IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

M141/2017
CHETAN SHRESTHA
Appellant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent
ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

BETWEEN:

M142/2017
BISHAL GHIMIRE
Appellant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent
ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

BETWEEN:

M143/2017
SHIVA PRASAD ACHARYA
Appellant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent
ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Filed on behalf of the First Respondent by:

DLA Piper Australia
1 Martin Place
Sydney NSW 2000

Telephone: (02) 9286 8084
Facsimile: (02) 9286 8007
DX: 107 Sydney
Reference:
LKL:CAH:03012333-951983
Contact: Chloe Hillary

Part II: ISSUES

2. The issues in these appeals are:

   2.1. whether the Tribunal made any legal error in finding that, because each of the appellants was no longer an "eligible higher degree student" within the meaning of cl 573.111 of Sch 2 to the *Migration Regulations 1994* (Cth) (**the Regulations**), there was a relevant change in any "circumstances" which permitted the grant of the visa for the purpose of s 116(1)(a) of the *Migration Act 1958* (Cth) (**the Act**);

   2.2. if so, whether any legal error made by the Tribunal affected the exercise of the power under s 116(1)(a) to cancel the appellants' visas so as to amount to "jurisdictional error"; and

   2.3. if so, whether the Federal Court erred in exercising its discretion to refuse to grant relief in the form of constitutional writs?

3. The first two issues are raised by the Notice of Contention filed by the Minister in each of the appeals, and are logically anterior to the issue raised by the Notice of Appeal concerning the exercise of discretion to grant relief.

Part III: SECTION 78B NOTICE

4. Notices under section 78B of the *Judiciary Act 1903* are not required.

Part IV: MATERIAL FACTS

5. The relevant facts are set out in the judgment below in the reasons of Charlesworth J: *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [51]-[77].

6. In summary, at the time of grant of the Class TU subclass 573 Higher Education Sector visa, each of the appellants was enrolled in:

   6.1. a principal course of study for the award of a bachelor's degree provided by an eligible education provider (the **Degree course**); and

6.2. another course of study for the award of a diploma provided by an "educational business partner" of the eligible education provider (the **Diploma course**).

Each of the appellants proposed to undertake the Diploma course before, and for the purposes of, the Degree course.

7. On the basis of the enrolments in both the Diploma course and the Degree course, each of the appellants met the definition of "eligible higher degree student" in clause 573.111, and thereby satisfied the criteria in clause 573.223(1A).[1] As accepted in the Appellants' Submissions at [7], it was "[b]y reason of meeting this definition" that the appellants met the criterion in clause 573.223(1A) which "led to the grant of the visas", and were not required to meet the more onerous evidentiary requirements set out in cl 573.223(2) and Sch 5 to the Regulations.

8. Each appellant subsequently ceased to be enrolled in the relevant Diploma course after failing all of the subjects in the first semester of that course. At the time of the primary decision by the delegate to cancel the visa, each appellant was no longer enrolled in the Diploma course which he proposed to undertake before and for the purposes of the Degree course.[2] By the time of the Tribunal's decision, each appellant's enrolment in the Degree course had also been cancelled, and they were not enrolled in any course for the purposes of the definition of "eligible higher degree student".[3]

9. In each case, the Tribunal relevantly found that the appellant was not enrolled in the Diploma course, being a course of study before and for the purposes of the principal course of study, and had ceased to be an "eligible higher degree student".[4] The Tribunal found that, when the appellant ceased to satisfy the definition of an eligible higher degree student, the circumstances that enabled him to satisfy clause 573.223(1A) no longer

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1 *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [59]. See Tribunal's reasons (Shrestha) at [42]; Tribunal's reasons (Ghimire) at [19]; Tribunal's reasons (Acharya) at [35].

2 [2017] FCAFC 69 at [36]-[37], [108], [115], [118].

3 [2017] FCAFC 69 at [39], [69].

