

10 **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

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ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

APPELLANT'S SYNOPSIS OF ARGUMENT

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Part I: Certification

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: Outline of oral argument

1. Introduction

2. The Tribunal's error

- (a) The underlying statutory provisions:

- (i) *Migration Act 1958* (Cth) s 65: AB 212 [9].

- (ii) *Migration Regulations 1994* (Cth) Sch 2, cl 820.211, 820.223: AB 212 [8].

- (b) The two relevant criteria were:

- (i) Public Interest Criterion 3001: AB 221 [40].

- (ii) Public Interest Criterion 4004: AB 212 [9].

- (c) The Tribunal asked the wrong question and erred in law by asking whether there were 'compelling reasons' at the time of application (21 May 2015) rather than the time of decision (25 February 2016): AB 4.

3. The process for determining jurisdictional error

- (a) *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [23]-[27] (*Wei*) makes three relevant points:

- (i) Jurisdictional error is a term of conclusion reflecting the results of a process of statutory construction: *Wei* at [24]-[26].

- (ii) Central to that process is to ask whether the purposes of the scheme would or would not be advanced by holding an exercise of power to be invalid: *Wei* at [26].

- (iii) The ultimate question is whether the duty breached was an express or implied condition of the valid exercise of the power: *Wei* at [23].

- (b) Materiality to outcome may be relevant but is not a necessary element of jurisdictional error.

- (c) In determining whether an error is jurisdictional, it is relevant to consider 'the extent and consequences' of the breach: *Minister for Immigration and*

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Citizenship v SZIZO (2009) 238 CLR 627 at [35]. Because the extent of the breach is relevant, the inherent gravity of the error is important: *ibid*.

4. The error here was jurisdictional:

(a) whether there were compelling reasons was a central issue for the Tribunal:

(i) the Tribunal's function was to *review* the delegate's decision: *Migration Act 1958* (Cth) ss 348, 349;

(ii) ordinarily, the issues arising in relation to a review are those which were dispositive before the delegate: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [34]-[35];

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(iii) the issue that was dispositive before the delegate was the issue of compelling reasons: AB 130-135. The delegate did not address Public Interest Criterion 4004.

(b) The consideration of compelling reasons had a measure of connection with the Tribunal's decision and affected the exercise of a power: *Craig v South Australia* (1995) 184 CLR 163 at 179; *Yusuf* (2001) 206 CLR 323 at [82].

(c) The error was grave.

(d) Parliament did not intend that the decision of the Tribunal be valid in those circumstances: *SAAP* (2005) 228 CLR 294 at [77]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [85]-[86].

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5. Alternatively, if a materiality test is required:

(a) the question is not what the decision *would* have been absent the error; it is what the decision *could* have been. If the decision *could* have been otherwise, it will ordinarily be invalid: *FTZK* (2014) 88 ALJR 754 at [97]; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; *WZAPN* (2015) 254 CLR 610 at [78].

(b) The relevant degree of materiality is low:

(i) because the merits are for the repository of the power;

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(ii) because the Court's role is to determine the legality of decisions;

(iii) because of the rule of law.

(c) For similar reasons, the Court would be cautious before finding that there was no real possibility.

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(d) The more serious the error, the lower the requisite degree of possibility.

6. The Tribunal's error was material in the relevant sense:

(a) The Minister does not dispute that, had the Tribunal asked the corrected question, it might have found that there were compelling reasons at the time of decision.

(b) In those circumstances, there had to be a real possibility that the Tribunal would have found that appropriate arrangements would be made (or had been made) for repayment.

(c) The Full Court erred in finding that Public Interest Criterion 4004 was separate and discrete: AB 214 [17], 218 [30].

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7. The Minister's contention on discretion should be dismissed:

(a) It is not in the interests of justice for the Minister to put the point now. The ground was not advanced before the Full Court: AB 203.

(b) Judge Street declined to exercise his discretion to refuse relief: AB 196-197. The Minister must show, but has not asserted, any *House v The King* error in that exercise of discretion.

(c) In any event, acceptance of the Minister's contention depends on a finding which this Court should not make, namely, that the error could not have affected the Tribunal's decision.

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(d) Further, if the Tribunal has failed to complete its "review", the Court would not decline to issue relief.

Dated: 21 March 2018

G. O'L. Reynolds

B. Zipser

D.P. Hume