FEDERAL CIRCUIT COURT OF AUSTRALIA

MOLLA v MINISTER FOR IMMIGRATION & ANOR *[2016] FCCA 761*

Catchwords:
MIGRATION – Review of decision of the former Migration Review Tribunal – cancellation of a higher education sector visa – whether the Tribunal overlooked an alleged breach of the National Code of Practice for educational institutions and whether the Tribunal overlooked the fact that the visa holder had been permitted to re-enrol at his educational institution, considered.

Legislation:
Education Services for Overseas Students Act 2000 (Cth), ss.19, 20, 34
Education Services for Overseas Students Regulations 2001 (Cth)
Federal Circuit Court Rules 2001 (Cth)
Legislative Instruments Act 2003 (Cth)
Migration Act 1958 (Cth), ss.116, 430
Migration Regulations 1994 (Cth)

Cases cited:
Applicant WAEE v Minister for Immigration [2003] FCAFC 184, (2003) 75 ALD 630
Craig v South Australia (1995) 184 CLR 163
Dranichnikov v Minister for Immigration [2003] HCA 26; (2003) 197 ALR 389, (2003) 77 ALJR 1088
Karki v Minister for Immigration [2015] FCA 1308
Kaur v Minister for Immigration (2014) 144 ALD 292
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration v CZBP [2014] FCAFC 105
Minister for Immigration v Li (2013) 249 CLR 332
Minister for Immigration v MZYTS (2013) 136 ALD 547
Minister for Immigration v Singh (2014) 231 FCR 437
Minister for Immigration v SZGUR (2011) 241 CLR 594
Minister for Immigration v SZJSS (2010) 243 CLR 164
Minister for Immigration v SZRKT [2013] FCA 317 ; (2013) 212 FCR 99
Minister for Immigration v SZSRS [2014] FCAFC 16, (2014) 309 ALR 67
Minister for Immigration v Yusuf (2001) 206 CLR 323
NABE v Minister for Immigration (No 2) (2004) 144 FCR 1
NAHI v Minister for Immigration [2004] FCAFC 10
SZEHN v Minister for Immigration [2005] FCA 1389
Wei v Minister for Immigration (2015) 90 ALJR 213
Yuan v Minister for Immigration [2015] FCCA 240

Zheng v Minister for Immigration [2015] FCCA 298

Applicant:	AL-AMIN MOLLA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 2781 of 2014
Judgment of:	Judge Driver
Hearing dates:	10 February, 6 April 2016
Delivered at:	Sydney
Delivered on:	20 May 2016

REPRESENTATION

Counsel for the Applicant:	Mr B D Kaplan
Solicitors for the Applicant:	GMH Legal
Counsel for the Respondents:	Mr G Johnson
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The name of the second respondent is amended to "Administrative Appeals Tribunal".

(2) A writ of certiorari shall issue, removing the record of the former Migration Review Tribunal decision made on 1 September 2014 into this Court for the purpose of quashing it.

(3) A writ of mandamus shall issue, requiring the Administrative Appeals Tribunal to redetermine the review application according to law.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 2781 of 2014

AL-AMIN MOLLA
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the former Migration Review Tribunal, now the Administrative Appeals Tribunal (Tribunal). The decision was made on 1 September 2014. The Tribunal affirmed a decision of a delegate of the Minister to cancel Mr Molla's subclass 573 higher education sector visa.

2. The following statement of background facts is derived from the submissions of the parties.

3. Mr Molla is a national of Bangladesh. He was granted a student visa on 10 August 2011[1].

4. On 19 March 2012, Mr Molla first enrolled in a Bachelor of Business (Accounting) degree at the Australian Institute of Business and Management Pty Ltd trading as King's Own Institute (KOI)[2]. He had

[1] Court Book (CB) 6
[2] CB 15

previously enrolled in, and completed, a Diploma of Accounting from 26 April 2010 to 22 April 2011 and an Advanced Diploma of Accounting from 18 July 2011 to 17 December 2011[3].

5. On or about 18 March 2013, Mr Molla enrolled in the first trimester of the 2013 academic year at KOI[4].

6. On 23 June 2013, Mr Molla informed Mr John Jones, the Deputy Dean at KOI, that he was ill and provided supporting documentation[5].

7. Shortly thereafter, on 28 June 2013, Mr Molla sent an e-mail to Mr Jones, referring to his earlier conversation with him and advising that he was too ill to sit his exams and to attend class in the following trimester[6].

8. On 26 July 2013, KOI cancelled Mr Molla's Confirmation of Enrolment (COE) in his Bachelor of Business (Accounting) degree[7].

9. In about November 2013, Mr Molla attended KOI to enrol in subjects for that trimester and was told that his COE had been cancelled on 26 July 2013[8].

10. On 5 February 2014, the Minister's Department sent a letter to Mr Molla to notify him that the Minister intended to cancel his student visa pursuant to s.116 of the *Migration Act 1958* (Cth) (Migration Act) (Notice of Intention to Consider Cancellation (NOICC)) on the basis that he had breached the condition in item 8202(2)(a) (condition 8202) of Schedule 8 to the *Migration Regulations 1994* (Cth) (Regulations)[9]. The NOICC, however, was defective and was re-issued on 4 March 2014[10].