4 Tribunal's reasons (Shrestha) at [45]-[46]; Tribunal's reasons (Ghimire) at [21]-[22]; Tribunal's reasons (Acharya) at [38]-[39].

existed.[5] Accordingly, the Tribunal was satisfied that the ground for cancellation in s 116(1)(a) of the Act existed, and proceeded to consider whether the power to cancel the visa should be exercised.[6]

10. In considering the exercise of its discretion, the Tribunal had regard to the matters identified in Departmental policy guidelines (Procedures Advice Manual PAM3, "General visa cancellation powers"), and took into account the evidence and submissions made by each appellant. After "[c]onsidering the circumstances as a whole", the Tribunal concluded that the visa held by each of the appellants should be cancelled.[7]

Part V: APPLICABLE PROVISIONS

11. The Minister accepts the appellants' statement of applicable statutory provisions, including as to the version of s 116(1)(a) of the Act that is relevant to the determination of these appeals.[8]

12. In addition, the Minister refers to clauses 573.111 and 573.223(1), (1A) and (2) of Sch 2 to the Regulations (as in force between 6 February 2015 and 1 March 2015).

13. Clause 573.223(1)(b) relevantly provided as a criterion for the grant of a subclass 573 visa that the Minister must be satisfied that the visa applicant is a genuine applicant for entry and stay as a student because he or she meets the requirements of subclause (1A) or (2). Clause 573.223(1A) was applicable if the visa applicant was "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". The requirements for eligible higher degree students under clause 573.223(1A) in relation to English

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5 Tribunal's reasons (Shrestha) at [46]; Tribunal's reasons (Ghimire) at [22]; *cf.* Tribunal's reasons (Acharya) at [39].

6 Tribunal's reasons (Shrestha) at [52]; Tribunal's reasons (Ghimire) at [27]; Tribunal's reasons (Acharya) at [42].

7 Tribunal's reasons (Shrestha) at [60]; Tribunal's reasons (Ghimire) at [34]; Tribunal's reasons (Acharya) at [52].

8 Subsequent amendments to the ground of cancellation under s 116(1)(a) do not apply to the present cases: see [2017] FCAFC 69 at [89]-[94].

language proficiency and financial capacity were less stringent than those applicable to other applicants under clause 573.223(2).

14. Clause 573.111 defined "eligible higher degree student" as:

> ***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:
>
> (ia) an advanced diploma in the higher education sector; or
>
> (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:
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> (i) the applicant is also enrolled in that course; and
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> (ii) that course is provided by the eligible education provider or an educational business partner of the eligible education provider.

Parts VI and VII: ARGUMENT

Did the Tribunal make an error of law (Ground 1(a) of the Notice of Contention)?

15. The issue before the Tribunal was whether s 116(1)(a) of the Act was engaged, and if so, whether the discretion to cancel the visas should be exercised adversely to each of the appellants.

16. Section 116(1)(a) relevantly provided:

> (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
>
> (a) any circumstance which permitted the grant of the visa no longer exists.
>
> ...

17. This provision directs attention to two points in time: the date on which the visa was granted, and the date of the decision whether to cancel the visa. It requires the decision-maker to determine the "circumstances" which

permitted the visa to be granted as at the time of the grant. This encompasses or includes those facts and circumstances which existed at the time of the grant and which formed the basis on which the visa holder met the prescribed criteria for the grant of the visa. The decision-maker must then ascertain whether any of those circumstances no longer exist. If a circumstance material to the grant of the visa no longer exists, the discretion to cancel the visa under s 116(1)(a) is enlivened.

18. While an identification of the "circumstances" which permitted the grant of the visa will be informed by the prescribed criteria, the circumstances that existed at the time of the grant are distinct from the formation of a state of satisfaction in relation to those visa criteria. Accordingly, the inquiry under s 116(1)(a) does not simply involve an ambulatory reconsideration or reapplication of the visa criteria to the prevailing circumstances from time to time, so as to enable the Minister (or a delegate) to change his or her mind about whether the visa should have been granted. For this reason, a change in the Minister's "satisfaction" as to whether or not a visa holder meets a visa criterion that was applicable to the grant of the visa cannot of itself be a change in "circumstance" for the purposes of s 116(1)(a) of the Act.[9]

19. In *Zhang*, for example, the visa holder had satisfied the Minister at the time of grant that his expressed intention only to visit Australia was genuine, as was required by a prescribed visa criterion. It was not sufficient to enliven the cancellation power under s 116(1)(a) of the Act for a delegate of the Minister to find that the visa holder had *never* had a genuine intention only to visit Australia – in such circumstances, the only thing that had changed was the Minister's state of satisfaction as opposed to any underlying circumstances relevant to the visa holder's intention. However, it is implicit in *Zhang* that the cancellation power under s 116(1)(a) *would* have been enlivened if there had been a change in the visa holder's expressed intention since the grant of the visa, or in the facts or circumstances relevant to that intention. In this way, s 116(1)(a) applies to the matters in respect of which the Minister or his

