FEDERAL COURT OF AUSTRALIA

Basra v Minister for Immigration and Border Protection [2018] FCA 422

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| Appeal from: | *Basra v Minister for Immigration and Border Protection* (2017) 322 FLR 228; [2017] FCCA 1302 |
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| File number: |  |
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| Judge: | **MOSHINSKY J** |
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| Date of judgment: | 29 March 2018 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – partner visa – where applicant applied in a single application for both a temporary partner visa (Subclass 820 visa) and a residence partner visa (Subclass 801 visa) – where a delegate (the first delegate) refused the application – where the Tribunal (the first Tribunal) affirmed the decision – where the Department then identified an error in decision to refuse the Subclass 801 visa and sought to remake the decision – where another delegate (the second delegate) refused the Subclass 801 visa – where the Tribunal (the second Tribunal) affirmed the decision of the second delegate – whether the second Tribunal had jurisdiction to consider the application for both the Subclass 820 visa and the Subclass 801 visa – where second Tribunal decided that it did not have jurisdiction to consider the Subclass 820 visa – where the primary judge held that the second Tribunal was correct in so deciding – whether primary judge erred in so holding – appeal dismissed |
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| Legislation: | *Freedom of Information Act 1982* (Cth)  *Migration Act 1958* (Cth), ss 30, 31, 45, 46, 65, 67, 348, 474  *Migration Regulations 1994* (Cth), Sch 2, cl 801.221, 820.211, 820.221; Sch 3 |
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| Cases cited: | *Commissioner of Taxation v Hornibrook* (2006) 156 FCR 313  *Manga v Minister for Immigration and Border Protection* (2017) 320 FLR 99  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597  *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336  *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219  *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476  *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398  *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228  *Re Jarman; Ex parte Cook* (1997) 188 CLR 595  *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82  *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32  *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 |
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| Date of hearing: | 10 November 2017 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 43 |
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| Counsel for the Appellant: | Mr A Solomon-Bridge |
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| Solicitor for the Appellant: | Carina Ford Immigration Lawyers |
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| Counsel for the First Respondent: | Ms J Lucas |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | VID 748 of 2017 |
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| BETWEEN: | KARAN BASRA  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 29 MARCH 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J

## Introduction

1. The appellant, a citizen of India, arrived in Australia in 2008 on a student visa.
2. On 4 February 2013, the appellant applied for both: (a) a Partner (Temporary) (Class UK) (subclass 820) visa (**Subclass 820 visa**); and (b) a Partner (Residence) (Class BS) (subclass 801 visa) (**Subclass 801 visa**). There was a single application form for the application for both visas. In the application form, the appellant indicated that he had married his spouse on 19 December 2012. I will refer to the appellant’s spouse as “Ms Y”. The application form stated that Ms Y was a permanent resident of Australia.
3. The applicable provisions relating to partner visas required an applicant to apply at the same time for both a Subclass 820 visa (which was a temporary visa) and a Subclass 801 visa (which was a permanent visa). If the application for the Subclass 820 visa was successful, then a temporary visa would be granted. After a period of time, a Subclass 801 visa could be granted. If granted, this visa would be effectively in substitution for the Subclass 820 visa.
4. The appellant’s application for the visas was refused by a delegate (the **first delegate**) of the first respondent (the **Minister**). This decision was affirmed by the Migration Review Tribunal (the **first Tribunal**).
5. Subsequently, the Department wrote to the appellant’s migration agent to the effect that there had been an error in the decision to refuse the Subclass 801 visa and seeking permission to make this decision again. The letter indicated that this was unlikely to change the outcome of the application. The appellant’s agent gave permission.
6. Subsequently, another delegate (the **second delegate**) of the Minister decided to refuse the application for the Subclass 801 visa. The appellant applied for review of the decision. The Administrative Appeals Tribunal (the **second Tribunal**), which had by this stage replaced the Migration Review Tribunal, affirmed the decision of the second delegate. In submissions to the second Tribunal both before and after the hearing, the appellant contended that: the decision of the first delegate had been affected by jurisdictional error and therefore could not be treated as a decision at all; therefore, the first Tribunal had no power to review that purported decision; and accordingly, the second Tribunal should consider the appellant’s application for both a Subclass 820 visa and a Subclass 801 visa. The second Tribunal rejected these contentions, concluding that it did not have jurisdiction to consider the application for a Subclass 820 visa.
7. The appellant applied to the Federal Circuit Court of Australia for judicial review of the second Tribunal’s decision. The appellant contended, in summary, that: the second Tribunal erred in concluding that it did not have jurisdiction to consider whether the appellant met the criteria for the grant of a Subclass 820 visa; and the Tribunal therefore constructively failed to exercise its jurisdiction. These contentions were premised on the application for both the Subclass 820 visa and the Subclass 801 visa being treated as a single application and, consequently, the decision of the first delegate being treated as a single decision. The primary judge rejected these contentions in reasons handed down on 16 June 2017 (the **Reasons**). The primary judge accepted the Minister’s submissions that: the statutory framework established separate criteria for each visa; and, as a consequence, the first delegate had made two separate decisions (one in relation to the Subclass 820 visa, the other in relation to the Subclass 801 visa). Accordingly, the application for judicial review was dismissed.
8. The appellant appeals to this Court from the judgment of the Federal Circuit Court. The appellant’s contentions on appeal are essentially the same as before the primary judge.
9. For the reasons that follow, no error is shown in the judgment of the primary judge. It follows that the appeal is to be dismissed.

