IN THE HIGH COURT OF AUSTRALIA **No. S 9 of 2015**
SYDNEY REGISTRY

BETWEEN **WEI WEI**
Plaintiff

AND **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant

PLAINTIFF'S SUBMISSIONS

PART 1

1. The plaintiff certifies by his counsel that this submission is in a suitable form for publication on the internet.

PART II

2. The issues in this matter may be stated as follows;

(i) WHETHER time should be extended to 8 January 2015 for the making of this application.

(ii) WHETHER, if the answer to (i) above is "yes",

a. the decision of the defendant's delegate on 20 March 2014 to cancel the plaintiff's visa was vitiated by jurisdictional error; or

b. the delegate's decision was vitiated by a breach of the requirements of procedural fairness.

Ren Zhou Lawyers
Level 4, 414-416 Pitt St.
SYDNEY NSW 2000

phone: (02) 9281-8155
fax: (02) 9281-4655
Attn: Ms Ying Zhang
Email: yingzhang.au@gmail.com

PART III

3. The plaintiff certifies that his counsel, having considered the question of whether notices under s. 78B of the *Judiciary Act* are required to be given to state and Commonwealth Attorneys General, are of the opinion that they are not.

PART IV

4. There were no proceedings below.

Part V

5. The relevant facts are stated in the "Statement of Agreed Facts" filed in these proceedings, and in the plaintiff's affidavit sworn 2 January 2015. In essence, the plaintiff is a Chinese national who arrived in Australia on a student visa in September 2008 and who completed his senior schooling at St Paul's Grammar School at Cranebrook NSW in September 2011. He enrolled in a "Foundation Program" at Macquarie University in February 2012. He was granted another student visa on 22 March 2012 and whilst in possession of that visa, enrolled in a subsequent "Foundation Program" at Macquarie University commencing on 24 June 2013 and concluding on 13 June 2014. This was confirmed to the plaintiff in a letter issued by Macquarie University on 23 December 2013. The plaintiff successfully completed this course, as scheduled, in June 2014.

6. The Macquarie University did not however at that time issue a "Confirmation of Enrolment", and did not in fact do so until 18 November 2014. Such a document in its electronic form would ordinarily have been the means by which the University informed the Secretary of the Department of Education and Training, and through him or her the

Department of Immigration and Border Protection of the details of the plaintiff's enrolment with the 'information' that is required to be given to the Secretary pursuant to s. 19 of the *Education Services for Overseas Students Act*, 2000 (The "ESOS Act"), and the *Education Services for Overseas Students Regulation*, 2001 (the "ESOS Regs") Reg 3.01. The information should have been given within 14 days of the applicant becoming an 'accepted student' of Macquarie University, which for this enrolment occurred no later than 24 June 2013. Thus, the PRISMS system[1], which provided a secure system for the purposes of receiving and storing information provided by registered providers pursuant to those provisions, did not contain information about the plaintiff's June 2013 enrolment until some five month after he completed his course in the following year.

7. Sometime after 26 July 2013 it appeared to a delegate of the defendant Minister that as his enrolment was not recorded on the PRISMS system, the plaintiff had breached a condition of his visa in that he had not been enrolled in a registered course since that date (*Migration Regulations*, Schedule 2 Cl. 573.611(a) read with Schedule 8 Item 8202(2)(a)). Thus, it appeared to the delegate that the plaintiff's visa was liable to be cancelled pursuant to section 116(1)(b) of the *Migration Act* which provides that the Minister may cancel a visa if the holder fails to comply with a condition thereof.

8. The delegate was required to give the plaintiff notice that there appeared to be grounds for cancelling the plaintiff's visa (s. 119 *Migration Act*). He made enquiries of Macquarie University as to the plaintiff's address and the date on which it was provided. Critically, however, he did not ask the University whether or not the plaintiff was an enrolled student of the University: AB 38 - 42.

[1] "PRISMS" is defined in Reg 1.03 of the ESOS Regs as "(Provider Registration and International Student Management System) [and] means the electronic system of that name used to process information given to the Secretary in the form approved under subsection 19(3) of the Act.

