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 SUBMISSION**

Part I – Certification

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

Part II – Concise statement of issues

2. The issues which the appeal presents are:

   a) whether an administrative decision-maker can have jurisdiction or authority to make a decision under s 65 of the Migration Act 1965 (Cth) ("**the Act**") which involves a jurisdictional error;

   b) where a court finds a jurisdictional error in an administrative decision, whether the only remaining issue is the question of discretion to grant relief; and

20 c) the operation of the principles of jurisdictional error, invalidity and relief under s 75 of the Constitution where a decision under s 65 of the Act is supported by two or more alternative bases, one of which is directly affected by jurisdictional error.

Part III – Certification concerning s 78B of Judiciary Act

3. No notice under s 78B of the Judiciary Act 1903 is required to be given.

Dated: 17 January 2018
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Part IV – Citation of judgments below

4. The appeal to the High Court is from a judgment of the Full Court of the Federal Court in Minister for Immigration v Hossain [2017] FCAFC 82.

5. The appeal to the Full Court of the Federal Court was from a judgment of the Federal Circuit Court in Hossain v Minister for Immigration [2016] FCCA 1729.

Part V – Narrative statement of relevant facts

6. In May 2003 the appellant, a national of Bangladesh, arrived in Australia on a student visa which ceased on 7 November 2005: AB **. This was the last day the appellant held a substantive visa.

10 7. In August 2013 the appellant commenced a de facto relationship with an Australian citizen: AB **.

8. In May 2015 the appellant applied under s 45 of the Act for a Partner (Temporary) (Class UK) visa on the basis of his relationship with the sponsor: AB **. The criteria for the visa, prescribed by s 31(3) of the Act and reg 2.03 of the Migration Regulations 1994 (Cth) ("**the Regulations**"), were contained in Part 820 of Schedule 2 of the Regulations. Among the criteria:

   a) One criterion (clause 820.211) for the visa involved the question of whether "the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria": see
20 clause 820.211(2)(d)(ii). Criterion 3001 provided:

      "The application is validly made within 28 days after the relevant day ..."

   b) Another criterion (clause 820.223) for the visa provided in part that the applicant "satisfies public interest criteria ... 4004 ...". Public Interest Criterion 4004 provided:

      "The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment."

9. In December 2015 a delegate of the first respondent ("**the Minister**"), appointed and empowered pursuant to s 496 of the Act, made a decision under s 65 of the Act refusing to grant the visa: AB **.

10. In January 2016 the appellant applied to the second respondent ("**the Tribunal**") under s 347 of the Act for review of the delegate's decision: AB **. Pursuant to s 349(1) of the Act, the Tribunal "may ... exercise all the powers and discretions that are conferred by this Act" on the primary decision-maker. On 16 February 2016 the appellant and sponsor appeared at a hearing before the Tribunal: AB **. On 25 February 2016 the Tribunal made a decision affirming the delegate's decision not to grant the visa and, pursuant to s 368 of the Act, prepared a written statement which set out its decision and reasons for decision: AB **.

11. The Tribunal, in its statement of reasons, made findings concerning the two criteria in paragraph 8(a) and (b) above as follows:.

    a) Clause 820.211: The Tribunal found at [13] that the appellant did not satisfy criterion 3001: AB **. In considering whether there were compelling reasons for not applying the Schedule 3 criteria, the Tribunal stated at [16] that "the question of whether there are compelling reasons for not applying the Schedule 3 criteria must be considered in relation to circumstances existing at the time of application": AB **. The Tribunal then found at [37] that it "is not satisfied there are compelling reasons for not applying the Schedule 3 criteria" and "accordingly, the applicant does not meet clause 820.211(2)(d)(ii)": AB **.

    b) Clause 820.223: The Tribunal found at [39] that "the applicant does not meet PIC 4004 for the purpose of clause 820.223": AB **. As explained by the Tribunal at [39], the appellant had an outstanding debt to the Commonwealth at the time of the Tribunal's decision, and the Tribunal was not satisfied that appropriate arrangements had been made for repayment of the debt.

12. In March 2016 the appellant applied to the Federal Circuit Court under s 476 of the Act: for relief in relation to the Tribunal's decision: AB **.

