

TAHIRI v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M77/2012)

Date Special Case referred to Full Court: 30 October 2012

At issue in this proceeding is the proper construction of clause 202.228 and Public Interest Criterion (PIC) 4015 of the *Migration Regulations*. Clause 202.228 provides:

202.228 *If a person (in this clause called the **additional applicant**):*
(a) *is a member of the family unit of the applicant; and*
(b) *has not turned 18; and*
(c) *made a combined application with the applicant —*
public interest criteria 4015 and 4016 are satisfied in relation to the additional applicant.

Public Interest Criteria 4015 provides:

4015 *The Minister is satisfied of 1 of the following:*
(a) *the law of the additional applicant's home country permits the removal of the additional applicant;*
(b) *each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;*
(c) *the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.*

The Plaintiff's family are citizens of Afghanistan and of Hazara ethnicity. The Plaintiff's father went missing in early 2003, when he travelled to another province and did not return. After the father's disappearance, the mother and the family left Afghanistan and travelled to Pakistan. In March 2009, the Plaintiff left Pakistan to travel to Australia and arrived at Christmas Island in May 2009, as an unaccompanied minor. Ultimately he was allowed to apply for a protection visa and, as part of his application, gave evidence that his father had been missing since early 2003 and his family had not heard of him since. The Plaintiff was granted a protection visa in September 2009 and, in his reasons for that decision, the delegate accepted that the father had been missing as claimed.

In November 2009, the mother applied for a Refugee and Humanitarian visa and the Plaintiff proposed his mother's entry into Australia. Each of the Plaintiff's 4 minor siblings was included in the application as a "dependent" child. The mother stated in the application that her current country of residence was Pakistan. Consideration of the mother's application included an interview with the mother and the children, DNA testing of two of the children and a letter to the mother, described as an "invitation to comment and respond" regarding the custody of the minor children and whether the law of Afghanistan permitted removal of the children. In response, the mother provided two documents, one entitled "Aram High Court, Kabul, Afghanistan" and written in English and the other a translation into Persian of the first document: there was a further interview with the mother in relation to those documents. On 2 January 2012 a Delegate of the Defendant made the decision to refuse the visa and advised the mother that cl 202.228 and Public Interest Criterion (PIC) 4015 were not satisfied.

The Plaintiff filed an application for an order to show cause and, on 30 October 2012, Hayne J referred the Special Case agreed by the parties to the Full Court.

The Plaintiff submits that the mother ought to have been found by the Delegate to be the sole person who could determine where her minor children could live; that the Plaintiff's father ought to have been presumed dead; and that there had been a breach of natural justice, in that the mother was not properly informed of the critical issue on which the decision might turn, namely whether the father was dead (as opposed to missing).

The Defendant submits that it was open to the Delegate to find that the home country of each of the children was Afghanistan and that on the material before him, it was open to him not to be satisfied that the law of Afghanistan would permit the removal of the children; that the consent of the mother alone was not sufficient. The Delegate had accorded procedural fairness to the mother by inviting her to comment and respond and the Delegate was not required to presume the father to be dead, as opposed to accepting he was missing, but alive somewhere.

The questions reserved by the Special Case signed by the parties include:

- Did the Delegate make a jurisdictional error in finding that paragraph (a) of PIC 4015 was not satisfied in relation to each additional applicant?
- Did the Delegate make a jurisdictional error in finding that paragraph (b) of PIC 4015 was not satisfied in relation to each additional applicant?
- Was the decision made in breach of the rules of natural justice?