9. On 20 February 2014 the delegate telephoned the plaintiff. The plaintiff's unchallenged evidence was that he was unwilling to disclose his address because he did not believe that the person who called him was an officer of the Department of Immigration: AB 4 – 5, at [5]. The delegate sent a Notice of Intention to Consider Cancellation of the plaintiff's visa to the plaintiff's last known address on 25 February 2014, in accordance with sections 119 and 494B(4) of the *Migration Act*. That letter was returned unclaimed to the delegate.

10. The delegate took a decision to cancel the plaintiff's visa on 20 March 2014 pursuant to s. 116(1)(b) of the *Migration Act*. The notification was sent to the plaintiff's last address informed to the Minister for service of notices, but that was also was returned unclaimed. Nonetheless the plaintiff was taken to have received the decision seven working days after it was dated (s. 494C(4)(a) *Migration Act*).

11. The plaintiff did not receive notification of the cancellation of his visa until he made enquiries of the Department of Immigration in October 2014. His subsequent application to the then Migration Review Tribunal was made outside the time limited by s. 347 of the *Migration Act*. The Tribunal found that it did not have jurisdiction to review the delegate's cancellation decision and that finding is not challenged in these proceedings.

PART VI

(a) Extension of time

12. Section 486A(1) of the *Migration Act* required an application for a remedy to be granted in the exercise of the Court's original jurisdiction in relation to a migration decision to be made within 35 days of the date of the relevant migration decision. Section 486A(2) permitted an extension of time in the interests of the administration of justice. The

relevant migration decision was made on 20 March 2014. Proceedings were commenced in this Court on 8 January 2015. There was thus a delay of 9 months and two weeks.

13. The agreed statement of facts is to the effect that the Minister's delegate attempted to serve the plaintiff with a notice under s. 119 of the *Migration Act* but the correspondence was returned unclaimed. An attempt at email communication by the delegate failed because of an error in typing the plaintiff's email address. The plaintiff was telephoned by an officer of the Minister's Department and refused to give his address. The unchallenged evidence is that he refused because he thought the caller was an imposter.

14. The decision record dated 20 March 2014 was also returned unclaimed. The plaintiff did not actually learn about the cancellation of his visa until 3 October 2014. He sought review of the delegate's decision at the Migration Review Tribunal, which decided, correctly, that it did not have jurisdiction. He then sought judicial review in this Court.

15. In the plaintiff's submission the delay has been explained and his conduct is not such that he should be denied an opportunity to obtain the relief to which he would be entitled if his substantive application were to have merit.

16. Nor, in the plaintiff's submissions, is there any reason to deny him relief to which he may be entitled pursuant to the principles stated in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 upon which the defendant has relied in opposing leave.

(b) The substantive issues

17. At all relevant times, s. 29 of the *Migration Act* permitted the Minister to grant a permission, known as a visa, to travel to and enter Australia or to remain in Australia

for a specified length of time, or both. Section 31 both prescribed certain classes of visas, and permitted the Regulations to prescribe criteria for a visa or visas of a specified class or classes. Section 31(5) stated that a visa is one of a particular class if the Act or Regulations specified that it is of that class.

18. In addition, s. 45 of the *Migration Act* required a person who wanted a visa to apply for a visa of a particular class. Section 46(2) provided that, subject to irrelevant exceptions, an application for a visa was valid if it was an application for a visa of a class prescribed for the purposes of s. 46(2)(a) and if under the Regulations, the application was taken to have been validly made.

19. Migration Regulation 2.07 stated, *inter alia*, that for the purposes of ss 45 and 46 of the *Migration Act*, Schedule 1 to the Regulations set out certain requirements for a valid application for a visa, including the form to be used, the fee to be paid and "...other matters relating to the application" (Reg 2.07(1)(c)). *Migration Regulation* 2.03 stated, *inter alia*, that, "...the prescribed criteria for the grant to a person of a visa of a particular class are ..." set out in Schedule 2 to the Regulations.

20. The requirements of an application for a valid Student (Temporary)(Class TU) Visa are set out in Item 1222 of Schedule 1 to the *Migration Regulations*. Amongst those were that where an application for a student visa was made in Australia on a certain form or forms, and the applicant is over the age of 18, the applicant's Education Provider had made appropriate arrangements for the applicant's accommodation, support and general welfare for at least the minimum period of the students enrolment stated in their "certificate of enrolment" or their "electronic confirmation of enrolment", or their "Acceptance Advice of Secondary Exchange Student (AASES)" (*Migration Regulations*, Sch. 1 Item 1222(3)(g)(ii)(A) and (B) read with Item 1222(3)(h)).