[3] CB 15
[4] CB 91 [6(d)]
[5] CB 107
[6] CB 101
[7] CB 15, 23, 29-32, 44, 61
[8] CB 108
[9] CB 6-13
[10] CB 20-28

11. In the meantime, on 6 February 2014, Mr Molla lodged with the Overseas Students Ombudsman (Ombudsman) a complaint against KOI's decision to cancel his COE[11].

12. On or about 5 March 2014, Dr Douglas Hinchliffe, the CEO and Dean of KOI, wrote to the Ombudsman to advise it that Mr Molla would be permitted to appeal KOI's decision to cancel his COE and "to enrol as a student at KOI while the appeal was being considered"[12].

13. On or about 7 March 2014, the Ombudsman agreed to the proposal put by Dr Hinchliffe[13]. On the same day, a panel was appointed by Dr Hinchliffe to consider and determine Mr Molla's internal appeal on 10 March 2014 (Appeal Panel)[14]. It seems that Mr Molla was invited on 7 March 2014 to appear before the Appeal Panel on 10 March 2014, but he could not do so due to illness[15].

14. On 10 March 2014 at 2:58pm, the Deputy Dean of KOI (Mr Jones) wrote to the Department to advise it he had been shown the NOICC by Mr Molla and that he had lodged an appeal with the Ombudsman, and to request that it defer making a decision as to whether to cancel his visa pending the outcome of that appeal[16].

15. The Minister's Department wrote to Mr Jones at 3:14pm on 10 March 2014 to advise that the Minister would not make a decision "until all information pertaining to [Mr Molla's] case has been received"[17].

16. On or about 10 March 2014[18] or 11 March 2014, the Ombudsman wrote to Mr Molla to advise him of the following:

    a) KOI agreed to offer to him an internal appeal (which had, it seems, been communicated to Mr Molla on 6 March 2014);

    b) KOI agreed to allow him to enrol in the trimester then underway and to issue to him a new COE pending the outcome of the internal appeal;

[11] CB 95
[12] CB 91 [2]
[13] CB 91 [2]
[14] CB 91 [3]
[15] CB 91 [4]-[5]
[16] CB 29-30
[17] CB 29
[18] CB 109

c) if he were to lodge an internal appeal, KOI would be required to give to him a written decision and advise him of his right to appeal to an independent external body and the time within which he could do so.

17. On 11 March 2014 at 10:16 am, Mr Jones wrote to the Minister's Department to advise it that, "[w]ith the agreement of the [Ombudsman], KOI is now considering the [applicant's] appeal to the [Ombudsman] as an appeal to KOI under National Code Standard 8", and that Mr Molla would be "offering evidence of compassionate and compelling circumstances"[19].

18. Also on that day, it appears that Mr Molla gave to the Appeal Panel some medical certificates[20].

19. On 18 March 2014, KOI issued to Mr Molla a COE with respect to his Bachelor of Business (Accounting) degree[21]. Mr Molla was enrolled at KOI from that date until on or about 10 April 2014 (being two weeks after the date of the decision of the Appeal Panel)[22].

20. In the meantime, on 26 March 2014, the Appeal Panel decided that the cancellation of Mr Molla's KOI on 26 July 2013 "was warranted and in accordance with KOI's obligations to take actions when students allow their enrolment to lapse" (Appeal Panel Decision)[23]. (Nowhere in that decision did the Appeal Panel say that KOI had notified Mr Molla of its intention to cancel his COE.) Mr Molla was notified of the Appeal Panel Decision on or about 27 March 2014[24].

21. On 28 March 2014 at 8:24 am, Mr Jones wrote to the Minister's Department to advise it of the Appeal Panel Decision[25].

22. On 9 April 2014, a delegate of the Minister made a decision to cancel Mr Molla's student visa pursuant to s.116(1)(b) of the Migration Act[26]. In doing so, the delegate found that Mr Molla had not complied with

[19] CB 31
[20] CB 92 [7], 111
[21] CB 93
[22] CB 90, 92 [15]
[23] CB 92 [13]
[24] CB 90
[25] CB 34
[26] CB 43-46

condition 8202(2)(a), which requires a visa holder to be "enrolled in a registered course", since 26 July 2013[27].

23. On 17 April 2014, Mr Molla applied to the Tribunal for review of the delegate's decision[28].

24. On 28 August 2014, Mr Molla attended at the Tribunal registry and submitted material in support of his application for review[29]. That material included the following:

    a) Mr Molla's written submissions to the Tribunal[30];

    b) an e-mail from Mr Molla's then agent advising him that he had not located "any correspondence about [his] cancellation of CoE or intention of cancellation of [his] CoE from KOI"[31];

    c) a letter from Holmes Institute to Mr Molla dated 22 August 2014 to confirm his enrolment in the Bachelor of Professional Accounting degree from 10 November 2014 to 31 July 2017[32].

25. On 1 September 2014, Mr Molla appeared before the Tribunal to give evidence and make submissions in support of his application for review[33].

26. On the same day, the Tribunal affirmed the delegate's decision to cancel Mr Molla's student visa pursuant to s.116(1)(b) of the Migration Act[34].

Summary of the Tribunal's reasons

27. The Tribunal found that Mr Molla had breached condition 8202(2)(a) because he had ceased to be enrolled in a registered course from 26

[27] CB 44
[28] CB 47-57
[29] CB 79
[30] CB 107-112
[31] CB 84
[32] CB 80-83
[33] CB 116 [4], 121-123
[34] CB 115-119

July 2013[35]. It noted that Mr Molla had confirmed this in his oral evidence to the Tribunal[36].

