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AUSTRALIAN EDUCATION UNION v GENERAL MANAGER FAIR WORK AUSTRALIA & ORS (M8/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 153

Date of judgment: 20 December 2010

In December 2003 the 3rd respondent, the Australian Principals Federation (the APF), applied to the Australian Industrial Relations Commission (the AIRC) for registration as a organisation under the *Workplace Relations Act* 1996 (Cth) (the WR Act). The applicant (the AEU) objected to that registration. In January 2006 Vice-President Ross of the AIRC granted the application for registration. The APF was then entered into the register of registered organisations under the WR Act. An appeal by the AEU to the Full Bench was dismissed in September 2006. The AEU sought constitutional writs in the High Court: that application was remitted to the Federal Court, where the Full Court ordered that writs of certiorari issue to quash the decision of the AIRC and the APF's registration. The Full Court found that the APF did not meet the criteria for registration under the WR Act because its rules did not contain a "purging rule", ie a rule providing that people no longer eligible to be members because they had ceased to be employed as principals would cease to be APF members. The APF then applied to the AIRC for leave to change its rules. The AEU objected to the application. The matter was heard by a Full Bench of the AIRC, which in November 2008 reserved its decision.

On 1 July 2009 s26A of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (the FWRO Act) came into operation. It provides:
If:
(a) an association was purportedly registered as an organisation under this Act before the commencement of this section; and
(b) the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not have the effect of terminating the membership of, or precluding from membership, persons who were persons of a particular kind or kinds;
that registration is taken, for all purposes, to be valid and to have always been valid.

In August 2009, the 1st respondent informed both the APF and the AEU that Fair Work Australia regarded itself as obliged by s26A to treat the APF as a registered organisation under the FWRO Act. The APF withdrew its pending application to alter its rules. The AEU commenced action in the Federal Court contending that s26A, properly construed, did not operate to validate the APF's registration. North J dismissed that application. The AEU's appeal to the Full Federal Court was unsuccessful.

The questions of law said to justify a grant of special leave are:

- whether properly construed, s26A of the *Fair Work (Registered Organisations) Act* 2009 (Cth) operates to validate the registration of the Australian Principals Federation (APF) under that Act, which registration had been quashed by the Full Federal Court on 18 July 2008 in *Australian Education Union v Lawler* [2008] FCAFC 135 before the commencement of s26A; and

- if s26A purports to validate the registration of the APF, whether s26A is, to that extent, invalid as an impermissible usurpation of or interference with the judicial power of the Commonwealth.

The special leave application was referred to a Full Court of this Court for argument as on an appeal on 2 September 2011.

The Attorneys-General for the Commonwealth and for South Australia are intervening in the application.

THE COMMISIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v BARGWANNA & BARGWANNA (AS TRUSTEES OF THE KALOS METRON CHARITABLE TRUST) (S284/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 126

Dates of judgment: 8 October 2010 & 17 February 2011

Date of grant of special leave: 12 August 2011

Mr & Mrs Bargwanna ("the Bargwannas") are trustees of a fund ("the Fund") established in 1997 for a charitable purpose. Mrs Bargwanna's father ("the father"), an accountant, administered the Fund's accounts and he also provided it with advice. In 1997 Mrs Bagwanna made a contribution to the Fund of approximately $10,000 and her father also gave it $160,000 in 2002. In June 2002 the trust entered into an agreement with an airline to provide it with accounting services, services which the father was to provide. The fees derived from those services were reported as Fund income and they were also its major source of assets growth. Over time, funds were applied to the acquisition of shares, interest free loans and a payment of a large sum into a mortgage offset account. They were also used for donations to HELP International and to various churches.

In 2004 the trust applied for endorsement as an income tax exempt entity pursuant to section 50-105 of the *Income Tax Assessment Act 1997* (Cth) ("the Act"). The Appellant ("the Commissioner") refused that application and the Bargwannas successfully appealed that decision to the AAT. The Commissioner's further appeal to the Federal Court was however allowed by Justice Edmonds. His Honour held that the intention of a fund's trustees was irrelevant, when the purposes for which an application (for the whole or part of the fund) was in question. The Bargwannas then appealed to the Full Federal Court. The main question for the Full Federal Court was whether the Fund was "applied for the purposes for which it was established. . ." within the meaning of section 50-60 of the Act.

