HIGH COURT OF AUSTRALIA

GUMMOW J

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS — RESPONDENT

EX PARTE STEPHEN OGHO AKPATA — APPLICANT

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Akpata
[2002] HCA 34
2 September 2002
A94/2002

ORDER

Application dismissed with costs.

Representation:

B M O'Brien for the applicant (instructed by Hamdan Lawyers)

S J Maharaj for the respondent (instructed by Sparke Helmore)

CATCHWORDS

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Akpata

Administrative law – Jurisdictional error – Natural justice – Privative clause – Failure to inform applicant that refusal of parent visa would result in automatic cancellation of bridging visa and detention of applicant – Alleged failure to afford applicant opportunity to put before Minister material concerning financial and emotional impact detention would have on him and his family and its impact on the preparation by applicant of pending special leave application – Alleged failure by Minister to take into account these matters – Whether Minister's decision protected by s 474 of the *Migration Act* 1958 (Cth) ("the Act").

Immigration – Refusal by Minister of application for parent visa on "character grounds" under s 501 of the Act – Minister "taken to have decided to cancel" bridging visa held by applicant by force of s 501F(3) of the Act – Applicant thereby became an "unlawful non-citizen" subject to immigration detention – Application under s 75(v) of the Constitution – Whether operation of s 474 of the Act attracted – No attack on validity of s 474 – Application of reasoning in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 to construction of s 474 – Whether distinct procedural fairness requirement attached to cancellation of bridging visa under s 501F(3) of the Act.

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 189, 196, 474, 501, 501F(3).

1 GUMMOW J. The applicant was born in Nigeria in 1962 and is a citizen of that country. On 10 February 1994, he arrived in Australia with his wife and two children. The applicant's wife was born in 1966 and is a Nigerian citizen. They were married in 1987. Their son was born in Nigeria in 1990. Their daughter was born in New Zealand in 1993 and is a New Zealand citizen.

2 The applicant entered Australia on a student visa identified as "561 Student Category B Entry Permit" to study at the Adelaide College of Ministries. On 22 December 1995, he applied for a protection visa. This was refused by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") and an application for review by the Refugee Review Tribunal ("the RRT") was unsuccessful. However, on 20 November 1998, the Federal Court of Australia set aside the decision of the delegate and remitted the matter to the RRT[1]. A differently constituted RRT again affirmed the decision of the delegate. On 29 November 1999, by consent, the Federal Court set aside the second RRT decision and remitted the matter for further consideration by the RRT. On 19 May 2000, the RRT again affirmed the decision of the delegate. An application for judicial review was dismissed by the Federal Court[2] and an appeal to the Full Court failed[3]. Thereafter, on 3 January 2002, the applicant lodged an application in this Court seeking special leave to appeal from that decision of the Full Court. That special leave application (No A1/2002) is still pending. During these events, on 30 July 1999, the applicant was granted a visa identified as "020 Bridging Visa B" ("the bridging visa").

3 On 6 November 1998 an application for a "103 Parent Visa" was refused. Thereafter, on 11 August 1999, a further application was made for a "103 Parent Visa" ("the parent visa"). It is the refusal of that application by the Minister, acting personally, on 11 June 2002 which has triggered in this Court the present stage of the litigation. The primary applicant on the parent visa is the applicant's wife, with the applicant and their son as secondary applicants. Refusal of the visa to the applicant would thereby not foreclose that section of the application in respect of his wife and son so long as they satisfied the other criteria.

4 The Minister acted under s 501 of the *Migration Act* 1958 (Cth) ("the Act")[4]. This deals with the refusal (and cancellation) of visas on "character grounds". Sub-section (1) of that section empowers the Minister to refuse to

---

1 *Akpata v Minister for Immigration and Multicultural Affairs* [1998] FCA 1473.

2 *Akpata v Minister for Immigration and Multicultural Affairs* [2001] FCA 402.

3 *Akpata v Minister for Immigration and Multicultural Affairs* [2001] FCA 1868.

4 The form of the Act is that which appears in Reprint 8, with amendments up to Act No 157 of 2001.

grant a visa to a person if that person does not satisfy the Minister that he or she passes the "character test". The character test is defined in s 501(6).

5 On 30 July 1996, the applicant pleaded guilty to four counts of false pretences and was sentenced to 12 months imprisonment and ordered to pay $20,193 to the Australia and New Zealand Banking Group Ltd. There was a non-parole period of five months. Thereafter, the applicant was charged with 27 counts of false or misleading statements, seven counts of dishonestly claiming to be entitled to benefits and 25 counts of obtaining benefits by dishonest means. The counts were in respect of breaches of pars (a), (b) and (c) of s 120(1) of the *Workers Rehabilitation and Compensation Act* 1986 (SA) and concerned a WorkCover claim made by the applicant. He was sentenced on 3 August 2001 to 12 months imprisonment with a non-parole period of six months. The applicant was released on parole on 2 February 2002. All the offences had been dealt with by the Magistrates Court of South Australia.