28. Having found that Mr Molla had breached a condition of his student visa, the Tribunal went on to consider whether it should exercise its discretion to cancel the visa[37]. Its findings and observations included the following:

a) Mr Molla had not engaged in any studies for a period of 15 months and that he "ha[d] not been fulfilling the purpose of his travel to and stay in Australia at least since July 2013"[38]. This breach was "significant, both because enrolment is central to the very purpose of the student visa and also because of the lengthy period of time in which the applicant failed to be enrolled in any course"[39];

b) Mr Molla claimed that his parents suffered from various ailments and that, as a result, he developed a medical condition that affected his studies; he approached the principal of KOI and sought a deferral, which was granted; but KOI cancelled his enrolment and failed properly to notify him of the cancellation[40];

c) there was no documentary evidence to confirm that KOI had allowed Mr Molla not to attend his course or that he had been granted a deferral[41];

d) by October 2013, Mr Molla had overcome his illness and was able to resume his studies[42];

e) the Tribunal was not persuaded by Mr Molla's reasons as to why, instead of enrolling in another registered course, he approached KOI in about November 2013 and pursued an appeal[43];

---

[35] CB 117 [9]
[36] CB 117 [9]
[37] CB 117-119 [10]-[24]
[38] CB 117 [12]
[39] CB 117 [12]. See also CB 119 [23]
[40] CB 117 [13]
[41] CB 117 [14]
[42] CB 117-118 [15]; See also CB 119 [23]
[43] CB 118 [16]-[17]

f) the fact that Mr Molla enrolled in another course in August 2014 demonstrates that he was able to do so from October 2013. His failure to do so, and his failure to engage in any study for almost one year from October 2013 "suggests that he is not a genuine student and that he did not have the intention of studying in Australia"[44];

g) Mr Molla's breach of condition 8202(2)(a) did not occur in circumstances beyond his control and there were no extenuating or compassionate circumstances that outweighed the grounds for cancelling his student visa[45];

h) while some hardship would be caused to Mr Molla and his family if his student visa were to be cancelled, his claim that this would adversely affect his parents' health was speculative[46].

29. The Tribunal concluded by saying that it had considered "the totality of the applicant's circumstances"[47] and "the circumstances as a whole"[48].

The present proceedings

30. These proceedings began with a show cause application filed on 7 October 2014. Mr Molla now relies upon an amended application filed in court by leave on 10 February 2016. There are three grounds in the application:

> *1A. In deciding to cancel the applicant's student visa pursuant to section 116 of the* Migration Act 1958 *(Cth) (Act), the Migration Review Tribunal (Tribunal) made a jurisdictional error in that it applied the wrong test under that provision.*
>
> *Particulars*
>
> *(a) In deciding whether or not to cancel the applicant's visa under section 116 of the Act, the Tribunal had a broad discretion and was required to consider all of the applicant's circumstances.*

[44] CB 118 [18]. See also CB 119 [23]
[45] CB 118 [19]
[46] CB 118 [20]
[47] CB 119 [23], [24]
[48] CB 119 [24]

(b) In paragraph 19 of its Statement of Decision and Reasons (Decision) (Court Book (CB) 118), the Tribunal found that it "does not consider that the breach occurred in circumstances beyond the applicant's control" and "does not consider there are extenuating or compassionate circumstances that outweigh the grounds for cancelling the visa".

(c) In so finding, the Tribunal applied a presumption that a breach of condition 8202 was sufficient for his visa to be cancelled and that the applicant was required to displace that presumption by pointing to extenuating or compassionate circumstances such that his visa ought not to be cancelled.

(d) In doing so, the Tribunal applied the wrong test under section 116.

1. In deciding to cancel the applicant's student visa pursuant to section 116 of the Act, the Tribunal made a jurisdictional error in that it failed to take into account:

(a) a claim; and/or

(b) a relevant consideration; and/or

(c) relevant material,

namely, that the applicant's education provider, Kings Own Institute (KOI), failed to inform him, as required by Standard 13.4 of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code), of its intention to cancel his Confirmation of Enrolment (COE) and notify him that he had 20 working days to access its internal complaints and appeals process as per Standard 8.1, during which time any cancellation of his COE could not have taken effect, thereby making a decision that was legally unreasonable.

Particulars

(a) The applicant made a claim that KOI had failed to comply with Standard 13.4 of the National Code in both his written submission to the Tribunal received on 28 August 2014 (CB 108, 111) and at the hearing before the Tribunal (p 3 of Exhibit SMH-1 to the

affidavit of George Mina Hanna sworn on 7 October 2014 (Hanna Affidavit)).

(b) The claim was expressly made. In any event, it arose clearly or squarely on the material before the Tribunal.

(c) The Tribunal failed to deal with that claim and/or those parts of the material before it in its Decision.

(d) Alternatively, the Tribunal failed to take into account a relevant consideration in the exercise of its discretion under section 116 of the Act.

2. In deciding to cancel the applicant's student visa pursuant to section 116 of the Act, the Tribunal made a jurisdictional error in that it failed to take into account:

(a) a claim; and/or

(b) a relevant consideration; and/or

(c) relevant material,

namely, that the applicant had enrolled at KOI on 18 March 2014, on the basis of an agreement between KOI and the Overseas Student Ombudsman (OSO), thereby making a decision that was legally unreasonable.