On 8 October 2010 the Full Federal Court (Dowsett, Kenny & Middleton JJ) unanimously allowed the Bargwannas' appeal. Their Honours held that while the primary judge's ultimate conclusion was correct, his Honour had erred in the reasons he gave. They then remitted the matter to the AAT for re-determination in accordance with their reasons. The Full Federal Court found that there was reason to suspect that section 50-60 of the Act had not in fact been satisfied and that the conduct of the Fund called for a more detailed explanation. Their Honours held however that the entire Fund (not just isolated transactions) should be examined to determine whether it is being applied to the relevant charitable purposes. Ultimately this would depend on the Fund's particular circumstances.

The grounds of appeal include:

- The Full Court erred in holding that the application of part of the fund of the Kalos Metron Charitable Trust for purposes other than public chartiable purposes did not result in the criteria in section 50-60 of the Act not being satisfied.

- The Full Court erred in holding that the relevant inquiry is not as to individual transactions but as to the application of the fund as a whole.

On 31 August 2011 the Respondents filed a notice of cross-appeal, the ground of which is:

- The Full Court erred in finding that there appeared to be no point at which the AAT addressed all of the evidence to determine whether or not the Fund, as a whole, was being applied to the relevant charitable purpose.

ALH GROUP PROPERTY HOLDINGS PTY LIMITED v CHIEF COMMISSIONER OF STATE REVENUE (S285/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 32

Date of judgment: 3 March 2011

Date of grant of special leave: 12 August 2011

On 20 April 2010 Justice Gzell set aside the assessment of the Commissioner of State Revenue ("the Commissioner") of ad valorem duty on a Deed of Consent and Assignment ("the Deed") executed on 27 June 2008. His Honour also set aside the Commissioner's decision that section 50 of the *Duties Act 1997* (NSW) ("the Act") did not apply to that Deed and ordered a refund of the $134,105.50 duty paid, plus interest.

The Deed itself dealt with rights created by a contract of sale dated 5 September 2003 ("the 2003 contract") between Oakland Glen Pty Ltd ("the vendor") and Permanent Trustee Co Ltd, as trustee of the ALE Direct Property Trust ("the purchaser"), for the sale of a hotel in French's Forest ("the Hotel") for $6,386,611.00.
The 2003 contract was subject to conditions relating to the development of other land owned by the vendor in the same title, and its subdivision. It was not chargeable with ad valorem duty because it was part of a corporate reconstruction exempted under section 281 of the Act.

The parties to the Deed were the vendor, the purchaser and ALH Group Property Holdings Pty Limited ("the taxpayer"). On 22 November 2008 the Commissioner assessed it to ad valorem duty under section 22(2) of the Act as a transfer of dutiable property. On 24 October 2008 however the vendor and the taxpayer entered into a Deed of Termination ("the Termination Deed") which rescinded both the Deed and the 2003 contract. They then entered into a new contract for the sale of the Hotel for $6,386,611.00, on which ad valorem duty was paid.

The taxpayer claimed that the Termination Deed avoided the liability of the Deed for ad valorem duty. It further claimed that it had a right to a refund under section 50 of the Act. The Commissioner refused that refund because the Deed was a transfer of dutiable property and not an agreement for its transfer. It was this decision that Justice Gzell overturned on 20 April 2010.

Upon further appeal, the Court of Appeal (Allsop P, Tobias JA & Handley AJA) unanimously allowed the Commissioner's appeal. Their Honours held that the Deed was an assignment of the benefit of the 2003 agreement and not a novation of it. The Deed therefore was not an agreement for the transfer of dutiable property but a transfer of that property. Accordingly the termination of the Deed did not entitle the taxpayer to a refund of the duty paid. The Commissioner's assessment was therefore restored.

The grounds of appeal include:

- The Court of Appeal should have concluded that the Deed effected a novation of the 2003 contract, in consequence of which a new contract for the sale of the subject land came into existance between Oakland Glen (as vendor) and the taxpayer (as purchaser) on the terms and conditions of the 2003 contract as varied by the terms of the Deed.