13. In May 2016 the appellant paid the outstanding debt to the Commonwealth: AB **.

14. On 11 July 2016 there was a hearing of the appellant's application to the Federal Circuit Court: AB **. At the hearing, in relation to the two criteria in paragraph 8(a) and (b) above:

    a) Clause 820.211: The Minister conceded that the Tribunal erred in its finding that the appellant did not satisfy the criterion in clause 820.211. The concession, recorded in the decision of the Full Court of the Federal Court at [49] (AB **), was in the following terms:

    > "The Minister concedes that the tribunal fell into error for the reasons identified in Waensila ... in construing clause 820.211(2)(d)(ii) as confining the decision-maker's satisfaction of whether there are compelling reasons for not applying schedule 3 criteria to circumstances which only exist at the time of application."

    b) Clause 820.223: The appellant conceded that there was no jurisdictional error in respect of the Tribunal's finding that the appellant did not satisfy the criterion in clause 820.223.

15. On 11 July 2016 the primary judge in the Federal Circuit Court gave an ex tempore judgment. His Honour found at [22] that the Tribunal's error in the course of finding that the appellant did not satisfy the criterion in clause 820.211 was a jurisdictional error: AB **. His Honour then turned to the question of whether to grant relief. His Honour approached the question as one of discretion and utility. His Honour, after referring to the evidence before him that the appellant had repaid his debt to the Commonwealth, considered it appropriate to grant relief: at [23]-[29] (AB **). His Honour made orders issuing a writ of certiorari to quash the decision of the Tribunal and remitting the matter to the Tribunal to be determined according to law: AB **.

16. On 28 July 2016 the Minister filed a notice of appeal in the Federal Court: AB **. The single ground of appeal was that the Federal Circuit Court erred in finding that the Tribunal's error went to its jurisdiction. In the event that the primary judge had a discretion to grant relief, the Minister did not challenge the judge's exercise of that discretion. As recorded in the decision of the Full Court at [55] and [100], the Minister "accepted on the appeal that if the Federal Circuit Court was correct to approach the matter in terms of discretion and utility, there was no appealable error in the way it had done so" and "as the Minister accepted, the Federal Circuit Court's discretion did not miscarry": AB **.

17. On 18 November 2016 there was a hearing of the appeal before the Full Court of the Federal Court.

18. On 25 May 2017 the Full Court issued a judgment: AB **. Flick and Farrell JJ, in the majority ("**the Majority**"), allowed the appeal. Mortimer J, dissenting, dismissed the appeal.

19. On 22 June 2017 the appellant applied to the High Court for special leave to appeal: AB **. On 13 December 2017 the High Court granted special leave to appeal.

Part VI – Argument

Section 65 of Migration Act, jurisdictional fact and jurisdictional error

10 20. As stated in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 (**SGLB**) at [37] (Gummow and Hayne JJ):

> "... s 65 of the Act provides that the minister is to grant a visa sought by valid application "if satisfied" of various matters. These include that any criteria for the visa prescribed by the Act are satisfied: s 65(1)(a)(ii). Section 65 imposes upon the minister an obligation to grant or refuse to grant a visa, rather than a power to be exercised as a discretion. The satisfaction of the minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned.[1]

21. Further, where the Minister, in a decision under s 65 of the Act, makes findings concerning more than one criterion for the visa, in respect of each criterion, the decision-
20 maker's finding as to whether or not the criterion has been satisfied is a jurisdictional fact. The same analysis applies to the Tribunal when exercising its function of review under s 348 of the Act.[2]

22. The concepts of jurisdictional fact and jurisdictional error are related: *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 (**Kirk**) at [64]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (**SZMDS**) at [24] and [120]. Where a decision-maker makes an error of a particular type in the course of making a finding concerning a jurisdictional fact, the error will be a 'jurisdictional error'. In *Craig v South*

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[1] See also *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [34]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (**SZMDS**) at [1] and [20] (Gummow ACJ and Kiefel J) and [102] (Crennan and Bell JJ).

[2] See for example *SGLB* at [37]; *SZMDS* at [3] and [29]; [101].