## Background facts

1. On 4 February 2013, the appellant applied for a Subclass 820 visa and a Subclass 801 visa. The form was headed “Application for migration to Australia by a partner”. On the first page, there was a single box available to be ticked in respect of both the Subclass 820 visa and the Subclass 801 visa. This box was ticked by the appellant.
2. On 4 March 2013, the Department of Immigration and Citizenship (the **Department**), as it was then known, wrote to the appellant. The letter referred to his “application for the Partner visa (subclass 820/801)”. At the end of the letter, the Department referred to the option to withdraw the appellant’s “application”, again using singular language.
3. On 4 September 2013, the first delegate decided to refuse the appellant’s application. The decision record, on the first page, in the section headed “Details of visa application”, referred to both the Subclass 820 visa and the Subclass 801 visa. In the first paragraph of the decision record, the delegate stated that various matters had been considered “[i]n reaching my decision” (thus adopting singular language). The delegate noted that the appellant had applied for two visas, namely the Subclass 820 visa and the Subclass 801 visa. She noted that, at the time of the application, the appellant had provided evidence that he was in a marital relationship with an Australian permanent resident (namely, Ms Y). The delegate was therefore satisfied that the appellant met cl 820.211(2) in Sch 2 to the *Migration Regulations 1994* (Cth) at the time of his application. The delegate then referred to the criteria to be satisfied at the time of the decision, being the criteria set out in cl 820.221, and stated that the Department’s records indicated that Ms Y’s permanent residency visa had been cancelled on 26 July 2013. It followed that the appellant did not satisfy the criteria that needed to be satisfied at the time of the decision. The delegate concluded (under the heading “Decision”) that, as the appellant did not meet the criteria in cl 820.221, he did not meet the prescribed criteria for the grant of a Subclass 820 visa and a Subclass 801 visa. The appellant’s application lodged on 4 February 2013 was therefore refused.
4. The appellant applied to the Migration Review Tribunal for review of the decision of the first delegate.
5. On 9 April 2014, the first Tribunal decided to “[affirm] the decision not to grant the [appellant] a Partner (Temporary) (Class UK) visa”, that is, the Subclass 820 visa. The Tribunal set out its reasons in a statement of decision and reasons. This commenced by stating that the application was for review of a decision of a delegate to refuse to grant “a Partner (Temporary) (Class UK) visa”, that is, the Subclass 820 visa. The Tribunal noted that: Ms Y’s visa had been cancelled on 26 July 2013 (on the basis that she had failed to notify the Department of changes in her circumstances); she had sought review of that decision by the Migration Review Tribunal; and the Tribunal had set aside the decision under review and substituted a decision not to cancel her visa. The first Tribunal stated that Ms Y currently held a permanent residency visa. The Tribunal then considered whether the appellant met the criteria in Sch 3 to the *Migration Regulations* or whether those criteria should be waived. The Tribunal explained that an applicant who was not the holder of a substantive visa at the time of the application was required to meet certain criteria in Sch 3. The Tribunal stated that it was not in dispute that the appellant did not have a substantive visa at the time of his application. It was therefore necessary for him to satisfy the Sch 3 criteria unless there were compelling reasons for not applying those criteria. One of the criteria was that the application for the visa had been lodged within 28 days of the “relevant day”, being (relevantly) the last day the applicant held a substantive visa. In the appellant’s case, the “relevant day” was found to be 5 December 2012. As the appellant’s application (lodged 4 February 2013) had not been made within 28 days of the relevant day, the Tribunal found that the applicant did not satisfy this criterion. The Tribunal was not satisfied that there were compelling reasons to not apply the Sch 3 criteria. Accordingly, the Tribunal found that the appellant did not satisfy the applicable criteria in relation to the Subclass 820 visa.
6. The appellant did not seek judicial review of the decision of the first Tribunal.
7. On 21 July 2014, the Department sent an email to the appellant’s migration agent in the following terms:

We have reviewed the decision to refuse [the appellant] a Partner (Residence) (class BS) (subclass 801) visa and identified an error. As such, we would like your permission to make this decision again. This is unlikely to change the outcome of the application, as the requirements to meet for grant remain the same.