Particulars

(a) In its e-mail to the applicant dated on or about 10 or 11 march 2014, the OSO advised that KOI had "agreed to offer [him] an internal appeal" and "agreed to allow [him] to enrol in the current trimester and issue [him] with a new Confirmation of Enrolment while the internal appeal is underway": Exhibit FMH-1 to the Hanna Affidavit, p 74; see also CB 109.

(b) In paragraphs 2 and 9 of its report dated 27 March 2014, KOI stated that it had agreed to permit the applicant to enrol in three subjects with KOI pending the determination of his internal appeal: CB 95-96.

(c) The applicant made a claim that he had again enrolled at KOI in March 2014 in both his written submission to the Tribunal received on 28 August 2014 (CB 9) and

at the hearing before the Tribunal: Exhibit GMH-1 to the Hanna Affidavit, pp 3, 5, 6, 10, 14.

(d) The claim was one that was expressly made. In any event, it arose clearly or squarely on the material before the Tribunal.

(e) The Tribunal failed to deal with that claim and/or those parts of the material before it in its reasons for decision.

(f) Alternatively, the Tribunal failed to take into account a relevant consideration in the exercise of its discretion under section 116 of the Act.

31. Only Grounds 1 and 2 were pressed. Ground 1A was not pressed.

32. In addition to the court book filed on 12 November 2014, I have before me as evidence the affidavit of George Mina Hanna (Mr Molla's solicitor) made on 7 October 2014 and portions of the exhibit to that affidavit[49].

33. Counsel for Mr Molla and the Minister made helpful written and oral submissions which the Court appreciates.

Consideration

The legislation

34. Before addressing the application before the Court, it is convenient to set out the relevant legislative provisions.

35. Condition 8202 relevantly provides:

Visa conditions

...

(1) The holder ... 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 ...

[49] GMH 1, pages 1-17, 40-48, 57-62 and 82

...

36. Section 116 of the Migration Act relevantly provides:

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 ...

...

37. Subsections 116(2) and (3) are not relevant for present purposes.

38. The *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) is also relevant to these proceedings. Subsections 19(1) and (2) of that Act relevantly provide:

Giving information about accepted students

(1) A registered provider must give the Secretary the following information within the applicable number of days after the event specified below occurs:

...

(d) any termination of an accepted student's studies (whether as a result of action by the student or the provider or otherwise) before the student's course is completed ...

...

(2) A registered provider must give the Secretary particulars of any breach by an accepted student of a prescribed condition of a student visa as soon as practicable after the breach occurs.

39. By reason of regulation 3.03A of the *Education Services for Overseas Students Regulations 2001* (Cth) (ESOS Regulations), condition 8202 is "a prescribed condition of a student visa" for the purposes of s.19.

40. Subsection 33(1) of the ESOS Act provides that the Minister for Education and Training "may make a national code by legislative instrument". Subsection 33(2) provides that it is to be called the National Code of Practice for Providers of Education and Training to Overseas Students (National Code).

41. The National Code was made in 2007 and its purpose is, as stated in s.34 of the ESOS Act, "to provide nationally consistent standards and procedures for registered providers and persons who deliver educational services on behalf of registered providers." Of particular importance in these proceedings is Standard 13.4 of the National Code, which provides:

> *The registered provider must inform the student of its intention to suspend or cancel the student's enrolment where the suspension or cancellation is not initiated by the student and notify the student that he or she has 20 working days to access the registered provider's internal complaints and appeals process as per Standard 8.1. If the student accesses the registered provider's internal complaints and appeals process, the suspension or cancellation of the student's enrolment under this standard can not take effect until the internal process is completed, unless extenuating circumstances relating to the welfare of the student apply.*

42. Standard 8.1 requires a registered provider to have an appropriate internal complaints handling and appeals process.

43. Standard 8.4 provides that, if a student chooses to access the registered provider's complaints and appeals processes, "the registered provider must maintain the student's enrolment while the complaints and appeals process is ongoing."

44. Section 40 of the ESOS Act provides that "[t]he only legal effects of the national code are the effects that this Act expressly provides for."

Ground 1 – did the Tribunal overlook the asserted breach of the National Code?

Mr Molla's submissions

45. This ground is framed in slightly different ways in paragraphs (a), (b) and (c). The essential point, however, is the same: as part of his case

as to why the Tribunal should not exercise its discretion pursuant to s.116(1)(b) to cancel his student visa, Mr Molla relied on the fact that KOI had not complied with Standard 13.4 of the National Code. The Tribunal, however, did not deal with that aspect of Mr Molla's case.

46. In his written submissions to the Tribunal received on 28 August 2014, Mr Molla claimed that KOI had failed to comply with Standard 13.4 as it had not notified him of its intention to cancel his COE[50]. Mr Molla made the same point, expressly, in his oral submissions to the Tribunal[51].

47. This was an important matter advanced by Mr Molla as to why his student visa ought not to be cancelled, given that compliance with Standard 13.4 would have resulted in condition 8202(2)(a) not being breached (and, therefore, s.116(1)(b) not being engaged) had Mr Molla invoked KOI's internal appeals process during that time - as he did after becoming aware that his COE had been cancelled. It was, plainly, a matter that went to the exercise of the Tribunal's power under s.116.