HARBOUR RADIO PTY LIMITED v TRAD (S318/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 61

Date of judgment: 22 March 2011

Date special leave granted: 2 September 2011

Mr Keysar Trad alleged that Radio Station 2GB ("the Radio Station") defamed him in a program broadcast on 19 December 2005. At a trial pursuant to section 7A of the *Defamation Act 1974* (NSW), the jury found that a number of defamatory imputations had been both conveyed and were defamatory. These included:

a) Mr Trad stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;
b) Mr Trad incites people to commit acts of violence;
c) Mr Trad incites people to have racist attitudes;
d) Mr Trad is a dangerous individual;
g) Mr Trad is a disgraceful individual;
h) Mr Trad is widely perceived as a pest;
j) Mr Trad deliberately gives out misinformation about the Islamic Community;
k) Mr Trad attacks those people who once gave him a privileged position.

The Radio Station claimed that each of the impugned imputations was published upon an occasion of qualified privilege at common law. It also submitted that they were a response to an attack upon it by Mr Trad the previous day. The Radio Station further pleaded that imputations (b), (c), (d) (h) & (j) were matters of substantial truth and were therefore related to a matter of public interest. It also claimed that any substantially true imputation was published contextually and they did not therefore further injure Mr Trad's reputation. The Radio Station additionally submitted that imputations (b) to (g) constituted comment on a matter of public interest.

The Chief Justice at Common Law, Justice McLellan, upheld the defences in respect of each imputation, except the defence of justification to the imputations (h) & (j). His Honour found that imputations (b), (c), (d) and (g) were substantially true and that the Radio Station's response related to a matter of public interest. He also upheld the defence of contextual truth with respect to imputations (a), (h), (j) & (k). Justice McLellan further held that the matter complained of was published on an occasion of qualified privilege and he rejected the submission that that defence was defeated by malice. He further found that imputations (b), (c), (d) & (g) were defensible as comment.

On 22 March 2011 the Court of Appeal (Tobias, McColl & Basten JJA) allowed the appeal in part. Their Honours found that a defence of truth was unavailable with respect to an imputation characterized as a statement of fact. With respect to imputations (b), (c), (d) & (g) they found that Justice McLellan erred in finding that Mr Trad believed that the appropriate punishment for homosexuality in modern Australia was death by stoning. His Honour had also failed to consider whether a right thinking member of the Australian community would consider that Mr Trad was the type of person (or that he actually held such views) giving rise to imputations (b), (c), (d) & (g).

The Court of Appeal further held that Justice McClellan had erred in finding that imputations (b), (c), (d) & (g) were defensible as comment and that (c), (h) & (k) were published on an occasion of qualified privilege.

The grounds of appeal include:

- In determining whether the broadcast was published on what the Court of Appeal had found was an occasion of qualified privilege arising from Mr Trad's prior public attack upon the Radio Station, the Court of Appeal applied wrong tests, namely, whether individual imputations "constituted a legitimate response", were "a relevant response" or were "a bona fide answer or retort by way of vindication fairly warranted by the occasion".

On 28 October 2011 Mr Trad filed a summons, seeking to file both a notice of cross-appeal and a notice of contention out of time. The grounds of the proposed notice of cross-appeal include:

- The Court of Appeal erred in upholding [the] defence of reply to attack to five imputations (a), (b), (d), (g) and (j) out of eight pleaded.

The ground of the proposed notice of contention is:

- That the decisions of the Court of Appeal relating to qualified privilege (reply to attack) and truth should be affirmed, but on grounds in addition to those relied upon by the Court below, that is to say on the ground that the whole of the qualified privilege defence should have been rejected because of malice and on the ground that the general community standard test was irrelevant to the termination of the truth defences.