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9 See *Minister for Immigration v Zhang* (1999) 84 FCR 258 at [48]-[54] (French and North JJ).

delegate was satisfied at the time of the grant of the visa, as opposed to the state of satisfaction itself.[10]

20. On its natural meaning, the term "circumstance" can extend to any matters which existed at the time of grant and which were necessary or material to the decision to grant the visa. This can include the facts relevant to meeting a requirement prescribed by a particular visa criterion, including any defined term incorporated into the visa criterion. But it can also include the ultimate fact or circumstance which is the subject of the visa criterion or the defined term. Accordingly, Bromwich J was correct to conclude that a "circumstance" within the meaning of s 116(1)(a) of the Act could be an objective visa criterion or part of an objective visa criterion, which had existed at the time of grant but which no longer existed at the time of the cancellation decision.[11]

21. In each of the present cases, a circumstance which permitted the grant of the visa was that the appellant was an "eligible higher degree student" for the purposes of cl 573.223(1A). This in turn required that the appellant met the definition in cl 573.111, which in the present case relevantly included enrolment in a principal course of study (*i.e.* the Degree course) and in another course of study (*i.e.* the Diploma course) that the appellant proposed to undertake before, and for the purposes of, the principal course of study.

22. There is no dispute that each of the appellants had ceased to be enrolled in the Diploma course, and that this was clearly a circumstance which permitted the grant of the visa that no longer existed at the date of the Tribunal's decision. That change in enrolment status was a change in a "circumstance" for the purpose of s 116(1)(a) of the Act. The Tribunal in each case made factual findings to this effect which are not challenged and, on any view, those findings were sufficient to enliven the power under s 116(1)(a).

23. The change in the appellants' enrolment status meant that they were no longer "eligible higher degree students" within the meaning of cl 573.111 and cl 573.223(1A). This was also a change in a "circumstance" which permitted the grant of the visas. The "circumstance" that the appellant was an eligible

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10 Compare *Minister for Immigration v Zhang* (1999) 84 FCR 258 at [67], [74] (Merkel J).

11 [2017] FCAFC 69 at [28].

higher degree student at the time of the grant of the visa no longer existed, because the appellant was no longer enrolled in the Diploma course (being a course that was undertaken before and for the purposes of the principal course of study).

24. Accordingly, there was no legal error in the Tribunal's finding that the relevant "circumstance" that had changed so as to enliven the power under s 116(1)(a) of the Act was that the appellant had ceased to meet the definition of "eligible higher degree student", or had ceased to be an "eligible higher degree student". The definition of "eligible higher degree student" in cl 573.111 is cast in objective terms, and is not expressly conditioned on the Minister's satisfaction. In any event, the Tribunal's findings were directed to the change in the appellants' status *consequent* on the cessation of their enrolments since the time of grant, and did not involve merely revisiting the question whether the Tribunal was satisfied that they had ever been eligible higher degree students. As Bromwich J concluded,[12] the 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".

25. In so far as the Tribunal observed in each case that the appellant had not provided any evidence to show that he currently met the definition of an eligible higher degree student, that observation did not bespeak any legal error in its approach to s 116(1)(a). First, the Tribunal made a clear finding that the appellant no longer met the definition at the time when he ceased to be enrolled in the Diploma course, and moreover (at least in the Shrestha and Ghimire matters) found that this was the point at which the circumstances that enabled him to satisfy cl 573.223(1A) no longer existed. Second, and in any event, it was open to the Tribunal to treat the relevant "circumstance" that no longer existed as being whether the appellants were no longer eligible higher degree students for the purposes of cll 573.111 and cl 573.223(1A), even if it could have stopped at an earlier stage of having

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12 [2017] FCAFC 69 at [32].

simply made the finding that each of the appellants had ceased his enrolment in the Diploma course.

26. It follows that the Tribunal did not ask itself the wrong question in addressing whether the power to cancel the appellants' visas under s 116(1)(a) was enlivened, and that the Tribunal's decisions did not involve any legal error.

Was there "jurisdictional error" (Ground 1(b) of the Notice of Contention)?