Australia (1995) 184 CLR 163 (**Craig**) at 179 the High Court explained the types of error in the following manner ("**the Craig Approach**"):

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law ... If such 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 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.

23. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (**Yusuf**) at [82] the High Court applied the Craig Approach in considering a decision of a tribunal made under the Act. In *Kirk* at [67] the High Court again referred to the Craig Approach with approval.

24. Thus, if an administrative decision-maker, in the course of making a finding concerning a jurisdictional fact, makes an error of the type explained in the Craig Approach, the error is a jurisdictional error.

25. Not dissimilarly, in *SZMDS* at [120] Crennan and Bell JJ stated:

> "An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error."

Jurisdictional error, invalidity and statutory context

26. The Craig Approach concludes with the proposition that "[s]uch an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it". This proposition was developed in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (**Bhardwaj**) at [51] (and [53]) where Gaudron and Gummow JJ stated (McHugh J agreeing at [63]):

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.

27. The proposition that a decision that involves jurisdictional error is regarded in law as no decision at all was repeated in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (**Plaintiff S157/2002**) at [76] ("This Court has clearly held that an administrative decision which involves jurisdictional error is regarded in law as no decision at all"), and by the Full Court in the related context of a decision affected by fraud in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 (**SZFDE**) at [51].[3]

28. Whether or not a particular error by an administrative decision-maker is a jurisdictional error or invalidates the decision depends in part upon the statutory context. Thus, the Craig Approach commences with the phrase "At least in the absence of a contrary intent in the statute ...". This point has been made in various ways in other contexts in judicial review of administrative decisions made under the Act, such as *Bhardwaj* at [47] ("Parliament may give an administrative decision whatever force it wants" but "legislative provisions should not be construed as giving rise to an implication which gives an administrative decision greater force or effect than it would otherwise have unless that implication is strictly necessary") and [54]-[60]; *Plaintiff S157/2002* at [77] ("it may be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision-maker exceeding its jurisdiction"), *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (**SZIZO**) at [26], [32] and [35] ("whether there is to be discerned from the legislative scheme an intention to invalidate in consequence of non-compliance with any of the obligations dealing with the manner of giving and receiving review documents"), *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 254 (**SAAP**) at [205]-[208] per Hayne J, and *Ma v Minister for Immigration and Citizenship* [2007] FCAFC 69 (**Ma**) at [27] where the Full Court stated:

> "The consequences of a decision infected by jurisdictional error will be determined by the Act which empowers the decision ... decisions affected by jurisdictional error can have legal and practical consequences depending on the statutory context."[4]

Jurisdictional error and relief

[3] See also *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 (**NAIS**) at [71] per Kirby J.

29. Where a court finds that an administrative decision involves or contains a jurisdictional error, the traditional approach developed by the High Court is that the court will then consider whether to grant relief by way of a writ under s 75 of the Constitution.[5] The "writ will issue almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course": *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (**Aala**) at [51]-[52] per Gaudron and Gummow JJ (Gleeson CJ agreeing at [5], Hayne J agreeing at [172]). The "discretion ... is not to be exercised lightly against the grant of a final remedy": *Aala* at [55]. The discretion "is to be exercised against the background of the animating principle described by Gaudron J in *Enfield City Corporation v Development Assessment Commission* [(2000) 199 CLR 135 at [56]] (*Aala* at [55]):

> "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less."[6]

30. Circumstances in which a court may decline to grant relief include where "no useful result could ensue", where "the party has been guilty of unwarrantable delay", where "there has been bad faith on the part of the applicant" and where the applicant "has acquiesced in the invalidity or has waived it": *Aala* at [56] and [57].[7]

31. One circumstance in which no useful result could ensue is where, in light of a separate or alternative finding by the decision-maker, "the decision-maker was bound by the governing statute to refuse" the application: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 (**SZBYR**) at [29]. In these types of matters, the court may need to consider whether the jurisdictional error "infected" or "affected" the separate or alternative finding (*Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 (**WZAPN**) at [73]-[79]) or whether the separate or alternative finding was

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[4] See also *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1; [2003] FCAFC 288 at [42] and [64]; and *SZKUO v Minister for Immigration and Citizenship* (2009) 145 FCR 1; [2009] FCAFC 167 at [26]-[27].

