# HIGH COURT OF AUSTRALIA

GAGELER, KEANE AND NETTLE JJ

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WEI WEI PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION DEFENDANT

*Wei v Minister for Immigration and Border Protection*
[2015] HCA 51
*17 December 2015*
S9/2015

**ORDER**

1. *The time for the making of the application be extended to 8 January 2015.*

2. *A writ of certiorari issue quashing the decision made by the delegate of the defendant on 20 March 2014 to cancel the plaintiff's student visa.*

3. *A writ of prohibition issue preventing the defendant, or his agents, employees or delegates, from acting on or giving effect to or enforcing the decision of the delegate.*

4. *The defendant pay the plaintiff's costs of the application other than those costs which were the subject of the order for costs made by Gageler J on 20 August 2015.*

**Representation**

S B Lloyd SC with L J Karp for the plaintiff (instructed by Ren Zhou Lawyers)

G R Kennett SC with R S Francois for the defendant (instructed by Clayton Utz Lawyers)

## CATCHWORDS

### Wei v Minister for Immigration and Border Protection

Migration – Visa cancellation – *Migration Act* 1958 (Cth), s 116(1)(b) provides that Minister may cancel visa if satisfied that visa holder has not complied with condition of visa – Where delegate cancelled plaintiff's visa on satisfaction that plaintiff had breached visa condition – Where delegate's satisfaction formed by process of fact-finding tainted by non-compliance of third party with imperative statutory duty – Whether delegate failed to make obvious inquiry as to critical fact – Whether decision affected by jurisdictional error.

Migration – Original jurisdiction of High Court – Where plaintiff's application for remedy made outside time limit in *Migration Act* 1958 (Cth), s 486A(1) – Operation of s 486A.

Words and phrases – "extension of time", "imperative duty", "jurisdictional error".

Constitution, s 75(v).
*Education Services for Overseas Students Act* 2000 (Cth), s 19.
*Migration Act* 1958 (Cth), ss 116(1)(b), 119(1), 486A.

GAGELER AND KEANE JJ.

Introduction

1 This is an application for prohibition and certiorari which has been made in the original jurisdiction of the High Court under s 75(v) of the Constitution by the filing of an application for an order to show cause in accordance with the High Court Rules 2004 (Cth). Following agreement by the parties as to the facts, the application for an order to show cause has been referred for hearing by a Full Court.

2 The application relates to a decision made by a delegate of the Minister for Immigration and Border Protection to cancel the plaintiff's student visa under s 116(1)(b) of the *Migration Act* 1958 (Cth). The delegate made that decision on the basis that he was satisfied that the plaintiff had not complied with a condition of the visa. The relevant condition was that the plaintiff be enrolled in a course of education provided by an institution registered under the *Education Services for Overseas Students Act* 2000 (Cth) ("the *ESOS Act*").

3 Having been made, or purportedly made, under s 116(1)(b), the decision of the delegate is either a "privative clause decision" or a "purported privative clause decision", and is also a "migration decision", within the meaning of the *Migration Act*[1]. The effect of s 474 is that neither prohibition nor certiorari can issue in relation to the decision unless the decision can be shown to have been affected by "jurisdictional error"[2]. The effect of s 486A is that the application for prohibition and certiorari was required to be made within a specified period of the decision unless this Court makes an order under that section extending that period.

4 The timing of the filing of the application for an order to show cause means that the operation of s 486A will need to be addressed. The operation of s 486A is most conveniently addressed after consideration of the merits of the plaintiff's argument that the decision was affected by jurisdictional error.

5 The merits of that argument are most conveniently addressed after reference first to the statutory scheme and then to the agreed facts.

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**1** Sections 5(1), 5E and 474(2) of the *Migration Act*.

**2** *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]-[77]; [2003] HCA 2.

Statutory scheme

6 The *Migration Act* and the *ESOS Act* form an integrated statutory scheme. The relevant operation of that scheme cannot adequately be understood by reference solely to the *Migration Act* and the *ESOS Act*. It is necessary also to refer to the Migration Regulations 1994 (Cth) and the Education Services for Overseas Students Regulations 2001 (Cth) ("the ESOS Regulations"), made under those Acts.