27. The jurisdiction to grant the constitutional writs of mandamus and prohibition is based upon the concept of "jurisdictional error".[13] The concept of jurisdictional error is directed to a transgression by a decision-maker of the limits of its authority or power to make a valid decision. This may involve an absence (or "want") of jurisdiction, or an excess of jurisdiction such as by an error which results in a constructive failure to exercise jurisdiction.

28. In *Craig v South Australia*,[14] this Court stated that an administrative tribunal will exceed its authority and powers if it "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*". This formulation of jurisdictional error was adopted and approved by McHugh, Gummow and Hayne JJ in *Yusuf*,[15] who referred to "identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material *in a way that affects the exercise of power*".

29. While the formulation in *Craig* and *Yusuf* is not to be treated as an exhaustive list of the species of jurisdictional error, the requirement that the exercise or purported exercise of power must have been affected by the error in question cannot be overlooked. Such a requirement of materiality is reflected or incorporated in the principles governing many recognised grounds of judicial

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13 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 507-508 [79]-[83].

14 (1995) 184 CLR 163 at 179 (emphasis added).

15 (2001) 206 CLR 323 at 351 [82].

review.[16] The absence of any such effect, or the "immateriality" of the particular error to the exercise of power, has the consequence that the error does not cause the decision-maker to exceed the limits of its authority or powers. Such an error does not go to the jurisdiction of the decision-maker.

30. It has never been the case that any error of law by an administrative decision-maker must inevitably give rise to jurisdictional error. This Court has consistently maintained the distinction between jurisdictional and non-jurisdictional errors of law. This distinction is relevant for the purposes of the writ of certiorari, which may be available in respect of a non-jurisdictional error of law on the face of the record. Further, a privative clause can validly restrict or exclude judicial review in relation to an error of law within jurisdiction.[17]

31. For such purposes, whether or not any particular legal error can be said to have affected the exercise of power turns on an analysis of the particular statutory framework and the particular course of decision making in question. The legal conclusion of "jurisdictional error" – with its consequential significance for the availability of constitutional writs – cannot be applied to an error of law unless it had an operative effect or material connection with the exercise of power and the outcome of the administrative process.

32. In the present case, the Appellants' Submissions rest on a premise that the error identified by Bromberg and Charlesworth JJ affected the exercise by the Tribunal of its discretion whether or not the visas should be cancelled. However, that premise is not supported by the findings made in each of the judgments below. Rather, the Court unanimously found that any error made

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16 In relation to failure to have regard to a relevant consideration (or having regard to an irrelevant consideration), see *Peko-Wallsend Ltd v Minister for Aboriginal Affairs* (1986) 162 CLR 24 at 40 and 46 (Mason J), noting that "[a] factor might be so insignificant that the failure to take it into account could not have materially affected the decision". See also *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 33-35 [80]-[93], 40 [124] (Moore and Lander JJ). In relation to procedural fairness, it may be relevant to consider whether or not any "practical injustice" occurred by which the person affected lost an opportunity to advance his or her case: *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 13-14 [36]-[38] (Gleeson CJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 337 [36], 342-343 [57], [60].

17 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571 [66], 581 [100].

by the Tribunal in each case did not affect the exercise of its power.[18] In each case, the Tribunal made sufficient factual findings about the change in the appellants' enrolment to enliven the power under s 116(1)(a). To the extent that the Tribunal might be found to have erred by going on to ask whether those findings meant that the appellants were no longer "eligible higher degree students" within the meaning of cll 573.111 and 573.223(1A), any such error did not affect in any way the antecedent factual findings by which the power conferred by s 116(1)(a) was enlivened. An analogy may be drawn with the situation where an administrative decision-maker makes a mistake as to the source of his or her power, in circumstances where the decision can nevertheless be equally supported by another available source of power.[19]

33. Accordingly, any error made by the Tribunal was only as to the basis on which the power to cancel was enlivened under s 116(1)(a), and had no operative effect on the consideration of the exercise of the discretion whether or not to cancel the appellant's visa in each case. This is clearly reflected in the structure and content of the Tribunal's reasons for decision. In circumstances where the appellants do not dispute that the power to cancel under s 116(1)(a) was enlivened by the fact that they had each ceased to be enrolled in the Diploma course, any error made by the Tribunal in asking whether the appellants were no longer eligible higher degree students did not affect the exercise of its power and did not amount to "jurisdictional error" attracting the grant of relief in the form of the constitutional writs.

