

Casenote

PLAINTIFF M174/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION [2018] HCA 16

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This case note provides an overview of the key facts and issues in the case of *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 18. This case challenges the legality of the 'Fast Track' review process based on a claim that it is procedurally unfair.

Facts

The plaintiff in this matter is an Iranian asylum seeker who arrived in Australia by boat in October 2012 and applied for a temporary protection visa.¹ The plaintiff's claim for protection was based on the fact that he had converted to Christianity and would therefore face religious persecution in Iran on the basis of his faith.²

To support his application for temporary protection, the plaintiff produced a statutory declaration stating that he had been attending a Baptist church in Melbourne regularly since arriving in Australia.³ The plaintiff produced a letter of support from the Reverend at the church.⁴

The plaintiff was subsequently interviewed by a delegate of the Minister for Immigration and Border Protection. During this interview, he again stated that he had been attending church regularly since his release from immigration detention in December 2012. However, the delegate then interviewed the Reverend from whom the plaintiff had received a letter of support and in this interview the Reverend stated that the plaintiff had stopped attending the church in 2013 because he moved to a new suburb, that he returned early in 2015 for a few weeks, and that since then he had only attended once in June 2015 where he requested a letter of support in his visa application.⁵

Shortly afterwards, the delegate rendered a decision to deny the plaintiff temporary protection based on a finding that he had not genuinely converted to Christianity and therefore would not face persecution if he were to be returned to Iran. In her record of this decision, the delegate referred to the information given to her by the Reverend.⁶ This implies that the delegate relied on this information in making the decision, however she did not present this information to the plaintiff nor did she give him a chance to respond to it.

The adverse decision was then referred to the Immigration Assessment Authority ('IAA') for review. For the purposes of this review, the plaintiff submitted a further letter of support from the Reverend as well as letters of support from other members of the church congregation. The IAA had regard to some, but not all, of this information and subsequently affirmed the delegate's decision to refuse the plaintiff temporary protection.⁷

Key issues

- Whether the original decision maker failed to comply with s 57(2) of the *Migration Act 1958* (Cth) ('the Act') by not giving the plaintiff particulars of, and inviting comment on, the information provided by the Reverend
- Whether a failure to comply with s57(2) precludes a 'fast track decision' from review by the IAA
- Whether the IAA acted unreasonably in failing to get or consider new information under s 473DC

Summary of the relevant law

The plaintiffs' argument relied on the following provisions of the Act:

- Section 57(2), which provides that 'relevant information' used by the Minister in making a visa decision must be provided to the applicant, and further that the Minister must ensure that the applicant understands the relevance of the information, and that the Minister must invite the applicant to respond to the information;
- Section 57(1), which defines 'relevant information' as information that the Minister considers a) would be the reason, or part of the reason for refusing to grant a visa or for deciding that the applicant is an excluded fast track review applicant; b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member and c) was not given by the applicant for the purpose of the application; and
- Part 7AA of the Act, which provides 'a limited form of review' of a 'fast track decision'. A fast track decision is constituted by a refusal to grant a protection visa to an applicant statutorily defined as a 'fast track applicant'. The Minister is obliged by s 473CA to refer a 'fast track reviewable decision' to the IAA and the IAA is obliged by s473CC to review and either affirm the decision or to remit it to the Minister for reconsideration. Section 473DB states that the IAA must review a fast track reviewable decision by reviewing the material provided to it under s 473CB without accepting new information and without interviewing the referred applicant. Section 473DC confers a discretionary power on the IAA to obtain 'new information' about a visa application but only if it was not before the Minister at first instance and if the IAA considers that the new information may be relevant. Section 473DD restricts this discretion to apply only where there are 'exceptional circumstances' to justify considering the new information.

Plaintiff's argument

The plaintiff argued, firstly, that the delegate's failure to inform the plaintiff of the adverse information provided to her by the Reverend was a breach of her obligations under s 57 of the Act.⁸ By failing to comply with s 57(2), the plaintiff argued that the delegate's decision to refuse the visa was affected by jurisdictional error. Importantly, the consequence of a finding that the decision was so affected is that the decision is void, i.e. that legally there is no decision at all. In sum, the plaintiff argued that there was no decision capable of being reviewed by the IAA and therefore that the IAA's adverse finding was also invalid.⁹

Further or in the alternative to these arguments about the delegate's obligations under s 57 of the Act, the plaintiff argued that it was legally unreasonable for the IAA to decline to exercise its discretionary power under s 473DC of the Act to get 'new information' about the plaintiff's attendance at church. This error, known as 'Wednesbury unreasonableness', if proven, would also amount to a jurisdictional error and would render the IAA's decision legally void.¹⁰