Can you please confirm that you continue to act as [the appellant’s] Migration Agent and consent to this action being taken?

We will provide you with a new notification/decision record explaining the decision and your client’s eligibility to seek review. It also means that your client continues to hold the bridging visa granted in association with this visa, a Bridging Visa C.

1. On the same day, the appellant’s migration agent responded by email. The agent confirmed that he was still acting for the appellant and stated: “Please do the needful.”
2. Although the email from the Department dated 21 July 2014 did not identify the error in relation to the decision to refuse the Subclass 801 visa, documents subsequently obtained by the appellant from the Department, pursuant to the *Freedom of Information Act 1982* (Cth), shed light on this. In a Minute of the Department dated 3 July 2014, the following advice was provided in relation to the decision of the first delegate and the decision of the first Tribunal:

4. The MRT decision refers only to the Subclass 820 visa refusal decision and makes no reference at all to the Subclass 801 visa refusal decision. Given this we can proceed on the basis it did not review the Subclass 801 visa refusal decision.

5. Clearly, the decision record and notification letter for the Subclass 801 visa refusal decision do not comply with [sections] 66(2)(a) and (c) [of the *Migration Act 1958* (Cth)] as no criteria for the Subclass 801 visa application are identified and no reasoning given as to why they are not satisfied. This means the notification of the Subclass 801 visa refusal decision was not effective.

6. Further, there is no evidence in the decision record that the delegate turned their mind to the Subclass 801 visa criteria. On this basis, the decision is affected by a jurisdictional error and should be revisited with the client’s consent. It will not be possible to properly notify the client of the Subclass 801 visa refusal decision unless a new decision is made given the failure to address criteria and provide reasons in the existing decision record. Thus if the client does not give consent, please seek further advice.

1. On 12 August 2014, the second delegate decided to refuse the appellant’s application for a Subclass 801 visa. On the first page of the decision record, under the heading “Details of visa application”, the visa referred to is: “Partner (Residence) Class BS”. Immediately beneath this, the visa subclass is identified as “820/801”. The first paragraph of the decision record referred to the appellant’s “application” for a Subclass 820 visa and a Subclass 801 visa. The delegate stated that the appellant had been notified on 4 September 2013 that the Subclass 820 visa had been refused because the appellant did not satisfy cl 820.211 of the *Migration Regulations*. The second delegate then stated: “I am now making a decision on your Partner (Residence) (Class BS) visa application”, that is, the Subclass 801 visa application. The delegate set out cl 801.221 of Sch 2 to the *Migration Regulations*. One of the requirements in this clause was that the applicant was (or had been) the holder of a Subclass 820 visa. The delegate reasoned that, as the appellant’s application for a Subclass 820 visa had been refused, he was not (and had not been) the holder of a Subclass 820 visa. He therefore did not meet cl 801.221.
2. On the same day, namely 12 August 2014, the Department wrote to the appellant attaching a copy of the second delegate’s decision. The covering letter referred to the earlier notification that the appellant’s “applications” for a Subclass 820 visa and a Subclass 801 visa had been refused. The letter then stated:

The department has assessed your case and found that you were not correctly notified of the decision in respect of the application for a Partner (Residence) (Class BS) (Subclass 801) visa. Further, as that decision was affected by a jurisdictional error, a new decision has been made and you are now being notified of that new decision.

After careful consideration of all the information you have provided, I was not satisfied that you met the relevant criteria for the grant of a Partner (Residence) (Class BS) (Subclass 801) visa as set out in Australian migration law.

1. The appellant applied to the Migration Review Tribunal for review of the second delegate’s decision. On the application for review form, in response to the question “What decision do you want reviewed?”, the appellant stated that the visa class was “BS”, the subclass was “820” and the date of decision was 12 August 2014. There was an inconsistency between identification of the class as “BS” (which related to the Subclass 801 visa) and identification of the subclass as 820. However, the date of decision indicates that the appellant was seeking review of the second delegate’s decision, which related to the Subclass 801 visa. The second Tribunal made a finding to this effect at [11]-[13] of its statement of decision and reasons, and the primary judge held at [34] of the Reasons that this was correct. (These conclusions are the subject of ground two in the notice of appeal to this Court, and are dealt with below.)
2. On 21 May 2015, the appellant’s solicitors provided a submission to the second Tribunal.
3. On 28 May 2015, a hearing took place before the second Tribunal.
4. On 10 August 2015, the appellant’s solicitors provided a supplementary submission to the second Tribunal. The Minute of the Department dated 3 July 2014, referred to above, was included as an attachment to this submission.
5. On 13 October 2015, the second Tribunal decided to “[affirm] the decision not to grant the [appellant] a Partner (Residence) (Class BS) visa”, that is, a Subclass 801 visa. After setting out background matters, the Tribunal set out contentions that had been raised on behalf of the appellant in relation to the scope of the matters that were to be considered by the second Tribunal. The submissions and the Tribunal’s reasoning in relation to those submissions were set out in its statement of decision and reasons at [16]-[19]:

16. The applicant’s representative provided legal submissions to the Tribunal to the effect that by notifying the applicant on 12 August 2014 that he had not been correctly notified of the decision in respect of his application for a Partner (Residence) (Class BS) visa, a fresh decision was made, and the Department conceded that there had been a jurisdictional error in the previous decision dated September 2013. The applicant’s submission in this regard is that the Tribunal should set aside the Department’s two decisions not to grant an 820 or 801 visa, and remit the application to the Department on the basis that the applicant meets both cl.820.211(2)(d)(ii) and also for reconsideration for the grant of a Subclass 801 visa on the basis that the application was lodged more than two years previously and is ongoing and genuine.

17. At the Tribunal hearing the applicant’s representative requested a period of time in which to make further submissions pending the outcome of a Freedom of Information request which had been made to the Department. The Tribunal agreed to this request and further written submissions were provided to the Tribunal on 10 August 2015. Those submissions are that the Department’s decision to refuse the applicant’s Partner (Temporary) Class UK visa on 4 September 2013 was infected by jurisdictional error and therefore cannot be treated as a decision at all. Therefore the Tribunal had no power to review that purported decision, because the Tribunal’s jurisdiction cannot arise in circumstances where there was no decision. Therefore the Tribunal as presently constituted should accept that the previous Tribunal erred in finding it had jurisdiction and failed to discharge its statutory function and the decision of the previous Tribunal in respect of the Subclass 820 visa is void. The submission reiterates the applicant’s opinion that the Tribunal can and ought to consider the applicant’s application for … both the Subclass 820 and Subclass 801 visas in order to make a lawful decision. The Tribunal has consider[ed] the applicant’s submissions.

18. The Tribunal does not accept that it has jurisdiction to review the Department’s decision to refuse the applicant the grant of a Partner (Temporary) Class UK (Subclass 820) visa. The Class UK (Subclass 820) is a separate visa class to Class BS (Subclass 801), and the decision of the Department to refuse the applicant’s application for a Class UK (Subclass 820) visa is a separate decision to the Department’s decision to refuse the Class BS (Subclass 801) decision which is the subject of the present review.

19. The applicant previously (as set out above) sought the review of the Department’s decision to refuse the applicant a Class UK (Subclass 820) visa and that decision was affirmed by the Tribunal (differently constituted) on 9 April 2014. The Tribunal considers that matter to have been finally determined within the meaning of s.5(9) of the Act. Further, as noted above, the Tribunal has found that the applicant has sought review of the Subclass 801 visa refusal decision and not the Subclass 820 visa refusal decision.

1. The second Tribunal then considered whether the appellant satisfied the criteria for a Subclass 801 visa. The Tribunal concluded that, as the appellant was not (and had not been) the holder of a Subclass 820 visa, he could not satisfy the requirements of cl 801.221 of Sch 2 to the *Migration Regulations*.

## The Federal Circuit Court decision

1. The appellant applied to the Federal Circuit Court for judicial review of the decision of the second Tribunal. The grounds set out in his amended application (without the underlining) were as follows:

1. The Tribunal engaged in jurisdictional error by misunderstanding the applicable law and, as a consequence, constructively failing to exercise its jurisdiction.

**Particulars**

a) The Tribunal erred by finding that the decision of the First Respondent’s delegate, dated 4 September 2013, and/or the decision of the previously constituted Tribunal, dated 9 April 2014, was not affected by jurisdictional error in relation to both the Subclass 820 and Subclass 801 visa.

b) On 4 September 2013 the delegate of the First Respondent refused the Applicant’s application for a Subclass 820 and Subclass 801 visa.

ba) On 9 April 2014, the Tribunal affirmed the delegate’s decision.

c) On 12 August 2014, following advice from the Department’s Refugee Law, Framework and Training Section (Legal Framework Branch), a delegate of the First Respondent made a new decision in relation to the Subclass 801 visa, noting that the decision dated 4 September 2013 had been affected by jurisdictional error.

d) The Tribunal erred in failing to find that the decision dated 4 September 2013 and/or that dated 9 April 2014 was affected by jurisdictional error and was therefore “a decision that lacks legal foundation and is properly regarded, in law, as no decision at all” (see *Minister for Immigration [and] Multicultural Affairs v Bhardwaj* [(2002) 209 CLR 597]).

e) The Tribunal erred by finding that:

i) The decision of the delegate dated 4 September 2013 and/or that dated 9 April 2014 was a validly made decision[.]

ii) It was therefore unable to make a finding that the decision dated 4 September 2013 and/or that of 9 April 2014, in relation to both the Subclass 820 and Subclass 801 visas was void[.]

iii) It did not therefore have jurisdiction to consider whether the Applicant met the criteria for the grant of the Subclass 820 visa.

iv) That it did not have jurisdiction to set aside the Department’s and/or the Tribunal’s decision not to grant a Subclass 820 or Subclass 801 visa on 4 September 2013 and 9 April 2014 respectively or consider the Applicant’s applications for both the Subclass 820 and 801 visas.

v) That the Department’s and/or Tribunal’s decision to refuse the Subclass 820 visa had been finally determined under s.5(9) of the *Migration Act 1958* (Cth) (Act).

