SHAHI v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M10/2011)

Date Special Case referred to Full Court: 15 June 2011

The plaintiff was born in Afghanistan. He has never known his precise date of birth. On 18 May 2009, the plaintiff arrived in Australia at Christmas Island as an unaccompanied minor without a valid visa. He was granted a Protection (Class XA)(subclass 866) visa on 16 September 2009. On 4 December 2009 the plaintiffs mother, who was living outside Australia, applied for a Refugee and Humanitarian (Class XB) visa. She sought to satisfy the criteria for the grant of a subclass 202 visa under the "split family" stream, which meant that she was not required to meet the criterion of being subject to substantial discrimination, amounting to gross violation of human rights in her home country, Afghanistan. The plaintiff's brothers and sisters and his niece were included as secondary applicants. The plaintiff was the proposer in respect of his mother's application. He was, at that time, under the age of 18 years. On 7 September 2010, a delegate of the defendant refused the mother's application because he was not satisfied that at the time of decision the mother continued to be a member of the immediate family of the plaintiff. Pursuant to Regulation 1.12AA of the *Migration Regulations* 1994 (Cth) (the Regulations), "a member of the immediate family" includes the parent of a person who is less than 18 years old. The plaintiff was, at the time of the delegate's decision, over the age of 18 years.

On 27 January 2011 the plaintiff filed an application for an order to show cause in this Court. He contends that the delegate erred in his interpretation of clauses 202.211(2) and 202.221 of the Regulations, which relevantly provide:

"202.211(2) The applicant meets the requirements of this subclause if:
- (a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called *the proposer);* and
- (b) either: ...
  - (ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or ...
- (ba) the application is made within 5 years of the grant of that visa; and
- (c) the applicant continues to be a member of the immediate family of the proposer; and
- (d) before the grant of that visa, that relationship was declared to Immigration."

202.22 Criteria to be satisfied at time of decision
- 202.221 The applicant continues to satisfy the criterion specified in clause 202.211.

On 15 June 2011 Crennan J referred the special case agreed upon by the parties to the Full Court. The following question has been stated for the consideration of the Court:

Did the delegate make a jurisdictional error in finding that the plaintiff's mother did not meet the requirements of clause 202.221 of Schedule 2 to the *Migration Regulations* 1994 (Cth)?