Defendant's argument

In response to the argument surrounding the obligations under s 57 of the Act, the Minister argued that the information obtained from the Reverend was not 'relevant information' as defined by that section. The definition of 'relevant information' is information that the Minister considers would be the reason, or part of the reason, for refusing to grant a visa. The Minister argued that the information provided by the Reverend was purely a set of intermediate findings of fact regarding the plaintiff's attendance at church and this information and, without being coupled with a "rejection, denial or undermining" of the plaintiff's claim, does not meet the definition of 'relevant information' for the purposes of s 57.¹¹

In respect of the argument that the Minister's decision was legally void, the defendant further argued that the doctrine of jurisdictional error did not apply given that s 69 of the Act explicitly provides that non-compliance by the Minister with s 57 'does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed'.¹²

In respect of the legal unreasonableness argument, the defendant argued that it was sufficient that the delegate had collected information regarding church attendance from the plaintiff in the initial application process, and had notified the plaintiff of the information from the Reverend in the record of the adverse decision, and that there was therefore no obligation on the Authority to consider new information on this subject during its review.¹³ The defendant argued, therefore, that it cannot be said that failure to consider the new information amounted to Wednesbury unreasonableness.

Judgment

The court found that the delegate of the Minister made the original decision in compliance with s 57 of the Act.¹⁴ Gageler, Keane and Nettle JJ (Edelman and Gordon JJ agreeing) found that the information failed to meet the critical condition for it to be characterised as relevant information within the meaning of s57(1). To be 'relevant information', the information must be of such significance as necessary to have led the delegate to consider in advance of reasoning on the facts of the case that the information of itself 'would', as distinct from 'might', be the reason or part of the reason for refusing to grant the protection visa.¹⁵ The information from the Reverend did not meet this test.

The court unanimously held that the limited form of review in Pt 7AA did not warrant departure from the principle established in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21. This means that a fast track reviewable decision is 'a decision in fact made, regardless of whether or not it is a legally effective decision'.¹⁶ Therefore, even a fast track decision affected by jurisdictional error can be reviewed by the IAA. As the plurality noted, the IAA's task is to review the decision afresh.¹⁷ Once affirmed by the IAA, the decision of the Minister or delegate has no independent continuing legal operation.¹⁸ A breach of procedural fairness by the delegate might lead to an error in the IAA's decision if the IAA also failed to provide a chance to respond to relevant information. However, the IAA has the power under s 473DC(3) to invite the applicant to comment on relevant information thereby avoiding this error.

The court also dismissed the plaintiff's challenge to the decision of the IAA on grounds of unreasonableness. To admit new information, the IAA must be satisfied that there are exceptional circumstances to justify considering any new information and that:

1. The information is credible information about an identified individual, or an individual who is reasonably identifiable;
2. The information was not previously known by either the Minister or the referred applicant; and
3. Had the information been known by either the Minister or the referred applicant, the information may have affected the consideration of the referred applicant's claim.¹⁹

The subsequent letters of support by the Reverend and other members of the congregation in support of the plaintiff's claim were deemed insufficient to meet these conditions. Gordon J agreed with the majority but added that non-compliance with s 57 would itself be an exceptional circumstance engaging the IAA's 'new information' powers.²⁰

Further reading

- *The submissions, transcripts of hearings and full judgment in this case are available from the High Court of Australia at < http://www.hcourt.gov.au/cases/case_m174-2016>.*
- [Factsheet: 'Fast tracking' refugee status determination](#), Kaldor Centre for International Refugee Law

- [Plaintiff M174/2016 v Minister for Immigration and Border Protection](#), Opinions on High, University of Melbourne
- Andrew Yulle, ['The latest from the High Court'](#) (June 2018), 45 *Law Society of NSW Journal* 94.

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Endnotes

¹ *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 at [54] (Gageler, Keane and Nettle JJ).

² *Ibid* at [55].

³ *Ibid* at [56].

⁴ *Ibid* at [55].

⁵ *Ibid* at [57].

⁶ *Ibid* at [15].

⁷ *Ibid* at [18].

⁸ *Ibid* at [25].

⁹ *Ibid* at [26].

¹⁰ *Ibid* at [27].

¹¹ First defendant's submissions, *Plaintiff M174/2016 v Minister for Immigration and Border Protection* at [22].

¹² *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 (Gageler, Keane and Nettle JJ) at [35].

¹³ *Ibid* at [55].

¹⁴ *Ibid* at [72].

¹⁵ *Ibid* at [72].

¹⁶ *Ibid* at [51].

¹⁷ *Ibid* at [17].

¹⁸ *Ibid* at [70].

¹⁹ *Ibid* at [34].

²⁰ *Ibid* (Gordon J) at [89].