BAIADA POULTRY PTY LTD v THE QUEEN (M126/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2011] VSCA 23
Date of judgment:	18 February 2011
Date special leave granted:	2 September 2011

On 29 May 2009, the appellant ('Baiada') was convicted in the County Court of Victoria of one count of breaching s 21(1) of the *Occupational Health and Safety Act* 2004 (Vic) ('the Act') by failing to provide plant and systems of work for employees that were safe and without risks to health. Baiada carried on a business of processing broiler chickens at a plant in Laverton North. The conviction arose from the death of Mario Azzopardi, who was the director and driver of Azzopardi Haulage, a company which was engaged by Baiada to transport crates of chickens from a farm in Moorooduc to its processing plant. Azzopardi was struck by a crate which was being moved by a forklift operated by an unlicensed driver who was an employee of DMP Poultech Pty Ltd ("DMP"). DMP was engaged by Baiada to provide chicken catchers, who caught the chickens at the farm and put them in crates, which were loaded on to Azzopardi's truck by forklift. The fatal accident occurred when a crate was being moved on the back of the truck, by means of the forklift, in order to redistribute the load.

The Crown case was that, although Baiada engaged DMP and Azzopardi Haulage as independent contractors, Baiada retained 'control' over the loading activities and thus, under s 21(3)(b) of the Act, owed duties as an 'employer' to the employees of DMP and Azzopardi Haulage in relation to those activities.

In its appeal to the Court of Appeal (Neave JJA and Kyrou AJA, Nettle AJ dissenting) Baiada complained, inter alia, about the trial judge's directions to the jury with respect to Baiada's contention that it was entitled to rely on the expertise of its independent contractors to take appropriate steps to safeguard the health and safety of their employees. The Court found that the trial judge's direction was inadequate. What was needed was a clear direction that, if the jury were satisfied that control had been established, they were bound to go on and consider whether they were satisfied beyond reasonable doubt that Baiada's engagement of DMP and Azzopardi Haulage was not sufficient to discharge Baiada's obligation to do what was reasonably practicable to provide and maintain a safe work site. The jury should have been directed in clear terms that, unless the Crown had satisfied them of that beyond reasonable doubt, they were bound to acquit.

Neave JA and Kyrou AJA held there was no substantial miscarriage of justice as a result of the misdirection, and they applied the proviso to s 568(1) of the *Crimes Act* 1958 (Vic) to dismiss the appeal. Nettle JA (dissenting) considered the inadequacy of the judge's direction denied Baiada the benefit of the jury's consideration of one of its two principal defences, and therefore, the proviso should not be applied.

The ground of appeal is:

The Court of Appeal erred in the application of the proviso to s 568(1) of the Crimes Act 1958 (Vic) and in particular

(a) in holding that the Court had a discretion as to whether to apply the proviso; and

(b) in applying the proviso in circumstances where, by virtue of the trial judge's directions, the appellant was denied the jury's consideration of one of its principal defences.

PLAINTIFF S10/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S10/2011)

Date application referred to the Full Court: 13 September 2011

The Plaintiff is a citizen of Pakistan. In August 2007 he arrived in Australia on a maritime crew visa. He applied for a protection visa on the basis that he feared that he would be killed by an Islamic fundamentalist group if he returned to Pakistan. On 6 November 2007 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused the Plaintiff a protection visa. On 22 February 2008 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision. Successive applications by the Plaintiff to the Federal Magistrates Court of Australia, the Federal Court of Australia and to this Court were each dismissed.

On 30 October 2009 the Plaintiff wrote to the Minister requesting that the RRT's decision be substituted with a decision more favourable to him under s 417 of the *Migration Act 1958* (Cth) ("the Act"). The Plaintiff also requested that the Minister, were he to decline to substitute a new decision, determine that he could make a further application for a protection visa under s 48B of the Act. On 6 August 2010 an officer of the Department of Immigration and Citizenship ("DIAC") decided that the Plaintiff's case did not meet the Minister's Guidelines for requests for intervention under s 48B. Consequently (and in accordance with those Guidelines) his case was not referred to the Minister for a decision on whether he could make a repeat protection visa application. The Plaintiff's case was however referred to the Minister for a possible substitution of the RRT's decision under s 417 of the Act. For that purpose, DIAC provided the Minister with a summary of the Plaintiff's case. On 21 October 2010 the Minister personally decided not to exercise his power under s 417. In a letter dated 26 October 2010, DIAC informed the Plaintiff of both the Minister's decision (not to intervene under s 417) and of the non-referral of the request for consideration under s 48B.