6 The result was that, at the time the Minister made his decision on 11 June 2002 ("the Decision"), the applicant had lived in Australia with his family for some eight years but 11 months of that period had been spent in prison. Paragraph (a) of s 501(6) of the Act specifies that a person does not pass the character test if that person has a "substantial criminal record", a term defined in s 501(7). A person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)). The applicant answered that description.

7 The Decision had significant consequences for the applicant. First, s 501F(3) so operates that, if the Minister, as here, makes a decision under s 501 to refuse to grant a visa, the Minister is taken to have decided to cancel any other visa held by the person in question. The result was the cancellation, by force of s 501F, of the bridging visa. Further, the effect of ss 13 and 14 of the Act is that, because the applicant no longer held a visa, he was an "unlawful non-citizen" in the migration zone. If "an officer", a term defined in s 5(1) of the Act, knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer is obliged by s 189 to detain that person. Finally, s 196 provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until that person is removed or deported from Australia or granted a visa. Sub-section (3) of s 196 specifies that the section prevents the release even by a court of an unlawful non-citizen from detention, otherwise than for removal or deportation, unless the non-citizen has been granted a visa. The applicant has been held in immigration detention since 13 June 2002.

8 Before the Minister made the Decision, an officer of his Department wrote to the applicant on 26 February 2002. That letter stated that it had come to the attention of the Department that the application for the parent visa might be liable for refusal under par (a) of s 501(6) of the Act. The applicant was told that the matters to be taken into account included his criminal convictions and the matters

detailed in a document titled "Direction under section 499 – Visa Refusal and Cancellation under section 501 Migration Act 1958". A copy of that document was enclosed. The letter stated that the applicant was being provided with an opportunity to comment and that he might wish to provide any further information which he felt the decision-maker ought to be aware of or to take into account. The applicant responded by a 15 page letter dated 12 March 2002.

9 An application was made to this Court on 26 June 2002 and, after the applicant obtained legal representation and the Court had considered, at a hearing on 19 July, the appropriate course to be taken the matter has proceeded as an application in the first instance for final relief.

10 The applicant complains that the Decision was reached after denial to him of natural justice and that that denial tainted the Decision with jurisdictional error attracting prohibition under s 75(v) of the Constitution and certiorari as appurtenant thereto under s 32 of the *Judiciary Act* 1903 (Cth). The consequence was said to be that the power of cancellation under s 501F(3) would be, at least prospectively from the granting of relief now sought from this Court, no longer effective to render the applicant an unlawful non-citizen liable to continued detention under s 196 of the Act. To that end, an injunction was sought to the effect of requiring the release of the applicant from immigration detention.

11 The applicant's evidence is that had the letter of 26 February 2002 notified him that were the Minister to refuse the parent visa application then his bridging visa would automatically be cancelled and, in turn, he would be detained under s 189 of the Act and, had he been invited to make submissions in respect thereof, he would have sought legal advice and would have been in a position to make submissions as to his circumstances.

12 In particular, the applicant submits that there was a denial of natural justice by the Minister in failing to afford him an opportunity to put before the Minister material concerning the financial and emotional impact which detention under ss 189 and 196 would have on him and his family. This was said to include added, and considerable, difficulty to the applicant in the preparation of his pending special leave application to this Court. The result is said to be that the Minister failed to take into account these matters.

13 Prohibition lies under s 75(v) of the Constitution as a discretionary remedy, in respect of the denial of procedural fairness by an officer of the Commonwealth in the exercise of a statutory power[5]. However, in the path of that submission there now stands s 474 of the Act. The decision of the Minister under s 501(1) on its face fell within the definition of "privative clause decision" in s 474(2) of the Act. Section 474(1) states:

---

5 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

"A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."

It will be apparent that for the applicant to succeed in this Court in obtaining orders for his release from immigration detention it is necessary for him first to succeed in the attack on the Decision. That, in turn, depends upon the operation of s 474.