7 The principal objects of the *ESOS Act* are expressed to include complementing Australia's migration laws by ensuring that institutions providing courses of education or training to holders of student visas collect and report information relevant to the administration of the law relating to "student visas"[3]. The expression "student visa", for the purposes of the *ESOS Act*, has the meaning given in the ESOS Regulations[4]. The meaning given in the ESOS Regulations, subject to immaterial exceptions, brings within the expression as used in the *ESOS Act* specified subclasses of student visa described in the Migration Regulations[5].

8 The *ESOS Act* requires institutions which provide courses of education or training to holders of student visas ordinarily to be registered[6]. The Migration Regulations make it a standard condition of each of the subclasses of student visa specified in the ESOS Regulations that "the holder is enrolled in a registered course"[7]. The expression "registered course" is defined relevantly to mean a course of education or training provided by an institution registered under the *ESOS Act*[8].

9 Section 19 of the *ESOS Act* relevantly requires each institution that is a registered provider to give to the Secretary of the Department of Education and Training specified information about each holder of a student visa who is

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**3** Section 4A(c) of the *ESOS Act*, read with the definitions of "course", "overseas student" and "provider" in s 5 of the *ESOS Act*.

**4** Section 5 of the *ESOS Act*.

**5** Regulation 1.03 of the ESOS Regulations.

**6** Section 8(1)(e) of the *ESOS Act*.

**7** Clause 573.611(a) in Sched 2, and condition 8202(2)(a) in Sched 8, to the Migration Regulations.

**8** Regulation 1.03 of the Migration Regulations.

enrolled in a course of education or training provided by that registered provider[9]. The required information relevantly includes information that is to be given within 14 days of enrolment which uniquely identifies the student and the course in which the student is enrolled[10]. The information which is required to be so given concerning enrolment is referred to in the ESOS Regulations as "confirmation of enrolment"[11].

10 The information which each registered provider is required to give to the Secretary under s 19 of the *ESOS Act* must be given in a form approved by the Secretary, which may be electronic[12]. The Secretary approved for that purpose an electronic database which was developed by what is now the Department of Education and Training in association with what is now the Department of Immigration and Border Protection. The approved electronic database is known as the Provider Registration and International Student Management System ("PRISMS").

11 Non-compliance by a registered provider with the requirement of s 19 of the *ESOS Act* that it upload confirmation of enrolment onto PRISMS is a criminal offence of strict liability[13]. Non-compliance by a registered provider with that requirement is also capable of resulting in suspension or cancellation of the provider's registration[14].

12 Section 175 of the *ESOS Act* permits the Secretary of the Department of Education and Training, for purposes which include "promoting compliance with the conditions of a particular student visa or visas, or of student visas generally" and "facilitating the monitoring and control of immigration", to give information obtained or received for the purposes of the Act to "an agency of the Commonwealth ... that is responsible for or otherwise concerned with immigration"[15]. In practice, the Secretary of the Department of Education and

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**9** Section 19(1) of the *ESOS Act*.

**10** Section 19(1)(a) and (b) of the *ESOS Act*, read with reg 3.01 of the ESOS Regulations.

**11** Regulation 1.03 of the ESOS Regulations.

**12** Section 19(3) of the *ESOS Act*.

**13** Section 19(5) and (6) of the *ESOS Act*.

**14** Part 6 of the *ESOS Act*.

**15** Section 175(1)(c), (d) and (e) of the *ESOS Act*.

Training gives information received from registered providers under s 19 of the *ESOS Act* to officers of the Department of Immigration and Border Protection by allowing those officers access to PRISMS, from which the information can be downloaded.

13 Section 116(1)(b) of the *Migration Act* provides that, subject to immaterial exceptions, "the Minister may cancel a visa if he or she is satisfied that ... its holder has not complied with a condition of the visa".

14 If the Minister is considering cancelling a visa under s 116(1)(b), the Minister is required by s 119(1) of the *Migration Act* to notify the holder that there appear to be grounds for cancelling it, giving particulars of those grounds and of the information because of which the grounds appear to exist, and inviting the holder to show within a specified time that those grounds do not exist or there is a reason why the visa should not be cancelled. The visa holder is to be notified in one of the ways prescribed by regulation[16], which include notifying the holder in a document sent to the holder's last residential address known to the Minister or in a document transmitted by email to the last email address known to the Minister[17]. That express requirement for notification and prescription of the means of notification "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule" in relation to the matters with which they deal[18]. If the visa holder does not respond to the invitation within the specified time, the Minister is permitted to make the decision about cancellation without taking any further action about the information[19].

