IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S1 of 2018

BETWEEN:

Sorwar Hossain
Appellant

and

Minister for Immigration and Border Protection
First respondent

Administrative Appeals Tribunal
Second respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: ISSUES

2. The issues in this appeal are whether under the provisions of the *Migration Act 1958* (the Act) the Administrative Appeals Tribunal (the Tribunal) retained jurisdiction to affirm the refusal of a visa on the basis that the Appellant did not satisfy a criterion for the visa, even though the Tribunal erred in deciding whether the Appellant also failed to satisfy a different and independent visa criterion; and if it did not retain jurisdiction, whether relief should nevertheless be refused in the exercise of the Court's discretion.

Part III: SECTION 78B NOTICE

3. Notices under s 78B of the *Judiciary Act 1903* are not required.

Part IV: MATERIAL FACTS

4. The Minister does not contest the Appellant's statement of material facts.

Part V: ARGUMENT

5. Before the Federal Circuit Court the Minister conceded that the Tribunal erred in applying cl 820.211(2)(d)(ii) of Schedule 2 to the *Migration*

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Regulations 1994 having regard to Waensila v MIBP [2016] FCAFC 32, (2016) 241 FCR 121, and the Appellant conceded that there was no error in the Tribunal's consideration of cl 820.223(1)(a).

6. Because the Appellant did not satisfy cl 820.223(1)(a) the Tribunal was required to affirm the refusal of the visa: see s 65(1)(b) of the Act. As the majority held at [25-30], it followed from s 65(1)(b) that the Tribunal retained authority to refuse the visa for this reason, despite erring in relation to cl 820.211(2)(d)(ii).

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7. The Appellant's submissions first suggest that the approach of the majority was contrary to the statement in Craig v South Australia (1995) 184 CLR 163 at 179 that a jurisdictional error "will invalidate any order or decision of the tribunal which reflects it". Leaving aside whether the Tribunal's decision can be said to "reflect" its conceded error in the circumstances (a matter addressed in Part VI below), the statement in Craig cannot be regarded as a universal proposition. For one thing it would deny the Court's unquestioned discretion to withhold relief (a matter also addressed in Part VI below). Further, as pointed out by the majority at [22], subsequent cases
20 have approached the consequences of failures to comply with requirements for decision-making as an issue of statutory construction having regard to the legislative purpose: see Jadwan Pty Ltd v Secretary, Department of Health and Aged Care [2003] FCAFC 288, (2003) 145 FCR 1 at [42] and Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 388-389 [91], and in addition MIAC v SZIZO (2009) 238 CLR 627 at [26], [35]). The Appellant's submissions at para 28 cite further authority to the same effect and at para 46 describe this point as "uncontroversial". There is nothing in the Act, in particular in s 65, to suggest that the legislature intended that an error by the Tribunal in relation to one visa
30 criterion was to deprive the Tribunal of authority to decide whether a different and independent visa criterion was met. Rather, the fact that s 65(1)(b) required that the Tribunal affirm the refusal of the visa if any applicable criteria for it were not satisfied indicates the contrary.

8. There is no authority that holds that a decision maker is deprived of authority to make a decision by reason of having made an error in reasoning when that decision is the only one authorised by the governing statute. That was the case here. Accordingly, whatever label is applied to the Tribunal's error in relation to cl 820.211(2)(d)(ii), the Tribunal
40 necessarily retained authority to refuse the visa.

