IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos. M141, 142 and 143 of 2017

BETWEEN:

CHETAN SHRESTHA
BISHAL GHIMIRE
SHIVA PRASAD ACHARYA
Appellants

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF ARGUMENT

The Tribunal did not make any error of law in applying s 116(1)(a): **RS [15]-[26]**

2. The question whether s 116(1)(a) of the *Migration Act 1958* (Cth) was engaged, and the discretion to cancel the visa was enlivened, turned on whether "any circumstance which permitted the grant of the visa" no longer existed.

3. Identifying the "circumstances" which permitted the grant of the visa requires a consideration of the prescribed criteria, and the basis on which the Minister formed a state of satisfaction that those criteria were satisfied for the purposes of s 65(1)(a)(i) and (ii) of the *Migration Act*.

4. This does not involve revisiting the decision to grant the visa, in that a mere change in the Minister's state of satisfaction is not itself a change in circumstances for the purposes of s 116(1)(a): *cf. Zhang* (1999) 84 FCR 258 at [48]-[54] (French and North JJ). Rather, since the grant of the visa, there must be a subsequent change in the facts or circumstances on which the satisfaction was based.

5. The circumstances which permitted the grant of the visa can include those facts or combinations of facts which were necessary or material to meeting a requirement prescribed by a particular visa criterion, including a defined term or status employed in the visa criterion. In this regard, there is no bright line between the terms of the visa criterion or any defined term and the "constituent facts" of that criterion or defined term.

6. In each of the present appeals, the visa was granted on the basis that the appellant satisfied cl 573.223(1A) as an "eligible higher degree student" as defined in cl 573.111. The Tribunal found that, when the appellant ceased enrolment in the Diploma course,

he ceased to be an "eligible higher degree student", upon which the circumstances which permitted him to satisfy cl 573.223(1A) no longer existed.

7. Irrespective of whether the appellant's enrolment in the relevant Diploma course was itself capable of being regarded as a "circumstance" for the purposes of s 116(1)(a), it was open to the Tribunal to treat the fact that the appellant was an "eligible higher degree student" at the time of grant as a "circumstance" which permitted the grant of the visa – being a state of facts that was required by cl 573.223(1A).

8. The Tribunal therefore did not ask itself the wrong question or otherwise err in law by finding that there was a ground for cancellation under s 116(1)(a) because the appellant was not an "eligible higher degree student" at the time of its decision. In applying s 116(1)(a), the Tribunal was not legally constrained to look only at the "constituent facts" of the definition as they existed at the time of grant, let alone those facts at their lowest "level of abstraction".

Any error of law by the Tribunal did not lead to "jurisdictional error": **RS [27]-[33]**

9. In order to attract the constitutional writs, or ancillary remedies such as certiorari (particularly in the light of s 474 of the *Migration Act*), the appellants must demonstrate "jurisdictional error". The label "jurisdictional error" is used to denote something which causes the decision-maker to transgress or exceed the limits of its authority or powers to make a valid decision.

10. In so far as the Tribunal erred in law by asking itself a wrong question as to the ground of cancellation under s 116(1)(a), that would not result in jurisdictional error unless the exercise of power by the Tribunal was affected by that error. In other words, the error must have been material to the Tribunal's decision. See *Craig* (1995) 184 CLR 163 at 179; *Yusuf* (2001) 206 CLR 323 at 351 [82].

11. Assuming that the correct question was whether each of the appellants had ceased to be enrolled in the relevant Diploma course in which he was enrolled at the time of grant, the Tribunal did in fact address and make findings on that question. The Tribunal found that each appellant was no longer enrolled in the Diploma course (being a course of study undertaken before and for the purposes of a principal course of study). That fact was material to the grant of the visa because it was the basis on which the appellant met the definition of "eligible higher degree student" for the purposes of cl 573.223(1A).

12. In the view of Bromberg and Charlesworth JJ, that finding was sufficient to enliven the discretion to cancel the visa under s 116(1)(a).

13. In so far as the Tribunal erred by going on to address the question whether each of the appellants was an "eligible higher degree student" at the time of its decision, that error did not affect the exercise of power by the Tribunal and was immaterial to its decision. The power to cancel the visas under s 116(1)(a) was enlivened in any event, and the appellants did not allege any error in the manner in which the Tribunal exercised its discretion to cancel the visas. In particular, there is no challenge to the finding that

each appellant was not an eligible higher degree student at the time of the Tribunal's decision, nor can it be said that this was irrelevant to the exercise of the discretion to cancel.

14. Not all legal errors must necessarily affect the exercise of power. Some errors may be so minor that a court upon judicial review may confidently conclude that the error was immaterial to the exercise of power, or was not connected with the exercise of power. This underpins the distinction between non-jurisdictional errors on the face of the record, which may be immunised from judicial review, and jurisdictional errors, which may not be so immunised.

15. On the facts of the present appeals, the fact of the appellants' cessation of enrolment in the relevant Diploma course and the consequence of that fact upon their continuing to meet the definition of "eligible higher degree student" were relevantly indistinguishable. Any distinction was not material for the purposes of a proper application of s 116(1)(a).

16. It follows that by acting upon the latter basis, the Tribunal did not fail to perform its duty to review the primary decision, and it cannot be said that there is any "jurisdictional error" capable of justifying the issue of the constitutional writs or ancillary relief.

The Full Court correctly exercised the discretion to refuse relief: **RS [34]-[50]**

17. The constitutional writs and certiorari are discretionary remedies: *Aala* (2000) 204 CLR 82 at 108, [5], [42]-[57], [104], [171].

18. For the reasons set out above, even if the Tribunal erred in its construction and application of s 116(1)(a), it can be said with confidence that the error did not affect the Tribunal's decision to cancel the visas and the appellants were therefore not deprived of any possibility of a more favourable outcome. The grant of relief in such circumstances would "serve no useful purpose". Compare *SZBYR* (2007) 81 ALJR 1190; 235 ALR 609 at [27]-[29]; *Stead* (1986) 161 CLR 141, 145.

19. The distinction between "backward-looking" and "forward-looking" tests is not determinative (RS [42]-[43]). There may be cases in which it is appropriate to exercise the discretion to refuse relief based on a backward-looking test, in circumstances where it is clear that there was no possibility of a different outcome: see *Giretti* (1996) 70 FCR 151 at 165 (Lindgren J).

20. The principles discussed in *Bhardwaj* do not preclude the exercise of the discretion to refuse relief even in cases where jurisdictional error is established (RS [47]-[50]). Alternatively, any tension may be resolved by concluding that there was no jurisdictional error in circumstances where the exercise of power was not affected.

21. Accordingly, as held by the Court below, it was appropriate to refuse to grant relief to the appellants even if they established jurisdictional error.

21 March 2018

CHRIS HORAN

ANGEL ALEKSOV