15 A decision by the Minister or his or her delegate to cancel a visa under s 116(1)(b) is reviewable on its merits by the Migration Review Tribunal[20], but only on an application lodged with the Tribunal within a specified period[21].

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**16** Section 119(2) of the *Migration Act*.

**17** Regulation 2.55 of the Migration Regulations.

**18** Section 118A(1) of the *Migration Act*.

**19** Section 123 of the *Migration Act*.

**20** Section 338(3) of the *Migration Act*.

**21** Section 347(1)(b)(i) of the *Migration Act.*

Facts

16 The plaintiff is a citizen of the People's Republic of China. He is now 22 years old. He first travelled to Australia on a student visa when he was 15 years old. Having completed his secondary schooling in Australia, he went on to enrol in a course of study known as the "Foundation Program" provided by Macquarie University, a registered provider under the *ESOS Act*. The plaintiff was subsequently granted a Student (Temporary) (Class TU) Higher Education Sector (Subclass 573) visa, a student visa for the purposes of the *ESOS Act*.

17 The plaintiff was in fact enrolled in the Foundation Program between 24 June 2013 and 13 June 2014. Unfortunately, confirmation of that enrolment was not recorded in PRISMS. It is to be inferred, on the balance of probabilities, that the confirmation of that enrolment was not recorded in PRISMS because Macquarie University failed to perform the obligation imposed on it by s 19 of the *ESOS Act* to upload the relevant information.

18 On the basis of outdated information which was recorded in PRISMS, officers of the Department of Immigration and Border Protection formed the view in early 2014 that the plaintiff was not then enrolled in a registered course. A letter dated 3 February 2014 was sent by registered post to the plaintiff's last residential address known to the Department notifying him of an intention to consider cancelling his visa because PRISMS indicated that he had not been enrolled in a registered course since 26 July 2013. The letter was returned as unclaimed. A second letter, dated 25 February 2014, was sent to another address, obtained as a result of making a telephone call to Macquarie University. That second letter suffered the same fate.

19 In the period between the sending of the first and second letters, an officer of the Department of Immigration and Border Protection succeeded in telephoning the plaintiff to ask for his then current address. The plaintiff responded "I'm not telling you that" and immediately hung up. According to the plaintiff, that was because he did not believe the caller's statement that he was from the Department. A little later, the same officer attempted to send an email to the plaintiff attaching a further copy of the letter dated 3 February 2014. The officer had the plaintiff's correct email address but, because of a typographical error by the officer, the email was sent to the wrong email address. The upshot was that, despite formal compliance with the requirement for notification under s 119(1) of the *Migration Act*, the plaintiff never in fact received notice that consideration was being given to cancelling his visa.

20 The time for responding to the notification contained in the letter of 25 February 2014 having expired, a delegate of the Minister made a decision on 20 March 2014 to cancel the plaintiff's visa under s 116(1)(b) of the *Migration Act* for non-compliance with the condition of the visa that he be enrolled in a

registered course. The parties are agreed that the decision was made because the delegate was satisfied, by reference to PRISMS, that the plaintiff had not been enrolled in a registered course since 26 July 2013. Written notice of the decision, and of the reasons for it, was set out in a letter which the delegate sent by registered post to the plaintiff on the same day. That letter too was returned unclaimed.

21 The plaintiff discovered that a decision had been made to cancel his visa only on 2 October 2014. The following day, he lodged an application for review of the decision with the Migration Review Tribunal. The Tribunal decided on 5 December 2014 that it did not have jurisdiction to review the decision, because the application was lodged too late.

22 The plaintiff filed his application for an order to show cause in this Court on 8 January 2015.

Jurisdictional error

23 Jurisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act. There is no reason in principle why jurisdictional error should be confined to error or fault on the part of the decision-maker.

24 Statutory provisions conditioning the validity of exercises of decision-making powers were described by Dixon J in *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* as imposing "imperative duties or inviolable limitations or restraints"[22]. As explained by Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth*[23]:

> "To describe a duty as imperative, or a restraint as inviolable, is to express the result of a process of construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made."

