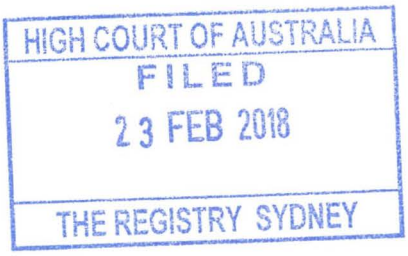
IN THE HIGH COURT OF AUSTRALIA **No S1 of 2018**

SYDNEY REGISTRY

BETWEEN: **Sorwar Hossain**

Appellant

and



Minister for Immigration and Border Protection

First respondent

Administrative Appeals Tribunal

Second respondent

10 **APPELLANT'S REPLY**

Part I – Certification

1. This submission is in a form suitable for publication on the Internet.

Part II – Reply

Ground 1 in Minister's notice of contention

2. In *Craig v South Australia* (1995) 184 CLR 163 (**Craig**) at 179 the High Court explained in part that:

> If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise
> 20 or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

3. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (**Yusuf**) at [82] and [84] and *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 (**Kirk**) at [67] the High Court referred to this passage with approval.

4. It is contended in the written submission of the first respondent ("**the Minister**") at [14] (**RS[14]**) that "the error made by the Tribunal cannot be said to be a jurisdictional error … because it did not affect the Tribunal's exercise of power as the Tribunal was obliged to affirm the refusal of the visa because of his finding concerning cl 820.223(1)(a)".

5. For at least one or more of the following reasons, the Minister's contention is wrong.

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6. First, as explained by Mortimer J in the Full Federal Court decision below at [65], the statement that "the tribunal's exercise of power is thereby affected" is not a separate requirement for a jurisdictional error to be made out, but is "rather an explanation of what jurisdictional error is" and speaks to the gravity of the error and "the need for the error to be material to how the decision-maker was required to, and did, discharge the statutory task". The appellant adopts the analysis of Mortimer J.

7. Second, even if the statement that "the tribunal's exercise of power is thereby affected" is a separate requirement for a jurisdictional error to be made out, for reasons explained by Mortimer J at [71]-[77], the exercise of power of the Administrative Appeals Tribunal ("**the Tribunal**") was affected in the present matter by its error in construing clause 820.211(2)(d)(ii) in Schedule 2 of the Migration Regulations 1994 (Cth). Among other reasons, her Honour noted at [76] that the Tribunal "being in control of the time at which it decided to bring the review to an end, had control of the time at which a criterion such as PIC 4004 needed to be met" and "could have given the first respondent a certain period of time in which to pay the debt". This observation reflects in part the express power of the Tribunal in s 363(1)(b) of the Migration Act 1958 (Cth) ("**the Act**") to "adjourn the review from time to time".

8. The Minister relies at RS[15] on *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562. In that case, Buchanan J at [60], after referring to Yusuf at [82], stated that in order to find jurisdictional error it is necessary to find not only an error of understanding or approach "but also a discernible effect on the exercise of power". If this is the appropriate test, it was satisfied in the present matter.

9. Third, the powers of the Tribunal are broad - see for example s 349(1) of the Act ("The Tribunal may, for the purposes of the review of a Part 5-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision") and ss 359 and 363 of the Act. The powers include the power to decide, in the course of conducting a review of a Part 5-reviewable decision and in considering s 65 of the Act, whether the criteria for the visa the subject of the review are satisfied by the visa applicant. The Tribunal's finding as to whether a criterion for a visa has or has not been satisfied involves or constitutes an exercise of power. In the present matter, the Tribunal made a finding in its decision at [38] that "the applicant does not meet clause 820.211(2)(d)(ii)". The Tribunal erred in making this finding. The error was significant. The Minister accepts at RS[13] that the error was at least an error of law. If the Tribunal had not made the error it made, it may have found that the appellant met clause 820.211(2)(d)(ii). In all the circumstances, the Tribunal's exercise of power was "affected" by its error of law as this term is used in the cases referred to in Craig, Yusuf and Kirk. Not dissimilarly, see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 per Gummow ACJ and Kiefel J at [16]-[31] and [43]-[53].

10. The Minister contends that the approach of Tracey and Foster JJ in *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415 at [120]-[122] is "sufficiently

analogous": RS[15]. For reasons explained by Mortimer J at [81]-[89], there is a significant distinction between:

a) court decisions involving judicial review of protection visa decisions where "the [single] criterion in issue (and the formation of the requisite state of satisfaction for the purposes of s 65 and the jurisdictional fact it had been held to create) was ... the Art 1A criterion from the Refugees Convention" (see Mortimer J at [81]); and

b) the present matter where there was more than one criterion in issue in respect of the visa the subject of the Tribunal's decision.

11. For reasons explained by Mortimer J at [81]-[89], court decisions involving judicial review of protection visa decisions are not analogous to the present matter.

Ground 2 in Minister's notice of contention

12. The Minister contends that "if the Tribunal did commit a jurisdictional error, relief should nevertheless be refused in the exercise of the Court's discretion" ("**the Discretionary Contention**"): RS[18].

