



HIGH COURT OF AUSTRALIA

14 December 2011

SAYED ABDUL RAHMAN SHAHI v MINISTER FOR IMMIGRATION AND CITIZENSHIP
[2011] HCA 52

Today the High Court held that it was not a requirement for the grant of a Global Special Humanitarian visa to the mother of a refugee that the son who proposed her for the visa be under the age of 18 at the time of the decision whether to grant it. A delegate of the Minister for Immigration and Citizenship refused to grant a visa to the plaintiff's mother on the basis that she did not fall within the definition of a member of the plaintiff's "immediate family" (a requirement for a Global Special Humanitarian visa) because the plaintiff had reached the age of 18 after his mother applied for the visa but before the decision on her application was made nine months later. Accordingly, the delegate of the Minister made a jurisdictional error.

The plaintiff, a refugee from Afghanistan, held a protection visa. In December 2009 he proposed that his mother and some other relatives be granted visas to enter and remain in Australia. The Migration Regulations 1994 (Cth) ("the Regulations") provided for prescribed classes of visas including the relevant subclass of Refugee and Humanitarian (Class XB) visas, Subclass 202 Global Special Humanitarian. Schedule 2 of the Regulations set out criteria to be satisfied for the grant of a visa. Clause 202.211(1)(b) of Sched 2 stated, as the criterion to be satisfied at time of application, that the applicant "meets the requirements of subclause (2)". Sub-clause (2) of cl 202.211 set out six requirements, including that the visa applicant must have been a "member of the immediate family" of the proposer at certain specified dates. The expression "member of the immediate family" was defined in reg 1.12AA(1) as including where "A is the parent of B, and B is not 18 years or more." Clause 202.221 required that, for the grant of a Subclass 202 visa, "the applicant continues to satisfy the criterion in clause 202.211."

At the time that the plaintiff's mother made her application the plaintiff was under 18 years of age, but he attained 18 years of age before the Minister's delegate decided whether to grant or refuse the application. As a result, the mother ceased to be a member of the plaintiff's immediate family within the meaning of reg 1.12AA(1). The Minister's delegate decided that the mother's ceasing to be a member of the plaintiff's immediate family required that the mother's application be refused.

The plaintiff instituted proceedings in the original jurisdiction of the High Court seeking certiorari to quash the decision made by the delegate of the defendant Minister. The issue before the Court was how the requirement made by cl 202.221 applied in relation to cl 202.211; that is, what was "the criterion" in cl 202.211 which the applicant must continue to satisfy?

The Court held by majority that the requirement under cl 202.221 should not be read as engaging with cl 202.211(1)(b) or any of the six requirements stated in cl 202.211(2). The drafting history of the Regulations pointed to reading the requirement that the applicant continue to satisfy "the criterion" in cl 202.211 as engaging only with the first criterion, that "[t]he applicant... is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country". The Regulations

contained within the text of the provisions dealing with Subclass 202 visas a readily available form of words that could have been adopted to provide, as a criterion to be satisfied at the time of decision, that the applicant continue to be a member of the immediate family of the proposer. The failure to adopt this precedent suggested that the provision made by cl 202.221 of continuing to satisfy the criterion in cl 202.211 was not to engage with the requirement about membership of the proposer's family.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*