48. Accordingly, the Tribunal was required to consider the matter, as Mansfield J held in *Kaur v Minister for Immigration*[52]. For reasons that will become apparent, the Tribunal failed to do so. Irrespective of the way in which that error may be characterised - as a failure to consider a claim[53], a failure to deal with relevant material that acquired importance to the exercise of the Tribunal's jurisdiction[54], or the making of a legally unreasonable decision as a consequence of some

---

[50] CB 108, 110, 111

[51] Affidavit of George Mina Hanna sworn on 7 October 2014 (Hanna Affidavit), Exhibit GMH-1, page 3

[52] (2014) 144 ALD 292 at 300 [38]-[41], 301 [46]-[49]. *Kaur* was followed by Judge Jarrett in *Yuan v Minister for Immigration & Anor* [2015] FCCA 240 at [16]-[17] and *Zheng v Minister for Immigration* [2015] FCCA 298 at [31]-[32]

[53] Compare *Dranichnikov v Minister for Immigration* (2003) 77 ALJR 1088 at 1092 [24] per Gummow and Callinan JJ; *NABE v Minister for Immigration (No 2)* (2004) 144 FCR 1 at 17-21 [55]-[63] per Black CJ, French and Selway JJ

[54] *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration v SZJSS* (2010) 243 CLR 164 at 175 [27]-[28] per curiam; *Minister for Immigration v SZRKT* (2013) 212 FCR 99 at 127-128 [97]-[98], 130 [111] per Robertson J; *Minister for Immigration v SZSRS* (2014) 309 ALR 67 at [32]-[34], [43], [54]-[55], [58]-[59] per Katzmann, Griffiths and Wigney JJ; *Minister for Immigration v CZBP* [2014] FCAFC 105 at [64]-[65] per Gordon, Robertson and Griffiths JJ

underlying vitiating error[55] - with the result that the error was jurisdictional.

49. Mr Molla accepts the following principles:

a) the Tribunal is not under an obligation "to comment on every item of material before it, to the extent of saying why it rejected a particular item, or attributed less weight to it than to another item"[56];

b) the fact that a particular matter has not been referred to in the Tribunal's reasons does not, of itself, mean that it has not been considered[57];

c) section 430(1)(c) of the Migration Act only requires the Tribunal to set out its findings on what *it* considers to be material questions of fact[58];

d) in general, if a matter has not been referred to in the Tribunal's reasons the Court can infer that it was not considered to be material[59];

e) it is not always a jurisdictional error for relevant material to be overlooked[60];

f) the onus is on the applicant to demonstrate that a matter has not been considered[61];

50. At the same time, however, the fact that a matter is absent from the Tribunal's reasons may reveal an underlying jurisdictional error[62]. The Court can draw such an inference from the Tribunal's reasons in the

[55] *Minister for Immigration v Li* (2013) 249 CLR 332 at 350-351 [27]-[28] per French CJ, 365-366 [72] per Hayne, Kiefel and Bell JJ; *Minister for Immigration v Singh* (2014) 231 FCR 437 at 445 [44] per Allsop CJ, Robertson and Mortimer JJ
[56] *NAHI v Minister for Immigration* [2004] FCAFC 10 at [14] per Gray, Tamberlin and Lander JJ. See also *Applicant WAEE v Minister for Immigration* (2003) 75 ALD 630 at 641 [46] per French, Sackville and Hely JJ
[57] *Minister for Immigration v SZGUR* (2011) 241 CLR 594 at 605-606 [31] per French CJ and Kiefel J; *Minister for Immigration v SZSRS* (2014) 309 ALR 67 at [34]
[58] *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 331-332 [10] per Gleeson CJ, 337-338 [33]-[35] per Gaudron J, 346 [68]-[69] per McHugh, Gummow and Hayne JJ
[59] *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 338 [35], 346 [69]
[60] *Minister for Immigration v SZRKT* (2013) 212 FCR 99 at 132 [122]
[61] *Minister for Immigration v SZGUR* (2011) 241 CLR 594 at 616 [67]-[68] per Gummow J, 623 [91] per Heydon J, [92] per Crennan J
[62] *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 338 [35], 346 [69]

present case. At no point did the Tribunal refer to Mr Molla's contention that KOI had not complied with Standard 13.4 of the National Code or that he had not been warned of its intention to cancel his COE. All that the Tribunal relevantly did was to say that it "had regard to matters raised by the applicant as to why [his] visa should not be cancelled"[63], to refer to "his submission to the Tribunal"[64] and "the circumstances put forward by [him]"[65], and to say that it considered "the totality of the applicant's circumstances"[66] and "the circumstances as a whole"[67]. In circumstances where this claim was one of the central features of Mr Molla's case as to why his visa ought not to be cancelled (including for the reason identified at [47] above), had it been considered one would have expected it to be referred to in the Tribunal's reasons, even if it were then rejected[68]. That is particularly so given that the Tribunal recited the matters that it understood had been raised by Mr Molla[69]. The claim cannot, therefore, sensibly be understood as a matter considered by the Tribunal but not mentioned because it was not material.

51. Indeed, it may even be said that the Tribunal misunderstood the point that was made by Mr Molla, in the light of its reference at [13][70] to Mr Molla claiming that:

> *by error, KOI cancelled his enrolment and* ***failed to properly notify him of the cancellation****, in breach of its obligations.* (Emphasis added)

52. The point was not that KOI had failed to notify Mr Molla that it had cancelled his COE (which s.20(4A) of the ESOS Act would have prohibited); rather, it was that KOI had not notified him of its intention to do so and that he had a period of 20 working days within which to appeal the decision—which, the Court can infer, Mr Molla would have done given his conduct after becoming aware that his COE had been cancelled.

