HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

M141/2017

CHETAN SHRESTHA — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

M142/2017

BISHAL GHIMIRE — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

M143/2017

SHIVA PRASAD ACHARYA — APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — RESPONDENTS

Shrestha v Minister for Immigration and Border Protection
Ghimire v Minister for Immigration and Border Protection
Acharya v Minister for Immigration and Border Protection
[2018] HCA 35
15 August 2018
M141/2017, M142/2017 & M143/2017

ORDER

Each appeal is dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G A Costello with M W Guo for the appellants in all matters (instructed by Da Gama Pereira & Associates)

C J Horan QC with A Aleksov for the first respondent in all matters (instructed by DLA Piper Australia)

Submitting appearance for the second respondent in all matters

CATCHWORDS

Shrestha v Minister for Immigration and Border Protection
Ghimire v Minister for Immigration and Border Protection
Acharya v Minister for Immigration and Border Protection

Migration – Cancellation of visa – Student visa – Where Minister for Immigration and Border Protection empowered to cancel visa if satisfied that any circumstances which permitted grant of visa no longer existed – Where delegate of Minister decided to cancel visa – Review of decision by Migration Review Tribunal – Where each appellant granted visa as "eligible higher degree student" – Where definition of "eligible higher degree student" required that visa applicant who proposed to undertake another course of study before and for purposes of principal course of study be enrolled in that other course of study – Where visa holder was enrolled in another course of study for purposes of principal course of study at time of grant of visa – Where visa holder ceased to be enrolled in that other course of study – Where Tribunal concluded that visa holder no longer "eligible higher degree student" – Where Tribunal concluded that circumstance which permitted grant of visa no longer existed – Whether Tribunal made error of law by considering legal characterisation of circumstance rather than circumstance itself – Whether jurisdictional error.

Words and phrases – "another course of study", "circumstances", "eligible higher degree student", "error of law", "factual circumstances", "jurisdictional error", "principal course of study", "reasonably and on a correct understanding and application of the applicable law", "satisfied".

Migration Act 1958 (Cth), s 116.
Migration Regulations 1994 (Cth), Sched 2, cll 573.111, 573.223.

1 KIEFEL CJ, GAGELER AND KEANE JJ. These three appeals were heard concurrently with the appeal in *Hossain v Minister for Immigration and Border Protection*[1]. Each falls to be determined in the application of the holding in that case that an incorrect understanding and application of the law in making a decision in the purported exercise of decision-making authority conferred by the *Migration Act* 1958 (Cth) does not constitute a jurisdictional error justifying the grant of relief under or by reference to s 75(v) of the Constitution if a correct understanding and application of the law could not in the circumstances have resulted in the decision that was made being a different decision.

2 The decision-making authority in question in each appeal was that conferred by s 116(1)(a) of the *Migration Act*, which provided that "the Minister may cancel a visa if he or she is satisfied that ... any circumstances which permitted the grant of the visa no longer exist". The provision adopts the familiar structure of conferring on a repository (the Minister or his or her delegate) a specified discretion (to cancel a visa) which can only be exercised if a specified precondition is met (that he or she is satisfied that any circumstances which permitted the grant of the visa no longer exist). The satisfaction of the Minister or delegate required to meet that precondition is a state of mind formed reasonably and on a correct understanding and application of the applicable law[2].

3 The Full Court of the Federal Court in the decision under appeal[3] held by majority that the word "circumstances" in s 116(1)(a) is properly construed as referring to a state of affairs as distinct from a legal characterisation of a state of affairs. That construction was challenged by notice of contention in the appeals. The question of the construction of that word in the section, however, does not warrant consideration by this Court. The appeals can and should be determined on the assumption that the majority's construction was correct.

4 Each appeal arises from a separate decision of the Migration Review Tribunal which affirmed on review a separate decision of a delegate of the Minister purporting to cancel a student visa, a prescribed criterion for the grant of which was that the applicant met the definition of an "eligible higher degree student". An element of that definition, which can be described for ease of reference as "the enrolment element", required that, if a visa applicant proposed

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1 [2018] HCA 34.

2 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33]; [2015] HCA 51.

3 *Shrestha v Minister for Immigration and Border Protection* (2017) 251 FCR 143 at 145-146 [3]-[6], 166-167 [103]-[104].

to undertake another course of study before and for the purposes of a principal course of study, the visa applicant had to be enrolled in that other course[4].