14 No question arises in this application respecting the validity of s 474. Rather, the parties directed their arguments to the construction of that provision. In particular, it was accepted that the section was not to be taken at face value; rather, it fell to be construed in the light of the principles associated with the judgments of Dixon J in *R v Hickman; Ex parte Fox and Clinton*[6] and *R v Murray; Ex parte Proctor*[7]. Counsel for the parties referred to the statement by Dixon J of the three so-called *Hickman* conditions[8]:

> "provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body",

but they differed as to their application to the present facts. Counsel for the applicant emphasised that, in his judgment in the later case of *Murray*, Dixon J had said that the "protection" the privative clause there in question purported to afford was, as a matter of construction, inapplicable "unless" the *Hickman* conditions were met[9]. Dixon J then spoke of a "second step" in interpreting "the whole legislative instrument"[10]; if the *Hickman* conditions were satisfied the question then was whether the observance of requirements as to the composition of the Local Reference Board with which *Murray* was concerned was "essential

---

6 (1945) 70 CLR 598.

7 (1949) 77 CLR 387.

8 (1945) 70 CLR 598 at 615.

9 (1949) 77 CLR 387 at 399-400.

10 (1949) 77 CLR 387 at 400.

to valid action"[11]; the general intention of the privative clause would yield to "a clearly expressed specific intention" of that kind[12].

15 Later decisions dealing with *Hickman* were collected in the judgment of Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers' Union*[13]. In *O'Toole v Charles David Pty Ltd*[14], Deane, Gaudron and McHugh JJ said that the second and third *Hickman* conditions were related. It follows from their Honours' analysis that a decision will "relate to the subject matter of the legislation" and will be a privative clause decision for the purposes of s 474 if it is expressed to deal with an exercise of power under s 501(1); the decision will be "reasonably capable of reference" to the power given the Minister if, on the face of the record, it was made in purported exercise of the power conferred by s 501(1). Both conditions are satisfied with respect to the Decision. There remains the requirement of "bona fide attempt" to exercise the power given by s 501(1). In that regard, in *O'Toole*, there were differences of opinion in the judgments as to whether the question of "bona fides" is an "objective" matter to be determined on the face of the record or whether the Court may go behind the face of the record. This case is not the occasion to attempt to resolve that debate.

16 What is presently important is the statement by Dawson J in *O'Toole*[15] that he took the requirement of bona fides "to embrace at least some aspects of natural justice"[16]. That may be accepted. However, those aspects of the principles of natural justice, such as actual bias, which may involve notions of lack of bona fides, are not present in this case.

17 It may be assumed, without deciding, that, in the circumstances, the rules of natural justice obliged the Minister, through the officers of his Department, to alert the applicant to the consequences for his bridging visa and the enlivening of ss 189 and 196 of the Act when giving him the opportunity to make submissions respecting the apprehended exercise of the power under s 501(1) to refuse him

---

11 (1949) 77 CLR 387 at 400.

12 (1949) 77 CLR 387 at 400.

13 (1983) 153 CLR 415 at 418.

14 (1991) 171 CLR 232 at 287.

15 (1991) 171 CLR 232 at 305.

16 See also the judgment of Deane, Gaudron and McHugh JJ: (1991) 171 CLR 232 at 287.

the parent visa[17]. However, the failure to do so did not deny the Decision the character of a bona fide attempt to exercise that power.

18 By analogy to the "second step" identified in *Murray*, the applicant submitted that the requirement of procedural fairness upon which he relied was, if regard be had to the Act as a whole, essential to valid action by the Minister under s 501(1) and so did not give way to the general terms of s 474. Reference was made to various provisions of the Act. These included the heading "Code of procedure for dealing fairly, efficiently and quickly with visa applications" to Subdiv AB of Div 3 of Pt 2 of the Act. Reference also was made to provisions discussed in *Minister for Immigration and Multicultural Affairs v Eshetu*[18]. As the decision in that case illustrated, such provisions fall well short of the clear expression of a "specific intention", spoken of by Dixon J in *Murray*, to which s 474 would yield.

19 The applicant further submitted that (i) a distinct procedural fairness requirement attached to s 501F(3) and (ii) the failure to meet that requirement was not protected by s 474. The first submission should not be accepted, so that the occasion for the second submission does not arise.

20 Section 501F applies if the Minister makes a decision under s 501 to refuse to grant a visa to a person (s 501F(1)). Sub-section (3) of s 501F states:

> "If:
>
> (a) the person holds another visa; and
>
> (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;
>
> the Minister is taken to have decided to cancel that other visa."

21 In this context, the phrase "is taken to have decided" identifies a state of affairs brought about by the operation of the statute. No other outcome is possible. The Minister, for example, cannot decide that another visa held by the person in question is to remain in force. The Minister is not the repository of a power conferred by s 501F; there is no power conditioned by the obligation of the repository of the power to adopt, as Brennan J put it in *Kioa v West*[19]:

---

17 cf *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 47 FCR 293 at 297-298.

18 (1999) 197 CLR 611.

19 (1985) 159 CLR 550 at 627.

"a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised".

22 The application is dismissed with costs.