Assessment of off-shore claims for refugee status

On 11 November, the High Court handed down its decision in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* [2010] HCA 41. An examination of the decision reveals a narrow focus.

Background

The plaintiffs arrived by boat at the Territory of Christmas Island where they were detained. That territory is an 'excised offshore place' for the purposes of the *Migration Act 1958* (Cth) (Act): (s 5). On arrival at an 'excised offshore place' the plaintiffs became 'unlawful noncitizen[s]' and could not make valid applications for a visa (including a 'protection visa') under the Act: (s 46A(1)).

However, the minister may decide that the restriction on applying for a visa does not apply to a person (s 46(2)) and may decide to grant a visa to an unlawful non-citizen in detention (s 195A(2)). Both powers are expressed to be only exercisable by the minister personally (ss 46A(3) & 195A(5)) and the minister does not have a duty to consider exercising either power (ss 46A(7) & 195A(4)).

On 29 July 2008, the minister announced certain changes to the assessment of offshore refugee claims, following which processes for a 'Refugee Status Assessment' (RSA) (by the department) and an 'Independent Merits Review' (IMR) (by a company contracted to the department) were developed. RSAs and IMRs undertaken with respect to the plaintiffs concluded that neither of them were persons to whom Australia had protection obligations.

Reasoning

A seven member court delivered single reasons for judgment.

An unsuccessful challenge to the validity of s 46A was made on the basis that the circumstances concerning whether to consider exercising it were arbitrary and unenforceable such that it was repugnant to s 75(v) of the Constitution. The court held that the provision was not of so little content so as not to be a law (at [56]).

The critical issue was whether the inquiries concerning the status of the plaintiffs as refugees were under and for the purposes of the Act (as the plaintiffs submitted) or in the exercise of non statutory executive power under s 61 of the Constitution (as the defendants submitted). For a number of reasons, the court concluded that the RSAs and IMRs were undertaken under and for the purposes of the Act. The exercise of power under ss 46A or 195A involves two steps: (1) a decision to *consider* exercising the power; and (2) a decision whether to exercise the power in a particular way. Although not obliged to take either step, the minister had decided to consider exercising the power by reason of the announcement in 2008. The RSAs and IMRs were consequent to that decision and therefore for the purposes of the Act.

Given the statutory foundation for the inquiries, they had to proceed in accordance with law and obligations of procedural fairness were attracted. Such obligations were accepted as applying not only where the exercise of a power affects rights in the strict sense, but also where it affects an interest or privilege. The interests of the plaintiffs were affected as their detention was prolonged while the inquiries took place and in circumstances where they would otherwise have to be removed as soon as practicable (cf. s 198(2)).

Three aspects of the IMRs revealed error across the two matters: (1) the IMRs stated that the review was not bound by Australian law and was non-statutory; (2) one of the IMRs did not refer to one of two claimed bases of persecution; and (3) adverse country information relied upon was not put to the plaintiffs. As such, the reasons involved legal error and procedural fairness was denied.

Because there was no obligation on the minister to exercise any power under ss 46A or 195A, mandamus would not lie and certiorari (in respect of the IMRs) would be futile. Accordingly, relief was limited to a declaration that the recommendation in the IMRs that the plaintiffs were not people owed protection obligations involved an error of law in not treating the provisions of the Act and judicial decisions as binding and failed to observe procedural fairness.

The narrow focus of the decision is revealed in its concentration on the minister's decision to consider exercising ss 46A or 195A. There was no obligation to make that decision. Had it not been made, it is arguable that the consequent obligations would not have arisen.

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