5 The Tribunal in each case found that the holder of a student visa, who had been found to have met the enrolment element by reason of having been enrolled in a particular course at the time of grant of the visa, was no longer enrolled in that course. The Tribunal had then gone on in each case to consider whether a different course of study in which the visa holder had later enrolled satisfied the enrolment element, concluding in each case that the different course of study did not satisfy that element. Being satisfied that the decision to grant the student visa had been based in part on the "circumstance" of the applicant meeting the enrolment element and that that circumstance no longer existed, the Tribunal turned its attention to the exercise of discretion. Weighing the personal situation of the visa holder, the Tribunal concluded in each case that the student visa should be cancelled.

6 Each decision of the Tribunal was challenged in an application for judicial review in the Federal Circuit Court. In each case, the application was dismissed by the Federal Circuit Court[5].

7 On appeal to the Full Court of the Federal Court, Bromberg and Charlesworth JJ found that the Tribunal had in each case misconstrued and misapplied the word "circumstances" in s 116(1)(a) by treating the relevant circumstance as fulfilment of the enrolment element of the definition instead of treating the relevant circumstance as enrolment in the particular course in which the visa holder was enrolled at the time of grant[6].

8 Given that the Tribunal was in each case satisfied that the visa holder was no longer enrolled in the particular course in which he or she had been enrolled at the time of grant, however, the majority found that the Tribunal's legal error had no effect on fulfilment of the precondition to the exercise of discretion. Together with Bromwich J, who dissented in relation to the construction of the word "circumstances" and who found no legal error in the reasoning of the Tribunal in relation to the precondition, Bromberg and Charlesworth JJ also found that treating the relevant circumstance as enrolment in the particular course could

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4 Clause 573.111 of Sched 2 to the Migration Regulations 1994 (Cth).

5 *Shrestha v Minister for Immigration and Border Protection* [2016] FCCA 828; *Ghimire v Minister for Immigration and Border Protection* [2016] FCCA 1440; *Acharya v Minister for Immigration and Border Protection* [2016] FCCA 1240.

6 (2017) 251 FCR 143 at 146 [8], 167 [108].

have had no effect on the findings which the Tribunal made or on the reasoning which the Tribunal adopted when it turned to the exercise of discretion. They concluded, therefore, that the Tribunal's legal error could have had no impact on the decisions which the Tribunal made in fact to cancel each visa[7].

9 Bromberg and Charlesworth JJ each characterised the Tribunal's legal error as a jurisdictional error, but treated the fact that the error could have had no impact on the Tribunal's decision as a reason to refuse relief as a matter of discretion[8]. Bromwich J indicated that he too would have refused relief as a matter of discretion had he considered the Tribunal to have erred[9].

10 For the reasons given in *Hossain v Minister for Immigration and Border Protection*, the fact that the postulated legal error could have had no impact on the Tribunal's decisions denied that error the character of a jurisdictional error. The postulated legal error at most led the Tribunal to ask a superfluous question. The Tribunal's reasons for decision in each case make perfectly clear that its treatment of the relevant circumstance (as meeting the enrolment element of the definition of an "eligible higher degree student", rather than as enrolment in the particular course in which the visa holder had been enrolled at the time of grant of the visa) did not impact on anything which the Tribunal otherwise did in finding facts and in reasoning to a conclusion as to the preferable exercise of discretion. For that reason, the postulated legal error could not have taken the decision of the Tribunal beyond the authority conferred on the Tribunal.

11 The nature of the postulated legal error lends itself to analogy with cases in which a decision-maker has authority to exercise discretion but is mistaken as to the statutory source of that authority. The mistake as to the source of authority has consistently been held not to take the exercise of discretion beyond the statutory authority which the decision-maker actually has[10] unless the mistake

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7 (2017) 251 FCR 143 at 148 [16]-[17], 170 [126].

8 (2017) 251 FCR 143 at 147-148 [11]-[18], 169-171 [121]-[128].

9 (2017) 251 FCR 143 at 153-155 [41]-[48].

10 Eg *Brown v West* (1990) 169 CLR 195 at 203-204; [1990] HCA 7; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426, 469; [1993] HCA 56.

leads the decision-maker to ignore statutory requirements which might have resulted in the exercise of the discretion being different had they been observed[11].