---

[63] CB 117 [11]
[64] CB 117 [13]
[65] CB 118 [19]
[66] CB 119 [23], [24]
[67] CB 119 [24]
[68] Compare *Minister for Immigration v MZYTS* (2013) 136 ALD 547 at [52] per Kenny, Griffiths and Mortimer JJ; *Minister for Immigration v SZSRS* (2014) 309 ALR 67 at [34]
[69] Compare *Kaur v Minister for Immigration* (2014) 144 ALD 292 at 299 [36]
[70] CB 117

53. For present purposes, it is sufficient for Mr Molla to prove that, in exercising its discretion, the Tribunal did not consider his claim that KOI had failed to comply with Standard 13.4. As Mansfield J observed in *Kaur* at 301 [47], in making a decision under s.116, the Tribunal "must have considered the totality of the [applicant]'s submissions". Here the Tribunal did not do so. Nothing more needs to be shown for relief to be granted to Mr Molla. It would not be appropriate for the Court to speculate as to what decision the Tribunal could or would have reached had it considered the claim[71], lest it exercises the discretion in s.116(1) - a matter for the repository of the statutory power and not a supervising court[72].

54. If the Court were to accept Mr Molla's submission that the Tribunal made a jurisdictional error by failing to consider a claim or relevant material, it is unnecessary for the Court to resolve the question as to whether the Tribunal failed to have regard to a mandatory relevant consideration[73]. This was a matter that was raised, but not dealt with, in *Karki v Minister for Immigration*[74]. Nevertheless, Mr Molla makes the following submissions with respect to that issue.

55. It is clear that neither s.116, nor the Regulations, identifies any express mandatory relevant considerations to which the Tribunal must have regard in exercising its discretion[75]. However, such considerations may, as Mason J observed in *Peko-Wallsend*[76], be implied from the subject matter, scope and purpose of the relevant legislation. Here, the relevant legislation comprises the Migration Act, the ESOS Act, the ESOS Regulations and the National Code (the last-mentioned item being a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth)). Both the Migration Act and the ESOS Act form what Gageler and Keane JJ described in *Wei v Minister for Immigration*[77] as "an integrated statutory scheme". In that case, it was held, at [31]-[34][78], that the power to cancel a visa in s.116(1)(b) of the

---

[71] Compare *Kaur v Minister for Immigration* (2014) 144 ALD 292 at 301 [51]
[72] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J (as his Honour then was); *Minister for Immigration v Singh* (2014) 231 FCR 437 at 446-447 [45], [47]
[73] as understood in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
[74] [2015] FCA 1308
[75] *Kaur v Minister for Immigration* (2014) 144 ALD 292 at 299 [33]
[76] at 39-40
[77] (2015) 90 ALJR 213 at 215 [6]
[78] at 219

Migration Act had been exercised invalidly by reason of a registered provider's material non-compliance with its imperative duty under s.19 of the ESOS Act to upload the applicant's COE to the prescribed database, namely, the Provider Registration and International Student Management System.

56. It is a mandatory relevant consideration vis-à-vis the exercise of the Tribunal's discretion under s.116(1)(b) whether there has been material non-compliance by a registered provider with its obligations under the ESOS Act and the National Code (relevantly, Standard 13.4). That is because non-compliance with Standard 13.4 affects the integrity of any communication by a registered provider (in this case, KOI) to the Secretary of the Department of Education and Training under ss.19(1)(d) and/or (2) of the ESOS Act. A breach of condition 8202(2)(a) occurs if a student is no longer enrolled in a registered course. A student is no longer enrolled in a registered course if his or her COE has been cancelled. But a COE cannot be cancelled if the requisite notice has not been given under Standard 13.4. If a breach of condition 8202(2)(a) has resulted at least in part because of a failure by a registered provider to comply with Standard 13.4, it is a circumstance surrounding the breach of a visa condition that must be considered. Non-compliance with Standard 13.4 is no trivial matter. Once condition 8202(2)(a) has been breached, the power to cancel a visa under s.116(1)(b) is enlivened even if the breach were transient. It cannot be reversed. The injustice that non-compliance with Standard 13.4 can work on an applicant is, therefore, readily apparent[79]. The consequence that non-compliance with that standard may have for a student strengthens Mr Molla's argument that the question of compliance is made mandatory by s.116(1)(b).

Minister's submissions

57. Mr Molla does not assert that the alleged failure by KOI to follow the procedure set out in the National Code, in particular in relation to the giving of notice of an intention to suspend or cancel a student's enrolment pursuant to clause 13.4 of the National Code, had the effect of nullifying the Tribunal's (or the delegate's) decision to cancel Mr Molla's visa. Rather, what is put is that the Tribunal failed to consider

[79] Compare *Wei v Minister for Immigration* (2015) 90 ALJR 213 at 218 [28] per Gageler and Keane JJ

Mr Molla's claim that KOI had not followed the applicable procedure under the National Code, leading to an error of the kind identified in *Dranichnikov v Minister for Immigration*[80].

