HIGH COURT OF AUSTRALIA

15 August 2018

CHETAN SHRESTHA v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR; BISHAL GHIMIRE v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR; SHIVA PRASAD ACHARYA v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR
[2018] HCA 35

Today the High Court unanimously dismissed three appeals from a judgment of the Full Court of the Federal Court of Australia which rejected the appellants' respective challenges to decisions of the Migration Review Tribunal.

In each case, the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Border Protection to cancel the visa holder's student visa pursuant to s 116(1)(a) of the *Migration Act* 1958 (Cth). Section 116(1)(a) 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". Each appellant was granted a student visa on the basis that they satisfied the definition of an "eligible higher degree student" under the Migration Regulations 1994 (Cth). That definition required that, if the applicant proposed to undertake a preliminary course of study before and for the purposes of a principal course of study, the applicant had to be enrolled in that preliminary course of study. In each case, the Tribunal found that the visa holder had been enrolled in a preliminary course of study at the time that person was granted a student visa, but was no longer enrolled in that course of study. The Tribunal concluded that the visa holder therefore no longer met the definition of an "eligible higher degree student" and that a "circumstance" within the meaning of s 116(1)(a) no longer existed. The Tribunal in each case decided to cancel the visa holder's visa.

Each visa holder applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. In each case, the Federal Circuit Court dismissed the application. Each visa holder appealed to the Federal Court, where their appeals were heard together. The Full Court of the Federal Court held, by majority, that the word "circumstances" in s 116(1)(a) referred to a state of affairs rather than a legal characterisation of a state of affairs, and that in each case the Tribunal had made a legal error by focusing on whether the visa holder met the definition of an "eligible higher degree student" instead of whether the visa holder remained enrolled in that course of study. The majority held that the error was jurisdictional in nature, but that the Tribunal's decisions should not be set aside because the error could have had no impact on the decisions.

By special leave, the visa holders appealed to the High Court. A plurality of the Court held that the appeals should be dismissed on the basis that, even if the Tribunal had in each case made the alleged error, that error could have had no impact on the Tribunal's decisions because at most the error caused the Tribunal to ask a superfluous question. Accordingly, the alleged error was not jurisdictional in nature and could not invalidate the Tribunal's decisions.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au