2. Further, the Tribunal erred in finding that the Applicant had only purported to apply for review of the Subclass 801 visa in circumstances where the Applicant indicated on the application form that he wanted review of a visa refusal for visa “Subclass 820” and where the Applicant required redetermination of the Subclass 820 visa to have any prospects of being granted a Subclass 801 visa.

3. Alternatively, that finding of the Tribunal was unreasonable or irrational for those reasons.

1. On 16 June 2017, the primary judge handed down the Reasons and dismissed the application for review. After setting out the grounds of the application and the applicable legislation (including ss 30, 31, 45, 46, 65 and 67 of the *Migration Act 1958* (Cth)), the primary judge provided a description of the first delegate’s decision, the first Tribunal’s decision, the second delegate’s decision and the second Tribunal’s decision. The primary judge summarised the appellant’s submissions at [29]-[31] of the Reasons:

29. The Applicant contends that, because the Department conceded that there had been jurisdictional error with respect to the First Delegate Decision, the Tribunal should have set aside not only the refusal to grant the 801 visa, but also reviewed the First Delegate Decision in so far as it related to the 820 visa. The Applicant submits that the Tribunal erred in finding that it did not have jurisdiction to review the First Delegate Decision to refuse to grant the Applicant the 820 visa, and in finding that the matter had been finally determined within the meaning of s 5(9) of the Act.

30. The Applicant’s argument is premised on the application for both the 801 and 820 visas being treated as a singular application and, consequently, the First Delegate Decision was a “singular decision” or “one composite decision”. This characterisation, is said to arise by reason of matters of form, namely:

a) the fact that the Applicant ticked a single box on a single application form;

b) the use of a single “instrument” (i.e. letter) to communicate both refusals;

c) a reference therein to “this decision”; and

d) the giving of reasons for both refusals in a single decision record.

31. The Applicant submits that, as that singular decision which the Department was obliged to revisit involved the refusal of an 801 visa and an 820 visa, it meant that, in revisiting that decision, the Department had to make a fresh decision regarding both visas. That is to say, it was erroneous for the Department to treat the singular decision as jurisdictionally flawed in respect of one visa but, on the other hand, treat the decision as jurisdictionally flawless in respect of the other. The singular decision was either made in excess of jurisdiction or it was not.

(Footnotes omitted.)

1. The primary judge then set out a summary of the Minister’s submissions at [32]-[33]. At [34], the primary judge accepted these submissions. These paragraphs of the Reasons were as follows:

32. The First Respondent submits that the statutory framework unequivocally points to a consideration of separate visa applications relating to individual visas. The First Respondent submits this is so because:-

a) First, the Act refers throughout to “applications” for “visas” or to “an application” or “a valid application” for “a visa”. Similarly, it refers throughout to “a decision to grant or refuse to grant a visa”, nowhere does the language appear to contemplate that there may be a singular application for, or decision in respect of, multiple visa applications.

b) Second, even where the two classes of visa could be applied for in the same way, other validity criteria might differ. This would necessarily result in the possibility that a “singular application” would satisfy the validity criteria for some but not all of the visas applied for. But the “singular application” could not be both valid and invalid. It would simply be invalid, for failing to satisfy *all* of the prescribed criteria regardless of whether it related to the criteria of one or other of the visas. As a result, the Minister would not be empowered to consider the application insofar as it related to a visa for which all validity criteria were satisfied. It may be comfortably inferred that Parliament did not intend such a consequence.

c) Third, s 65 contemplates a single “[d]ecision to grant or refuse to grant visa”. The entire premise of s 65 is based on the decision-maker reaching a state of satisfaction in relation to criteria which applies to a particular visa. The Applicant’s construction would lead to the absurd consequence that where a visa application relates to multiple visas, the decision-maker could not reach a state of satisfaction under s 65 until the criteria had been satisfied in relation to both visas. By way of example, and bearing in mind that the criteria for the grant of a Subclass 820 visa is that it is made at the same time and place as a Subclass 801 visa, should the Minister grant a Subclass 820 visa he is ordinarily required to wait two years before proceeding to determine the application for a Subclass 801 visa. On the Applicant’s construction, this would be practically, impossible. Further, s 67 of the Act does not contemplate that a single decision might both be to grant and refuse multiple visas.

d) Fourth, at every stage, the statutory scheme for review of decisions provides for different rules depending on factors that may differ across visa classes. For this to be compatible with the notion of a “singular decision” upon a “singular application” for multiple visas, Part 5 of the Act would need to tell the Tribunal which rules to apply in cases where a single application relates to two different classes of visa. It makes no attempt to do this.