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**22** (1951) 82 CLR 208 at 248; [1951] HCA 3.

**23** (2003) 211 CLR 476 at 489 [21].

His Honour went on to explain that "[b]ecause what is involved is a process of statutory construction ... the outcome will necessarily be influenced by the particular statutory context"[24].

25 The analysis of Gleeson CJ in *Plaintiff S157/2002* shows that, notwithstanding the note of caution sounded in *Project Blue Sky Inc v Australian Broadcasting Authority*[25], there remains utility in maintaining the traditional terminological distinction between an "imperative" (or "mandatory") duty on the one hand, and a "directory" duty on the other hand, for the purpose of describing whether or not a material breach of an antecedent statutory duty results in an invalid exercise of a decision-making power. That distinction was explained in *Clayton v Heffron* when it was said[26]:

> "Lawyers speak of statutory provisions as imperative when any want of strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act is wholly ineffective, is null and void."

26 Consistently with *Project Blue Sky Inc*, what is critical to be borne in mind is that assignation of one or other of those labels to a particular statutory duty imposed by a particular statutory provision marks "the end of the inquiry, not the beginning"[27]. To label a particular statutory duty either "imperative" or "directory" is to express the conclusion of a process of statutory construction. Central to that process of statutory construction is an inquiry as to whether the statutory purpose of the duty, when considered within the particular statutory scheme of which it forms part, would or would not be advanced by holding an exercise of decision-making power affected by breach of the duty to be invalid[28].

27 Considerations bearing on an inquiry of that nature have long been recognised to include the justice and convenience of holding that a breach of the

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**24** (2003) 211 CLR 476 at 489 [21].

**25** (1998) 194 CLR 355 at 389-391 [92]-[93]; [1998] HCA 28.

**26** (1960) 105 CLR 214 at 247; [1960] HCA 92.

**27** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93].

**28** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93].

duty invalidates an exercise of the decision-making power. Thus, in *Montreal Street Railway Company v Normandin*[29], in which the issue was whether the verdict of a civil jury was to be set aside on account of non-compliance by a designated court officer with a statutory duty annually to revise a list of jurors, the Privy Council said:

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

28 The same considerations of justice and convenience tell in favour of the conclusion that a duty is imperative where a material breach would work to the peculiar disadvantage of an individual.

29 The duty with which we are presently concerned is that imposed by s 19 of the *ESOS Act* on a registered provider to upload onto PRISMS confirmation of enrolment of a person holding a student visa. Within the statutory scheme, there is little difficulty in concluding that the statutory purpose of that duty would be advanced by holding that an exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act* that is affected by a breach of that duty is invalid.

30 The statutory scheme establishes PRISMS as a repository of information available to be taken into account in decision-making under the *Migration Act*, and makes the requirement of s 19 of the *ESOS Act* for a registered provider to upload information onto PRISMS the means by which the integrity of that information is sought to be ensured. That scheme furthers the express statutory object of the *ESOS Act*: to complement Australia's migration laws by ensuring that institutions providing courses of education or training to holders of student visas collect and report information relevant to the administration of the law relating to student visas.

31 The injustice to the holder of the student visa of the power to cancel that visa being exercised on the basis of incorrect information downloaded from PRISMS is manifest. The facts of the present case well illustrate that such injustice is not necessarily mitigated by either the requirement to give notice of the decision or the availability of merits review.

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**29** [1917] AC 170 at 175.

32 The requirement of s 19 of the *ESOS Act* that a registered provider upload onto PRISMS confirmation of enrolment of a person holding a student visa is therefore properly characterised as an imperative duty, in the sense that material non-compliance with the requirement will result in an invalid exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act*.

33 The "satisfaction" required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act* is a state of mind. It is a state of mind which must be formed reasonably and on a correct understanding of the law[30]. Equally, it is a state of mind which must be untainted by a material breach of any other express or implied condition of the valid exercise of that decision-making power. The imperative duty imposed on a registered provider by s 19 of the *ESOS Act* is such a condition.