21. A "Certificate of Enrolment" was defined in *Migration Regulation* 1.03 as a paper copy, sent by an education provider to an applicant for a student visa, of an electronic confirmation of enrolment relating to the applicant. An "electronic confirmation of enrolment in relation to an applicant for a student visa", was defined in *Migration Regulation* 1.03 as meaning a confirmation that;

(a) states that the applicant is enrolled in a registered course; and

(b) is sent by an education provider, through a computer system under the control of the Education Minister, to:

(i) a diplomatic, consular or migration office maintained by or on behalf of the Commonwealth outside Australia; or
(ii) an office of a visa application agency that is approved in writing by the Minister for the purpose of receiving applications for a student visa; or
(iii) any office of Immigration in Australia.

22. Item 1222(4) of Schedule 1 to the *Migration Regulations* stated that certain subclasses of visas, that is sub classes 570, 571, 572, 573, 574, 575, 576 and 580, were included within Class TU. That is, the criteria for any of those sub classes had to be met to the Minister's satisfaction before a Student (Temporary)(Class TU) Visa could be granted. The plaintiff in the current case held a Student Visa, having met the criteria in sub class 573.

23. One of the criteria which was required to be met at the time of the application for a Class TU visa, where the visa applicant was seeking to meet the criteria for sub class 573, was cl. 573.212, which stated that if the visa applicant was "an eligible higher degree student" (as defined in cl. 573.111), he or she had to "...have a confirmation of enrolment in each course of study for which the applicant [was] an eligible higher degree student.

24. However, as at the date of the plaintiff's enrolment in his Foundation course

commencing 24 June 2013, and at the time of the delegate's decision, s. 19 of the ESOS Act required that a registered education provider, of which Macquarie University was one, give to the Secretary of the Department of Education certain information relating to the name of any person who becomes an accepted student of the provider, and also the name, starting date and expected duration of the student's course, as well as persons who have not commenced their courses, those who have changed their courses and those whose studies have been terminated. That information is conveyed electronically to the PRISMS system, which is described in paragraphs 7 to 9 of the Agreed Statement of Facts, and which is used to store information about accepted students and monitor compliance with student visa conditions. That purpose is confirmed by the Revised Explanatory Memorandum to the *Education Services For Overseas Students Bill 2000,* p 37,

> "It is intended that these records would be required for tracking a student's progress through the electronic confirmation of enrolment system, for use in monitoring a student's compliance with relevant visa conditions concerning attendance or satisfactory academic performance and for assisting in the provision of a refund to a student where required under Division 2 of Part 3."

25. It may be added that for a person to be granted a visa the Minister must be satisfied that he or she meets the prescribed criteria for the grant of the particular visa (s. 65 *Migration Act*). Similarly, if a visa is to be cancelled under s. 116 the Minister must be satisfied that any of the facts there stated exist. In this case the plaintiff's student visa was cancelled pursuant to s. 116(1)(b) of the *Migration Act* which stated;

116 Power to cancel

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

...

(b) its holder has not complied with a condition of the visa; or

...

the non-compliance being with the requirement that the plaintiff maintain enrolment in a registered course. In that respect Condition 8202 (Schedule 8 Item 8202) which was a compulsory condition attached to the plaintiff's visa (cl. 573.611(a) of schedule 2 to the *Migration Regulations*), stated, as relevant;

> *8202 (1) The holder (other than the holder of a Subclass 560 (Student) visa who is a Foreign Affairs student or the holder of a Subclass 576 (Foreign Affairs or Defence Sector) visa) must meet the requirements of subclauses (2) and (3).*
>
> *(2) A holder meets the requirements of this subclause if:*
>
> *(a) the holder is enrolled in a registered course; or ...*

26. The importance of the education provider complying with s. 19, and the compulsory nature of its obligation to do so, are reinforced by the fact that a failure to comply is a criminal offence (s. 19(5) ESOS Act). In the present case Macquarie University did not comply with s. 19 of the ESOS Act. The delegate merely assumed that it had, without making an inquiry of the University either when he contacted them for details of the plaintiff's address, or at any other time.

