IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S9 of 2015

BETWEEN:

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Plaintiff

and

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Defendant

10 **DEFENDANT'S SUBMISSIONS**

Part I: Form of Submissions

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. There are two issues:

   (a) whether the Court should enlarge time by over four months for the plaintiff to make this application under rule 25.06.1 of the *High Court Rules 2004* (Cth) (**Rules**) pursuant to rule 4.02 of the Rules; and

   (b) if so, whether the delegate failed to accord the plaintiff procedural fairness, or otherwise fell into jurisdictional error, because "the plaintiff's education provider
20 failed to comply with ss. 19(1)(a) and 19(1)(b)" of the *Education for Overseas Students Act 2000* (Cth) (**ESOS Act**).

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The defendant certifies he has considered whether a notice should be given under section 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

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Part IV: Contested Facts

4. The plaintiff's evidence as to why he refused to provide the delegate with his address during a telephone call on 20 February 2014[1] is not accepted by the defendant.[2] It does not appear to be relevant to any issue in the proceedings, and on that basis the factual issue does not need to be determined. If it is relevant, this evidence should nevertheless be excluded under s 191 of the *Evidence Act 1995* as an attempt to contradict or qualify the Agreed Statement of Facts.[3]

Part V: Applicable Legislation

5. The plaintiff's references to the applicable legislation is incomplete and/or incorrect in the following respects:

   (a) the plaintiff does not refer to section 338(3) in the Part 5 of the *Migration Act 1958* (Cth) (**Act**) which is part of the statutory scheme which enabled factually erroneous decisions to be reviewed on their merits;

   (b) the plaintiff incorrectly cites the basis upon which he was deemed to have received the correspondence sent by delegate.[4] Regulation 2.55(7) of the *Migration Regulations 1994* (Cth) (**Regulations**) deems the plaintiff to have received the document in the circumstances of this case.

Part VI: Argument

Extension of time

6. Absent exceptional circumstances, an extension of time should not be granted to the

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[1] AB 6 at [4] to [5]; referred to in Plaintiff's Submissions at [9], [13].

[2] The defendant indicated on 15 June 2015 that, if the plaintiff's conduct in refusing to provide his address (and the circumstances which led his education provider, Macquarie University, not to provide a Certificate of Enrolment on PRISMS until 18 November 2014) were relevant, he wished to cross-examine the plaintiff and put on further evidence: Transcript 15 June 2015 at page 2.33 to 3.64; cf statement of agreed facts (and those which were deleted) at AB 94 to 98.

[3] AB 94 at 97 [23].

[4] At [9] and [10].

plaintiff: *Re Commonwealth of Australia; Ex parte Marks* (2000) 177 ALR 491; [2000] HCA 67 at [16] per McHugh J.

7. The plaintiff's explanation as to why he refused to provide the delegate with his address on 20 February 2014 has not been tested and, as noted above, is not accepted by the defendant. In any event, it is agreed that the delegate left a message later on the same day asking the plaintiff to contact the Department (and providing a telephone number for that purpose), and then wrote to the plaintiff at his last address known to Macquarie University.[5] If the reason why notices did not reach the plaintiff in a timely fashion is relevant, it is to be found in his failure to ensure the Department and the University had his up to date contact details (a failure which is not explained by his state of mind during one telephone call).[6] In circumstances where the plaintiff's own conduct frustrated the decision making process and led to the significant delay in commencing proceedings, he should not be granted the indulgence of the Court to extend the time to make this application.

Substantive issues

8. The plaintiff alleges that the delegate erred in the exercise of his jurisdiction because he was in fact enrolled in a registered course at the time his visa was cancelled and Macquarie University acted in breach of section 19 of the ESOS Act in failing to record his enrolment on PRISMS.

9. The plaintiff claims that the "*statutory scheme*" was "*undercut*" because non-compliance by Macquarie University with the ESOS Act "*prevented the delegate from reaching his state of satisfaction on what the law required to be before him*"[7]. It is on this basis that the plaintiff claims he was denied procedural fairness.

10. The ground on which the plaintiff's visa was cancelled was a failure to comply with a condition of the visa requiring him to be "enrolled in a registered course". Information

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[5] AB 97 [26], [27].

[6] See AB 19 (email request for updated address); AB 31 (telephone request and refusal to provide address), AB 32 (attempted further email contact); AB 42 (further attempted telephone contact); AB 43 (University advising of current address given by the plaintiff); AB 51 (return to sender notification from last address).