The Plaintiff contends that DIAC, in deciding not to refer the s 48B request to the Minister, made certain mistaken conclusions concerning his case. He further submits that the resulting flawed decision infected the Minister's decision on the s 417 request. The Plaintiff contends that DIAC should have informed him of the material upon which adverse conclusions were proposed to be drawn and invited him to comment.

On 7 January 2011 the Plaintiff filed an Application for an Order to Show Cause in this Court. In a Further Amended Application for an Order to Show Cause filed on 1 September 2011, the Plaintiff seeks, inter alia, a declaration that he had been denied procedural fairness. He also seeks an order compelling the Minister to reconsider his request in accordance with the requirements of procedural fairness.

On 13 September 2011 Justice Gummow referred this matter for final hearing by the Full Court.

On 4 January 2012 the Plaintiff filed an Amended Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General for South Australia has advised this Court that he will be intervening in this matter.

The grounds said to justify the granting of relief include:

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit by decision notified on 26 October 2010 in exercising discretion under s 417 of the Act failed in his duty of procedural fairness to the Plaintiff.

- Jurisdictional error occurred notwithstanding the applicable privative clause s 474(2) relative to the exercise of s 417 and s 48B of the Act.

KAUR v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S43/2011)

Date application referred to the Full Court: 13 September 2011

Ms Jasvir Kaur is a citizen of India. In July 2005 she arrived in Australia on a student visa ("the first visa"). After changing courses, Ms Kaur was granted a second student visa ("the second visa") in June 2006, valid until June 2008. After completing the second course (a diploma of accounting) in February 2008, she enrolled in a cookery certificate course. In April 2008 Ms Kaur consulted a migration agent as to which visa was valid. She was incorrectly advised that the first visa was valid and that it would expire on 31 August 2008. That visa had in fact been cancelled, unbeknownst to Ms Kaur. On 1 September 2008 Ms Kaur applied for a further student visa. On 26 September 2008 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused Ms Kaur's application. This is because it had been lodged more than 28 days after the second visa had expired. On 18 September 2009 the Migration Review Tribunal ("MRT") affirmed that decision.

On 16 October 2009 Ms Kaur requested that the Minister substitute a more favourable decision for the MRT's decision pursuant to s 351 of the *Migration Act 1958* (Cth) ("the Act"). DIAC then provided a summary of Ms Kaur's case to the Minister. On 14 January 2010 the Minister personally decided not to exercise his power under s 351, because it would not be in the public interest for him to intervene.

Ms Kaur then unsuccessfully applied to the Federal Magistrates Court for a review of the MRT's decision. On 26 November 2010 Justice Jacobson also dismissed her subsequent appeal. In his reasons for judgment however, his Honour observed that the letter from DIAC to Ms Kaur in June 2006 concerning the grant of the second visa was confusing. This was because it referred to the expiry date of the first visa, being the only visa label evidenced in her passport. It was therefore not unreasonable that she had received incorrect advice from the migration agent. His Honour then commented that the Minister might therefore be prepared to revisit Ms Kaur's case pursuant to s 351 of the Act.

On 20 December 2010 Ms Kaur made a further request to the Minister for intervention under s 351 of the Act. On 10 January 2011 DIAC, noting Justice Jacobson's comment, decided not to refer her request to the Minister. This was because Ms Kaur had not provided any fresh compelling information that would bring her case within the Minister's Guidelines for a repeat referral.

Ms Kaur contends that DIAC's summary of her case to the Minister mischaracterised the June 2006 letter (granting the second visa), as it stated that that letter clearly indicated the new visa's expiry date. She also contends that DIAC, in considering her second request to the Minister, referred only to Justice Jacobson's comment of possible revisitation and not to his Honour's observation that that letter was confusing. Ms Kaur contends that in both instances she should have been invited to be heard on these issues before DIAC's summary was put to the Minister.

On 21 January 2011 Ms Kaur filed an Application for an Order to Show Cause in this Court. In a Further Amended Application for an Order to Show Cause filed on 1 September 2011, she seeks a declaration that she had been denied procedural fairness. Ms Kaur also seeks an order compelling the Minister to reconsider (in

accordance with the requirements of procedural fairness) whether he should intervene under s 351 of the Act.

