**IN THE HIGH COURT OF AUSTRALIA** **No. S 9 of 2015**
**SYDNEY REGISTRY**

**BETWEEN** **WEI WEI**
Plaintiff

**AND** **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant



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**PLAINTIFF'S REPLY**

1. The plaintiff certifies by his counsel that this submission is in a suitable form for publication on the internet.

2. It is axiomatic that the determination of the scope of jurisdiction (or decision-making power) and its converse, jurisdictional error, involves a process of statutory construction. Here, the scope of the relevant power, and its limits, are defined by a composite legislative scheme to be found partly in the *Migration Act* 1958 and the Migration Regulations, and partly in the *Education Services for Overseas*
20 *Students Act* 2000 and in the Education Services for Overseas Students Regulations 2001.

3. In light of the Minister's submissions, the key features of that legislative scheme are reviewed below. That review demonstrates that within a scheme which permits decisions to be made by reference to a database, and requires on pain of criminal sanction that those entities that have direct knowledge of the key facts take steps to ensure the accuracy of the database, an inviolable limit on the valid exercise of the decision-making power is that those steps have been taken and the database is therefore as accurate as possible.

4. The Minister's principal contention is that since the Act contains requirements for procedural steps to
30 be taken which result in the person affected being deemed to have received notice, the power should not be construed as limited in the manner for which the plaintiff contends. The vice of that approach is that it can result, as it did here, in a decision based upon deemed notice in the absence of any actual notice of the foreshadowed decision, and in a cancellation based as here upon assumed facts which are wrong.

5. Although the Minister contends that the plaintiff's evidence as to why he refused to provide

Ren Zhou Lawyers
Level 4, 414-416 Pitt St.
40 SYDNEY NSW 2000
phone: (02) 9281-8155
fax: (02) 9281-4655
Attn: Ms Ying Zhang
Email: yingzhang.au@gmail.com

the delegate with his address on 20 February 2014 is irrelevant (Defendant's Submissions, **DS**, [4]) he devotes a substantial paragraph of his argument to a pejorative description of the plaintiff's conduct: DS [7]. The plaintiff accepts that it is not necessary for any purpose in this proceeding to determine that factual issue. The point at issue in this proceeding is no different than if the plaintiff had provided his current address to the Department, but the notification letter had been misplaced by a housemate, or stolen from the mailbox.

5. The Plaintiff accepts that *Migration Regulation* 2.55, and not section 494B of the *Migration Act*, governs the giving of a document to a visa holder relating to the cancellation or proposed cancellation of a visa under that Act. That does not impact upon the plaintiff's argument.

**Contested facts**

6. The agreed fact referred to at DS [4] was that an officer of the Minister's Department telephoned the Plaintiff who refused to give his address. The Statement of Agreed Facts notes that the delegate's file note does not indicate how he identified himself. Contrary to DS [4], the Plaintiff's explanation at AB 6-7 does not contradict or qualify the Agreed Statement of Facts, but merely adds an explanation. If the Minister's submissions suggesting that the plaintiff was responsible or culpable for not receiving notices under s. 119 of the *Migration Act*, and indeed for not receiving the notice of cancellation of his visa under s. 116 are relevant, then so is his evidence as to his state of mind on 20 February.

**Delay**

7. In *Re Commonwealth of Australia; ex parte Marks* (2000) 177 ALR 491 at [16], relied on by the Minister at paragraph [6] of his submissions, McHugh J stated that he found it difficult to see how a person who, "with knowledge of the decision" delays 17 months before seeking redress could be granted relief. The applicant here had deemed knowledge of the decision pursuant to *Migration Regulation* 2.55(7). The agreed statement of facts is to the effect that he did not actually find out about the decision until 3 October 2014, after which he took steps to challenge it, albeit that his application to the then Migration Review Tribunal (MRT) was misguided. It may also be observed that *ex parte Marks* was an unfair dismissal case, which may be expected to have been pursued with due haste. McHugh J also found at 177 ALR 691 at [14] that Mr Marks was not able to advance, "even an arguable case of jurisdictional error". That is not this case.

8. The plaintiff also relies on the principle stated by Gaudron J in *Corporation of the City of Enfield* v *Development Assessment Commission* (1999) 199 CLR 135 at [59], approved in *Re Refugee Review Tribunal: Ex parte Aala* (2000) 204 CLR 82 at [55] (cf *Aala* at [45]) to the effect that rule of law that

requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise.

**The substantive issue**

9. The Minister's submissions do not meet the plaintiff's point: had the plaintiff's education provider complied with s. 19 of the *Education Services for Overseas Students Act*, 1999 (the ESOS Act), the plaintiff's visa would not have been cancelled. Nor, had s. 19 been complied with, would it have been necessary for the delegate to seek out the Plaintiff's address, or send a notice under s. 119 of the *Migration Act*. To say as the Minister does in DS [10], that "information 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..." misstates the position of the database within the statutory scheme. It was also incorrect to say that the statutory scheme is not predicated on any information being supplied by a third party being correct: cf DS [13]. Compliance with s. 19 by the education providers who have, and who alone have, direct knowledge of whether a student "has been accepted for enrolment or is enrolled", which is backed by criminal sanctions, was central to the process.

