

## **PLAINTIFF M47/2012 v DIRECTOR GENERAL OF SECURITY & ORS (M47/2012)**

Date Special Case referred to Full Court:

6 June 2012

The Plaintiff is a national of Sri Lanka. He attempted to travel by boat from Indonesia to Australia, but the boat was intercepted. The Plaintiff entered Australia at Christmas Island as the holder of a special purpose visa which expired in December 2009. After the expiry of that visa he was detained on Christmas Island, pursuant to s 189(3) of the *Migration Act 1958* (Cth) (the Act). He was later transferred to mainland Australia. He applied for a protection visa. He has been found to be a refugee. However he has been refused a visa because the Fourth Defendant (“the Minister”) was not satisfied he had met public interest criterion 4002 in Schedule 2 of the *Migration Regulations 1994*. This was as a result of an adverse security assessment issued by ASIO, which organisation is controlled by the First Defendant. While he is an unlawful non-citizen the Plaintiff remains in detention. The Defendants contend, and the Plaintiff disputes, that the legal basis for that detention is ss 189 and 196 of the Act. While the Defendants do not propose to remove the Plaintiff to Sri Lanka, there is at present no other country to which the Plaintiff can be sent. The Third Defendant (the Secretary) and the Minister have taken, and continue to take, steps to identify a country to which to remove the Plaintiff pursuant to s 198 of the Act.

The Plaintiff filed an application for an order to show cause in this Court and Hayne J has referred the Special Case agreed by the parties to the Full Court.

The Plaintiff contends that s 198(2) does not apply to a person to whom Australia owes protection obligations both under the Act and the Refugees Convention. The Plaintiff maintains that neither Articles 32(1) nor 33(2) of the Convention apply to him to allow either his expulsion or *refoulement*. Criterion 4002 does not reflect those Articles as they are embodied in the Act. He also contends that as there is no power to remove him, his continued detention is not for a statutory purpose and therefore unlawful. If s 198(2) does apply, it is contended that removal is not reasonably practical and his detention is unlimited and unlawful. The Plaintiff contends that the construction of the Act reflected in this Court’s decision in *Al-Kateb v Godwin* (2004) 219 CLR 562, is incorrect and seeks to challenge that decision. The Plaintiff further submits that, because of a failure to put to him critical issues on which the ASIO adverse assessment turned, that decision is attended by a failure to accord procedural fairness and is therefore invalid.

The Australian Human Rights Commission seeks leave to intervene. Another person, in a similar position to this Plaintiff, Plaintiff S138/2012, also seeks leave to intervene.

The questions reserved by the Special Case signed by the parties include:

- In furnishing to 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness;
- Does s 198 of the *Migration Act 1958* (Cth) authorise the removal of the Plaintiff, being a non-citizen;
  - to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

- whom ASIO has assessed poses a direct or indirect risk to security; to a country where he does not have a well-founded fear of persecution for the purpose of Article 1A of the Refugees Convention as amended by the Refugees Protocol;
- Do ss 189 and 198 of the *Migration Act* 1958 (Cth) authorise the Plaintiff's detention?