SHRESTHA v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M141/2017)
GHIMIRE v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M142/2017)
ACHARYA v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M143/2017)

Court appealed from:	Full Court of the Federal Court of Australia [2017] FACAFC 69
Date of judgment:	27 April 2017
Date special leave granted:	14 September 2017

The three appellants are citizens of Nepal. They each entered Australia holding a Student (Class TU) Higher Education Sector (subclass 573) visa. They were each enrolled in two courses: a diploma and a bachelor degree. The diploma course was to be undertaken before and for the purposes of the degree course. Their enrolment meant they met the definition of 'eligible higher degree student' ('EHDS definition') in cl 573.111 of 10 Schedule 2 to the *Migration Regulations* 2004 (Cth). By reason of meeting this definition, the appellants were assessed against the 'less stringent' criterion in cl 573.223(1A) of the Regulations. The appellants were not successful students. After the end of the first semester of their studies, each of them had ceased to be enrolled in their diploma courses. They nonetheless remained enrolled (and maintained confirmation of enrolment in) their respective bachelor degree courses for some time afterward.

A delegate of the first respondent ('the Minister') cancelled each appellant's visa on the ground that the circumstances which permitted the grant of the visa no longer existed because each of the appellants was no longer an eligible higher degree student. Each of the cancellation decisions was affirmed by the Migration Review Tribunal. The appellants each made applications for judicial review of the Tribunal's decisions to the Federal Circuit Court. Each application for judicial review was dismissed.

The appellants' respective appeals to the Full Federal Court (Bromberg, Bromwich & Charlesworth JJA) were dismissed.

Charlesworth J found that in the part of its reasons concerning the existence of the cancellation power, the Tribunal wrongly pre-occupied itself with the question of whether the appellants currently fulfilled the EHDS definition and cl 573.223(1A). That question was clearly relevant to the exercise of the discretionary power to cancel, but not relevant to its existence. The Tribunal asked itself the wrong question because, in the circumstances, the power to cancel the visa would be enlivened irrespective of whether the appellants continued to satisfy alternate parts of the EHDS definition or otherwise satisfied alternate visa criteria. It was sufficient that the circumstance of their enrolment in the diploma course had ceased to exist. The Tribunal assumed the test for identifying a cancellation ground to be more onerous than that for which s 116(1)(a) of the *Migration Act* 1958 (Cth) provides.

However, her Honour concluded that relief should be refused as a matter of discretion, as she was not satisfied that the outcome of the Tribunal's review function could or might have been any different had the error identified in the appeal not been made. In short, the Tribunal arrived at the same conclusion on the application of an incorrect test as it was bound to arrive at on the application of the correct test.

Bromberg J agreed with Charlesworth J that the Tribunal asked the wrong question in applying s 116(1)(a) of the Act. However, on the facts at hand and with the requisite degree of clarity, his Honour was satisfied that no different outcome could have eventuated had the right question been posed and answered by the Tribunal in each case.

Bromwich J found that there was no jurisdictional error in the Tribunal's decisions.

The ground of each appeal is:

- The Full Court of the Federal Court erred in exercising its discretion not to issue writs of certiorari.

The first respondent has filed a Notice of Contention, submitting that the decisions of the Tribunal in each case were not affected by jurisdictional error.