The discretion to grant relief

34. The following submissions are made in the alternative to the Minister's submissions in support of the Notice of Contention, and upon the assumption that the Tribunal made a "jurisdictional error" which engaged the power of the Court to grant constitutional writs or other associated relief.

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18 [2017] FCAFC 69 at [13]-[16] (Bromberg J), [41]-[48] (Bromwich J), [121]-[127] (Charlesworth J).

19 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, [34]; *Brown v West* (1990) 169 CLR 195, 203; *Johns v Australian Securities Commission* (1993) 178 CLR 408, 426, 469.

35. While Bromberg and Charlesworth JJ found that the Tribunal had asked the wrong question in applying s 116(1)(a) of the Act and characterized the Tribunal's error as a "jurisdictional error",[20] their Honours declined to grant relief to the appellants because they found that it was "crystal clear" that the error did not affect the outcome of the review by the Tribunal.[21] There was no doubt that the discretion to cancel the visas under s 116(1)(a) was enlivened on the unchallenged findings of fact made by the Tribunal, and there was no possibility that the Tribunal would have exercised its discretion any differently if had correctly identified that it was sufficient to enliven the discretion that the appellants were each no longer enrolled in the Diploma course (whether or not they currently met the definition of "eligible higher degree student"). Justice Bromwich found that the decisions of the Tribunal were not affected by jurisdictional error (accepting the Minister's argument), but would in any event have refused to grant relief for similar reasons to Bromberg and Charlesworth JJ.

36. As Charlesworth J observed (at [123]), any error made by the Tribunal applied a higher or more onerous standard for the engagement of the power under s 116(1)(a). That is, the test was more favourable to the appellants, in so far as it contemplated that the power might not have been enlivened if it were the case that any of the appellants could meet the definition of "eligible higher degree student" at the time of the Tribunal's decision, albeit on a different factual basis to that which existed when the visas were granted. That possibility was entirely hypothetical on the facts of the present cases, because (as the Tribunal found) none of the appellants had shown that he remained an eligible higher degree student notwithstanding the cessation of his enrolment in the Diploma course.

37. Accordingly, on the unchallenged facts found by the Tribunal, the only conclusion open was that the power under s 116(1)(a) of the Act was enlivened. From that point, the Tribunal properly considered the exercise of the discretion whether the appellants' visas should be cancelled on the basis of a consideration of the circumstances as a whole. The Tribunal's reasons

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20 [2017] FCAFC 69 at [11] (Bromberg J), [121] (Charlesworth J).

21 [2017] FCAFC 69 at [16] (Bromberg J), [123]-[126] (Charlesworth J).

in each case carefully distinguished the question whether the power was engaged, and the question how the consequential discretion should be exercised. The appellants do not identify any particular respect in which the exercise of the discretion by the Tribunal can be impugned. Indeed, whether or not the appellants continued to meet the definition of eligible higher degree student was itself a factor that could lawfully be taken into account in the exercise of the discretion.

38. In such circumstances, there can be no dispute that the power under s 116(1)(a) was enlivened on the factual findings made by the Tribunal, and it is not alleged on these appeals that there has been any miscarriage in the discretionary aspects of the power. Any technical legal error made by the Tribunal in relation to the question of whether s 116(1)(a) was enlivened could have had no material effect on the exercise of power. In other words, the appellants were not deprived of any possibility of a successful outcome.

39. It is settled that the constitutional writs and the writ of certiorari are discretionary remedies.[22] It is also settled that the constitutional writs will ordinarily issue if an applicant has been deprived of a possibility of a successful (or more favourable) outcome before the decision-maker. Implicit in this formulation, and consistent with authority in other contexts,[23] is that it may be appropriate to refuse relief where a court is satisfied that an applicant has <u>not</u> been deprived of even a possibility of success.

