Case Analysis

Kiri Flutter

Case Citation:	*Sayed Abdul Rahman Shahi v Minister for Immigration and Citizenship* [2011] HCA 52
Date of Judgment:	14 December 2011
Jurisdiction:	High Court of Australia
Majority Decision:	French CJ, Gummow, Hayne and Bell JJ
Minority Decision:	Heydon J

Summary

On 14 December 2011, the High Court of Australia ('HCA') held that a delegate of the Minister for Immigration and Citizenship ('the Minister') mis-interpreted cl 202.221 of Sch. 2 to the *Migration Regulations* 1994 (Cth) ('the Regulations'), regarding the criteria required to satisfy an application for a Refugee and Humanitarian visa (subclass 202). Accordingly it was determined that the Minister's delegate had made a 'jurisdictional error' in refusing to grant a Subclass 202 visa to the mother of an Afghani refugee. The visa application was denied on the basis that the plaintiff's mother was no longer a member of the plaintiff's 'immediate family'[1]. This was due to the plaintiff attaining the age of 18 in the nine month period between his mother's application and the Minister's decision.

Background

In May 2009, the plaintiff arrived in Australia from Afghanistan as an unaccompanied minor. In September 2009, he applied for, and was granted, a Protection (Class XA) visa. In December 2009, the plaintiff was the proposer in an application by his mother (and some other relatives) for the grant of a subclass 202 visa. The plaintiff did not know his exact date of birth, however it was agreed upon by both parties that at the time of the application for the subclass 202 visa, he was 17 years of age. In September 2010, the visa application was refused by a delegate of the Minister. The parties agree that between the date of the application and the visa refusal, the plaintiff attained 18 years of age.

Relevant Legislation

So far as is relevant, division 202.2 provides:

> **"202.2 Primary criteria**
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> Note: The primary criteria must be satisfied by all applicants except certain applicants who are members of the family unit, or members of the immediate family, of certain applicants who satisfy the primary criteria. Those other applicants need satisfy only the secondary criteria.
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> **202.21 Criteria to be satisfied at time of application**
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> 202.211 (1) The applicant:

[1] A requirement for the grant of a Subclass 202 visa: cl 202.211(2); cl 202.221

(a) 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; or

(b) meets the requirements of subclause (2).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called the proposer); and

(b) either:

...

(i) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or

...

(ba) the application is made within 5 years of the grant of that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to Immigration

202.22 Criteria to be satisfied at time of decision

202.221 The applicant continues to satisfy the criterion in clause 202.211.

202.222 The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

(a) the degree of discrimination to which the applicant is subject in the applicant's home country; and

(b) the extent of the applicant's connection with Australia; and

(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and

(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia."

The Minister's Submissions

The Minister submitted that the visa application was to be refused due to applicant's failure to adhere to the criterion contained in cl 202.211(2), and cl 202.221. The applicant could not "continue to satisfy" the criterion contained in cl 202.211(2), as the applicant was no longer part of the

plaintiff's 'immediate family' up to the date of the Minister's decision.[2] The Minister submitted that a construction of these provisions that would result in cl 202.221 to having no bearing on the application of cl 202.211(2), would lead to an "absurd result or a result contrary to the purpose of the provisions".[3]

The Minister further submitted that cl 202.222 had not been met. This subdivision requires the Minister to be "satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to" certain matters.[4] In this case, 'compelling reasons' directly related to the satisfaction of those matters laid out in cl 202.211. Consequently, the Minister conceded that the subsequent argument regarding subdivision 202.22 should not provide a separate basis for the Minister's decision.

Application of cl 202.211 and cl 202.221

The question for the HCA centred upon whether the statement contained in cl 202.221, that "the applicant continues to satisfy the criterion in cl 202.211", referred solely to the criterion contained in cl 202.211(1)(a), or the entirety of the criteria contained in cl 202.221. Both the majority and minority judgements were satisfied that the cl 202.221 referred directly to cl 202.221(1)(a), effectively requiring the applicant relying upon this criterion to be subject to substantial discrimination both at the time of application and at the time of decision.