[5] See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [4]-[5] (Gleeson CJ), [51]-[59] (Gaudron and Gummow JJ), [104] (McHugh J), [131] (Kirby J), and [172] (Hayne J);*SAAP* at [79]-[84]; NAIS v at [55]; *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [3] and [27]-[29]; *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [72]-[78];

[6] See also *SAAP* at [79]-[84] (McHugh J); [210]-[211] (Hayne J); *NAIS* at [55], [120]-[123]; *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [12]-[16] (Bromberg J), [41]-[48] (Bromwich J).

[7] See also *SAAP* at [79]-[84].

"reached quite independently" of the jurisdictional error (*SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1 (**SZOOR**) at [102] and [114])

32. The nature of the jurisdictional error before the High Court in *Aala* was a denial of procedural fairness. However, the relationship between jurisdictional error and relief under s 75 of the Constitution explained in the passages from *Aala* above has been applied by the High Court and Full Federal Court in respect of other types of jurisdictional error: see *SAAP* at [210]-[211] per Hayne J (invalid decision arising from failure to comply with s 424A of Act (Kirby J agreeing at [174]-[176])); *SZBYR* at [3] and [27]-[29] (failure to comply with s 424A of Act); *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 (**Lu**) at [48] and [51] (Minister failed to take into account mandatory consideration); *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181 (**Lee**) (Tribunal failed to comply with s 359A of Act); *Gill v Minister for Immigration and Border Protection* [2017] FCAFC 51 at [95]-[100] (Tribunal's findings based on no evidence and factually erroneous); *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 (Tribunal asked wrong question in applying s 116(1)(a) of Act) at [12]-[16] (Bromberg J), [41]-[48] (Bromwich J), [121]-[126] (Charlesworth J)).

Bases of jurisdictional error overlap

33. As stated or indicated by the High Court in various decisions, the bases of jurisdictional error overlap – see for example *Yusuf* at [82]-[85]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [24], [25] and [32] (tribunal's error could be characterized as either "a failure to accord natural justice or … a constructive failure to exercise jurisdiction"); *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [25]-[26] and [100] (overlap between rules of procedural fairness, "duty to base a decision on evidence" and "duty to act judicially"); *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [27], [32] and [43] (overlap between obligation to afford procedural fairness, "failure to comply with the duty imposed by s 414(1) to conduct the review" and "the duty under s 425(1) to hear from the applicant"); *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 (**FTZK**) at [19] ("specific grounds of judicial review may overlap"); *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at [25]. For example, there will be cases

where a particular error by a decision-maker under the Migration Act may be characterised as both a denial of procedural fairness and some other type of error.

34. The points in the above paragraph support a conclusion that the consequence for the validity of a decision affected by an error of the type stated in the Craig Approach should be determined by reference to the principles explained in *Aala* at [51]-[59].

Analysis in courts below

Federal Circuit Court (AB **)

35. In the Federal Circuit Court, the primary judge made his decision in the following way. His Honour at [12] (AB **) recorded that "the question that arises first ... is whether the character of the error made by the Tribunal in confining itself to compelling reasons at the time of application is properly described as a jurisdictional error". His Honour considered at [16] the Craig Approach and noted at [17] "the importance of determining whether the error affects the exercise of power in a material way". His Honour concluded at [22] (AB **) that the character of the error made by the Tribunal was a jurisdictional error. His Honour at [23] commenced considering whether or not to grant relief which involves discretionary considerations. His Honour concluded at [29] that "as a matter of discretion it is appropriate to grant relief".