33. The First Respondent submits that as a consequence of the above the only view that can be arrived at is that the Minister makes two separate decisions:

a) should the Minister refuse the Subclass 820 then he may immediately proceed to refuse the Subclass 801 visa, as in fact happened in the present case. Then, as a matter of convenience both for himself and for the Applicant, the Minister may record his reasons for these two related decisions in the same Decision Record.

b) should the Minister grant the Subclass 820 visa then he can (and it is implicit in the scheme that, if necessary to enable compliance with the criteria, he *will*) wait two years before proceeding to determine the application for the Subclass 801 visa.

34. The Court accepts these submissions of the First Respondent. The Court finds also that the Tribunal was correct to conclude that the Applicant actually intended to seek review of the 801 visa only. The Tribunal had made a decision in respect of the 820 visa on 9 April 2014. Accordingly as the First Respondent submits, the Tribunal was *functus officio* in relation to that decision.

(Footnotes omitted.)

1. The primary judge stated, at [35] of the Reasons, that the appellant’s submission that the second Tribunal’s decision was unreasonable or irrational was not supported by the evidence. The primary judge, at [36], did not accept the appellant’s submissions based on the judgment of Hayne J in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 (***Plaintiff M79/2012***). The statutory scheme considered in that case was “wholly distinguishable”, the primary judge held.
2. The primary judge referred with approval to the observations about the statutory scheme made in *Manga v Minister for Immigration and Border Protection* (2017) 320 FLR 99 at [58]-[63]. The primary judge referred, at [38], to *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***Plaintiff S4/2014***). The primary judge concluded that no jurisdictional error attended the decision of the second Tribunal.

## The appeal to this Court

1. The appellant appeals to this Court from the judgment of the Federal Circuit Court. The notice of appeal sets out three grounds. These grounds correspond to the three grounds of the amended application in the Federal Circuit Court, save that the first ground commences with the words: “The Federal Circuit Court erred in finding that the Tribunal did not engage in jurisdictional error …”. Thus the appellant’s contentions on appeal are, in effect, that the primary judge erred in not accepting the appellant’s contentions below.