Regarding cl 202.211(2), the majority noted that the criteria contained in the clause do not share similar temporal reference points. Several criteria look to past or present events, while others are fixed by past reference points. Yet almost all are similar in that, "if met at the time of the application, cannot thereafter cease to be met".[5] Only cl 202.211(2)(c), the criterion requiring that the "applicant continues to be a member of the immediate family of the proposer" has a temporal element which continues beyond the date of application. The majority observed that the applicant's continuing adherence to cl 202.211(2)(c) may be directly related to the length of time taken for the Minister to decide the visa application.[6] The majority determined that such an interpretation would produce unsatisfactory results and would provide:

> "evident scope for capriciousness and unjust operation of the requirement in circumstances where its engagement depends upon the occurrence of a relevant factual change which, in the case of a person attaining the age of 18 years, depends wholly upon how promptly the application for a visa is determined. Why should such a construction of the provisions be adopted?"[7]

The *Migration Act* 1958 (Cth) ('the Act') along with its Regulations does not prescribe a time limit within which a subclass 202 visa must be decided. However, the majority noted section 65(1) of the Act, which states that once the Minister is satisfied that a valid visa application meets the relevant criteria, the Minister "is to grant the visa".[8] It *should not* be assumed that the Minister can refuse to consider a valid application for a Subclass 202 visa, nor can the Minister unreasonably delay the decision. The majority further noted that it *should* be assumed that the provisions relating to Subclass 202 visa applications are to be interpreted on the basis that the visa deliberation process will be without delay.[9]

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[2] *Sayed Abdul Rahman Shahi v Minister for Immigration and Citizenship* [2011] HCA 52 ('Shahi') [18]
[3] Ibid. [38]
[4] Ibid. [18]
[5] Ibid. [22]
[6] Ibid.
[7] Ibid. [31]
[8] Ibid. [27]
[9] Ibid. [28]

The majority confirmed that there had been no evidence submitted which demonstrated that the nine month interval between the date of application and the date of decision constituted unreasonable delay. The Minister did successfully refute claims of unreasonable delay in processing by reference to section 39(1) of the Act generally and cl 202.226 of the Regulations in particular, both of which act to limit the number of subclass 202 visas which may be granted per year, while classifying all applications made after this limit is reached as "taken not to have been made".[10] The Minister submitted that the results of section 39(1) and cl 202.226 are avoided by deferring such applications to be processed in the next financial year.

The Minister further submitted that the present case should be considered as equivalent to a hypothetical dealt with in subdivision cl 202.32, whereby the Minister may be obliged to grant a Subclass 202 visa to the former spouse of the proposer where there has been an intervening divorce between the date of application and the date of decision. The majority rejected this comparison on two grounds. First, the majority noted that the hypothetical found in subdiv. 202.32 rests on the unstated premise that the due administration of the Act and Regulations required to issue a Subclass 202 visa may result in an interval so long that the relation between the proposer and the applicant may disintegrate entirely.[11] The majority found this premise to be unacceptable. Second, the Minister has the discretion to deal with such a case outside the constraints of cl 202.211, under cl 202.222(b), as the rupture of the relationship would directly affect the "extent of the applicant's connection with Australia".[12]

The majority also pointed to a drafting problem in regards to the application of cl 202.221 to cl 202.211(2). Namely, iIf 202.221 was to specifically relate to cl 202.211(2)(c) it would result in combining the requirement from cl 202.211, expressed as 'continues to satisfy', with the requirement from cl 202.211, expressed as 'continues to be'. This would result in the unintended textural awkwardness of requiring the applicant to 'continue to continue to be' a member of the proposer's immediate family.[13]

The Court concluded that the adoption of the Minister's construction of cl 202.211(2) and cl 202.221 would lead to a "capricious and unjust" result.[14] Cl 202.221 should not be read as engaging with any of the requirements stated in cl 202.211(2). Consequently, it is not a requirement for the grant of a Subclass 202 visa under cl 202.211(1)(b) that the plaintiff's mother continue to be, at the time of the Minister's decision, a member of the plaintiff's immediate family. The scope of cl 202.221 is restricted to applications made on the basis of the first criterion contained in cl 202.211(1)(a).

