IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M141/2017

B E T W E E N: **CHETAN SHRESTHA**
Appellant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

No. M142/2017

B E T W E E N: **BISHAL GHIMIRE**
Appellant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

No. M143/2017

B E T W E E N: **SHIVA PRASAD ACHARYA**
Appellant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

APPELLANTS' REPLY

Part I: Certification

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

Part II: Reply

The Minister's notice of contention

2. In each case, the Tribunal applied the wrong test, and lacked the power to do so.

Da Gama Pereira & Associates
Unit 12, 1 Bromham Place
Richmond VIC 3121

Telephone: 03 9428 1198
Fax: 03 9429 0819
Email: valerie@dagamapereira.com.au
Ref: Valerie Pereira

3. The Tribunal's incorrect identification of the question infected the exercise of its discretion whether to cancel the visas.

4. For these reasons, the Tribunal's decision in each appeal was affected by jurisdictional error.

The decision of the Court below

5. Section 116(1)(a) of the *Migration Act 1958* (Cth) (**the Act**), as it then was, directed attention to whether "any circumstance which permitted the grant of the visa no longer exists".

6. In each case, the Tribunal erroneously considered whether the Appellants continued to meet the definition of "eligible higher degree student" and satisfy cl 573.223(1A), when the correct question was whether factual circumstances that permitted the visa grant no longer existed.

7. In the Court below, Bromberg and Charlesworth JJ concluded that the Tribunal in each case made a jurisdictional error in asking itself the wrong question, in determining whether the discretion to cancel the Appellants' visas was enlivened.[1]

8. The Minister has not demonstrated any appellable error in the findings of Bromberg or Charlesworth JJ that the Tribunals' decisions were affected by jurisdictional error.

9. Justice Bromberg was, respectfully, correct to find that the Tribunal "asked the wrong question in applying s 116(1)(a)".[2]

10. Justice Charlesworth was, respectfully, correct to hold that the Tribunal "wrongly pre-occupied itself with the question of whether Mr Shrestha currently fulfilled the EHDS definition and cl 573.223(1AA)"[3] and that "the Tribunal misapprehended the statute and asked itself the wrong question in applying s 116(1)(a) of the Act".[4]

---

[1] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [6]-[11] (Bromberg J) and [109]-[111] (Charlesworth J).
[2] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [2].
[3] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [109].
[4] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [111].

11. As Bromberg J explained, the change in "circumstance" was not to be decided at the level of whether the appellants continued to meet the definition of "eligible higher degree student", but rather, whether there was any change to the constituent facts that met the definition of "eligible higher degree student".[5] It was to this lower level of abstraction that s 116(1)(a) directed the decision-maker's mind.

12. Bromberg J's reasoning is consistent with *Minister for Immigration and Multicultural Affairs v Zhang* (1999) 84 FCR 258. In that case, the relevant criterion for the grant of Mr Zhang's visa was that the Minister be satisfied that the intention of the visa applicant to only visit Australia was genuine. Mr Zhang was granted a visa, because that criteria was satisfied. However, upon arrival, a delegate formed a different view. The delegate considered that was a change in "circumstance"—even though no attribute of Mr Zhang had changed. The Full Court disagreed.[6] As can be seen from these facts, the correct enquiry was of the attributes of Mr Zhang, rather than any higher level of abstraction. In *Zhang*, the erroneous higher level of abstraction was the Minister's satisfaction. In the present appeals, the erroneous higher level of abstraction was the satisfaction of the "eligible higher degree student" definition.

13. Charlesworth J adopted substantially the same reasoning as Bromberg J.[7] Her Honour observed: "the Minister is not to embark upon a reapplication of the visa criteria ... [t]he power [to cancel] will be enlivened even if the visa holder satisfies (and even has continued, without interruption, to satisfy) the criteria for the grant of the visa at the time of the cancellation decision".[8]

14. Notably, the Minister in the Court below contended for an interpretation of s 116(1)(a) at the lower level of abstraction, submitting (as was accepted by Bromberg and Charlesworth JJ[9]) that the "factual circumstances that prevailed at the time of grant are distinct from the visa criteria themselves".[10] The Minister now resiles from his position: his notice of contention contends that

---

[5] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [5]-[6].
[6] *Minister for Immigration and Multicultural Affairs v Zhang* (1999) 84 FCR 258 at [54]-[55].
[7] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [104], [108]-[110].
[8] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [104].
[9] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [103].
[10] *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [103].