34 Here, the delegate's satisfaction that the plaintiff was in breach of the visa condition that he be enrolled in a registered course was formed by a process of fact-finding which was tainted by Macquarie University's antecedent breach of its duty, under s 19 of the *ESOS Act*, to upload onto PRISMS confirmation of the plaintiff's then current enrolment. The delegate reached that satisfaction because the delegate found as a fact that the plaintiff was not enrolled in a registered course. The delegate found that fact on the basis of information contained in PRISMS. That finding was wrong because the information contained in PRISMS was wrong. The information contained in PRISMS was wrong because of Macquarie University's failure to perform its imperative statutory duty.

35 The case is one of jurisdictional error.

Extension of time

36 Section 486A of the *Migration Act*, as amended after *Bodruddaza v Minister for Immigration and Multicultural Affairs*[31] and as it currently stands, provides in part:

> "(1) An application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

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**30** *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137]; [1999] HCA 21, citing *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; [1944] HCA 42 and *Buck v Bavone* (1976) 135 CLR 110 at 118-119; [1976] HCA 24.

**31** (2007) 228 CLR 651; [2007] HCA 14.

(2) The High Court may, by order, extend that 35 day period as the High Court considers appropriate if:

(a) an application for that order has been made in writing to the High Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the High Court is satisfied that it is necessary in the interests of the administration of justice to make the order."

37 The "date of the migration decision" for the purposes of the present case is the date of the written notice of the decision[32]: 20 March 2014.

38 The plaintiff acknowledges that his application for prohibition and certiorari was made outside the period of 35 days referred to in s 486A(1) and has sought in his application for an order to show cause an order under s 486A(2) extending that period. His written submissions specify why the plaintiff considers that it is necessary in the interests of the administration of justice to make the order.

39 We are satisfied that it is necessary in the interests of the administration of justice to make the order which the plaintiff seeks under s 486A(2) extending the period for the making of the application. We have already concluded that the decision of the delegate of the Minister was affected by jurisdictional error. We are also satisfied that the plaintiff's delay in making the application has been satisfactorily explained. For much of the period of the delay, the plaintiff was simply unaware of the decision. When he did become aware of it, he acted expeditiously in attempting to challenge the decision by immediately seeking to review the decision on its merits in the Migration Review Tribunal. He filed his application for an order to show cause in this Court within 35 days of the decision of the Tribunal that it lacked jurisdiction. The Minister has suffered no prejudice by reason of the delay which has occurred.

40 We therefore consider it appropriate to make an order under s 486A(2). In the course of the hearing, a question was raised as to whether that order should extend the period for the making of the application to the date of the filing of the application for an order to show cause, or instead to the date of that hearing. The appropriate order is one which extends the period for the making of the application to the date on which the application for an order to show cause was filed.

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**32** Section 486A(3), read with s 477(3)(d) of the *Migration Act*.

41 That is consistent with the prior practice of single Justices of the High Court[33]. More importantly, it reflects the nature of s 486A as a procedural provision which regulates the exercise of the original jurisdiction conferred by s 75(v) of the Constitution. Section 486A does not, and could not, impose a condition precedent to the invocation of that jurisdiction.

42 Section 486A does not prevent the making of an application under s 75(v) of the Constitution. The application is made by filing an application for an order to show cause in accordance with the High Court Rules. Section 486A operates rather to regulate the procedure applicable to the exercise of the jurisdiction that has been invoked by the making of such an application where the application has not been made within 35 days of the date of the decision which the plaintiff seeks to challenge. It does so by making the grant of the relief sought in the application conditional on an order extending the period for the making of the application. The period of the extension need only be to the date on which the application for an order to show cause has in fact already been filed. In parlance which derives from the historical practice of the Court of Chancery[34], the order is one which can and should be made *nunc pro tunc*.

Orders

43 The following orders should be made:

(1) The time for the making of the application be extended to 8 January 2015.

(2) A writ of certiorari issue quashing the decision made by the delegate of the defendant on 20 March 2014 to cancel the plaintiff's student visa.

(3) A writ of prohibition issue preventing the defendant, or his agents, employees or delegates, from acting on or giving effect to or enforcing the decision of the delegate.

(4) The defendant pay the plaintiff's costs of the application other than those costs which were the subject of the order for costs made by Gageler J on 20 August 2015.