27. In circumstances where the delegate knew that the notice of intention to cancel had been returned unclaimed, his decision to cancel the visa without inquiring of the University whether the plaintiff was in fact enrolled as a student during the relevant period was unreasonable and resulted in jurisdictional error: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. The information was centrally relevant to the decision to be made, and as his inquiry as to address showed, was readily available: *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at [25] and the cases there cited; *Tickner v Bropho* (1993) 40 FCR 183 at 199 per Black CJ; *Ex parte Helena Valley/Boya Association (Inc)* (1990) 2 WAR 422 at 445-6.

28. Further or alternatively, the failure of the University to comply with its statutory obligations under s. 19(1) of the ESOS Act undercut the statutory scheme put in place for monitoring the satisfaction of the criteria for the grant and subsistence of visas and the compliance by visa holders with the conditions of their visas. Compliance with the scheme thus established was of such importance that non-compliance by the education provider prevented the delegate from reaching his state of satisfaction on what the law required to be before him. His decision was vitiated by the underlying failure of the provider to discharge its statutory obligations. Cases of jurisdictional error are not confined to established categories: *Kirk* v *Industrial Court of New South Wales* (2010) 239 CLR 531, 574 [73]). Jurisdictional error may occur without fault of the actual decision maker.[2]

29. For the delegate to act upon the material in the PRISMS database without verifying it, in circumstances where he knew that the notice of intention to cancel had been returned unclaimed was also a denial of procedural fairness. Section 118A only operates in respect of the matters that Subdivision E deals with: *Saeed* v *Minister for Immigration and Citizenship* (2010) 241 CLR 252. Although the plaintiff was taken to have received the notice 7 working days after the date of the document, the delegate knew from the return of the notice unclaimed that the plaintiff had not by that process been given actual notice of the breach alleged. In circumstances where accurate information as to his enrolment status was readily available from the University, for the delegate to have proceeded to cancel without verifying the information was a denial of procedural

---

[2] *Hot Holdings* v *Creasy* (2002) 210 CLR 428, 448 [25]; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82; *Taylor* v *Taylor* (1979) 143 CLR 1; *Clements* v *Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at 38; *Minister for Immigration* v *Maman* (2012) 200 FCR 30 at 49 [63]; *O'Sullivan* v *Repatriation Commission* (2003) 128 FCR 590, 602-605 (re denial of procedural fairness by third party); *Minister for Immigration and Multicultural Affairs* v *SZFDE* (2006) 154 FCR 365 at [100] per French J (as his Honour then was); *SZFDE* v *Minister for Immigration and Citizenship* (2007) 232 CLR 189 (re third party fraud); *Baker* v *Canada (Minister for Immigration)* [1999] 2 SCR 817 at [45] (cited by Gleeson CJ in *Hot Holdings* at [25]) (re apprehended bias of third party); *Minister for Immigration and Multicultural Affairs* v *Seligman* (1999) 85 FCR 115, at 128-129 [56]-[58] (Minister's decision was ultra vires because a medical officer of the Commonwealth, upon whose opinion the Minister was required to accept as correct, acted pursuant to an invalid Regulation).

fairness: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 per French CJ at 347 [21].

Part VII

30. A copy of relevant statutory provisions is annexed to these submissions. The only relevant change is the insertion of s.19(6) of the ESOS Act which makes an offence in terms of s. 19(5) an offence of strict liability.

Part VIII

The Orders sought by the plaintiff are;

1) That time be extended for the making of this application to 8 January 2015.

2) That a WRIT OF CERTIORARI issue quashing the decision made by the Defendant's delegate on 20 March 2014 to cancel the plaintiff's student visa (the decision).

3) That a WRIT OF PROHIBITION or an INJUNCTION, issue, preventing or restraining the Defendant, his agents, servants or delegates from acting upon or giving effect to or enforcing the decision.

4) Costs.

5) Any further or other orders that the Court considers necessary or appropriate.

Part IX

31. The plaintiff estimates that his oral argument will take about 1.5 hours.

Date: 4 September 2015

Counsel for the Plaintiff

10

L. J. Karp
Ninth Floor, Culwulla Chambers
67 Castlereagh Street, Sydney 2000
Phone: (02) 9233-1733
Email: karp@culwulla.com.au

N.J. Williams SC
Sixth Floor, Selborne Chambers
174 Phillip Street, Sydney 2000
Phone: (02) 9235-0156
Email: njwilliams@sixthfloor.com.au