12 Each appeal is to be dismissed with costs.

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11 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 16-17 [34]; [2012] HCA 3; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 at 412.

NETTLE AND EDELMAN JJ.

Introduction

13 Each appellant in these appeals was granted a Student (Temporary) (class TU) Higher Education Sector (subclass 573) visa under s 65 of the *Migration Act* 1958 (Cth). Delegates of the Minister cancelled the appellants' visas on substantively the same grounds. In each case, the Migration Review Tribunal ("the Tribunal") affirmed the delegate's decision and the Federal Circuit Court of Australia dismissed an application for judicial review. On appeal to the Full Court of the Federal Court of Australia, a majority held that the Tribunal had made a jurisdictional error but dismissed the appeals on the basis that the discretion not to issue writs of certiorari should have been exercised because the error could not have made any difference to the result. The appellants submitted that the Full Court erred by concluding that the discretion should have been exercised not to issue writs of certiorari.

14 An issue of law raised by these appeals was dealt with on the appeal in *Hossain v Minister for Immigration and Border Protection*[12], which was heard concurrently with them. In that case, it was held that an error of law that would have made no difference to the result is not generally a jurisdictional error. Absent a finding of jurisdictional error, a writ of certiorari cannot issue to quash a decision of the Tribunal[13]. However, these appeals should be resolved on a point that logically precedes that issue. By notice of contention, the Minister submitted that the appeals should be dismissed on the basis that the Tribunal made no error of law. That submission should be accepted. The appeals should be dismissed.

The grant of visas to the appellants

15 The criteria for the visa granted to the appellants were prescribed by Subclass 573 of Sched 2 to the Migration Regulations 1994 (Cth). Those criteria included cl 573.223(1)(b), which provided that the decision maker must be satisfied that the visa applicant meets the requirements of cl 573.223(1A) or cl 573.223(2).

16 Of these two possibilities, the appellants were granted visas under sub-cl (1A), which included a requirement that the applicant be an "eligible higher degree student". Clause 573.223 relevantly provided as follows:

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12 [2018] HCA 34.

13 *Migration Act* 1958 (Cth), s 474; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]-[77]; [2003] HCA 2.

"(1A) If the applicant is an eligible higher degree student who has a confirmation of enrolment in each course of study for which the applicant is an eligible higher degree student:

(a) the applicant gives the Minister evidence that the applicant has:

(i) a level of English language proficiency that satisfies the applicant's eligible education provider; and

(ii) educational qualifications required by the eligible education provider; and

(b) the Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student, having regard to:

(i) the stated intention of the applicant to comply with any conditions subject to which the visa is granted; and

(ii) any other relevant matter; and

(c) the Minister is satisfied that, while the applicant holds the visa, the applicant will have sufficient funds to meet:

(i) the costs and expenses required to support the applicant during the proposed stay in Australia; and

(ii) the costs and expenses required to support each member (if any) of the applicant's family unit.

(2) If the applicant is not an eligible higher degree student, or does not have a confirmation of enrolment in each course of study for which the applicant is an eligible higher degree student:

(a) the applicant gives the Minister evidence in accordance with the requirements mentioned in Schedule 5A for the highest assessment level for the applicant; and

(b) the Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student, having regard to:

(i) the stated intention of the applicant to comply with any conditions subject to which the visa is granted; and

(ii) any other relevant matter; and

(c) the Minister is satisfied that, while the applicant holds the visa, the applicant will have access to the funds demonstrated or declared in accordance with the requirements in Schedule 5A relating to the applicant's financial capacity."

17 The definition of "eligible higher degree student" ("the EHDS definition"), contained in cl 573.111, was as follows:

"***eligible higher degree student*** means an applicant for a Subclass 573 visa in relation to whom the following apply:

(a) the applicant is enrolled in a principal course of study for the award of:

(i) a bachelor's degree; or

(ii) a masters degree by coursework;

(b) the principal course of study is provided by an eligible education provider;

(c) if the applicant proposes to undertake another course of study before, and for the purposes of, the principal course of study:

(i) the applicant is also enrolled in that course; and

(ii) that course is provided by the eligible education provider or an educational business partner of the eligible education provider."

