HIGH COURT OF AUSTRALIA

Public Information Officer

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KAZI FAZLY ALAHI BODRUDDAZA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

The High Court of Australia today held that a section in the *Migration Act* imposing strict time limits on the seeking of remedies in the Court against adverse migration decisions is invalid.

Mr Bodruddaza was born in 1976 in Bangladesh. He entered Australia on a postgraduate research visa. Before it expired he sought a skilled independent overseas student visa. He failed two English tests which left him five points short of the 120 required for his visa application to be considered. His application was refused and he instructed a migration agent to seek a review of the Immigration Department's decision. The 21-day period for filing a review application with the Migration Review Tribunal expired on 6 February 2006. The application was filed the next day. On 9 May 2006, the MRT held that it did not have the jurisdiction to determine the review application as there was no provision for an extension of time. On 11 July 2006, Mr Bodruddaza instituted proceedings in the High Court, asserting that the department showed error in refusing him a visa and seeking writs of certiorari, prohibition and mandamus, to quash the department's decision and to require determination by the Minister of the visa application. Section 75(v) of the Constitution provides that the Court has original jurisdiction for writs sought against Commonwealth officers.

The application to the High Court was outside the maximum 84-day period specified in section 486A of the Act. The section provides that an application to the Court to grant a remedy in exercise of its original jurisdiction in relation to a migration decision must be made with 28 days of actual notification of the decision. The High Court may extend this by 56 days upon application made within the 84-day period and if the Court is satisfied that to do so is within the interests of the administration of justice, but otherwise the Court must not make an order allowing an application for a remedy outside the 28-day period. High Court Rule 4.02 states that any period of time fixed by the Rules may be enlarged or abridged by the Court either before or after the time has expired. Section 486A denies the Court the capacity to make an order allowing an application out of time.

A special case agreed on by the parties asked whether section 486A applies to Mr Bodruddaza's application and if so whether section 486A is invalid in respect of that application. A third question involves determination by the Court of the legal merits of the application, asking whether the department's decision displayed jurisdictional error. The Court unanimously held that section 486A was invalid and thus does not validly deny the competence of the Court to hear the application. The section was inconsistent with the power of judicial review contained in section 75(v) of the Constitution. Section 486A, hinged on the date of actual notification rather than deemed notification, did not allow for a person becoming aware later of circumstances giving rise to a possible challenge to a decision, or allow for supervening events which may have led to a failure to act on time through no fault of the applicant. Mr Bodruddaza was one day late, apparently through failure by his migration adviser, and this could be dealt with through the Court's discretion to grant or withhold a remedy under section 75(v). The Court held that section 486A is invalid and could not be read down or severed to preserve any valid operation.

However it held that Mr Bodruddaza had failed to show jurisdictional error by the department in assessing his visa application. He required 20 points for English skills to meet the points test but received only 15. Test scores had to be achieved through one test, not through an aggregate of his two tests.

- *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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