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**33** Eg *Ahmed v Minister for Immigration and Citizenship* [2011] HCATrans 035; *SZTVL v Minister for Immigration and Border Protection* [2014] HCATrans 010; *Zhang v Minister for Immigration and Border Protection* [2015] HCATrans 244.

**34** See *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 131-132; [1997] HCA 20.

44 NETTLE J. I have had the considerable advantage of reading in draft the reasons for judgment of Gageler and Keane JJ, but I am unable to agree with their Honours that, simply because the University failed to provide PRISMS with accurate information concerning the status of the plaintiff's enrolment, the Minister's delegate made a jurisdictional error in basing the decision to cancel the plaintiff's student visa on the consequently inaccurate information in PRISMS.

45 As Gageler and Keane JJ observe, at relevant times the University was under an obligation under s 19 of the *ESOS Act* to give the Secretary of the Department of Education and Training prescribed information in relation to an accepted student and it was an offence to fail to comply with that obligation. As their Honours also observe, at relevant times s 175 of the *ESOS Act* empowered the Secretary to share that information with, inter alia, the Department of Immigration and Border Protection. Neither the *ESOS Act*, however, nor the *Migration Act*, nor any regulation made under those Acts required the Minister's delegate, when deciding whether to cancel the student visa under s 116(1)(b) of the *Migration Act*, to have regard to PRISMS alone; still less to base the decision on PRISMS. The legislative scheme did not expressly or impliedly accord any presumptive correctness or weight to information in PRISMS. The scheme of the legislation appears rather to have been that, in the case of a decision under s 116(1)(b), PRISMS was to be available as one of the sources of information to which the Minister's delegate could have regard. The Secretary's sharing of information in PRISMS with the Department of Immigration and Border Protection can be seen as having facilitated administrative convenience and efficiency. But in each case it was up to the Secretary and not a necessary consequence of the duty on registered providers to provide prescribed information to the Secretary.

46 Further, given the nature of the information involved, and the processes by which it may be supposed it would ordinarily be obtained from registered providers and overseas students, it is self-evident that, even with the best will in the world and the most assiduous attention to compliance with s 19 of the *ESOS Act*, there would be errors made in the compilation of PRISMS from time to time. Hence, the recognition in s 119 of the *Migration Act* of the need to allow a student in the position of the plaintiff the opportunity to correct such a mistake by appropriate submission to the Minister.

47 There is also a degree of uncertainty about the extent to which a decision to cancel a visa should be conceived of as "tainted" or "affected" by an error in PRISMS. In a case of this kind, where there is only one fact to be determined by a binary process of fact-finding based primarily on PRISMS, it might not appear problematic that an incorrect statement of the fact in PRISMS should be conceived of as so fundamentally tainting or affecting the decision as to afflict it with jurisdictional error. But what of a case where a decision is based on an evaluation of a multitude of facts of which, say, only one is an incorrect entry in PRISMS? If reliance upon any incorrect information in PRISMS constituted a

jurisdictional error it would follow that any decision which took into account any information that was wrongly entered in PRISMS would be vitiated by jurisdictional error, unless, in the circumstances of the particular case, it were clear that taking that information into account could not possibly have made any difference to the decision.

48 According, however, to established principle, an error of fact is ordinarily an error made in the exercise of jurisdiction and is not ultra vires[35]. And, in this case, because the basis of cancellation was the satisfaction of the Minister's delegate of failure to comply with a condition of the visa, whether the plaintiff was enrolled was a question of fact[36]. That being so, it should not be accepted that the delegate's taking into account of the wrongly entered information in PRISMS rendered the decision ultra vires. It is more in keeping with principle to treat the fact of some or even total reliance on incorrect information in PRISMS as an error of fact made in the exercise of jurisdiction. Significantly, the statutory scheme accounted for the possibility of such errors, albeit, as this case demonstrates, imperfectly, by requiring the decision-maker to notify the visa-holder of the proposed ground for cancellation and inviting comment[37] and by providing for merits review in the Migration Review Tribunal[38].