18 At the time the appellants received their visas, they satisfied each of criteria (a), (b), and (c) of the EHDS definition. All of them were enrolled in a principal course of study for the award of a bachelor's degree with an eligible education provider, and all of them proposed to undertake, and were enrolled in, a diploma course with an educational business partner of the eligible education provider before commencing their bachelor's degree course. One of the appellants, Mr Acharya, subsequently changed his enrolment to a different bachelor's degree and a different diploma but, at that time, he continued to satisfy criteria (a), (b), and (c) of the EHDS definition. It was not suggested on his appeal that anything turned upon this difference.

The cancellation of the appellants' visas

19 The appellants' studies were not a success. At the end of the first semester of the diploma courses, each appellant ceased to be enrolled in the diploma course although maintaining enrolment in the proposed, subsequent bachelor's degree.

20 Delegates of the Minister cancelled the appellants' visas. At the relevant time, s 116(1)(a) of the *Migration Act* provided that, subject to sub-ss (2) and (3), which are not relevant to these appeals, "the [decision maker] may cancel a visa if he or she is satisfied that ... any circumstances which permitted the grant of the visa no longer exist".

The Tribunal and the Federal Circuit Court

21 The approach taken by the Tribunal to each appellant was effectively the same. The Tribunal's reasoning in relation to Mr Shrestha is illustrative.

22 Mr Shrestha was granted a visa on the basis of his enrolment in a Bachelor of Information Technology with an eligible education provider (Deakin University) and a Diploma of Computing with an educational business partner of that provider (Melbourne Institute of Business & Technology). Mr Shrestha failed all of the units that he undertook in his Diploma of Computing. He then enrolled in cookery courses.

23 The Tribunal held that although Mr Shrestha remained enrolled in the Bachelor of Information Technology at Deakin University, he ceased being "enrolled in another course of study before and for the purposes of the principal course of study and provided by an education[al] business partner of Deakin". The cookery courses in which he subsequently enrolled were not "before, and for the purposes of, the principal course of study" within criterion (c) of the EHDS definition. Nor did Mr Shrestha provide any evidence of enrolment in another course of study that was a pathway to the Bachelor of Information Technology in which he was enrolled. The Tribunal concluded as follows:

> "Accordingly, the Tribunal finds that [Mr Shrestha] is not an eligible higher degree student. He therefore does not satisfy the requirements of cl 573.223(1A) and a circumstance which permitted the grant of the visa no longer exists."

24 The Tribunal held that the non-existence of a circumstance that permitted the grant of Mr Shrestha's visa enlivened the discretion under s 116(1)(a) of the *Migration Act* to cancel his visa. After considering the circumstances relevant to the exercise of the discretion to cancel the visa, the Tribunal held that it should be cancelled. The delegate's decision was therefore affirmed by the Tribunal.

25 In each case, an application to the Federal Circuit Court for judicial review was dismissed.

The Full Court

26 The Full Court heard the three appeals together[14]. In their judgments, their Honours used the circumstances of Mr Shrestha to illustrate the common issues raised on the appeals.

27 By a notice of contention, the Minister raised a legal issue that is logically anterior to a consideration of the particular grounds of appeal. That legal issue is whether the Tribunal had asked the wrong question when applying the test for cancellation of a visa under s 116(1)(a) of the *Migration Act*. In the Full Court, Charlesworth J (with whom Bromberg J relevantly agreed) held that the Tribunal had asked itself the wrong question and that a jurisdictional error had been established. However, their Honours dismissed the appeals on the basis that the outcome could not have been any different.

28 As Charlesworth J correctly explained, the power under s 116(1)(a) of the *Migration Act* to cancel a visa if "any circumstances which permitted the grant of the visa no longer exist" directed attention on these appeals to each appellant's enrolment in the diploma course as the relevant circumstance upon which the visa was granted. Her Honour said, also correctly, that at the time of the cancellation decision Mr Shrestha was no longer enrolled in the diploma, so the power to cancel the visa was enlivened[15]. However, her Honour held that the Tribunal had erred by proceeding on the basis that the power to cancel Mr Shrestha's visa "turned upon whether or not he satisfied the EHDS definition and perhaps to a lesser extent, the criteria under cl 573.223(1A)"[16].

29 An example can illustrate her Honour's point about the difference between (i) a legal conclusion as to whether the EHDS definition is satisfied, and (ii) a factual conclusion as to whether the circumstances underlying the EHDS definition have changed. Suppose an applicant were granted a visa on the basis of enrolment to study for a bachelor's degree falling within criteria (a) and (b) of the EHDS definition. If the applicant failed the degree but, immediately prior to failure, enrolled in a different degree that satisfied criteria (a) and (b) of the EHDS definition, the applicant would continue to satisfy the EHDS definition and the ministerial discretion to cancel the applicant's visa would not be

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14 *Shrestha v Minister for Immigration and Border Protection* (2017) 251 FCR 143.

