SHORT PARTICULARS OF CASES

COMMENCING MONDAY, 22 AUGUST 2011

No. Name of Matter Page No

Monday, 22 August and
Tuesday, 23 August 2011

1. Plaintiff M70/2011 v. Minister for Immigration and Citizenship & Anor; Plaintiff M106 of 2011 by his Litigation Guardian, Plaintiff M70/2011 v. Minister for Immigration and Citizenship & Anor; 1

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PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (M70/2011);
PLAINTIFF M106/2011 BY HIS LITIGATION GUARDIAN PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (M106/2011)

Date Applications referred to Full Court: 15 August 2011

These applications arise from the arrangement executed on 25 July 2011 between the governments of Australia and Malaysia for the transfer of up to 800 people from Australia to Malaysia ("the Arrangement"). Pursuant to the Arrangement the first defendant ("the Minister") declared Malaysia a "specified country" pursuant to s 198A(3) of *Migration Act* 1958 (Cth) ("the Act").

The plaintiffs arrived at Christmas Island by boat on 4 August 2011. Plaintiff M70 is a citizen of Afghanistan and is 24 years of age. Plaintiff M106 is a citizen of Afghanistan who is 16 years of age and was not accompanied by his parents, an adult relative or any guardian on the voyage to Christmas Island. Both plaintiffs claim to have well-founded fear of persecution in Afghanistan and are seeking protection from Australia. No assessment of Australia's protection obligations to the plaintiffs has been undertaken. On 7 August 2011 a delegate of the Minister determined that Plaintiff M70 should be taken to Malaysia pursuant to the Arrangement. On 13 August 2011 a pre-removal assessment was completed in respect of Plaintiff M106.

On 8 August 2011 Plaintiff M70 filed an application for an order to show cause in this Court. An application was filed by Plaintiff M106 on 15 August 2011. The plaintiffs submit that the only source of power to take offshore entry persons who claim to be persons to whom Australia owes protection obligations, in circumstances where those claims have not been assessed, out of Australia is s 198A(2) of the Act. Thus, the plaintiffs can only be taken out of Australia to Malaysia pursuant to an exercise of power under s 198A(1), which in turn depends upon there being a valid declaration under s 198A(3) in force, and the discretion in s 198A(1) having been lawfully exercised. The plaintiffs contend the declaration made by the Minister is either not in force or was not validly made because: it is a legislative instrument and has not been registered; whether or not it is a legislative instrument, the criteria in s 198A(3) are jurisdictional facts for the Court objectively to determine and they do not exist in relation to Malaysia; and Malaysia does not have the requisite legal obligations in either international or domestic law.

The plaintiffs also contend that the Minister asked himself the wrong question in deciding whether to make the declaration. He asked how Malaysia would treat the 800 asylum seekers who would be transferred to Malaysia under the Arrangement rather than how all asylum seekers and refugees within Malaysia's borders are treated. They contend that the discretionary power in s 198A(3) miscarried in relation to Plaintiff M70 because: it was unlawfully fettered by a direction given by the Minister on 25 July 2011; and the delegate who made the decision failed to consider the individual circumstances of Plaintiff M70, in that she was required to, but did not, consider the operation of Malaysian law on the Plaintiff, given that he had entered and exited Malaysia illegally on his way to Australia.

In relation to Plaintiff M106 it is also contended that the Minister is his guardian and taking him to Malaysia is not in his best interests. The failure of the Minister

to consider exercising his powers under ss 46A and 195A of the Act and instead take him to Malaysia constitutes a breach of duty.

On 15 August 2011 Hayne J referred the applications for consideration by the Full Court. The Australian Human Rights Commission has filed a summons seeking leave to intervene in matter M106/2011.

The issues raised in the applications include:

- What is the proper construction of sub-ss 198A(3)(i) to (iv) of the Act?
- Did the Minister's exercise of jurisdiction under s 198A(3) miscarry when he made the Declaration?
- Has the discretion conferred by s 198A(1) to take a person to a declared country been properly exercised in relation to the Plaintiff?
- If there is no power to take the Plaintiffs to Malaysia pursuant to s 198A of the Act, can the Plaintiffs be removed to Malaysia pursuant to s 198(2)?
- In respect of Plaintiff M106, what is the content of the duty imposed by s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth)? Has there been a breach of guardianship by reason of the Minister's direction not to consider exercising ss 46A and 195A of the Act, and in threatening to take Plaintiff M106 to Malaysia under s 198A?