2014. When such a decision is made, it must be referred to the Authority for review together with specified "review material". The Authority may either affirm the decision or remit the decision to the Minister for reconsideration, but the Authority is not authorised to set the decision aside or to substitute its own decision. Subject to exceptions, the Authority is required to review decisions on the papers. One exception is that the Authority may invite a person, including an applicant, to provide "new information" in writing or at an interview. However, the Authority is not permitted to consider any new information unless it is satisfied that there are exceptional circumstances and that the information either was not and could not have been before the Minister or is credible personal information which was not previously known.

The plaintiff is a citizen of Iran who entered Australia on 11 October 2012 as an unauthorised maritime arrival and subsequently applied for a temporary protection visa. He claimed that he would face a real chance of harm if he returned to Iran because he is a Christian. In support of his claim to be a committed Christian, he told the Minister's delegate that he had regularly attended a particular church since his release from immigration detention and provided material including a letter from the reverend of the church. The delegate called the reverend, who told the delegate that the plaintiff had attended the church, but had stopped attending two years earlier and had only attended on a few occasions since then. The delegate made a file note of the telephone call, but did not give to the plaintiff particulars of what the reverend had said. The delegate refused to grant a protection visa to the plaintiff because she did not accept that he had genuinely converted to Christianity. She set out the information provided by the reverend in her reasons for decision.

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On review, the delegate's file note was included in the review material provided to the Authority. The plaintiff requested that the Authority interview him, the reverend and other congregants, and also provided further letters of support from the reverend and other congregants. The Authority affirmed the delegate's decision without conducting interviews. It took into account the further letters only to the extent that the reverend's further letter stated that the plaintiff had occasionally attended church in 2016. Like the delegate, the Authority did not accept that the plaintiff had genuinely converted to Christianity or that he would be at risk of harm for that reason if he returned to Iran. In its reasons, the Authority explained that, having regard to the requirement for exceptional circumstances to exist before it could consider any new information, it had chosen not to conduct any interviews because it considered that the plaintiff had been given an opportunity to present his claims and to respond to relevant issues in his interview with the delegate.

The High Court held that the jurisdiction of the Authority under Pt 7AA is to review decisions that are made in fact, with no requirement that those decisions be legally effective. The Authority's task is to consider the merits of a decision under review by determining for itself whether it is satisfied that the criteria for the grant of the visa are met. Further, if the decision under review is affected by jurisdictional error because of a failure to provide relevant information to an applicant in compliance with s 57(2), a failure by the Authority to exercise its powers to get and consider new information about the relevant information may be legally unreasonable. The Court held that the information provided by the reverend in the telephone call with the delegate was not "relevant information" because it supported the plaintiff's claim, so far as it went, and accordingly the delegate had not failed to comply with s 57(2). Nor had the Authority acted unreasonably by declining to exercise its powers to interview the reverend and other congregants: that exercise of discretion was open to it and was justified by the reasons it gave.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*