



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD197/2021

On Appeal from the Federal Circuit and Family Court of Australia (Division 2)

MOHAMMAD ROKIB HOSSAIN and others named in the schedule
Appellant

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND
MULTICULTURAL AFFAIRS** and another named in the schedule
Respondent

ORDER

JUDGES: JUSTICE BESANKO, JUSTICE LOGAN and JUSTICE
O'BRYAN

DATE OF ORDER: 17 November 2021

WHERE MADE: Adelaide

THE COURT ORDERS BY CONSENT THAT:

- 1 The appeal be allowed.
- 2 The orders and judgment of the Federal Circuit and Family Court of Australia made on 17 February 2021 be set aside and in lieu thereof it is ordered that:
 - a) A writ in the nature of certiorari issue quashing the decision of the second respondent dated 14 October 2019.
 - b) A writ in the nature of mandamus issue requiring the second respondent to redetermine the application made to it in accordance with the law.
 - c) The first respondent pay the applicants' costs of the application fixed in the sum of \$7,467.00.
- 3 The hearing listed on 22 November 2021 at 10:15 am before Besanko, Logan and O'Bryan JJ be vacated.



4 The first respondent pay the appellants' costs of the appeal, as agreed or taxed.

THE COURT NOTES THAT:

The first respondent concedes that the decision of the second respondent (**Tribunal**) is affected by jurisdictional error.

Pursuant to s 349(2)(c) of the *Migration Act 1958* (Cth) and reg 4.15(1)(b) of the *Migration Regulations 1994* (Cth), the Tribunal had power to remit the appellants' visa application to the first respondent with a direction that the first appellant satisfied Public Interest Criterion (**PIC**) 4020(1) for the purposes of cl 187.213(1) of Schedule 2 to the Regulations: see reg. 2.03(2) of the Regulations.

The appellants requested the Tribunal review the delegate's finding that the first appellant did not satisfy PIC 4020(1): see Tribunal [20], [21]. The Tribunal was satisfied, at paragraph [35], that the first appellant did not provide a bogus document or false or misleading information relating to his visa application. The Tribunal found, at paragraph [36], that cl 187.213(1) of Schedule 2 to the Regulations (which requires satisfaction of multiple public interest criteria including PIC 4020) was met. In making the findings of fact it did, the Tribunal acted on an understanding that it could overcome the PIC 4020(2) 'bar': see transcript Appeal Book (**AB**) 208.32-213.09 in particular AB 211.11; Tribunal at [21], [22], [35], [36]. That understanding was incorrect: *Kim v Minister for Immigration and Citizenship & Anor* (2008) 167 FCR 578 at 583[23].

Because of its misunderstanding as to the relevance of its fact-finding, the Tribunal did not consider whether to exercise the power in s 349(2)(c) and reg. 4.15(1)(b) and/or misunderstood the scope of that power. Its error was material as it could have deprived the appellants of the possibility of a favourable outcome in relation to the PIC 4020(2) bar, noting that bar had not and has not yet expired in the current matter.

Date that entry is stamped: 17 November 2021


Registrar



Schedule

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Second Appellant	SHARMIN AKTHER
Third Appellant	OHI MOHAMMAD
Second Respondent	ADMINISTRATIVE APPEALS TRIBUNAL