



HIGH COURT OF AUSTRALIA

5 October 2012

PLAINTIFF M47/2012 v DIRECTOR GENERAL OF SECURITY & ORS

[2012] HCA 46

Today a majority of the High Court held invalid a regulation which prevented the grant of a protection visa to a refugee if the Australian Security Intelligence Organisation ("ASIO") had assessed the refugee to be a risk to security. Accordingly, a majority of the Court held that the decision to refuse the plaintiff a protection visa on the basis of that regulation had not been made according to law.

The plaintiff, a Sri Lankan national, arrived in Australia in December 2009, and has been held in detention since that time. In June 2010, he applied for a protection visa. A delegate of the Minister for Immigration and Citizenship found that the plaintiff had a well-founded fear of persecution in Sri Lanka on the basis of his race or political opinion and was therefore a refugee. However, the delegate refused the plaintiff's application for a protection visa because, in December 2009, the plaintiff had been assessed by ASIO to be a risk to security. Clause 866.225 of Sched 2 to the Migration Regulations 1994 (Cth) prescribes as a criterion for the grant of a protection visa that the applicant not be assessed as a risk to security under the *Australian Security Intelligence Organisation Act 1979* (Cth). This criterion is called public interest criterion 4002.

The plaintiff commenced proceedings in the original jurisdiction of the High Court challenging the validity of the decision to refuse him a protection visa and challenging his continued detention. The plaintiff argued that ASIO had denied him procedural fairness when making a fresh adverse security assessment in 2012, that the requirement that he satisfy public interest criterion 4002 was invalid, and that the *Migration Act 1958* (Cth) did not authorise the removal and detention of a person found to be a refugee.

A majority of the Court held that the plaintiff was not denied procedural fairness in connection with the making of the security assessment because the plaintiff was given the opportunity to address issues of concern to ASIO in the interview that was conducted before the fresh assessment was made in 2012. However, a majority of the Court held that the Migration Regulations could not validly prescribe public interest criterion 4002 as a condition for the grant of a protection visa because doing so was inconsistent with the *Migration Act 1958* (Cth). Because the prescription of public interest criterion 4002 as a criterion for the grant of a protection visa was invalid, a majority of the Court held that the decision to refuse the plaintiff a protection visa on the basis of this criterion had not been made according to law. Accordingly, the plaintiff's continuing detention was valid for the purpose of determining his application for a protection visa. Given these conclusions, it was unnecessary for the majority to consider the plaintiff's other arguments about the validity of his detention and proposed removal from Australia.

- *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.*