"circumstance" in s 116(1)(a) "can also include the ultimate fact or circumstance which is the subject of the visa criterion".[11] The Minister thus contends that it was open to the Tribunal to treat the relevant "circumstance" that no longer existed as being whether the appellants no longer met the definition of "eligible higher degree student".[12]

15. This new position must be rejected. Not only has the Minister failed to articulate any appellable error, his new position is contrary to the settled position in *Zhang*, which was adopted by Bromberg and Charlesworth JJ. Further, as Bromberg J emphasised, the position in *Zhang* properly recognisees the strong policy reason to prefer the interpretation of "circumstance" as being directed to the underlying facts rather than any higher level of abstraction. Otherwise, as his Honour explained (and as was explained in *Zhang*), the legislative goalposts could be shifted and a defined term re-defined to enliven cancellation powers even against visa holders whose underlying facts or attributes never changed. That interpretation of s 116(1)(a) would only be possible if there were clear words of necessary intendment, given that one consequence of such an interpretation might be deprivation of liberty—even though no fact or attribute of the person concerned had changed.[13]

16. As a result, it is clear that the Tribunal in each of the present cases asked the wrong question. That was an error which was jurisdictional in nature.

The Minister's reliance on Craig v South Australia

17. Contrary to the Minister's submissions, *Craig*[14] does not stand for the proposition that there is an additional requirement that an error of an administrative tribunal is jurisdictional only if "the tribunal's exercise or

---

[11] Minister's submissions, [20].
[12] Minister's submissions, [25].
[13] *Minister for Immigration and Multicultural Affairs v Zhang* (1999) 84 CR 258 at [54] (French and North JJ); *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [5] (Bromberg J), [100] (Charlesworth J). For these reasons, Bromwich J was wrong in his analysis at [30] in concluding that the prospect of "any subsequent change in a visa criterion ... including by way of changing a definition" was "irrelevant" to the proper construction of s 116(1)(a). To read *Zhang* as permitting the construction of "circumstance" as to include the meeting of a legislative definition, rather than the underlying facts, (cf [28] (Bromwich J)) is to overlook the potential for inconsistency with the principle of legality.
[14] *Craig v South Australia* (1995) 184 CLR 163.

purported exercise is affected". The passage in *Craig* relied upon by the Minister, set out in full, is:

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. That point was made by Lord Diplock in *In re Racal Communications Ltd*:
>
> > "Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so."
>
> The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[15]

18. That passage in *Craig*, which is often cited, is rooted in the fundamental proposition that an administrative decision-maker cannot "make an order or decision otherwise than in accordance with the law". It necessarily follows that if a decision-maker does not correctly identify the law, then its decision cannot objectively be, on its own reading, "in accordance with the law".

19. Put another way, here, the Tribunal, having asked itself the wrong question, necessarily made an error that affected its exercise of power, for it proceeded on a misguided basis as to whether, and how, any cancellation discretion became enlivened.

20. The Minister seeks to bolster his interpretation of *Craig* by contending for the imposition of a supervening materiality requirement, and points to the failure to

---

[15] *Craig v South Australia* (1995) 184 CLR 163 at 179 [14].

take into account relevant considerations and denial of procedural fairness as examples where materiality is said to already exist.[16] Such a contention fails to appreciate that these examples are qualitatively different to errors where decision-makers embark on the purported exercise of jurisdiction upon a misconceived basis.

21. If the same answer might have been arrived at notwithstanding the asking of an incorrect question, then that is a matter may go towards whether discretionary relief should be granted (although, as the Appellants' submissions in chief demonstrate, that raises the question of whether the backward- or forward-looking tests should apply).[17] However, in any event and contrary to the Minister's submissions, it is not a factor for concluding that the error is not jurisdictional.

The inseparable nature of the error from the decision to cancel the visas

22. The Tribunal's misdirected attention to whether the Appellants were "eligible higher degree students" infected the Tribunal's conclusion that the ground for cancellation in s 116(1)(a) was engaged. So much is clear from the contents of the latter paragraphs of the Tribunal's reasons under the heading "Does the ground of cancellation exist?". In the case of each Appellant (using Mr Shrestha's case as an example) the Tribunal found:

a. at [50] that Mr Shrestha did not provide evidence of currently meeting the definition of eligible higher degree student;

b. at [51] that "[a]ccordingly" he was not an eligible higher degree student and "therefore" he did not satisfy the requirements of cl 573.223(1A) and a circumstance which permitted the grant of the visa no longer existed; and

c. at [52] that "[f]or these reasons" the Tribunal was satisfied that the ground for cancellation under s 116(1)(a) existed.

23. The Tribunal's chain of cumulative reasoning built to its conclusion that the cancellation power existed.

---

[16] Minister's submissions, [29].
[17] This was the approach taken by Charlesworth J: [111].

