

PLAINTIFF S49/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S49/2011)

Date application referred to the Full Court: 13 September 2011

The Plaintiff arrived in Australia in June 1998 on a tourist visa, using an Indian passport bearing a false name. He applied for a protection visa on the basis that he feared persecution for his political opinions if he returned to India. On 14 August 1998 a delegate of the Minister refused to grant the Plaintiff a protection visa. On 5 April 2001 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision.

In September 2003 the Plaintiff informed the Minister's Department ("DIAC") that he was in fact Bangladeshi, that his Indian passport was fraudulent and that he feared persecution in Bangladesh for his religious beliefs. In September 2004 the Plaintiff wrote to the Minister stating that he could not return to either India or Bangladesh and that he was seeking a more favourable decision than that made by the RRT. DIAC then invited the Plaintiff to provide supporting documents by 27 October 2004. On 21 October 2004 it received a letter from the Plaintiff explaining that he had not yet received a response from the Bangladeshi consulate on his application (made with DIAC's assistance) to obtain the necessary identity documents. On the same day, DIAC referred its summary of the Plaintiff's case (without mention of the Plaintiff's efforts to obtain identity documents) to the Minister. On 9 November 2004 the Minister declined to exercise her power under s 417 of the *Migration Act 1958* (Cth) ("the Act") to substitute a new decision for that made by the RRT.

In December 2004 the Plaintiff told DIAC that he was actually Indian, not Bangladeshi. He also signed an application for Indian travel documents because he wanted to return to India. In July 2006 the Minister notified the Plaintiff that he would be removed from Australia. The Plaintiff then commenced proceedings in the Federal Magistrates Court. On 31 July 2008 the Federal Magistrate dismissed the Plaintiff's application for judicial review and the Full Court of the Federal Court also dismissed his subsequent appeal.

In June 2009 the Plaintiff wrote to the Minister asking him to consider exercising his power under either s 417 of the Act, or s 48B (to permit him to make a further application for a protection visa). In that letter, he detailed the history of his life in Bangladesh and how he obtained an Indian passport fraudulently. The Plaintiff also set out his Australian migration agent's advice in 1998 recommending that he mislead DIAC as to his identity and his activities in India. On 8 October 2009 a DIAC officer decided that the Plaintiff's case did not meet the Minister's Guidelines for requests for intervention under s 48B. Consequently his case was not referred to the Minister for a decision on whether the Plaintiff could make a repeat protection visa application. In February 2010 however, DIAC sought further information (including from the Plaintiff) regarding his s 417 request. In November 2010 DIAC provided the Minister with its submission on the Plaintiff's case. On 25 November 2010 the Minister decided not to exercise his power under s 417 of the Act.

The Plaintiff contends that DIAC, when considering his first s 417 request (in 2004), denied him procedural fairness by failing to consider the identity documents which it had invited him to provide. Regarding his request in 2009, the Plaintiff contends that DIAC denied him procedural fairness by:

- a) not putting to him the country information it would rely upon in deciding not to refer his case to the Minister for consideration under s 48B of the Act; and
- b) not providing him with an opportunity to be heard on the basis for DIAC's view that he was an Indian citizen, as stated in its submission for the Minister under s 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, inter alia, a declaration that he had been denied procedural fairness. He also seeks an order compelling the Minister to consider whether to intervene under s 417 of the Act 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 in relation to the decision notified on 13 October 2009 failed in his duty of procedural fairness to the Plaintiff
- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit in relation to the decision notified on 1 December 2010 failed in his duty of procedural fairness to the Plaintiff.