58. Further, Mr Molla appears not to take any issue with the finding by the Tribunal that Mr Molla failed to comply with condition 8202, and therefore the discretion to cancel the visa under s.116 was enlivened. This case is therefore distinguishable on the facts from *Wei v Minister for Immigration*[81]. *Wei* concerned alleged breaches by a registered provider of imperative duties under the ESOS Act to upload onto the PRISMS system confirmation that the visa holder was enrolled in a registered course. The failure of the registered provider caused an officer of the Minister's Department to form the view that the visa holder was not enrolled in a registered course when in fact he was enrolled. *Wei* was not a case involving alleged breaches of the National Code.

59. Mr Molla's challenge to the Tribunal's decision targets its exercise of discretion, not the validity of the exercise of the power. To that end, notwithstanding an alleged failure by the registered provider to follow procedures under the National Code, contrary to *Wei*, it is not alleged that the Tribunal proceeded on the basis of a mistake by KOI. Indeed, not only was the PRISMS record relied on by the Tribunal consistent with the views of the Deputy Dean of KOI[82], but the COE cancellation was found to be warranted once an internal review was conducted, to which attention is directed below[83].

60. The real question for determination that arises from the first ground is whether in exercising its discretion, the Tribunal failed to consider Mr Molla's claim that KOI had failed to follow procedures under the National Code. There are two responses to this ground.

61. First, the Tribunal was clearly aware of the claim advanced by Mr Molla, where at [13][84], it makes reference to the claim that "KOI cancelled his enrolment and failed to properly notify him of the cancellation, in breach of its obligations." It is to be noted that in

[80] [2003] HCA 26; (2003) 197 ALR 389
[81] (2015) 90 ALJR 213
[82] CB 30, 31
[83] CB 90-92
[84] CB 117

summarising at [13] the submissions presented by Mr Molla to the Tribunal, the Tribunal was considering the question of whether Mr Molla was a genuine student, as a factor that bore upon the exercise of its discretion to cancel. It was not an issue contested by Mr Molla[85] that the decision by KOI to cancel his COE was vitiated in some way due to a failure to comply with the National Code. The Tribunal, as it made clear during the hearing, focussed its attention upon whether it should exercise its discretion to cancel.

62. Secondly, as Mr Molla concedes in his written submissions[86], s.116 of the Migration Act does not prescribe any matters that must be taken into account when a decision-maker exercises the discretion to cancel a visa. Contrary to Mr Molla's submissions, an alleged failure by an education provider to comply with the National Code is not a relevant consideration as considered in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [87] . The Federal Court in *Karki v Minister for Immigration*[88] appears to have accepted this to be the case[89].

63. Further, the case of *Wei v Minister for Immigration*[90] has no bearing on the issues raised by Mr Molla in this case. Whilst their Honours Gageler and Keane JJ observed that the Migration Act and the ESOS Act were "an integrated statutory scheme", such an observation does not advance Mr Molla's first ground. *Wei* is a different case from the present, as explained above. It was in the context of the particular failures by the registered provider in that case that the Court opined of the manifest injustice that can result to visa holders when "incorrect information is downloaded from PRISMS". Mr Molla's attempt to draw an analogy with *Wei* and submit that injustice arises in the present case due to "non-compliance with Standard 13.4" is, with respect, a long bow.

64. It should be noted here that the relevant breach of condition 8202 that enlivened the discretion to cancel was not achieved by means of KOI's cancellation of Mr Molla's COE. Neither the ESOS Act nor the ESOS Regulations mention a document called a "Confirmation of Enrolment".

---

[85] at least having regard to his oral evidence to the Tribunal: see Exhibit GMH-1, pages 1 and 2
[86] at [49]
[87] (1986) 162 CLR 24
[88] [2015] FCA 1308
[89] see Barker J's reasons for judgment in particular at [57] and [66]
[90] (2015) 90 ALJR 213

Rather, the ESOS Regulations define in Regulation 103 "confirmation of enrolment" as "the information a registered provider must give the Secretary under section 19 of the Act when a person becomes an accepted student of the provider". In the reasons for decision of the KOI appeal panel dated 27 March 2014, it describes the relevant sequence of events as follows[91]:

> *14 July 2013, start of trimester 2 of 2013. Mr Molla did not make any contact with KOI to enrol for the trimester or seek leave of absence.* ***On 26 July 2013 KOI cancelled Mr Molla's COE, as he remained unenrolled and in breach of his visa conditions****.* (emphasis added)

65. Section 19 of the ESOS Act requires registered education providers to notify the Secretary of the Department of Education and Training of various matters, including "particulars of any breach by an accepted student of a prescribed condition of a student visa as soon as practicable after the breach occurs"[92]. The relevant breach belonged to Mr Molla, and his failure to enrol for the second trimester of 2013. Regardless of what steps KOI took after July 2013, the breach had occurred and KOI had an obligation to notify the Department of Education and Training. To this end, Mr Molla's submission[93] that "non-compliance with Standard 13.4 affects the integrity of any communication by a registered provider … to the Secretary of the Department of Education and Training under ss.19(1)(d) and/or (2) of the ESOS Act" mischaracterises the nature of the obligation on the education provider under s.19, and the relevant facts of the matter. There is no basis upon which it can be said that an alleged failure by KOI to comply with the National Code was a relevant consideration that the Tribunal had to consider in exercising its discretion.