49 It does not follow, however, that there is nothing which can be done for the plaintiff. In *Prasad v Minister for Immigration and Ethnic Affairs*[39], Wilcox J held that, although it is not enough to establish jurisdictional error on the part of an administrative decision-maker that the court may consider that the sounder course for the decision-maker would have been to make further inquiries, where it is obvious that material is readily available which is centrally relevant to the decision to be made, and the decision-maker proceeds to make the decision without obtaining that information, the decision may be regarded as so unreasonable as to be beyond jurisdiction. In *Ex parte Helena Valley/Boya Association (Inc)*[40], Ipp J, sitting as a member of the Full Court of the Supreme

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**35** *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 per Mason CJ; [1990] HCA 33.

**36** Cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353; [1949] HCA 26; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1168 [8]-[9] per Gleeson CJ; 198 ALR 59 at 61-62; [2003] HCA 30.

**37** *Migration Act*, ss 119-121.

**38** *Migration Act*, Pt 5, Div 3.

**39** (1985) 6 FCR 155 at 169-170.

**40** (1990) 2 WAR 422 at 445-446.

Court of Western Australia, applied Wilcox J's reasoning in *Prasad* in order to conclude that a local council had failed properly to apply its mind to the question which needed to be decided in determining whether to approve a planning application. In *Minister for Immigration and Ethnic Affairs v Teoh*[41], Mason CJ and Deane J expressly approved of Wilcox J's reasoning in *Prasad* and of its application in appropriate cases. And in *Minister for Immigration and Citizenship v Le*[42], Kenny J surveyed the course of authority following *Prasad* and held that it was legally unreasonable for the Migration Review Tribunal to fail to make an obvious inquiry. Based on those decisions, in *Minister for Immigration and Citizenship v SZIAI*[43], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ similarly concluded that there may be circumstances in which a merits reviewer's failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, can be seen to supply a sufficient link to the outcome of review to constitute a constructive failure to exercise jurisdiction.

50 In this case, the delegate was put on inquiry. As a result of the return of his letter of 3 February 2014 as "unclaimed", he knew that the address shown in the records of the Department of Immigration and Border Protection as being the plaintiff's address was not the plaintiff's address. As a result of the return of his letter of 25 February 2014, he also knew that the address of the plaintiff supplied by the University was unlikely to be the plaintiff's address. Inasmuch as the delegate knew that none of the communications which he had sent to the plaintiff had reached the plaintiff, the delegate knew that the plaintiff did not know that the Minister proposed to cancel the visa. As a result, the delegate also knew that the plaintiff would not have the opportunity, which ss 119-121 of the *Migration Act* contemplated that the plaintiff should have, of demonstrating to the Minister why the supposed ground of cancellation did not exist. Thus, until the prescribed time for responding under s 121(2) expired, it would have been apparent to the delegate, or it should have been, that it was more than usually important for the delegate to be as certain as reasonably possible that the proposed ground of cancellation existed, and thus for the delegate to be as certain as reasonably possible that the plaintiff was not in fact enrolled at the University.

51 As already mentioned, there was nothing in the relevant legislation that provided that PRISMS was to be treated as a conclusive record of enrolment. Hence, one obvious way of ensuring, or at least being more certain, that the plaintiff had ceased to be enrolled was to make a telephone inquiry of the University, the direct and authoritative source of confirmation of the plaintiff's enrolment, just as the delegate had done on 20 February 2014 to check the

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**41** (1995) 183 CLR 273 at 289-290; [1995] HCA 20.

**42** (2007) 164 FCR 151 at 174-179 [64]-[79].

**43** (2009) 83 ALJR 1123 at 1129 [25]; 259 ALR 429 at 436; [2009] HCA 39.

plaintiff's address. Given the criticality of the fact that the plaintiff was enrolled at the University, the relative ease with which that fact could have been ascertained, the obviousness of the means of doing so – by picking up the telephone and requesting the University to check whether the plaintiff's enrolment status as shown in PRISMS was in fact correct – and the clear link between the delegate's failure to make that inquiry and the delegate's determination to cancel the visa, I consider this to be a case in which the delegate's failure amounted to a constructive failure to exercise jurisdiction and therefore a jurisdictional error.

52 For those reasons, I agree with Gageler and Keane JJ that the decision to cancel the plaintiff's student visa should be quashed. I also agree with their Honours' reasons and conclusions regarding the operation of s 486A of the *Migration Act*. Accordingly, I, too, would make orders in the terms which their Honours propose.