HIGH COURT OF AUSTRALIA

GAGELER J

PLAINTIFF S53/2019 PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP
AND MULTICULTURAL AFFAIRS & ORS DEFENDANTS

Plaintiff S53/2019 v Minister for Immigration, Citizenship and Multicultural Affairs
[2019] HCA 42
Date of Judgment: 25 June 2019
S53/2019

ORDER

The amended application is dismissed with costs.

CATCHWORDS

Plaintiff S53/2019 v Minister for Immigration, Citizenship and Multicultural Affairs

Immigration – Refugees – Where plaintiff sought intervention of Minister under s 48B or s 417 of the *Migration Act 1958* (Cth) – Where request for intervention finalised without referral to the Minister – Whether Minister could delegate exercise of power under s 48B – Whether departmental officer involved in exercise of non-statutory executive power – Whether denial of procedural fairness.

Words and phrases – "finalised without referral", "Ministerial intervention", "non-statutory executive power", "procedural fairness", "request for intervention".

High Court Rules 2004 (Cth), r 25.09.1.
Migration Act 1958 (Cth), ss 48B, 417.

1 GAGELER J. On 5 March 2019, the plaintiff commenced this proceeding in the original jurisdiction of the High Court by filing an application for a constitutional or other writ. On 9 May 2019, the plaintiff filed an amended application seeking the same relief on the same grounds as in his original application. The amended application concerns a request by the plaintiff that the Minister for Immigration, Citizenship and Multicultural Affairs exercise his power of intervention under s 48B or s 417 of the *Migration Act 1958* (Cth) ("the Act").

2 The plaintiff is a Sri Lankan citizen who arrived in Australia in September 2012. In January 2016, he made a valid application for a protection visa. In August 2016, a delegate of the Minister refused that application. The Immigration Assessment Authority affirmed the delegate's decision in January 2017.

3 The plaintiff sought judicial review of the Authority's decision in the Federal Circuit Court. He was unsuccessful. He appealed to the Federal Court. He was again unsuccessful. He then sought special leave to appeal from the Federal Court to this Court, which was refused in September 2018[1].

4 The following month, the plaintiff sought the personal intervention of the Minister. By letter dated 7 October 2018, he requested that the Minister allow him to submit a further protection visa application by an exercise of power under s 48B of the Act or to substitute the Authority's decision for a more favourable decision by an exercise of power under s 417 of the Act. By letter dated 25 February 2019, a departmental officer informed the plaintiff that his request for an exercise of power under s 48B had been finalised without referral to the Minister. The fate of the plaintiff's request for a more favourable decision by an exercise of power under s 417 of the Act does not appear from the evidence. But as the Minister's power under s 417 can be exercised only in relation to a decision of the Administrative Appeals Tribunal, it is plain that the power cannot be exercised in relation to the plaintiff.

5 The plaintiff's contentions in support of the amended application follow the template of those considered and rejected in the numerous cases recently collected by *Plaintiff S322/2018 v Minister for Immigration, Citizenship and Multicultural Affairs*[2]. They are: first, that the Minister could not delegate to a departmental officer the exercise of his power under s 48B of the Act; second, that the assessment process conducted by the departmental officer involved the exercise of non-statutory executive power; third, that the departmental officer denied the plaintiff procedural fairness; and fourth, that the departmental officer "failed to make inquiries according to law and procedural fairness".

---

1 *AQR17 v Minister for Immigration and Border Protection* [2018] HCASL 261.

2 [2019] HCATrans 096.

6 For reasons I and other members of the Court have repeatedly explained, the contentions do not support the relief sought by the plaintiff.

7 As to the first, there has here been no purported delegation of the Minister's power under s 48B of the Act. As to the second, it does not follow from the circumstance that the departmental officer exercised non-statutory executive power that the officer acted beyond power, or made any legal error, in refusing to refer the plaintiff's request to the Minister. The third and fourth are foreclosed by the holding of this Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[3] that the consideration by departmental officers of requests for the Minister to consider exercising his power under s 48B of the Act is not conditioned by requirements of procedural fairness.

8 For completeness, I record the plaintiff's further contention that changed circumstances in Sri Lanka since the time of the delegate's and the Authority's decisions mean that the Authority's decision has "become" legally unreasonable. The contention is devoid of legal merit. Whether the Authority's decision was legally unreasonable can be assessed only by reference to the facts as at the time of that decision.

9 The amended application does not disclose an arguable basis for the relief sought. The plaintiff says that a costs order in the Minister's favour would cause him financial hardship. That circumstance alone provides no basis on which to interfere with the ordinary approach as to costs.

10 The amended application will be dismissed with costs under r 25.09.1 of the *High Court Rules 2004* (Cth).

---

3 (2012) 246 CLR 636; [2012] HCA 31.