Full Federal Court – Mortimer J (AB **)

36. In the Full Federal Court, Mortimer J approached the matter in two alternative ways. Her Honour's first approach commenced with a consideration of whether the Tribunal committed a jurisdictional error. Her Honour observed at [56] (AB **), with reference to *Plaintiff 157/2002,* that "an error that is jurisdictional in nature cannot be protected by [a privative] clause". Her Honour then considered at [58] the statutory power pursuant to which the Tribunal made its decision, being s 65 of the Act. Her Honour concluded at [59] that "if there is a miscarriage of the formation of a decision-maker's state of satisfaction about whether a criterion for the grant of a visa is met, most obviously, in one of the ways set out in Craig and Kirk, then the requisite jurisdictional precondition for an exercise of power under s 65 does not exist and the exercise of power is liable to be set aside". Her Honour at [60] described the nature of the error by the Tribunal in the present matter. Her Honour at [63]-[66] considered the nature of the Tribunal's error in the context of the Craig Approach, and concluded at [66] that the Tribunal's "error was

jurisdictional in nature". Her Honour concluded at [70] that "the correct approach is to accept an error of this kind is jurisdictional and then to ask whether there is utility in the grant of relief to an applicant because of a second basis for the decision on review".

37. Her Honour's second and alternative approach, commencing at [71] (AB **), responded to the Minister's submission that the Tribunal's error was not jurisdictional because it did not "affect the exercise of the Tribunal's review power". Her Honour at [71] set out an upfront finding that "the error about clause 820.211(2)(d)(ii) was capable of affecting the exercise of the Tribunal's power and its approach to PIC 4004". Her Honour at [72]-[77] provided detailed reasons in support of this finding, including that "the Tribunal's error about clause 820.211(2)(d)(ii) concerned a visa criterion with a significant discretionary element" (at [72]), there were discretionary matters associated with the criterion in PIC 4004 including "what constitutes 'appropriate' arrangements to repay a debt due to the Commonwealth" (at [72]), 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]), and "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]). Her Honour at [76] again discussed the discretionary elements associated with PIC 4004. Her Honour concluded at [77] that "the two visa criteria in issue on the review ... although separate were not entirely independent of each other".

38. Her Honour, after considering at [78]-[94] some authorities on which the Minister relied, turned at [96]-[100] (AB **) to the discretion to refuse relief where jurisdictional error is identified. Her Honour explained at [100]:

> "Where on review there were two reasons for a Tribunal's conclusion that a visa should not be granted, relating to two different visa criteria, it will not always be the case that there will be utility in remitter. It will depend on the particular visa criteria in issue, the state of the evidence before the Court, and the decision-maker's reasons."

Her Honour concluded at [100] that "the Federal Circuit Court's discretion did not miscarry".

39. In summary, her Honour applied the traditional approach to jurisdictional error explained in cases referred to in paragraphs 20 to 34 above. Among other matters, her Honour

considered and applied the Craig Approach (at [57]-[60]), including considering the statutory context and statutory power pursuant to which the Tribunal made its decision (at [56]-[60]), and her Honour concluded, after a careful and detailed analysis, that the Tribunal's error concerning clause 820.211 affected the Tribunal's exercise of power (at [71]-[77]).

Full Federal Court – the Majority (AB **)

40. The Majority in the Full Federal Court accepted at [27] (AB **) that the Tribunal committed a jurisdictional error "in respect of the construction and application of clause 820.211(2)(d)(ii)" and at [30] that "the conclusion of the Tribunal in respect of clause 820.211(2)(d)(ii) was in excess of the jurisdiction or authority vested in it". Thus, all justices in the Full Federal Court (as well as the primary judge in the Federal Circuit Court) found that the Tribunal committed a jurisdictional error. However, the Majority continued that, although the Tribunal committed a jurisdictional error, "the Tribunal nevertheless retained jurisdiction or authority to determine the separate and discrete point going to Public Interest Criterion 4004": at [30]. It followed, according to the Majority, that the Tribunal had "jurisdiction or authority" to make the decision refusing to grant the appellant's visa, with the consequence that the Federal Circuit Court had no discretion to grant relief.

