



HIGH COURT OF AUSTRALIA

12 October 2022

SDCV v DIRECTOR-GENERAL OF SECURITY & ANOR
[2022] HCA 32

Today, the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia. The appeal concerned a challenge to the validity of s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") on the basis that it was contrary to Ch III of the *Constitution*.

The appellant's visa was cancelled in consequence of an adverse security assessment certified by the Director-General of Security on behalf of the Australian Security Intelligence Organisation ("the ASA certificate"). The ASA certificate was accompanied by a statement of grounds (together, "the ASA decision"). The appellant applied to the Administrative Appeals Tribunal for merits review of the ASA decision. The Minister administering the *Australian Security Intelligence Organisation Act 1979* (Cth) issued certificates under s 39B(2)(a) of the AAT Act stating that disclosure of some of the contents of documents relating to the ASA decision would be contrary to the public interest because it would prejudice the security of Australia ("the certificated matter"). The Tribunal was provided with the certificated matter, but it was not disclosed to the appellant or his legal representatives. The Tribunal affirmed the ASA decision.

The appellant appealed to the Federal Court of Australia pursuant to s 44 of the AAT Act, including on the ground that the Tribunal's decision was not open on the evidence before it. The appeal was heard in the original jurisdiction of the Federal Court by a Full Court. By reason of s 46(1) of the AAT Act, the Federal Court was allowed to have regard to the certificated matter in determining the appeal, but the Federal Court was required not to disclose the certificated matter to the appellant or his legal representatives. In that regard, s 46(2) provided that the Federal Court "shall ... do all things necessary to ensure that the [certificated] matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding". In the course of the appeal, the appellant also challenged the constitutional validity of s 46(2). The Federal Court rejected the constitutional challenge and dismissed the appeal.

The High Court, by majority, held that s 46(2) of the AAT Act was a valid law. There is no "minimum requirement" of procedural fairness applicable to all proceedings in a Ch III court; the ultimate question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid practical injustice. An appeal under s 44, to which s 46 applies, is additional to the available remedies under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth). As a practical matter, any "disadvantage" occasioned by s 46(2) would have been avoided by the choice of proceedings under these other remedies. But such a choice would have denied the appellant, by the likely operation of the rules of public interest immunity, the forensic advantage offered by s 46(1) in having the certificated matter provided to the Court. Section 46(2) operated inseparably from s 46(1) to provide the appellant with forensic advantages different from those otherwise provided by law. The appellant, having chosen to pursue the remedy that afforded those advantages, suffered no practical injustice.

- *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.*