HIGH COURT OF AUSTRALIA

Public Information Officer

8 November 2006

MINISTER FOR IMMIGRATION AND INDIGENOUS AFFAIRS v STEFAN NYSTROM

The cancellation of one of Mr Nystrom's two visas should be taken to have cancelled the other, the High Court of Australia held today.

Mr Nystrom was born in Sweden on 31 December 1973 while his mother was visiting relatives. His parents had migrated to Australia in 1966. Mr Nystrom and his mother returned to Australia on 27 January 1974 and he has not left Australia since. He knows little of his Swedish relatives and does not speak Swedish. Mr Nystom has a criminal record of 87 offences dating back to when he was aged 10 and he has served eight prison terms. His convictions include theft, burglary, criminal damage, armed robbery, drug offences, driving offences, arson, intentionally causing serious injury and aggravated rape. In 2004 the Minister cancelled Mr Nystrom's transitional (permanent) visa because, based on his substantial criminal record, he failed to meet the character test specified in section 501(6) of the *Migration Act*. He claimed he also held an absorbed person visa. There is no difference in the substantive rights conferred by the two visas. Mr Nystrom argued that because he had been a permanent resident for 10 years before the commission of the crimes he was not liable to removal from Australia on cancellation of a visa. He also argued that the Minister had either cancelled the wrong visa or failed to take his absorbed person visa into account.

A federal magistrate upheld the Minister's decision on the basis that, even if accepted that Mr Nystrom was deemed to hold an absorbed person visa, section 501F(3) of the Act applied. This provides that if the Minister cancels a person's visa and the person holds another visa, the Minister is also taken to have decided to cancel that other visa. When Mr Nystrom appealed to the Full Court of the Federal Court, the Minister argued that an absorbed person visa only applied to those who became absorbed persons before 1984 although they had originally been illegal immigrants and Mr Nystrom was not such a person. The Full Court, by majority, held that Mr Nystrom met the criteria for the visa. It set aside the Minister's decision to cancel the transitional visa and held that the Minister had committed jurisdictional error. If Mr Nystrom did not hold a transitional visa then cancelling a non-existent visa is not a valid exercise of statutory power. If he held both visas, the Minister had not considered the fact that he held an absorbed person visa which would also be cancelled by operation of section 501F(3). The Minister appealed to the High Court.

The High Court unanimously allowed the appeal. It held that the Minister did not fail to take into account a relevant consideration when she did not refer Mr Nystrom also holding an absorbed person visa. The Court held that he qualified for and acquired simultaneously each of the deemed visas. Accordingly, the absorbed person visa was also cancelled upon cancellation of his transitional (permanent) visa in accordance with section 501F(3) of the Act. Both visas conferred the same rights, so the same considerations applied whichever visa was cancelled. The power conferred on the Minister by section 501(2) to cancel a visa could be exercised in Mr Nystrom's case. The Court also held that this power is not restricted by the deportation power in sections 200 and 201 of the Act which enables the deportation of non-citizens convicted of an offence attracting at least one year's jail and who had been in Australia for less than 10 years. It held that the provisions are capable of operating concurrently and the deportation provisions did not "protect" Mr Nystrom from removal via visa cancellation.

- *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.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au