



HIGH COURT OF AUSTRALIA

15 August 2018

SORWAR HOSSAIN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION &
ANOR
[2018] HCA 34

Today the High Court unanimously held that an error of law made by the Administrative Appeals Tribunal in relation to one criterion for the grant of a partner visa did not invalidate the Tribunal's decision not to grant the visa because the Tribunal correctly concluded that the requirements of another criterion were not met. The Court held that, in those circumstances, the Tribunal's error of law in relation to the first criterion did not materially affect the Tribunal's decision.

Mr Sorwar Hossain, a citizen of Bangladesh, applied for a partner visa in May 2015. A delegate of the Minister for Immigration and Border Protection refused to grant the visa and Mr Hossain applied to the Tribunal for review of the delegate's decision. The Tribunal affirmed the delegate's decision because the Tribunal was not satisfied that two criteria prescribed by the Migration Regulations 1994 (Cth) had been met. The first criterion was that the application for the visa be made within 28 days of the applicant ceasing to hold a previous visa "unless the Minister is satisfied that there are compelling reasons for not applying" that criterion. The second criterion was that the visa applicant "does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment". Section 65 of the *Migration Act 1958* (Cth) provided that "if satisfied" that all the criteria prescribed for the visa had been met, the Minister was to grant the visa; and that, "if not so satisfied", the Minister was to refuse to grant the visa. For the purposes of the review of the delegate's decision, the Tribunal was required to determine whether it was satisfied that the criteria had been met.

The Tribunal was not satisfied that the first criterion had been met because Mr Hossain had not applied for the partner visa within 28 days of ceasing to hold a previous visa and the Tribunal was satisfied that there were no compelling reasons, as at the time at which Mr Hossain had applied for the partner visa, for not applying that criterion. The Tribunal also was not satisfied that the second criterion had been met because Mr Hossain had a debt to the Commonwealth which he had made no arrangements to repay, although Mr Hossain told the Tribunal that he intended to repay the debt. The Tribunal accordingly affirmed the delegate's decision not to grant the partner visa.

Mr Hossain applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. Before that Court, the Minister conceded that the Tribunal had made an error of law by deciding that there were no compelling reasons for not applying the first criterion as at the time of the visa application, whereas the Tribunal should have decided whether such reasons existed as at the time of the Tribunal's decision. The Federal Circuit Court held that this error was jurisdictional in nature and meant that the Tribunal's decision was invalid, notwithstanding that the Tribunal also had not been satisfied that the second criterion had been met. On appeal, a majority of the Full Court of the Federal Court held that the Tribunal's error was jurisdictional in nature, but that the error had not stripped the Tribunal of authority to affirm the delegate's decision.

By grant of special leave, Mr Hossain appealed to the High Court. The Court held that a decision-maker is required to proceed on a correct understanding of the applicable law, but that an

error of law will not be jurisdictional in nature if the error does not materially affect the decision. The Tribunal's findings with respect to the second criterion provided an independent basis on which the Tribunal was bound to affirm the delegate's decision. The suggestion that the Tribunal might have allowed Mr Hossain more time to arrange to repay his debt if the Tribunal had not made the error was insufficient to demonstrate that the Tribunal's decision might have been different had it not made the error. The Court therefore dismissed the appeal.

- *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.*