13. A preliminary observation is that, although the Minister advanced the Discretionary Contention at trial in the Federal Circuit Court and the primary judge rejected the contention, the Minister did not appeal against this aspect of the primary judge's decision or otherwise pursue the Discretionary Contention in the Federal Court.

14. In *Water Board v Moustakas* (1988) 180 CLR 491 at 497 the High Court stated:

> "Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point."

15. The appellant's position is that, for reasons including the following, it is not in the interests of justice to allow the Minister to proceed with a contention which he chose not to pursue in the Federal Court.

16. First, as stated in *Coulton v Holcombe* (1986) 162 CLR 1 at 7:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

17. For related reasons, it is in the interests of the administration of justice that parties advance grounds of appeal and contentions in intermediate appellate courts before pursuing them in the High Court. Among other reasons, this will usually provide the High Court and the opposing party with the advantage of the intermediate appellate court's consideration of the issue: see, for example, *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1 at [68] where a majority of the Full Federal Court made

this observation in the context of a point being raised for the first time on appeal. In the present matter, if the Minister had pursued the Discretionary Contention in the Federal Court, the decision of Mortimer J would have addressed the Minister's arguments. The High Court and the parties have been deprived of the benefit of her Honour's analysis. The decision of the majority in the Full Federal Court may also have addressed the Minister's argument.

18. Second, the Discretionary Contention does not purely involve a point of law. The Minister challenges an exercise of discretion by the primary judge. Further, the Minister contends at RS[18] that the primary judge rejected the Minister's submission that "relief should necessarily be withheld applying a 'backward-looking' test. However, the primary judge applied a backward-looking test at [25] of his decision where his Honour stated:

> "What the Court identified in Menon, which is equally applicable to the present case, is that if there had been a finding that there were compelling reasons, the Tribunal might have exercised its power to grant the applicant further time to meet the public interest criteria 4001 ..."

19. If the High Court agrees that the primary judge applied a backward-looking test, it appears that the Minister is merely seeking to challenge in the High Court a finding of fact by the primary judge, and without articulating the manner in which the primary judge erred in his finding.

20. Third, in the particular circumstances, it can be inferred that the Minister chose not to pursue the Discretionary Contention in the Federal Court for tactical reasons: *Crampton v The Queen* (2000) 206 CLR 161 at [4]. It is unfair if the Minister, having taken this course at the intermediate appellate court level, should now be allowed to change his position.

21. Fourth, the Minister has provided "no adequate explanation for the failure to take the point [below]": see *Murad v Assistant Minister for Immigration and Border Protection* (2017) 250 FCR 510 at [19], citing this proposition from earlier Full Federal Court decisions.

22. Fifth, there is no significant prejudice to the Minister if he is not allowed to proceed with the Discretionary Contention in the High Court.

23. If the High Court permits the Minister to proceed with the Discretionary Contention in the High Court, for reasons including the following, the ground of contention should be dismissed.

24. First, where a court finds that an administrative decision contains a jurisdictional error, the court will then consider whether to decline to grant relief by way of a writ under s 75 of the Constitution. Paragraphs 29 to 32 of the appellant's written submissions filed on 17 January 2018 set out general principles developed by the High Court concerning the circumstances in which a court may decline to grant relief. As indicated in those

paragraphs, the writ will issue almost as of right, and the discretion is not to be exercised lightly against the grant of relief.

25. Second, where a court is considering declining to grant relief because "no useful result could ensue" (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [56]), a range of views have been expressed in Federal Court decisions as to whether the court should apply a "backward-looking" test, a "forward-looking" test, or a combination of the two. A forward-looking test is appropriate for reasons given in the written submission of the appellant in *Shrestha v Minister for Immigration and Border Protection* (M141/2017) filed on 19 October 2017 at [24]-[38].

26. Third, even if the High Court decides that a court should apply a "backward-looking" test on a judicial review application:

    a) As stated above, the primary judge applied a backward-looking test in his decision at [25]. It is immaterial that his Honour also considered a forward-looking test in his reasons for decision.

    b) For reasons explained by Mortimer J at [71]-[77], the Tribunal may have made a different decision concerning the PIC 4004 criterion if it had not erred in construing clause 820.211(2)(d)(ii). For example, her Honour stated that it was "not possible to say how taking the correct approach to 'compelling reasons' may have affected the Tribunal's approach to whether [the appellant] should be given a qualitatively different opportunity to make 'appropriate arrangements' to pay his debt to the Commonwealth" (at [72]), "if the Tribunal might have taken a different approach to clause 820.211(2)(d)(ii) it is also possible the Tribunal might have taken a different approach to the discretionary element in PIC 4004" (at [75]), and "the Tribunal, having the conduct of the review and being in control of the time at which it decided to bring the review to an end, had control of the time at which a criterion such as PIC 4004 needed to be met and how it needed to be met" and the Tribunal "could have given the first respondent a certain period of time in which to pay the debt or make arrangements" (at [76]). The Minister, in his written submissions, does not identify any error in her Honour's analysis. If the High Court agrees with her Honour's analysis, it follows that, on application of a "backward-looking" test, relief should not be refused.

Dated: 23 February 2018

G Reynolds SC

B Zipser