24. There is no room for the asking of a further question of whether the Tribunal's purported exercise of the discretion was affected. This is because the effect is not separable from the incorrect identification of the question.

25. Contrary to paragraphs 32 and 33 of the Minister's submissions, the error made in asking the wrong question had an operative effect on the Tribunal's decision to cancel the visas. The Tribunal's error in construing s 116(1)(a) was central and significant to its reasons for exercising the cancellation discretion. This is because the Tribunal focussed on fulfilment of the definition of "eligible higher degree student" in considering the discretion (see [54]), as well as in considering whether a ground for cancellation existed.

The Court's discretion to grant relief in cases of jurisdictional error

26. The correct approach for a court having found jurisdictional error is to ask whether there is utility to the grant of relief, by looking at whether there is the possibility that a successful outcome may ensue from the exercise of the power reposed in the decision-maker. To look back in time and consider whether a discretionary power could have been exercised differently effectively amounts to hypothetical merits review.

27. Whilst certiorari is undoubtedly a remedy which is subject to a discretion, the considerations as to whether to refuse relief are qualitatively different—and markedly so—when the basis for refusal is (for example) delay, disentitling conduct or the availability of an alternative remedy on the one hand, and cases of purported futility on the other.

28. It is the latter—cases of purported futility—which is the context in which these appeals are brought. The resolution of the appeals does not require the development of a doctrine that holds each of the different bases for refusing relief in lock-step with each other.

29. Conflation occurs in the Minister's submissions between cases of futility where there is an independent (and insurmountable) legal basis for the decision (such as *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190;

235 ALR 609),[18] and futility because of a view taken that the same set of facts must invariably lead to the same result. The former might be said to be "actual" futility, whereas the latter cannot be more than a "purported" futility.

30. These appeals are in the latter category. The reason why futility is at best "purported" is, as the Minister accepts,[19] that even on the same facts, it would be open for a decision-maker to arrive at a different conclusion; there is not, on a proper analysis, the inevitability of the same outcome. For the reasons set out in the Appellants' submissions in chief, the preferable test in cases of purported futility is the forward-looking approach.

10 31. But even on a backward-looking test, it is not possible to be "crystal clear" that there was no possibility of a different decision, because that requires an impossible intellectual suppression of the Tribunal's misconstruction of the law, as if it had not infected its subsequent assessment of whether to exercise the discretion (and not even subconsciously, given that the discretion was one at large).

32. Further, the Minister's attempt to articulate a distinction between the backward- and forward-looking tests is wrong.[20] He contends that the different tests have application in different circumstances, although the case law is not organised that way. He asserts that the backward-looking test "involves a recognition that
20 the decision-maker acted within power and that relief must therefore be refused", but if the decision-maker acted within power in the first place, there would be no occasion to consider the discretion to refuse relief—and therefore no consideration as to whether to adopt the backward- or forward-looking tests—much less so apply the backward-looking test.

33. Finally, the Minister's submissions obscure the issue presented by the contrast between the outcomes in *Bhardwaj* and *Aala*.[21] Where there is a jurisdictional error, then unless the decision is quashed, the unlawful decision is given continuing legal effect. This could not have been what Parliament intended, because the conclusion of whether an error is jurisdictional is arrived at by a

---

[18] Minister's submissions, [40].
[19] Minister's submissions, [44].
[20] Minister's submissions, [43].
[21] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

process of statutory interpretation.[22] By the point at which a decision is found to be in excess of jurisdiction, the Court will have found, by definition, that the decision is unlawful. That conclusion however, will not preclude the unlawful decision being given a continuing practical effect. A person whose visa has been cancelled due to a decision affected by jurisdictional error receives no consolation from the proposition in *Bhardwaj* that the decision was not a decision at all—unless he or she is granted relief. Special categories of case such as delay, disentitling conduct or the availability of an alternative remedy may be put to one side as they invoke a range of policy considerations. So too may cases of "actual futility",[23] because they involve an independent and insurmountable legal basis for the same outcome.

34. No solution is offered in the Minister's submissions.

35. So long as the refusal of relief is "exercised lightly" (because ultimately due to the rule of law as explained in *Aala*),[24] the courts can ensure that decisions beyond jurisdiction are not given continuing legal effect. For the reasons set out in the Appellants' submissions, to "exercise lightly" in the present matters means to apply a forward-looking test, which directs towards the grant of relief based on long-established principles.

Dated: 23 November 2017

Georgina Costello
Ninian Stephen Chambers
(03) 9225 6139
costello@vicbar.com.au

Min Guo
Castan Chambers
(03) 9225 8365
min@guo.com.au

[22] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].
[23] Paragraph 29.
[24] *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [55].