



HIGH COURT OF AUSTRALIA

11 November 2010

PLAINTIFF M61/2010E v COMMONWEALTH OF AUSTRALIA & ORS
PLAINTIFF M69 of 2010 v COMMONWEALTH OF AUSTRALIA & ORS
[2010] HCA 41

Today the High Court declared that it was an error of law for a person conducting a review of a refugee status assessment as part of an "offshore processing regime" to fail to treat provisions of the *Migration Act 1958* (Cth) ("the Migration Act") and the decisions of Australian courts as binding. It held that two Sri Lankan citizens who arrived at Christmas Island claiming refugee status were also denied procedural fairness in the review of the assessment of their claims.

Each plaintiff arrived at Christmas Island by boat, and was detained under the Migration Act. Under the Migration Act, each became an "unlawful non-citizen" and by the operation of section 46A(1) could not make a valid application for a protection visa. The Minister had power to waive the operation of section 46A(1), or grant a visa, if it was in the public interest to do so. During the plaintiffs' detention, officers of the Department of Immigration and Citizenship made assessments of each plaintiff's refugee status and concluded that neither was a person to whom Australia owed protection obligations. An Independent Merits Review of each of those decisions conducted by contractors of the Department reached the same conclusion.

Each plaintiff argued before the High Court that he was not afforded procedural fairness during the assessment or review process, and that the persons conducting the assessment and review erred in law by not treating themselves as bound by relevant provisions of the Migration Act and relevant decisions of Australian courts. The Commonwealth and the Minister for Immigration and Citizenship argued that the assessment and review processes were conducted as an exercise of non-statutory executive power. It was argued that there was consequently no obligation on assessors and reviewers to afford procedural fairness, or to decide applications according to law. The plaintiffs argued that the processes were a part of the exercise of the Minister's powers under the Migration Act. It was also argued by one plaintiff that section 46A of the Migration Act, which precluded him from making a valid application for a protection visa in the circumstances of the case, was invalid.

In a unanimous decision the Court held that because the Minister has decided to consider exercising powers under the Migration Act in every case where an offshore entry person claims to be owed protection obligations, the assessment and review inquiries adopted in respect of such offshore entry persons are therefore steps taken under and for the purposes of the Migration Act. Because these inquiries prolonged the detention of the plaintiffs, there was a direct impact on the rights and interests of the plaintiffs to freedom from detention at the behest of the Executive. Those making the inquiries were therefore bound to act according to law and to afford procedural fairness to the plaintiffs. The Court rejected the challenge to the validity of section 46A.

The Commonwealth and the Minister were ordered to pay the plaintiffs' costs.

- *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.*