## Consideration

1. In his outline of submissions, the appellant submits that the appeal concerns the circumstances in which an administrative decision-maker may ‘revisit’ and remake a decision of its own motion, pursuant to the principles established in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (***Bhardwaj***).
2. The appellant’s submissions are, in summary as follows:
   1. The essential question for this Court’s determination is whether the second delegate, in revisiting the first delegate’s decision (which was found to be affected by jurisdictional error), was permitted to revisit only that part of the decision that concerned the Subclass 801 visa, or whether she was obliged to revisit the whole of the first delegate’s decision, including that part of it that purported to refuse the Subclass 820 visa.
   2. If the second delegate was obliged to revisit both aspects of the first delegate’s decision then the second Tribunal was equally obliged to review both aspects, and was not limited by the second delegate’s having confined herself to the Subclass 801 visa question. After all, having all the powers and discretions available to it as were available to the second delegate (and thus standing in the shoes of the second delegate), the second Tribunal had the jurisdiction (and therefore the duty) to do again that which the second delegate had been entrusted to do: see *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32; *Commissioner of Taxation v Hornibrook* (2006) 156 FCR 313 at [97]-[100]. Alternatively, as was submitted below, the second Tribunal should have recognised (as the Department had done) that there was a jurisdictional error affecting the earlier Subclass 801 visa refusal. Having identified jurisdictional error, the second Tribunal was obliged to revisit the first Tribunal decision, as the Immigration Review Tribunal had done in *Bhardwaj*. On any view, the Subclass 820 visa issue squarely arose in relation to the first Tribunal decision by reason of the terms of the first delegate’s decision. In that regard, the complaint in this Court is just as much that the second Tribunal failed to revisit the first Tribunal’s decision, as it is that there was a failure properly to review the second delegate’s decision.
   3. The basis upon which the second delegate was able to revisit the first delegate’s decision was pursuant to the principles established in *Bhardwaj*. The appellant relies, in particular, on *Bhardwaj* at [51], [53], [142], [144], [147] and [152]. It follows from these passages that to consider the metes and bounds of an administrative decision-maker’s power to revisit a decision of the kind under consideration, it is proper (and, indeed, necessary) to look to the corresponding power that a judicial review court would have to interfere with such a decision.
   4. The effect of Part 8 of the *Migration Act* is that only decisions affected by jurisdictional error are liable to be “called in question in [the relevant] court” and “subject to prohibition, mandamus, injunction, declaration or certiorari”: see *Migration Act*, s 474(1); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
   5. A writ (or order in the nature) of certiorari is, of course, the usual remedy for quashing decisions which contain non-jurisdictional errors (which errors otherwise appear on the face of the record): see *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [26]. Certiorari may also be an available remedy in the case of decisions affected by *jurisdictional* errors – but in that case, the remedy is purely ancillary to the principal remedy of a writ (or order in the nature) of mandamus: see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [14], [142], [151]-[152], [218]; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604. Indeed, mandamus can issue in such cases entirely unassisted by certiorari – on the basis that the “ostensible decision is not a real performance of the duty imposed by law upon the tribunal”, but in fact a nullity: see *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 (***Bott***) at 242; *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at [57].
   6. It follows that a court tasked with reviewing a decision of the kind in question, which is purported to have been made under the *Migration Act*, will look principally to whether the decision-maker is susceptible to a writ (or order in the nature) of mandamus. Whether or not the decision-maker is susceptible to such a writ (or order) was explained in *Bott.*
   7. Where a decision-maker has professed to have performed the duty, a convenient point of departure for a court conducting judicial review will be the decision which is purported to have been made and any reasons given for that decision.
   8. The relevant distinction, however, is that, in a case in which certiorari is the primary (and not ancillary) relief claimed, the start and end point of the analysis will be the decision and its record. On the other hand, in a case in which mandamus is the principal (or only) relief claimed, the ultimate analysis will centre, not on the decision made and its record, but on the “duty of a public nature which remains unperformed”.
   9. Under the *Migration Act*, the relevant duty is sourced in s 65 of that Act (which contains an obligation on the Minister, after considering a valid application, to grant or refuse a visa). A corresponding obligation is sourced, relevantly, in s 348 of the *Migration Act* (which contains an obligation on the Tribunal to review a decision if an application is properly made to it).
   10. In the instant case, the duty was first engaged by the appellant’s application. That application was a composite one: that is to say, it constituted an application for both the Subclass 820 visa and the Subclass 801 visa. Accordingly, once he accepted the application as valid, the Minister had a duty to grant or refuse the Subclass 820 visa, and to grant or refuse the Subclass 801 visa. The first delegate in this case purported to refuse both visas.
   11. Therefore, once it was determined that the first delegate’s decision was affected by jurisdictional error, the nature of the duty which remained unperformed was that which had been engaged by the appellant’s pending and undisposed application. As that application was for two visas, the proper approach was to revisit and remake the decision as it concerned both visas.
   12. Further and in any event, the first delegate’s decision to refuse both the Subclass 820 visa and Subclass 801 visa was a “composite decision” (*Plaintiff S4/2014* at [55]; see also *Plaintiff M79/2012* at [83] per Hayne J), which could not be disturbed by the second delegate without revisiting it in its entirety.
   13. The singularity of the first delegate’s decision is evidenced by the fact that it was communicated in one instrument, and indeed stated (when alerting the appellant to his review rights) that “this decision [ie, singular] can be reviewed”. The decision is supported by a singular decision record. Thus, while the effect of the first delegate’s decision was to refuse to grant two visas, nonetheless it “was a single decision which cannot be severed and treated as if there had been two separate decisions” (*Plaintiff S4/2014* at [8]).
   14. In particular, the relevant “decision” is that which the general law identifies as the relevant exercise of power and, in turn, that which a judicial review court would fix upon as such. Where a decision-maker proposes to remake a decision according to *Bhardwaj* principles, the decision-maker is to be guided and controlled by what a court exercising powers of judicial review would do (as outlined above). A court would treat the first delegate’s decision as the first delegate herself did – as a single decision affecting rights in respect of two visa subclasses. Once that is recognised, it follows that the second delegate was not authorised to revisit only a part of that singular decision if the decision itself was considered to be affected by jurisdictional error.
