



HIGH COURT OF AUSTRALIA

12 December 2013

PLAINTIFF M76/2013 v MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS
AND CITIZENSHIP & ORS

[2013] HCA 53

Today the High Court unanimously declared that an error of law affected the exercise of power by the Minister for Immigration, Multicultural Affairs and Citizenship to determine whether to permit the plaintiff to make a valid application for a visa. The error of law was that an officer of the Commonwealth, in deciding not to refer the plaintiff's case to the Minister, acted upon an incorrect view of the law by considering an invalid regulation to be relevant to the decision.

The plaintiff arrived in Australia at Christmas Island by boat in 2010 without a visa. She is a Sri Lankan national of Tamil ethnic origin and had been a member of the Liberation Tigers of Tamil Eelam. Because the plaintiff arrived at Christmas Island without a visa, the *Migration Act* 1958 (Cth) prevented her from making a valid application for a visa unless the Minister exercised his power under the Act to permit her to do so. In order to consider whether to exercise that power, the Minister had in place processes by which his department assessed whether the plaintiff was a person in respect of whom Australia owed protection obligations under the Refugees Convention. The plaintiff was assessed to be such a person.

The plaintiff was also the subject of an adverse security assessment made by the Australian Security Intelligence Organisation. The Minister's department took that adverse security assessment to mean that the plaintiff could not satisfy a criterion for the grant of a visa (public interest criterion 4002). On that basis, it did not refer the plaintiff's case to the Minister for his consideration. Subsequently, in *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372; 292 ALR 243; [2012] HCA 46, the High Court held that public interest criterion 4002 was invalid.

The plaintiff is currently in immigration detention. Due to her refugee status, she cannot be returned to Sri Lanka. Approaches to third countries for her resettlement have been unsuccessful.

In the original jurisdiction of the High Court, the plaintiff sought habeas corpus and declaratory relief, claiming on both statutory and constitutional grounds that her detention is unauthorised. She invited the High Court to re-open and overrule its decision in *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37. A special case stated questions of law for the determination of the Court.

The High Court unanimously held that the exercise of the Minister's power was affected by an error of law, in that the Minister's department acted upon an invalid regulation in deciding not to refer the plaintiff's case to the Minister. The Court held that, because the Minister, as a result of the error of law, has yet to complete his consideration of whether to permit the plaintiff to make a valid application for a visa, the plaintiff's present detention, being for the purpose of allowing that consideration to be completed according to law, is authorised by the Act. A majority of the

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Court found that it was therefore unnecessary to decide the plaintiff's constitutional claim or whether *Al-Kateb v Godwin* should be re-opened.

- *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.*