[7] At [28].

provided by the University via the PRISMS system was, relevantly, no more than evidence upon which the delegate might rely as to whether the plaintiff was enrolled in a course. If the University failed in its obligation to upload relevant information to the system,[8] that created an evidentiary gap but did not "undercut" the statutory scheme: it did not in itself lead to any breach of a visa condition or compel any conclusion on the part of the Minister.[9]

11. Any wrong impression created in the mind of the delegate was amenable to correction following compliance with the procedural fairness obligations which are set out in Subdivision E of Division 3 to Part 2 of the Act. Section 119 relevantly provided that (emphasis added):

> "(1) Subject to Subdivision F (non-citizens outside Australia), if the Minister is considering cancelling a visa, whether its holder is in or outside Australia, under section 116, the Minister must notify the holder that there appear to be grounds for cancelling it and:
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> (a) give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist; and
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> (b) invite the holder to show within a specified time that:
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> (i) **those grounds do not exist**; or
>
> (ii) there is a reason why it should not be cancelled."

12. The delegate was also required to give the visa holder particulars of information that would be part of the reason for cancelling a visa (s 120) and was not permitted to make a decision until the holder had responded, or the time prescribed for responding had passed (s 124). A decision to cancel a visa was also subject to review on the merits (s 338(3)), which provided a further mechanism by which incorrect or missing information could be corrected.

13. The statutory scheme was therefore not predicated on any information being supplied by a third party, or such information being correct. In the face of a detailed code for the provision of procedural fairness, including opportunities for the person affected to

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[8] A Certificate of Enrolment was created, after the event, on 18 November 2014 (AB 98 [36]). The reasons why this was not done earlier are not recorded.

[9] Contrast eg *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115, relied on by the plaintiff at [29].

demonstrate that a ground for cancellation does not exist by supplying further information, it would be anomalous to construe the power of cancellation as incapable of exercise because a third party has not complied with an obligation under a different Act to supply information to the Department. This is particularly so when there is a separate regime of sanctions for failure to comply with the obligation in question (cf s 19(5) of the ESOS Act).

14. In the present case, the delegate did more than was required to comply with the procedural fairness obligations referred to above. After a first notice of intention to consider cancellation was returned unclaimed, the delegate attempted to send the notice by email and to contact the plaintiff by telephone. He also sent a second notice to the plaintiff at an address which he had obtained (on his own motion) from the University.[10] The plaintiff's submissions accept that the second notice, at least, was sent to the plaintiff's last known address and thus complied with the requirements of s 119.[11] By operation of reg 2.55(7) of the Migration Regulations, the plaintiff is deemed to have received that notice. The plaintiff, meanwhile, was aware of his own enrolment status and could readily have established that fact to the delegate by providing the "Enrolment Letter" he received in December 2013.[12] The statutory scheme was thus "undercut" only by the plaintiff's refusal or failure to tell the Department or the University his address.

15. While there is no dispute that third party conduct can in some cases give rise to jurisdictional error, the circumstances of the plaintiff's case are readily distinguishable from the cases he relies upon. In particular, the present case is not one where the opinion of a third party was a *factum* upon which obligations depended (as in *Seligman*, referred to above). Nor is it one where the statutory scheme was frustrated by third party conduct which fraudulently discouraged the plaintiff from participating in a hearing (as in *SZFDE v Minister for Immigration and Multicultural Affairs* (2007) 232

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[10] AB 96 [21]-[28].

[11] Plaintiff's Submissions at [9]. The material before the Court does not suggest any reason to doubt that the earlier notice, also, was sent to the plaintiff's last address known to the Minister, and therefore constituted an effective notice under s 119.

[12] AB 78 [6], 88.

CLR 189), or where a hearing was rendered unfair by the conduct of a party (as in *O'Sullivan v Repatriation Commission* (2003) 128 FCR 590, 602-605, and *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330, 343E-G, 345C-346B, 347B per Lord Slynn of Hadley (other members of the Court agreeing)).[13]

Part VII: Statement of Argument on Cross Appeal/Notice of Contention

16. Not applicable.

Part VIII: Estimate re oral argument

17. About 1 hour will be required for the defendant's oral argument.

Dated: 25 September 2015

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[13] Whether the reasoning in the latter case reflects the law in Australia is, in any event, doubtful: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 459-460 [41]-[42].