

BODRUDDAZA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS (S241/2006)

Amended application to show cause filed: 13 September 2006

Special case filed: 21 September 2006

The Plaintiff is not, nor has he ever been an Australian citizen. On 18 July 2003 he entered Australia holding a Class TU, subclass 574 (Postgraduate Research Sector) visa. On 26 July 2005 he applied for a Class DD, subclass 880 (Skilled Independent Overseas Student) visa. On 17 September 2005 and 17 December 2005 the Plaintiff sat tests under the International English Language Testing System ("IELTS"). On 5 January 2006 the Applicant's application for the Skilled Independent Overseas Student visa was refused. The Applicant scored 115 points under the applicable 'points test', while the pass mark for further consideration of his application was 120 points. In particular, he scored only 15 points in the 'Vocational English' category despite having sat the IELTS test twice. On both occasions he scored an average mark of more than 6 over the four sub-categories of; 'listening', 'reading', 'writing' and 'speaking'. He did not however score a minimum mark of 6 in each of those sub-categories, as required.

The Plaintiff applied to the Migration Review Tribunal ("MRT") for a review of the delegate's decision, but his application was one day out of time. On 9 May 2006 the MRT held that it did not have the jurisdiction to determine the matter.

On 11 July 2006 the Plaintiff filed an application for an order to show cause, which was amended on 13 September 2006. In his amended application he sought writs of prohibition, certiorari and mandamus arising from the delegate's decision of 5 January 2006. The Plaintiff alleged that there had been either a constructive failure to exercise jurisdiction or an error of law by the delegate. He also submitted that the delegate misunderstood the applicable law as it related to points to be allocated in respect of language skills.

On 21 September 2006 Justice Heydon referred the special case to the Full Court.

The questions of law reserved for the consideration of the Full Court are:

- Does section 486A(1) of the *Migration Act* 1958 ("the Act") apply to the Plaintiff's application to the High Court for remedies to be granted in exercise of the Court's original jurisdiction?
- If the answer to Question 1 is yes for any or all of the remedies applied for, is section 486A(1) of the Act invalid in respect of the Plaintiff's application?
- If appropriate to answer having regard to the answers to questions 1 and 2, did the delegate of the Minister make a jurisdictional error in the course of assessing the Plaintiff's visa application?

- By whom should the costs of the proceedings in this Honourable Court be borne?

On 3 October 2003 the Plaintiff filed a notice pursuant to Section 78 of the *Judiciary Act* 1903. The issue said to arise under the Constitution is whether the time limits imposed by section 468A of the Act on the making of an application to this Court for constitutional writs is inconsistent with Chapter 3 of the Constitution.

On 21 November 2006 this Court was advised that the Attorney-General for South Australia would intervene in this matter.