On 13 September 2011 Justice Gummow referred this matter for final hearing by the Full Court.

On 4 January 2012 the Plaintiff filed an Amended Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General of South Australia has advised this Court that he will be intervening in this matter.

The grounds said to justify the granting of relief include:

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit by decision notified on 10 January 2011 in exercising discretion under s 351 of the Act failed in their duty of procedural fairness to the Plaintiff.

PLAINTIFF S49/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S49/2011)

Date application referred to the Full Court: 13 September 2011

The Plaintiff arrived in Australia in June 1998 on a tourist visa, using an Indian passport bearing a false name. He applied for a protection visa on the basis that he feared persecution for his political opinions if he returned to India. On 14 August 1998 a delegate of the Minister refused to grant the Plaintiff a protection visa. On 5 April 2001 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision.

In September 2003 the Plaintiff informed the Minister's Department ("DIAC") that he was in fact Bangladeshi, that his Indian passport was fraudulent and that he feared persecution in Bangladesh for his religious beliefs. In September 2004 the Plaintiff wrote to the Minister stating that he could not return to either India or Bangladesh and that he was seeking a more favourable decision than that made by the RRT. DIAC then invited the Plaintiff to provide supporting documents by 27 October 2004. On 21 October 2004 it received a letter from the Plaintiff explaining that he had not yet received a response from the Bangladeshi consulate on his application (made with DIAC's assistance) to obtain the necessary identity documents. On the same day, DIAC referred its summary of the Plaintiff's case (without mention of the Plaintiff's efforts to obtain identity documents) to the Minister. On 9 November 2004 the Minister declined to exercise her power under s 417 of the *Migration Act 1958* (Cth) ("the Act") to substitute a new decision for that made by the RRT.

In December 2004 the Plaintiff told DIAC that he was actually Indian, not Bangladeshi. He also signed an application for Indian travel documents because he wanted to return to India. In July 2006 the Minister notified the Plaintiff that he would be removed from Australia. The Plaintiff then commenced proceedings in the Federal Magistrates Court. On 31 July 2008 the Federal Magistrate dismissed the Plaintiff's application for judicial review and the Full Court of the Federal Court also dismissed his subsequent appeal.

In June 2009 the Plaintiff wrote to the Minister asking him to consider exercising his power under either s 417 of the Act, or s 48B (to permit him to make a further application for a protection visa). In that letter, he detailed the history of his life in Bangladesh and how he obtained an Indian passport fraudulently. The Plaintiff also set out his Australian migration agent's advice in 1998 recommending that he mislead DIAC as to his identity and his activities in India. On 8 October 2009 a DIAC officer decided that the Plaintiff's case did not meet the Minister's Guidelines for requests for intervention under s 48B. Consequently his case was not referred to the Minister for a decision on whether the Plaintiff could make a repeat protection visa application. In February 2010 however, DIAC sought further information (including from the Plaintiff) regarding his s 417 request. In November 2010 DIAC provided the Minister with its submission on the Plaintiff's case. On 25 November 2010 the Minister decided not to exercise his power under s 417 of the Act.

The Plaintiff contends that DIAC, when considering his first s 417 request (in 2004), denied him procedural fairness by failing to consider the identity documents which it had invited him to provide. Regarding his request in 2009, the Plaintiff contends that DIAC denied him procedural fairness by:

a) not putting to him the country information it would rely upon in deciding not to refer his case to the Minister for consideration under s 48B of the Act; and

b) not providing him with an opportunity to be heard on the basis for DIAC's view that he was an Indian citizen, as stated in its submission for the Minister under s 417 of the Act.

On 1 February 2011 the Plaintiff filed an Application for an Order to Show Cause in this Court. In a Further Amended Application for an Order to Show Cause filed on 1 September 2011, the Plaintiff seeks, inter alia, a declaration that he had been denied procedural fairness. He also seeks an order compelling the Minister to consider whether to intervene under s 417 of the Act in accordance with the requirements of procedural fairness.

On 13 September 2011 Justice Gummow referred this matter for final hearing by the Full Court.