Minority Judgment: Heydon J

Heydon J took an opposing view of the relationship between cl 202.221 and cl 202.211(2). In contrast to the majority, he determined that cl 202.221 referred to both criteria contained in cl 202.211. As an applicant need only satisfy one of the two criteria in order to provide a successful application, the use of 'the criterion' in cl 202.221 was appropriate, as each applicant would generally only be concerned with a single relevant criterion. Cl 202.221 operated to require applicants to meet their chosen criterion at both the date of application and the date of decision. Heydon J did not share the majority's misgivings about the adverse effects this relationship may

[10] Ibid. [30]
[11] Ibid. [37]
[12] Ibid.
[13] Ibid. [26]
[14] Ibid. [38]

spawn, stating that cl 202.221 "is capable of affecting applicants adversely so far as a matter is capable of varying over time".[15]

In support of this position His Honour examined the intended effect of the clauses. He posited that the function of cl 202.211(2) and cl 202.221 was to allow for the reunion of 'immediate families' where one member of the immediate family is an Australian citizen or Australian permanent resident who holds or has held a particular visa[16]. In the event that cl 202.221 related only to cl 202.211(1)(a), the cl 202.221 has the effect of compelling the grant of a visa to the applicant where the applicant is no longer a part of the proposer's immediate family.

Heydon J observed that:

> the plaintiff construes a provision dealing with the reunion of "immediate" families as compelling a grant of a visa even though that grant will not lead to the reunion of "immediate" families because the successful applicant, though once a member of the proposer's immediate family, no longer is.[17]

His Honour refuted the presumption, applied by the majority, that changes in the membership of the immediate family of the proposer occur over a long period of time. Instead, he opined that divorce, termination of a de facto relationship, or the movement of an adult child from dependency, could happen quickly. This was particularly so in the case of geographical separation, which Heydon J stated was "not conductive to permanency of relationships".[18]

Heydon J concluded by arguing that the construction of the clauses requires that the plaintiff's mother be a member of the plaintiff's immediate family at three points in time: first, at the point of the plaintiff's initial application for the Subclass 866 (Protection) visa, as per cl 202.211(2)(b)(ii); secondly, at the point of the mother's application for the Subclass 202 visa, as per cl 202.211(2)(c); and, thirdly, at the point of the delegate's decision, as per cl 202.221. His honour observed that "it would be curious if the need for membership of the immediate family applied at the first two points but not the third".[19]

Implications

The practical impact of this decision upon subdiv. 202.21 is quite limited. If an applicant for a subclass 202 visa chooses to meet those criteria set out in 202.211(2), the applicant will be required to "continue to meet" that criteria up until the date of application. However, where there is an *intended* rather than an *incidental*, rupture between immediate family members, between the date of application and the date of decision, the Minister may draw upon the powers located in cl 202.22 and reject the application on the basis that the applicant no longer has a discernable link to Australia. Cl 202.221 will continue to apply to cl 202.211(1) resulting in the requirement that the applicant meet this criterion at both the date of application and the date of decision.

The possibility for further modification of the interpretation and application of the Act lies in the position taken by the majority, that visa applicants should not be forced to bear the negative consequences of bureaucratic or ministerial delay, even where this delay is justifiable. This position is founded on an assumption, implicit in the Act, that deliberations on visa applications are to be finalised promptly. Consequently, any delay by the Minister, undue or due to the circumstances

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[15] Ibid. [45]
[16] For example, as in this case, the Subclass 866 (Protection) Visa, as set out in cl 202.211(2)(b)(ii)
[17] *Shahi* [47]
[18] Ibid. [48]
[19] Ibid. [51]

considered above, will not affect an application, where it is only due to the effluxion of time that the applicant is unable to continue to meet the required criteria.