   15. The Federal Circuit Court below placed too much emphasis on how the *Migration Act* in form treated the making of visa decisions (Reasons, [32]-[34]), and failed to appreciate that the relevant “decision” was to be ascertained by reference to general law principles.
3. In my view, for the reasons that follow, no error is shown in the judgment of the primary judge.
4. A convenient starting place is the question whether the first delegate’s decision is to be treated, for present purposes, as the making of two decisions or only one decision. I do not think this question can be answered without reference to the statutory scheme. As set out in the Reasons, the statutory scheme relevantly established two different visas (namely, the Subclass 820 visa and the Subclass 801 visa), with separate criteria applicable for each visa. Given this statutory scheme, I consider that the first delegate’s decision should be treated as two decisions, one in respect of each visa. It may be accepted that there was a close relationship between the two decisions. In particular, they were expressed in the one instrument and singular language (“decision”) was used in the decision record. Nevertheless, in circumstances where the statutory scheme established two different visas, each with their own criteria, the first delegate’s decision to reject the appellant’s application should be treated as two decisions.
5. Once it is accepted that the first delegate’s decision should be treated as two decisions, it follows that it is conceptually possible for one of the decisions to be affected by jurisdictional error, and the other to have been validly made. Thus, at least on one view, the first delegate’s decision in relation to the Subclass 801 visa was affected by jurisdictional error (on the basis that the first delegate failed to consider the applicable criteria for that visa) and the decision in relation to the Subclass 820 visa was validly made. (It may be noted that, in circumstances where the Subclass 801 visa criteria included the holding of a Subclass 820 visa, the decision to refuse the Subclass 820 visa would seem inevitably to lead to the conclusion that the application for a Subclass 801 visa would be refused.) In these circumstances, consistently with *Bhardwaj*, it was open to the Minister to treat the decision of the first delegate in relation to the Subclass 801 visa as, in law, “no decision at all” (*Bhardwaj* at [51]-[53]) and to ‘remake’ that decision. Adopting the language of *Bhardwaj*,the duty to make a decision on the appellant’s application for a Subclass 801 visa remained unperformed. It was performed when the second delegate made a decision to refuse the application for that visa.
6. The appellant places reliance on the form of a number of the documents, which may be taken to suggest that the first delegate made only one decision (in respect of both visas). However, I consider that the question should be addressed as a matter of substance rather than form. Approaching the matter in this way, for the reasons indicated above, I consider that the first delegate’s decision is to be treated as two decisions for present purposes.
7. The appellant relies on passages from *Plaintiff S4/2014* and *Plaintiff M79/2012*. In relation to *Plaintiff S4/2014*, it is true that the High Court, in a joint judgment of five members of the Court (French CJ, Hayne, Crennan, Kiefel and Keane JJ), considered the decision in that case to be a “composite decision in the sense that to sever it into two distinct decisions would radically recast its nature and effect” (at [55]). But this statement needs to be read in the context of the issue under consideration. The issue was whether, in circumstances where two visas (referred to in the judgment of the High Court as the seven-day visa and the THC visa) had been granted by the Minister, and the High Court had determined that the grant of one of these visas (the seven-day visa) was invalid, severance was possible (see also at [8]). The issue to be determined in the present case is very different. It concerns whether, in circumstances where a delegate refused an application for two visas, and failed to consider the criteria for one of the visas, any such error affected (in the sense of jurisdictional error) the refusal of the other visa. In the context of this issue, for the reasons given above, I consider that the first delegate’s decision should be treated as two decisions for present purposes. For substantially the same reasons, I do not consider that the passage from *Plaintiff M79/2012* relied on by the appellant (that is, [83]) is applicable.
8. For these reasons, I reject the appellant’s first ground of appeal.
9. By his second ground of appeal, the appellant contends that the second Tribunal erred in finding that the appellant had only purported to apply for review of the Subclass 801 visa, in circumstances where the appellant indicated on the application for review form that he sought review of a visa refusal for “Subclass 820” and where the appellant required redetermination of the Subclass 820 visa to have any prospect of being granted a Subclass 801 visa. Implicitly, the appellant contends that the primary judge erred in not concluding that the Tribunal had erred in the way indicated in this ground. I consider that it was open to the Tribunal to find that the application for review sought review of the second delegate’s decision, which related to the Subclass 801 visa. As discussed at [21] above, there was inconsistency in the application for review form, in that it referred both to the “BS” visa class (associated with the Subclass 801 visa) and to the “820” subclass. However, the date of decision was stated to be 12 August 2014, which was the date of the second delegate’s decision. That decision concerned only the Subclass 801 visa. In these circumstances, no error is shown in the conclusion that the appellant applied for review of the second delegate’s decision, being a decision to refuse the Subclass 801 visa. In any event, even if (contrary to the finding of the second Tribunal) the appellant did intend to seek review in relation to the Subclass 820 visa, the second Tribunal did not have jurisdiction to deal with this, the issue having already been dealt with by the first Tribunal.
10. The appellant also contends, by the third ground in his notice of appeal, that the finding of the second Tribunal was unreasonable or irrational. Again, implicitly, the appellant contends that the primary judge erred in not concluding that the Tribunal erred in this way. This contention relies on the same matters as raised in support of the other two grounds. For substantially the same reasons, I reject this ground of appeal. Once it is accepted that the decision of the first delegate should be treated as two decisions for present purposes, it follows that the approach taken by the second Tribunal was not legally unreasonable or irrational in the sense discussed in authorities such as *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

## Conclusion

1. For these reasons, the appeal is to be dismissed. Both sides accepted at the hearing that costs should follow the event. Accordingly, I will also order that the appellant pay the Minister’s costs of the appeal.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 29 March 2018