HIGH COURT OF AUSTRALIA

9 April 2025

FEL17 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
[2025] HCA 13

Today, the High Court of Australia unanimously dismissed an appeal from a judgment of the Full Court of the Federal Court of Australia. The issue for determination was whether, when the appellant made an application for a protection visa in 2017, he was barred from doing so by s 48A of the *Migration Act 1958* (Cth) ("the Act") by reason of being a non-citizen who had previously made "an application for a protection visa, where the grant of the visa has been refused".

The appellant, a Coptic Christian from Egypt, made his first application for a protection visa in 2013. That first application was refused in 2014 pursuant to s 65 of the Act by a delegate of the respondent, the Minister for Immigration, Citizenship and Multicultural Affairs. That refusal decision was later affirmed in 2015 by the Administrative Appeals Tribunal pursuant to s 415(2)(a) of the Act. Subsequently, in 2017, the Assistant Minister for Immigration and Border Protection decided to "substitute" the decision of the Tribunal for a more favourable decision pursuant to s 417(1) of the Act – namely, to grant the appellant a Visitor (Subclass 600) visa for three months with a no further stay condition, which was valid from 12 September 2017 to 12 December 2017.

Later in 2017, the appellant made another application for a protection visa. A delegate of the Minister held that application to be invalid on the grounds that it was barred by s 48A of the Act. The appellant sought judicial review of that decision in the Federal Circuit Court of Australia (as it was then named), which dismissed the appellant's application in 2023.

The appellant appealed to the Full Federal Court, which later in 2023 upheld the Federal Circuit Court's decision by majority. The majority held that the Assistant Minister's exercise of the power pursuant to s 417 of the Act "did not alter history", in that it did not undo the fact that the appellant's first application for a protection had been refused for the purposes of s 48A. The delegate's decision in 2014 to refuse the appellant's first protection visa application, which was subsequently affirmed by the Tribunal, had "continuing legal effect" and had not been "set aside" by the exercise of the power in s 417 of the Act. In 2024, the appellant was granted special leave to appeal from this judgment to the High Court.

The High Court held that the reference to an act of refusal in s 48A of the Act was simply to an historical fact, that has not been set aside in fact, regardless of its legal effect. The Court further held that the Assistant Minister's act of substitution pursuant to s 417 of the Act did not set aside either the delegate's refusal decision or the Tribunal's affirmation of that decision. Accordingly, the delegate's refusal decision persisted for the purposes of s 48A of the Act.

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.

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