HIGH COURT OF AUSTRALIA

Manager, Public Information

23 June 2010

SAEED v MINISTER FOR IMMIGRATION AND CITIZENSHIP [2010] HCA 23

The High Court today held that, in the case of offshore visa applicants, s 51A of the *Migration Act* 1958 (Cth) does not exclude the Minister's obligation, imposed by law, to afford an applicant the opportunity to comment on information before the Minister that is adverse to the applicant, prior to a decision on the application being made.

The appellant is a Pakistani citizen who applied for a Skilled – Independent Visa (Subclass 175). One of the eligibility requirements for the visa was employment in a skilled occupation for at least 12 months in the 24-month period before lodging the application. The appellant had provided documents to demonstrate that she had been employed as a cook in Pakistan. Australian immigration officers in Pakistan had investigated the appellant's claims. They discovered that no employee records were kept at the restaurant and were told that no woman had ever worked in the kitchen ("the adverse information"). On the basis of the adverse information, on 16 July 2008, a delegate of the Minister for Immigration and Citizenship refused the application because she could not be satisfied that the appellant had met the eligibility criteria. The appellant was not made aware of the adverse information until it was outlined in a letter refusing her application.

Subdivision AB of Part 2 of the *Migration Act* is entitled "Code of procedure for dealing fairly, efficiently and quickly with visa applications". It sets out procedures for dealing with visa applications after they are lodged and before a decision is made. Section 57(2), which is in subdivision AB, provides that certain "relevant information" received by the Minister must be provided to a visa applicant for comment. Section 57(3) provides, however, that this obligation does not arise unless the visa can be granted when the applicant is in the Australian migration zone; and unless the *Migration Act* provides, under Parts 5 or 7, for review of a decision to refuse to grant the visa. In the appellant's case, neither condition in s 57(3) was met. The particular visa could only be granted while the appellant was offshore and no avenue of review was provided for under Parts 5 or 7 of the Act. The Minister was therefore not obliged to follow the procedure in s 57 to give the appellant an opportunity to comment on the adverse information.

The appellant sought judicial review of the delegate's decision in the Federal Magistrates Court of Australia. She claimed that she had been denied procedural fairness because she was not given an opportunity to comment on the adverse information prior to the delegate's decision. Because the procedural obligation under s 57 did not apply, she relied upon the natural justice hearing rule at common law. In a case such as this, that rule requires that a person be given an opportunity to comment on adverse information that is credible, relevant and significant to the decision to be made.

On 2 December 2008, Federal Magistrate Emmett dismissed the application on the basis that the common law natural justice hearing rule was excluded by the operation of s 51A of the *Migration Act*. Section 51A provides that subdivision AB is "taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". The Full Court of the Federal Court of Australia dismissed the appellant's appeal. On 3 November 2009, the appellant was granted special leave to appeal to the High Court.

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The appellant submitted that s 51A did not exclude the application of the natural justice hearing rule in this case. The Court noted that the statement in s 51A is qualified by the words "in relation to the matters it deals with". It held that the "matter" with which s 57 deals is the provision of relevant information for comment to the persons to whom the information is required to be provided. The terms of s 57(3) limit the beneficiaries of the statutory procedure to onshore visa applicants. Therefore, the provision of information to offshore visa applicants, such as the appellant, is not a "matter" dealt with by the section. The Court concluded that the application of the natural justice hearing rule was not, in the appellant's case, excluded by s 51A. The Minister was obliged to provide the appellant with an opportunity to respond to the adverse material. This conclusion made it unnecessary for the Court to consider the appellant's alternative argument that s 51A was constitutionally invalid.

The Court allowed the appeal, quashed the decision of the Minister's delegate and ordered that the Minister consider and determine the appellant's application in accordance with the Court's reasons.

- *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.*