On 4 January 2012 the Plaintiff filed an Amended Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General for South Australia has advised this Court that he will be intervening in this matter.

The grounds said to justify the granting of relief include:

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit in relation to the decision notified on 13 October 2009 failed in his duty of procedural fairness to the Plaintiff

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit in relation to the decision notified on 1 December 2010 failed in his duty of procedural fairness to the Plaintiff.

PLAINTIFF S51/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (S51/2011)

Date application referred to the Full Court: 10 November 2011

The Plaintiff is a citizen of Nigeria. He arrived in Australia in August 2009 on a short-stay business visa, supposedly to attend a medical conference. During an airport interview the Plaintiff admitted that he wished to claim refugee status. His short-stay business visa was immediately cancelled. He then applied for a protection visa on the basis that he feared being killed by Islamic fundamentalists if he returned to Nigeria. On 3 November 2009 a delegate of the Minister for Immigration and Citizenship ("the Minister") refused to grant the Plaintiff a protection visa. On 23 November 2009 the Plaintiff was diagnosed with post-traumatic stress disorder. On 1 December 2009 the Department of Immigration and Citizenship ("DIAC") found that he met the documented guidelines for Ministerial intervention under s 195A of the *Migration Act 1958* (Cth) ("the Act"). (Under that section, the Minister may grant a visa to any person in detention even if that person has not applied for a visa.) On 10 February 2010 the Refugee Review Tribunal ("RRT") affirmed the delegate's decision. The Federal Magistrates Court also dismissed the Plaintiff's application for a review of the RRT decision, while the Federal Court dismissed the Plaintiff's subsequent appeal on 3 September 2010.

DIAC's s 195A submission had been drafted by March 2010, but it was not forwarded to the Minister as the Plaintiff then had court proceedings pending. On 6 October 2010 DIAC accepted a letter from the Plaintiff as both a request for the Minister to substitute a more favourable decision for the RRT decision (under s 417 of the Act), and a request for the Minister to determine (under s 48B of the Act) that the Plaintiff could make a further application for a protection visa. On 11 November 2010 DIAC:

1. Determined that the Plaintiff's case did not meet documented guidelines for requests for intervention under s 48B;

2. Referred the case to the Minister for him to consider a substitution of decision under s 417; and

3. Recorded that the Plaintiff's case was inappropriate for consideration under s 195A because a decision under s 417 was available.

On 16 November 2010 the Minister requested that DIAC provide him with further information on the Plaintiff's case. On 16 December 2010, having considered a detailed submission prepared by DIAC, the Minister decided not to exercise his power under s 417.

The Plaintiff contends that DIAC was obliged under the relevant guidelines to have referred his case to the Minister under s 195A (either in December 2009 or jointly with the referral under s 417). He further submitted that DIAC should have given him an opportunity to make submissions both at that stage (on the merits of a decision under s 195A) and later on DIAC's view that access to s 417 precluded a referral under s 195A. The Plaintiff also contended that he should have been given an opportunity to comment upon adverse material relating to his request for referral to the Minister under ss 48B and 417 of the Act.

On 1 February 2011 the Plaintiff filed an Application for an Order to Show Cause in this Court. In a Further Amended Application for an Order to Show Cause filed on 1 September 2011, the Plaintiff seeks a declaration that he had been denied procedural fairness. He also seeks an order that DIAC reconsider his requests under ss 48B and 417 in accordance with the requirements of procedural fairness. He further submits that both the Secretary of DIAC and the Minister show cause why the former should not be directed to forward to the latter any submission or assessment made under the s 195A guidelines.

On 10 November 2011 Acting Chief Justice Gummow referred this matter for final hearing by the Full Court.

On 4 January 2012 the Plaintiff filed an Amended Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General for South Australia has advised this Court that he will be intervening in this matter.

The grounds said to justify the granting of relief include:

- The First and/or Second Defendant through his officers in the Ministerial Intervention Unit in relation to the decision notified on 20 December 2010 failed in his duty of procedural fairness to the Plaintiff.

- Jurisdictional error occurred notwithstanding the applicable privative clause s 474(2) relative to the exercise of s 417 and s 48B of the Act.