15 (2017) 251 FCR 143 at 167 [108].

16 (2017) 251 FCR 143 at 167-168 [109].

enlivened. The process might then be repeated in relation to the second degree. If the decision maker asked himself or herself only whether the EHDS definition was still satisfied, then he or she could not cancel the applicant's visa for this reason even though the factual circumstances that permitted the grant of the applicant's visa no longer existed.

30 Charlesworth J considered that the Tribunal erred by focusing upon the more onerous standard for cancellation of whether Mr Shrestha had ceased to meet the EHDS definition, rather than by considering the circumstance of Mr Shrestha's enrolment in the diploma course, which enrolment had ceased to exist. Her Honour considered that this error by the Tribunal was a jurisdictional error. Nevertheless, the appeals were dismissed because her Honour considered that the more onerous test applied by the Tribunal meant that the outcome would not have been any different.

31 Bromwich J also dismissed the appeals. However, his Honour did so because he concluded that the Tribunal had not made any error of law. At one point in his Honour's reasons, he described the enquiry for s 116(1)(a) in terms similar to those that Charlesworth J correctly said were erroneous: whether "the circumstance of each appellant being an EHDS no longer existed"[17]. However, the approach taken by his Honour to the issue raised by s 116(1)(a) of the *Migration Act* – whether circumstances which permitted the grant of the visa no longer exist – was to consider "the basis upon which each appellant met the criterion of being an EHDS at the time of each visa grant" and whether each appellant still met that *basis* at the time of considering cancellation[18]. His Honour said[19]:

> "The correct approach, adopted by the Tribunal, was to consider how each of the appellants met the criterion of being an EHDS at the time of the grant of each visa; and how each no longer met that criterion, either by way of diploma enrolment at the time of each delegate's decision, or at all by the time of each Tribunal decision. The visa criterion did not change. A relevant circumstance of each appellant did change, such that they no longer met the visa criterion that existed at the time of the grant of each visa."

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17 (2017) 251 FCR 143 at 152 [34].

18 (2017) 251 FCR 143 at 152 [31].

19 (2017) 251 FCR 143 at 152 [32].

The Tribunal did not make any error of law

32 The approach taken by Bromwich J is correct. The requirement in s 116(1)(a) of the *Migration Act* – that the decision maker must be satisfied that "circumstances which permitted the grant of the visa no longer exist" – is concerned with factual circumstances. The criteria in the EHDS definition are factual circumstances that can permit the grant of a visa.

33 Although the grant of the visa also requires, by cl 573.223(1)(b) of the Migration Regulations, that the decision maker must be satisfied that the visa applicant meets the requirements of either cl 573.223(1A) or cl 573.223(2), and although a state of mind is capable of being a fact, it was properly common ground on these appeals that a "circumstance" in s 116(1)(a) does not include the ministerial state of mind. In other words, s 116(1)(a) is not to be construed as though it applied to "ministerial satisfaction about ministerial satisfaction"[20], ie if the Minister is satisfied that the Minister is satisfied that the requirements of cl 573.223 no longer apply.

34 The approach taken by the Tribunal in each case was not to focus upon the EHDS definition divorced from its underlying circumstances or basis. Rather, as Bromwich J explained, the Tribunal, correctly, considered whether the criteria in the EHDS definition that permitted the grant of the visa no longer existed. As explained above in relation to Mr Shrestha, the Tribunal concluded that the circumstances that permitted the grant of his visa, as with the other appellants, included the satisfaction of the facts in criterion (c) of the EHDS definition. Like the other two appellants, Mr Shrestha satisfied those facts at the time of the grant of his visa but did not do so at the time of cancellation of his visa. At the time of cancellation a circumstance that permitted the grant of his visa no longer existed.

Conclusion

35 The conclusion that the Tribunal made no error of law, and therefore could not have committed a jurisdictional error, is sufficient to uphold the notice of contention.

36 Each appeal must be dismissed with costs.

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20 *Minister for Immigration and Multicultural Affairs v Zhang* (1999) 84 FCR 258 at 270 [54].