10. In the current case the statutory scheme is a hybrid.

    (a) Under s. 5 of the ESOS Act an 'accepted student' of a 'registered provider' is relevantly one "who is accepted for enrolment, or enrolled, in a course provided by the provider", and requires a student visa.
    (b) Under s. 19 of the ESOS Act the education provider must give to the Secretary a "Confirmation of Enrolment" (defined in ESOS Regulation 1.03 as the information which is required to be given under s. 19).
    (c) The "confirmation of enrolment" must be given in a form approved by the Secretary of the Department of Education which may be electronic (s. 19(3) ESOS Act). The name of the electronic system is "PRISMS" which is defined in ESOS Reg 1.03.
    (d) Section 175 of the ESOS Act permits the Secretary of the Department of Education to give information to an agency of the Commonwealth for *inter alia* the purposes of facilitating the monitoring and control of immigration.
    (e) An "electronic confirmation of enrolment" is defined in *Migration Regulation* 1.03 as a confirmation that the student is enrolled and is sent by an education provider through a computer system under the control of the Education Minister to *inter alia* any office of Immigration in Australia.

11. Thus, the legislative scheme envisages that the information given to the Education Minister under s. 19 ESOS Act is conveyed electronically to the Secretary of the Department of Immigration and Border Protection for the purposes of monitoring compliance with the conditions of student visas.

12. The information thus conveyed may then be used, and was used in the Plaintiff's case, to trigger the process by which the Immigration Minister decides whether to commence the process that may lead to cancellation of the student's visa. That process involves a notice under s. 119 and where appropriate a decision under s. 116(1)(b).

10 13. In summary propositional form, the plaintiff's case can thus be stated as follows;

(a) "What jurisdictional error in every case amounts to is a breach of some express or implied legislative condition which defines the ambit and powers of the Commonwealth judicial officer or administrative officer to whom the writ is directed."[1]

(b) Thus, determining whether an exercise of power is taken within or outside the jurisdiction of the person making the decision requires an examination of the statutory scheme to determine its purpose: *Project Blue Sky* v Australian Broadcasting Authority (1998) 194 CLR 355 at [41]; [93].

20 (c) That in turn requires an assessment of the importance of a particular process or act in the context of the statute or statutory scheme.

(d) The provisions in question here, which ensure the integrity of the database on which decision-making having large consequences for individuals is to be based, are central to the legislative scheme regulating overseas student visas, a centrality which is reinforced by the provision of criminal sanctions for non-compliance.

(e) The breach in question need not be that of the decision-maker: *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.

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14. It was therefore essential to the legislative scheme governing the oversight of compliance with conditions of student visas that the Education Provider comply with s. 19 of the ESOS Act. If the education provider does not do so the scheme does not work.

15. The Minister also submits that any wrong impression created in the mind of the delegate was

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[1] "Administrative Law Judicial Remedies" Gageler S, in Groves & Lee (eds) *Australian Administrative Law: Fundamental Principles and Doctrines* (2007) p. 377.

amenable to correction, following compliance with procedural fairness obligations in the *Migration Act* and possible merits review in the then Migration Review Tribunal (MRT) ( DS [11]-[12]). It may be that the omission can be cured by a notice under s. 119 of the *Migration Act*, which as the Minister submits would, if sent under Migration Regulation 2.55(3) would be deemed to be received under Reg 2.55(7) or by an application to the Migration Review Tribunal. But there is nothing in the *Migration Act* or Regulations which requires a person who is the holder of a visa to keep the Minister informed as to changes of address. The deeming provision satisfies the requirements of administrative convenience, not substantive justice or fairness.

16. Moreover, given the centrality of information on the PRISMS database to the decision making process, there is no certainty that a delegate or the MRT would have accepted such evidence of enrolment as the Plaintiff could have provided in the absence of a Confirmation of Enrolment issued by the education provider. It may be noted in that respect that there is no obligation upon the delegate to make an enquiry under s. 56 of the *Migration Act*, and no obligation for the MRT to do so under s. 359(1). The Minister's submissions seek to call in aid the facts of the present case, as the Minister views them, in the construction of the statutory scheme.

17. The Minister's submissions concerning the acts or omissions of third parties constituting jurisdictional error (DS [15]) also misstate the true position. Cases of jurisdictional error are not confined to established categories (*Kirk* v *Industrial Court of New South Wales* (2010) 239 CLR 531, 574 [73]). This must be so, because the extent or seriousness of an error made by an inferior court or an administrative tribunal will necessarily be measured against the requirements of the relevant statutory scheme. As Professor Jaffe observes, denominating some questions as jurisdictional is almost entirely functional (*Kirk* at 570-571, citing *Harvard Law Review*, vol 70 (1957) 953 at 963).

Neil Williams
Tel: 02 9235 0156
Email: njwilliams@sixthfloor.com.au

Leonard Karp
Tel: 02 9233 1733
Email: karp@culwulla.com.au
Counsel for the plaintiff

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