41. One matter important to the Majority's conclusion that "the Tribunal nevertheless retained jurisdiction or authority" to make the decision it made was its view that the Tribunal's finding concerning the appellant's failure to satisfy PIC 4004 was "entirely separate and discrete" from its finding in respect of clause 820.211(2)(d)(ii). Thus the Majority stated at [23] that a jurisdictional error on the part of the Tribunal did not have the consequence "that the Tribunal was incapable of determining a separate and discrete point, being the conclusion expressed in respect to Public Interest Criterion 4004"; at [27] that the appellant's failure to satisfy PIC 4004 was an "entirely separate and discrete conclusion" by the Tribunal from its conclusion in respect of clause 820.211(2)(d)(ii); at [29] that the statutory context in which the Tribunal made its decision was one in which the findings of fact relevant to the reaching of a state of satisfaction in respect of one criteria "stand separate and apart from" the findings of fact relevant to another criterion; and at [30] that, although the Tribunal's conclusion in respect of clause 820.211 involved

jurisdictional error, "the Tribunal nevertheless retained jurisdiction or authority to determine the separate and discrete point going to Public Interest Criterion 4004".

42. A second matter important to the Majority's conclusion that "the Tribunal nevertheless retained jurisdiction or authority" to make the decision it made was the construction of s 65 of the Act. For example, the Majority stated at [25] that "section 65(1)(b) of the Migration Act ... forever remained an impediment to Mr Hossain's path of success because he did not satisfy s 65(1)(a)(ii) at the time the Tribunal made its decision".

Error in approach of the Majority

43. There are difficulties with the Majority's approach and conclusion that, although the Tribunal committed a jurisdictional error, "the Tribunal nevertheless retained jurisdiction or authority to" make its decision refusing to grant the appellant's visa, with the consequence that the Federal Circuit Court had no discretion to grant relief. The difficulties include the following.

44. One difficulty is that the Majority's approach and conclusion are inconsistent with the approach to jurisdictional error in administrative decisions and its consequences explained by the High Court in decisions referred to in paragraphs 20 to 34 above. For example, the Craig Approach concludes with the statement that a jurisdictional error by an administrative tribunal "will invalidate any order or decision of the tribunal which reflects it": see paragraph ** above. The Tribunal's decision in the present matter reflects the jurisdictional error it made in its finding concerning clause 820.211. Further, no High Court decisions referred to in paragraphs 20 to 34 above propose or suggest that, where a court finds, on an application for relief under s 75 of the Constitution, that an administrative decision is infected by jurisdictional error, the decision-maker can "retain jurisdiction or authority" to make the decision such that the court has no discretion to grant relief. Further, despite the existence of a number of Federal Court decisions involving judicial review of administrative decisions made under the Act where the decision-maker's decision is supported by alternative bases one of which is infected by jurisdictional error (referred to, for example, in the decision of Mortimer J at [68]-[69] (AB **) and [78]-[94] (AB **)), none of the Federal Court decisions support the Majority's conclusion that an administrative decision-maker can "retain jurisdiction or authority" to make a decision infected by jurisdictional error such that the court has no discretion to grant relief. Instead, as explained by Mortimer J at [69], in some of these

cases the court found the decision-maker's error was not jurisdictional and in other cases the court found that although the decision-maker's error was jurisdictional relief should be refused on a discretionary basis.

45. A second difficulty with the Majority's approach and conclusion is the Majority's reliance on and emphasis of the point that the Tribunal's finding concerning the appellant's failure to satisfy PIC 4004 was "entirely separate and discrete" (at [27]) (AB **) from its finding in respect of clause 820.211(2)(d)(ii). However, for reasons explained in detail by Mortimer J at [71]-[77] (AB **), the Tribunal's finding concerning PIC 4004 was not in fact separate and discrete from its finding concerning clause 820.211.

46. A third difficulty with the Majority's approach and conclusion is its reliance on s 65 of the Act. According to the Majority, s 65 has the effect that, even though a decision made under s 65 is infected by jurisdictional error, the decision-maker can "retain jurisdiction or authority" to make the decision such that a court, on a judicial review application, has no discretion to grant relief. It is uncontroversial that "the consequences of a decision infected by jurisdictional error will be determined by the Act which empowers the decision": see *Ma* at [27] and other cases in paragraph 28 above. However, a statutory provision would need to be very clearly drafted to have the effect that an administrative decision-maker can "retain jurisdiction or authority" to make a decision infected by jurisdictional error such that the court has no discretion to grant relief. Given the High Court's concerns explained in *Plaintiff S157/2002* about the privative clause in s 474 of the Act, it is difficult to understand how s 65 of the Act can achieve what s 474 failed to achieve. The analysis of Mortimer J commenced at [56] by acknowledging that "an error that is jurisdictional in nature cannot be protected by [a privative] clause".

