

HOSSAIN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S177/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 82

Date of judgment: 25 May 2017

Mr Sorwar Hossain is a citizen of Bangladesh who arrived in Australia on a student visa in 2003. Since the expiry of that visa in November 2005 Mr Hossain has remained in Australia without a valid visa. In May 2015 he applied for a partner visa. The application was refused by a delegate of the first respondent (“the Minister”), on the basis that Mr Hossain did not satisfy cl 820.211 of Sch 2 to the *Migration Regulations* 1994 (Cth) (“the Regulations”) because the delegate was not satisfied that Mr Hossain met the requirements of criterion 3001.

Clause 820.211(2)(d)(ii) required criteria 3001, 3003 and 3004 of Sch 3 to the Regulations to be satisfied unless the Minister was satisfied that there were compelling reasons for those criteria not to be applied.

Mr Hossain applied to the Administrative Appeals Tribunal (“the Tribunal”), which reviewed the delegate’s decision and affirmed it. The Tribunal found no “compelling reasons” and concluded that Mr Hossain had not satisfied criterion 3001 because he had not lodged his partner visa application within 28 days after the expiry of his student visa. The Tribunal also found that Mr Hossain did not satisfy cl 820.223 of Sch 2 to the Regulations. That was on the basis that he had not met Public Interest Criterion (“PIC”) 4004, because Mr Hossain had outstanding debts to the Commonwealth which he had not arranged to pay.

Mr Hossain then applied to the Federal Circuit Court. In those proceedings, the Minister conceded that the Tribunal had erred by considering “compelling reasons” as at the time Mr Hossain applied for a partner visa, rather than at the time of the Tribunal’s decision (“the Temporal Error”). On 11 July 2016 Judge Street quashed the Tribunal’s decision and ordered the Tribunal to reconsider Mr Hossain’s application to it. His Honour held that the Temporal Error was a jurisdictional error. In relation to Mr Hossain’s non-compliance with PIC 4004, Judge Street granted relief on a discretionary basis, in view of the fact that Mr Hossain had since paid his debts to the Commonwealth (although that had occurred three months after the Tribunal’s initial decision). His Honour considered that the Tribunal, upon a reconsideration of Mr Hossain’s application to it, might find compelling reasons not to apply criteria 3001, 3003 and 3004 of Sch 3 to the Regulations.

An appeal by the Minister was allowed by the Full Court of the Federal Court (Flick and Farrell JJ; Mortimer J dissenting). Flick and Farrell JJ held that although the Temporal Error was a jurisdictional error, the Tribunal’s decision ought not to have been quashed. This was because s 65(1)(b) of the *Migration Act* 1958 (Cth) precluded the making of any decision other than the refusal of Mr Hossain’s visa application. Their Honours held that although the Tribunal had exceeded its jurisdiction in making the Temporal Error, it had not exceeded

its jurisdiction in making the separate finding that Mr Hossain had failed to satisfy PIC 4004. Since Mr Hossain had failed to satisfy that criterion at both relevant times (the time of the delegate's decision and the time of the Tribunal's decision), s 65(1)(b) mandated the refusal of his visa application.

Mortimer J however would have dismissed the Minister's appeal. PIC 4004 had discretionary elements, in that it was a "time of decision" criterion and it prescribed "appropriate arrangements" for the payment of debts to the Commonwealth. Her Honour considered that the Tribunal had some discretionary scope as to both the timing of its decision after a hearing and the appropriateness of arrangements in satisfaction of PIC 4004. Mortimer J held that the "compelling reasons" element of cl 820.211(2)(d)(ii) of Sch 2 to the Regulations was not independent of PIC 4004, as the existence of any such compelling reasons at the conclusion of a review hearing might persuade the Tribunal to give an applicant a longer period of time in which to meet PIC 4004. Her Honour then held that Judge Street had not erred by considering Mr Hossain's payment of debts owed to the Commonwealth in determining that there was utility in ordering the Tribunal to redetermine Mr Hossain's application to it.

The ground of appeal is:

- The Federal Court erred in finding that, although the decision of the Tribunal dated 25 February 2016 was infected by jurisdictional error and contained a conclusion in excess of the jurisdiction or authority vested in it, the Tribunal nevertheless retained jurisdiction or authority to make its decision.