9. The Appellant's submissions secondly suggest that the majority erred at [27] in characterising the Tribunal's decision concerning cl 820.223(1)(a) as an "entirely separate and discrete conclusion" from that relating to cl 820.211(2)(d)(ii), referring to Mortimer J's reasons at [71-77]. Her Honour there speculates that it is possible that the Tribunal might have allowed more time to the Appellant to pay his debt to the Commonwealth if it had not erred in construing cl 820.211(2)(d)(ii). However as the majority point out at [27], the Appellant did not ask for more time, and the Tribunal waited nine days before making its decision. The majority correctly concluded at [27] that the Tribunal's finding concerning cl 820.223(1)(a) was "not infected" by the error in relation to cl 820.211(2)(d)(ii). There is simply no basis on the facts of this case to suggest otherwise, and Mortimer J's suggestion to the contrary is, with respect, not available on the balance of probabilities. The critical point is that the Tribunal's lack of satisfaction that cl 820.223(1)(a) had been met was not said by the Appellant to involve any error, and provided a sufficient foundation for its decision. It is not to the point (even if it is correct) that the Tribunal might have reached a different conclusion if it had viewed the material before it in a different light. Still less is it relevant to speculate that the Tribunal might have delayed longer and been presented with changed facts.

10. The Appellant's submissions thirdly suggest that the approach of the majority is somehow in conflict with the decision in Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 concerning the "privative clause" in s 474 of the Act. However the suggested jurisdictional error in Plaintiff S157 was a breach of natural justice by the Refugee Review Tribunal: see Plaintiff S157 at [45]. The issues arising in this case concerning the effect of s 65(1)(b) on an unchallenged finding that the Appellant failed to satisfy a visa criterion simply did not arise in Plaintiff S157 and were not considered in it. The key point is not that s 65 somehow achieves what s 474 could not. It is that s 65 defines the obligations of the decision-maker so as to require refusal of the visa if (as was uncontroversially the case here) it is not satisfied that an applicable criterion is met.

11. The Appellant's submissions also suggest that the majority's approach is "unnecessary" because the issue can be satisfactorily approached as one of discretion, and "complex". The first suggestion begs the question as to the correct state of the law, and in any case the Minister submits that if the matter be approached as one of discretion he should nevertheless succeed

(see Part VI below). The second suggestion depends on the asserted difficulty of determining whether an error in relation to one visa criterion is truly independent from a finding in relation to a different visa criterion. This depends on the terms of each criterion and is not necessarily "complex". It is not apparent that the majority's conclusion at [32], which as previously submitted was clearly correct, involved questions of any great complexity or difficulty.

Part VI: ARGUMENT ON FIRST RESPONDENT'S NOTICE OF CONTENTION

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12. The Minister's Notice of Contention raises two issues.

13. The first issue is whether the majority at [27], and Mortimer J at [65-70], erred in characterising the error made by the Tribunal in relation to cl 820.211(2)(d)(ii) as a jurisdictional error. That error was undoubtedly an error of law, but the Court has held that not all errors of law go to jurisdiction: Re MIMIA; Ex parte Applicant S20/2002 (2003) 198 ALR 59 at [57] per McHugh and Gummow JJ; East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission (2007) 233 CLR 229 at
20 [71] per Gummow and Hayne JJ; Kirk v Industrial Relations Commission of NSW (2010) 239 CLR 531 at [66]. "Jurisdictional error" is a term of conclusion, serving to identify errors that have a particular consequence (relevantly, the invalidity or ineffectiveness of a purported decision): SZDAV v MIMIA (2002) 199 ALR 43 at [27]; Plaintiff S157 at [76].[1] The label cannot properly be applied to an identified error before determining whether it does have that consequence.

14. MIMA v Yusuf (2001) 206 CLR 323 at [82] per McHugh, Gummow and Hayne JJ, following Craig at 179, suggests that a jurisdictional error must
30 be one that affects the Tribunal's exercise of power. For the reasons already given in para 9 above, the majority's conclusion at [32] that the Tribunal's finding concerning cl 820.223(1)(a) was not affected by its error in relation to cl 820.211(2)(d)(ii) was correct. Once that is accepted, then the error made by the Tribunal cannot be said to be a jurisdictional error, as opposed to a non-jurisdictional error of law, 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 its finding concerning cl 820.223(1)(a).

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[1] See also Aronson, "Jurisdictional Error without the Tears" in Groves and Lee (eds), Australian Administrative Law: Fundamentals, Principles and Doctrines (2007) 330 at 333.

