IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M141, M142 and M143 of 2017

B E T W E E N: **SHRESTHA, GHIMIRE & ACHARYA**

Appellants

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR

Respondents

APPELLANTS' OUTLINE OF ORAL ARGUMENT

Part I: This outline is in a form suitable for publication on the internet.

Part II:

1. The context of the Tribunal's decision is student visa cancellation. The appellants were granted student visas based on their enrolments in particular courses (bachelor degrees and diplomas) with education providers which gave them access to fast track student visa processing.

2. After arriving in Australia, at the end of their first semester of study in diploma courses, they each ceased enrolment in their diploma course, but remained enrolled in bachelor courses for some time [as the Federal Court found **AB 375**]. The appellants also enrolled in courses that were not in the fast track list of courses: **AB 21 [46]**; **AB 30 [22]**; **AB [46]**.

Jurisdictional error

3. The Tribunal's decisions were affected by jurisdictional error because the Tribunal asked the wrong question. The Tribunal asked whether discretion to cancel the visa arose because the Appellants ceased to satisfy the definition of 'eligible higher degree student', rather than whether a circumstance permitting the grant of the visa no longer existed: *Migration Act 1958* (Cth), s 116(1)(a) [**AS [11]-[15]**].

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4. That the error is jurisdictional fits with the nature of the Court's supervisory jurisdiction to quash decisions made beyond the limits of the decision maker's power.

5. There is an implied statutory requirement that the Tribunal can validly exercise its review and cancellation powers only on a correct understanding of the law applicable to the decision to be made: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [75] (Gageler J).

6. The Tribunal did not have jurisdiction to ask the wrong question: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [35].

7. The error is jurisdictional based on orthodox application of *Craig v South Australia* (1995) 184 CLR 163 at 177-78 [**Reply [17]-[21]**].

8. The error was material. The Tribunal misconstrued the central provision. The error was inextricable from the eventual exercise of discretion: evaluation of the nature of the change in circumstances from the time since visa grant informed the discretion to cancel, [Shrestha Tribunal reasons: **AB 21-22 [50]-[51]**, **[Reply [22]-[25]]**.

9. The error was "capable of affecting" the exercise of power: *Minister for Immigration v Hossain* [2017] FCAFC 82 at [71] per Mortimer J.

10. The Minister contends for a construction of s116(1)(a) that departs from *Minister for Immigration and Multicultural Affairs v Zhang* (1999) 84 FCR 258, and from what the Minister argued before the Federal Court [**Reply [14]**]. The Minister also fails to acknowledge the constructional difficulties explained by French and North JJ in *Zhang* at [54] and Bromberg and Charlesworth JJ below[1] [**Reply [15]**].

Relief

11. The Federal Court erred in refusing to grant relief. Refusal of relief gave continuing legal effect to an unlawful cancellation decision, which is not what Parliament intended [**AS [43]-[46]**]. The Tribunal decision is affected by jurisdictional error. Therefore the duty of the Tribunal to review is unexercised: *Minister for*

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[1] The examples given by French and North JJ in *Zhang* were that such proposition would mean mere passage of time, a change in the state of mind of the Minister, or the objective discovery of a falsity, would be sufficient to enliven the cancellation power.

Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 at [53] (Gaudron and Gummow JJ), [152] (Hayne J).

12. The Federal Court should have should have applied a forward-looking test and asked: could be result be different on remittal? Where a decision-maker is found to err jurisdictionally in exercising a general and unfettered discretion, the correct test is forward-looking. This is because the outcome is necessarily stochastic (not capable of precise prediction). Application of the forward-looking test would mean relief ought to have been granted [**AS [26]-[38]; Reply [30]**]. For instance, the Tribunal may have not affirmed cancellation of the visas on remittal because the appellants remained enrolled in bachelor degrees at the time of cancellation, or because they were genuine students (just not successful students in a particular course for which the government stipulated fast-track visa grant).

13. Even if the correct test is backward-looking, the refusal to grant relief was still in error. It is not possible to conclude that the discretion would have been exercised the same way if the decision-maker had asked the right question. Application of the wrong question in respect of the basis for the existence of the discretion to cancel, was inextricable from the exercise of that discretion [**Reply [31]**].

14. Reasoning that the decision would inevitably have been the same without the error verges towards an apprehension of bias (nothing could have changed the Tribunal's mind) and can easily descend into merits review.

15. Independent of the question of a forward- versus backward-looking test, refusing relief means that an unlawful decision is given a continuing practical effect. Parliament did not intend such an outcome. The way to resolve this is to grant relief—to do so would be nothing more maintain consistency with what *Aala*[2] says about refusal being "exercised lightly". [**AS [41]-[45]**]

16. The only conclusion to be drawn here is that it is not possible to say how the correct approach to law may have affected the Tribunal's discretionary power.

Dated: 21 March 2018

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2 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.