HIGH COURT OF AUSTRALIA

31 August 2011

PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP

PLAINTIFF M106 OF 2011 BY HIS LITIGATION GUARDIAN, PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP

[2011] HCA 32

Today the High Court held invalid the Minister for Immigration and Citizenship's declaration of Malaysia as a country to which asylum seekers who entered Australia at Christmas Island can be taken for processing of their asylum claims. After an expedited hearing before the Full Bench, the Court by majority made permanent the injunctions that had been granted earlier and restrained the Minister from taking to Malaysia two asylum seekers who arrived at Christmas Island, as part of a larger group, less than four weeks ago.

The Court also decided that an unaccompanied asylum seeker who is under 18 years of age may not lawfully be taken from Australia without the Minister's written consent under the *Immigration (Guardianship of Children) Act* 1946 (Cth). The Court granted an injunction restraining the Minister from removing the second plaintiff, an Afghan citizen aged 16, from Australia without that consent.

The Court held that, under s 198A of the *Migration Act* 1958 (Cth), the Minister cannot validly declare a country (as a country to which asylum seekers can be taken for processing) unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection.

The Court also held that the Minister has no other power under the *Migration Act* to remove from Australia asylum seekers whose claims for protection have not been determined. They can only be taken to a country validly declared under s 198A to be a country that provides the access and the protections and meets the standards described above. The general powers of removal of "unlawful non-citizens" given by the *Migration Act* (in particular s 198) cannot be used when the *Migration Act* has made specific provision for the taking of asylum seekers who are offshore entry persons and whose claims have not been processed to another country, and has specified particular statutory criteria that the country of removal must meet.

On the facts which the parties had agreed, the Court held that Malaysia is not legally bound to provide the access and protections the *Migration Act* requires for a valid declaration. Malaysia is not a party to the Refugees Convention or its Protocol. The Arrangement which the Minister

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signed with the Malaysian Minister for Home Affairs on 25 July 2011 said expressly that it was not legally binding. The parties agreed that Malaysia is not legally bound to, and does not, recognise the status of refugee in its domestic law. They agreed that Malaysia does not itself undertake any activities related to the reception, registration, documentation or status determination of asylum seekers and refugees. Rather, the parties agreed, Malaysia permits the United Nations High Commissioner for Refugees ("UNHCR") to undertake those activities in Malaysia and allows asylum seekers to remain in Malaysia while UNHCR does so.

The Court emphasised that, in deciding whether the Minister's declaration of Malaysia was valid, it expressed no view about whether Malaysia in fact meets relevant human rights standards in dealing with asylum seekers or refugees or whether asylum seekers in that country are treated fairly or appropriately. The Court's decision was based upon the criteria which the Minister must apply before he could make a declaration under s 198A.

- *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.*