15. Mortimer J erred at [65] in holding that the statement in Yusuf that a jurisdictional error is one that affects the exercise of power is not a separate requirement for a jurisdictional error to be made out. Federal Court authorities cited by the Minister below, in particular VCAD v MIMIA [2005] FCAFC 1 at [22] per Gray J; MIBP v Lesianawai (2014) 227 FCR 562 at [60] per Buchanan J; and SZMCD v MIMA (2009) 174 FCR 415 at [120-122] per Tracey and Foster JJ, each cited Craig or Yusuf in support of the proposition that a jurisdictional error must be one that affects the Tribunal's exercise of power. While it is true as Mortimer J points out at [87] that the cases involving protection visas such as VCAD and SZMCD involve consideration of a single visa criterion, that does not mean that they are not applicable by way of analogy in this case. In SZMCD for example, a suggested error in relation to relocation was said not to affect the Refugee Review Tribunal's exercise of power within Craig because the applicant had already been found not to have a well founded fear of persecution so the Tribunal "had no choice other than to affirm the delegate's decision" (SZMCD at [121]), and the issue of relocation was "an alternative and independent basis for affirming the delegate's decision" (SZMCD at [122]). That is sufficiently analogous to the effect of the different and independent visa criteria in this case for the Federal Court's approach in SZMCD to be applicable here.

16. The Minister also adopts his submissions to similar effect in Shrestha v MIBP (M141/2017) at paras 27-33.

17. Once it is concluded that no jurisdictional error was made by the Tribunal, the appeal must necessarily fail. The constitutional writs do not lie in the absence of an error going to jurisdiction (East Australian Pipeline at [71]) and other forms of relief are precluded by s 474: Plaintiff S157. Legislation may deny the availability of relief for non-jurisdictional error of law: Kirk at [100].

18. The second issue raised by the Minister's Notice of Contention is whether, if the Tribunal did commit a jurisdictional error, relief should nevertheless have been refused in the exercise of the Court's discretion. Before the Federal Circuit Court the Minister had argued that a "backward-looking" test for the exercise of discretion should apply, referring to Kabir v MIAC [2010] FCA 1164, (2010) 118 ALD 513 (Siopis J) at [33-53] and Kaur v MIBP [2016] FCA 132 (Perry J) at [45-47], and as the Tribunal was required to affirm the refusal of the visa because cl 820.223(1)(a) was not satisfied at

the time of its decision then relief should necessarily be withheld applying a "backward-looking" test. Judge Street rejected this submission at [23-28]. While the issue was not raised as a ground of appeal before the Federal Court by the Minister, after the Court's judgment was reserved Shrestha v MIBP [2017] FCAFC 69 was handed down, and the Minister drew the Court's attention to Shrestha at [12-17], [41-48] and [121-127] (as Mortimer J notes at [95]). The decision in Shrestha provided fresh support for the position which the Minister had taken before the Federal Circuit Court. The majority at [31] stated that, given its conclusion, it was "unnecessary to resolve any question as to whether relief would have been refused in the exercise of the Court's discretion".

19. A "backward-looking" test is appropriate for the reasons given in the Minister's submissions in the appeal to this Court in Shrestha at paras 34-50. As explained there, the point is not that relief would be futile, but that relief is not justified in circumstances where, had the identified error not been made, the decision would inevitably have been the same. Once that is accepted, even if there was a jurisdictional error by the Tribunal relief should be refused in the exercise of the Court's discretion. The error made by the Tribunal in relation to cl 820.211(2)(d)(ii) could not have affected its decision at the time it was made, since at that time the Appellant's debt to the Commonwealth remained unpaid and no arrangements had been made to repay the debt so he necessarily failed to satisfy cl 820.223(1)(a).

Part VII: ESTIMATE OF ORAL SUBMISSIONS

20. The Minister estimates he will require 1 hour in oral submissions.

6 February 2018

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