40. Even if a court is satisfied that there is a legal error made by an administrative decision maker which is of a kind described in *Craig* and *Yusuf* as being a "jurisdictional error", the Court may refuse to grant relief in circumstances where this error could not have affected the outcome or could not have made any difference to the exercise of power. The decision in

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22 *Aala v Minister for Immigration* (2000) 204 CLR 82 at 108, [5], [42]-[57], [104], [171]; *Re Minister for Immigration; Ex parte Applicants S134/2002* (2003) 211 CLR 441, [90]. While the Appellants' Submissions appear to accept the existence of the discretion to grant or refuse relief (see at [40]), they nevertheless come close to annihilating any such discretion by suggesting that there is a "dilemma" said to arise from *Bhardwaj* which can only be resolved "if the granting of relief is not subjected to a discretion" (at [44]).

23 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145; *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151.

SZBYR can be understood as having been resolved on this basis, in circumstances where there was an independent basis for the Tribunal's decision which could not be "overcome" by the appellants.[24] Although the ultimate conclusion in *SZBYR* is expressed in terms of futility, namely that it was "a case in which no useful result could ensue from the grant of the relief desired by the appellants", this is properly understood as a conclusion that the legal error did not make any difference to the exercise of power, and therefore did not warrant the grant of the discretionary remedies.

41. As the appellants appear to accept, this outcome is aligned with other areas of the law where relief may be refused despite the demonstration of a legal error.[25]

42. Properly understood, there is no dichotomy requiring a choice between "backward looking" or "forward looking" approaches to the exercise of the discretion to refuse relief. This terminology reflects two different and alternative bases on which it may be appropriate to refuse relief in the circumstances of a particular case. They are different approaches which deal with conceptually different circumstances. On the one hand, the grant of relief may serve no useful purpose if it can be established that a decision-maker on remittal would be bound to make the same decision because of an incontrovertible fact or point of law, or if supervening events have rendered the issues moot. This is what has sometimes been identified or described as involving a "forward looking" inquiry. On the other hand, there may be cases in which it is clear that the review applicant could not possibly have obtained a different outcome (*i.e.* looking "backwards"), for example, in circumstances where there is an independent basis for the decision which was unaffected by any error.

43. As Lindgren J correctly observed in *Giretti*,[26] the "backward-looking" approach and the "forward-looking" approach are alternative bases on which relief may be refused in the exercise of discretion – either on the basis that

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24 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; 235 ALR 609 at [27]-[29].

25 Appellants' Submissions at [19], [40].

26 *Giretti v Commissioner of Taxation* (1996) 70 FCR 151 at 165.

there *was* no possibility of a different result or that there *is* no possibility of a different result. They are different bases arising in different circumstances – the former involves a recognition that the decision-maker acted within power and that relief must therefore be refused, whereas the latter involves a recognition that even though the decision-maker acted beyond power relief should nevertheless be refused because it will not achieve any useful result.

44. The present case is not one involving the asserted futility or lack of utility of the grant of relief setting aside the Tribunal's decision and remitting the matters for reconsideration. It may be accepted that, on any such remittal, a differently constituted Tribunal might make a different decision based on the evidence and material before it. However, there is no occasion to have a fresh consideration of the discretion whether to cancel the appellants' visas, in circumstances where it is clear that any error made by the Tribunal in relation to the basis on which the power to cancel under s 116(1)(a) was enlivened could not possibly have made any difference to the outcome of its decisions.

45. In contrast to many of the authorities on which the appellants rely,[27] there is no suggestion in the present case that the appellants were denied any opportunity to be heard both on the question whether there was a ground for cancellation under s 116(1)(a) of the Act, and the question as to how the discretion under s 116(1) should be exercised. In each case, the Tribunal took into account all relevant material, including the submissions made by the appellant. It is not in dispute that the appellants were no longer enrolled in the Diploma courses, nor that they were no longer eligible higher degree students within the meaning of cll 573.111 and 573.223(1).

46. The appellants' submissions seek to conflate or obscure the distinction between the exercise of the discretion to cancel the visas, and the anterior question whether the discretion was enlivened. Any error of law by the Tribunal went only to the latter question, in circumstances where the discretion under s 116(1)(a) was inevitably enlivened on the Tribunal's unchallenged findings of fact. Accordingly, this is a case in which it is

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27 Appellants' Submissions at [19]-[38].

appropriate to exercise the discretion to refuse relief on the basis that any error of law as to the application of s 116(1)(a) could not have affected the Tribunal's decision and could not possibly have led to a different outcome. Accepting that this may be a "high bar", the Federal Court was correct to conclude that it had been established to the requisite level of "clarity".

