

BETWEEN:

Sorwar Hossain
Appellant

and

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Minister for Immigration and Border Protection
First respondent

Administrative Appeals Tribunal
Second respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF ARGUMENT

- 20 2. The decision of the Administrative Appeals Tribunal was based on two separate adverse findings.

a. clause 820.211(2)(d)(ii): The Appellant did not satisfy Schedule 3 criteria 3001, and the Tribunal was not satisfied that there were compelling reasons for not applying the Schedule 3 criteria (AB 8 paras 37-38); and

b. clause 820.223(1)(a): The Appellant did not satisfy PIC 4004, because the Appellant had an outstanding debt to the Commonwealth and the Tribunal was not satisfied that appropriate arrangements had been made for payment (AB8-9, para 39) .

- 30 The First Respondent concedes that the finding in relation to 820.211 involved an error of law. On the other hand, the Appellant does not contend that there was any error in the Tribunal's finding in relation to 820.223.

3. The Tribunal retained authority or power (jurisdiction) to affirm the decision to refuse the visa, notwithstanding the conceded error of law in relation to cl 820.211(2)(d)(ii), and the majority below correctly so held: **First Respondent's submissions, paras 6-11.**

a. Because the Tribunal found (without any error) that the Appellant did not satisfy cl 820.223, it was required by s 65(1)(b) to affirm the visa

refusal. The Tribunal had no authority or power to make any other decision.

SZMDS (2010) 240 CLR 611 at 625 [40], 638 [102], 644 [120].

S297/2013 (2014) 255 CLR 179 at 188-189 [34].

b. The Tribunal's finding on clause 820.223 was separate and discrete, and was not affected by the error of law in relation to clause 820.211.

i. At the time of the decision, the Appellant had an outstanding debt to the Commonwealth and had not made any arrangements for repayment for over 10 years.

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ii. The Appellant did not request an adjournment nor seek any further time to make arrangements to repay the debt. In such circumstances, there is no suggestion that the Tribunal acted unfairly or unreasonably in proceeding to make its decision.

4. The Full Federal Court should have found that the error made by the Tribunal was not jurisdictional error. Accordingly, relief was precluded by s 474 of the *Migration Act*. **First Respondent's submissions, paras 13-17.**

a. Not all errors of law result in jurisdictional error. The error of law in relation to clause 820.211 was not one that affected the Tribunal's exercise of power, in the light of the Appellant's failure to satisfy clause 820.223. It did not result in invalidity of the Tribunal's decision.

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Craig (1995) 184 CLR 163 at 179.

Yusuf (2001) 206 CLR 323 at 351 [82].

Project Blue Sky (1998) 194 CLR 355 at 388-389 [91], 390 [93].

SZIZO (2009) 238 CLR 627 at 637 [26], 640 [35]-[36].

WZAPN (2015) 254 CLR 610 at 637-638 [78].

VCAD [2005] FCAFC 1 at [22]-[23].

SZMCD (2009) 174 FCR 415 at [120]-[122].

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b. Because the Tribunal's decision was within the limits of its authority or power under ss 65 and 349 of the *Migration Act*, it did not involve "jurisdictional error".

5. Alternatively, if the Tribunal's error in relation to clause 820.211 involved a jurisdictional error which deprived the Tribunal of authority to affirm the refusal of the visa based on non-satisfaction of other prescribed visa criteria

(including clause 820.223 and PIC 4004), the Court should exercise its discretion to refuse or withhold relief. **First Respondent's submissions paras 18-19.**

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- a. It is appropriate to apply a "backward-looking" test, in so far as the Tribunal was required to affirm the refusal by reason of the Appellant's failure to satisfy clause 820.223 at the time of decision.
 - b. Accordingly, any "jurisdictional error" in relation to clause 820.211 could not have affected the Tribunal's decision to affirm the refusal, and the Appellant was not deprived of any possibility of a more favourable outcome.

Aala (2000) 204 CLR 82 at 88-89 [4], 106-109 [51]-[58], 122 [104].

Kabir (2010) 118 ALD 513 at 518-521 [34]-[53].

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- c. The point was raised by the First Respondent at first instance. The basis on which the First Respondent contends that the discretion should be exercised is closely related to the arguments concerning the relationship between the conceded error in relation to clause 820.211 and the Tribunal's decision to affirm the visa. Accordingly, there is no reason why the point should not be considered by this Court on the appeal.

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