47. Some more fundamental concerns about the approach of the Majority include the following.

48. First, the High Court has explained the concept of "jurisdictional error" and the relationship between jurisdictional error, invalidity and the grant of relief in the cases referred to in paragraphs 20 to 34 above. The High Court has provided a workable framework which can be applied by judges of the Federal Circuit Court and Federal Court. The approach of the Majority adds a step to the framework which is both unnecessary and complex. The step is unnecessary because, as briefly explained by

Mortimer J at [100] (AB **) and indicated in other cases such as *SZBYR* at [28]-[29], *WZAPN* at [72]-[79] and *SZOOR*, the existing framework satisfactorily accommodates matters where an administrative decision-maker provides two or more alternative bases for refusing to grant a visa under s 65 of the Act and one basis "stands separate and apart from" another basis. The step is complex because, whether one basis for refusing to grant a visa stands "separate and apart from" another basis involves a complex and nuanced analysis. The analysis is likely to involve a consideration of the evidence before the decision-maker including the record of any interview, requires a consideration and analysis of the relationship between the two alternative bases, touches on the mental processes of the decision-maker, and may involve a consideration of the nature of the jurisdictional error. Further, it is a question about which judicial officers may have different views, as reflected in the present decision of the Full Federal Court and in other cases such as *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 and *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346. Further, it is a question which involves assumptions as to the point in time that a decision unaffected by jurisdictional error would be made and the information on which the decision-maker would rely in respect of such a decision. These assumptions, touched upon in the decision of Mortimer J at [71]-[77] (AB **), were not explored in the Majority's decision.

49. Second, as stated in the above paragraph, whether one basis for refusing to grant a visa stands "separate and apart from" another basis involves a complex and nuanced analysis in respect of which the views of judicial officers may differ. Keeping in mind that the concept of jurisdiction is functional and "is used to validate review where review is felt to be necessary" (see *Kirk* at [65]), it is preferable that this analysis applies at the stage where the court, having identified a jurisdictional error in an administrative decision, considers whether or not to grant relief as a matter of discretion. One reason this approach is preferable is because it gives greater control to the courts to decide whether, in circumstances where a decision involves jurisdictional error, it is appropriate to grant relief in light of all the circumstances of the matter.

50. Third, if the High Court upholds the Majority's approach and conclusion, s 65 of the Act will have achieved what the privative clause in s 474 of the Act failed to achieve. The High Court should give careful consideration to such a consequence.

Jurisdictional error and discretion

51. The Majority found at [30] that, although the Tribunal committed a jurisdictional error, "the Tribunal nevertheless retained jurisdiction or authority to" make its decision refusing to grant the appellant's visa. A consequence of this approach was that Federal Circuit Court had no discretion to grant relief. If the High Court decides that this approach is erroneous and the Federal Circuit Court had a discretion to grant relief, the Minister did not challenge in the Full Federal Court the primary judge's exercise of that discretion. As recorded in the Full Court's decision at [55] and [100], the Minister "accepted on the appeal that if the Federal Circuit Court was correct to approach the matter in terms of discretion and utility, there was no appealable error in the way it had done so" and "as the Minister accepted, the Federal Circuit Court's discretion did not miscarry": AB **. Further, the latter statement by Mortimer J involved a positive finding by her Honour that the primary judge's discretion did not miscarry.

Notice of contention

52. On 9 January 2018 the Minister filed a notice of contention. The appellant will respond to the matters raised in the notice in a reply submission.

Part VII – Orders sought by appellant

53. The appeal is allowed.

54. The decision and orders of the Federal Court are set aside.

55. The first respondent is to pay the appellant's costs of the appeal in the High Court and of the proceedings in the Federal Court.

Part VIII – Estimate of number of hours required for presentation of appellant's oral argument

56. The appellant estimates he will need 2 hours to present oral argument.

Dated: 17 January 2018

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