47. The decision in *Bhardwaj* does not require any different analysis or conclusion in the present case.[28] In particular, there is no tension between the principles applied in *Bhardwaj* and the discretionary nature of the constitutional writs and associated relief. *Bhardwaj* does not stand for a universal proposition that jurisdictional error will lead to a decision having no consequences whatsoever.[29] As was recognised by Hayne J, in determining whether any legal consequences are to be given to an administrative decision affected by "jurisdictional error", it is relevant to consider whether a court would set aside or quash that decision if it were the subject of challenge.[30] And there are circumstances in which an invalid administrative decision may have some operational effect, including where no person seeks to have the decision set aside or if a court refuses to grant relief for discretionary reasons, or where a purported decision is given some effect pursuant to statute.[31] There is no occasion to revisit these principles in the present appeals.

48. The statement by Gaudron and Gummow JJ in *Bhardwaj* that "a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all"[32] was directed to the particular question that arose in that case – namely, whether the Tribunal had power to

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28 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

29 See *e.g. Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1. Compare *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 (McHugh, Gummow, Kirby and Hayne JJ).

30 (2002) 209 CLR 597 at 646 [152].

31 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 604-605 [12]-[13] (Gleeson CJ), referring to *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 413 (Finkelstein J). Compare *e.g. SZKUO v Minister for Immigration and Citizenship* (2009) 180 FCR 438 at 440 [3], 445 [23]-[25], 446 [30] (Moore, Jagot and Foster JJ).

32 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51], 616 [53].

reopen or revisit a decision in circumstances where it had not completed its statutory task of review.[33] This should not be understood as denying the existence of the recognised discretion to refuse relief, which was subsequently confirmed in *Ex parte Aala*.[34]

49. There are clearly circumstances in which relief might not be granted by a court in relation to an administrative decision even if jurisdictional error can be established. These include "if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made".[35] The judicial discretion to refuse relief can extend to cases in which there is jurisdictional error.[36] This is evident in the judgments of the majority in *SAAP*, who nevertheless concluded that there were no grounds in that case to exercise the discretion to refuse relief in respect of a breach of s 424A of the Act which comprised jurisdictional error.[37] There is nothing in the judgments in *Bhardwaj* which modifies or supplants these principles, whether in relation to decisions which involve the exercise of a "general" discretion or otherwise.

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33 Thus, Gaudron and Gummow JJ noted that the case "involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness": (2002) 209 CLR 597 at 612 [44]; compare at 648-649 [162]-[163] (Callinan J).

34 (2000) 204 CLR 82 at 106-107 [53] (Gaudron and Gummow JJ).

35 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400; cited in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56] (Gaudron and Gummow JJ). To take one example, a court may exercise the discretion to refuse to grant relief in proceedings seeking judicial review of an administrative decision in circumstances where there is (or was) another available avenue of appeal or review, such as an entitlement to a merits review of the decision.

36 See *NAUV v Minister for Immigration, Multicultural and Indigenous Affairs* [2004] FCAFC 124 at [38], [41] (Beaumont, Conti and Crennan JJ): "We cannot accept that there is an error in refusing relief on discretionary grounds in circumstances where a jurisdictional error by the delegate was found to exist, and where that decision remained extant. It is only when a jurisdictional error has been established that the question of the exercise of discretion can arise in the first place. ... The grounds in the notice of appeal seem to suggest that, whenever there is jurisdictional error, a judge has no alternative but to grant the relief sought once the preceding requirement of a jurisdictional error has been established. We cannot accept this." Special leave refused: [2005] HCATrans 96 (4 March 2005).

37 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 322-324 [79]-[84] (McHugh J), 346 [174] (Kirby J), 355 [211] (Hayne J).

50. In the present cases, the Full Court of the Federal Court properly understood the principles applicable to the exercise of the discretion to refuse relief, and correctly exercised that discretion so as to refuse relief in the particular circumstances of each of the appellants.

Part VIII: ESTIMATE OF ORAL SUBMISSIONS

51. The Minister estimates that he will require 1 ½ hours in oral submissions.

Dated: 9 November 2017

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Chris Horan
Telephone: (03) 9225 8430
Facsimile: (03) 9225 8668
Email: chris.horan@vicbar.com.au

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Angel Aleksov
Telephone: (03) 9225 6736
Email: aleksov@vicbar.com.au