66. In any event, it is not clear how, on whatever basis Mr Molla asserts his first ground, any failure by the Tribunal as alleged could have made any difference to the outcome on the review. There is no challenge to the decision of KOI to cancel the COE, and the evidence shows clearly that Mr Molla was given an opportunity by KOI, once he complained to the Overseas Students Ombudsman, to have the COE cancellation

[91] CB 91
[92] Section 19(2)
[93] at [50] of his written submissions

decision internally reviewed. Mr Molla took up the opportunity for internal review to an appointed appeal panel within KOI. The outcome of the internal review[94] was that:

> *... on the basis of the available evidence, ... cancellation of Mr Molla's CoE on 26 July 2013 was warranted and in accordance with KOI's obligations to take action when students allow their enrolment to lapse. The appeal is therefore dismissed.*

67. The Deputy Dean of KOI advised the Minister's Department of the relevant findings of the KOI appeal panel and the outcome of the internal review[95].

68. There is, further, no basis to Mr Molla's contention, which is not developed in his written submissions, that in exercising its discretion under s.116(1) the Tribunal's decision was legally unreasonable in the sense considered in *Minister for Immigration v Li*[96]. The plurality in *Li* said, among other things, that "unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".

69. Clearly here, the Tribunal gave detailed and rational reasons for its decision to exercise its discretion under s.116(1) of the Migration Act to cancel Mr Molla's visa. Among the reasons considered by the Tribunal, as revealed in its decision record at [11][97] were "matters raised by the applicant as to why the visa should not be cancelled, and government policy guidelines contained in the Department's Procedures Advice Manual (PAM3)". The Tribunal gave consideration to the arguments advanced by Mr Molla[98], and it gave reasons for its concerns with that evidence[99]. At [23][100], the Tribunal concluded that "the applicant had breached condition 8202 of his visa because he ceased to be enrolled. The Tribunal has found this breach to be significant and the Tribunal has also found that at least since July 2013 the applicant had not been fulfilling the purpose of his travel to and stay in Australia because he had not engaged in any study". The

[94] see CB 90
[95] CB 34
[96] (2013) 249 CLR 332
[97] CB 117
[98] see [13]; CB 117
[99] [14]-[19]; CB 117-118
[100] CB 119

reasoning of the Tribunal for the exercise of its discretion was lucid, justified on the evidence, and manifestly logical.

Resolution

70. In my opinion, Mr Molla has established jurisdictional error by the Tribunal in respect of this ground. It is unnecessary to decide whether a breach by an education provider of a provision of the National Code is a mandatory relevant consideration for the purposes of the Tribunal's consideration of its discretion under s.116(1). Further, the outcome is not determined by the decision of the High Court in *Wei* because the facts are different: there is no dispute that Mr Molla was not enrolled at KOI after July 2013 (except for a relatively brief period during the consideration of the informal internal appeals process in March 2014) and there is no question of the Tribunal being misled by a failure by the educational institution to notify the Minister's Department of the correct enrolment particulars.

71. Rather, the error here is that the Tribunal's exercise of discretion miscarried because it misunderstood, and thus overlooked, the point Mr Molla was attempting to make. It is plain that the Tribunal misunderstood Mr Molla's argument because it mischaracterised it at [13] of its decision record[101] as a claim that KOI failed to properly notify him of the cancellation of his enrolment. Mr Molla's claim was fundamentally different, namely that he had not been notified of KOI's intention to cancel his enrolment and thus he was deprived of the opportunity to appeal that proposed decision and to obtain the automatic continuation of his enrolment pending the outcome of that appeal.

72. It was central to the Tribunal's reasoning process that Mr Molla was not a genuine student because he had not been enrolled in a course of study from the time of the cancellation of his enrolment by KOI until late August 2014. The Tribunal stated at [18] of its decision record[102]:

> *The applicant provided to the Tribunal evidence of his recent enrolment at Holmes Institute which he arranged in late August 2014. The applicant appears to be no longer concerned by the*

[101] CB 117
[102] CB 118

fact that his student visa was cancelled and that he may have to repeat the four subjects he had previously completed at KOI. In the Tribunal's view, the applicant's decision to enrol in late August 2014 (shortly before his Tribunal hearing) indicates that he was equally able to arrange such enrolment from October 2013. The applicant's failure to do so, and his failure to engage in any study for a period of almost one year since October 2013 suggests that he is not a genuine student and that he did not have the intention of studying in Australia.

73. It is, in my opinion, clear that if the Tribunal had understood and considered Mr Molla's claim it would have understood and discussed the following propositions:

a) if Mr Molla had been notified of the intention to cancel his COE he would have exercised his right of appeal, because once he was aware of the decision, he complained to the Ombudsman and exercised the informal appeal right that was provided to him;

b) if Mr Molla had exercised that right of appeal, his enrolment would have continued until the outcome of the appeals process, which was likely to involve a period of several months, noting the 20 day appeal period and the necessity for a process to consider the appeal and provide an outcome;

c) if the proper process had been followed, not only would Mr Molla's COE have been cancelled (if at all) at a significantly later date but also he would have been able to act on the cancellation more promptly;

d) Mr Molla's non enrolment between July 2013 and March 2014 was a consequence of the failure by KOI to comply with the National Code rather than inaction by Mr Molla; and

e) it must follow that if the National Code had been complied with, the period of non enrolment, pointing to the proposition that Mr Molla was not a genuine student, would have been much shorter and the conclusion reached by the Tribunal may not have been available.

74. The determination of the appeal panel, pursuant to the informal process consequent upon KOI's failure to comply with the National Code, was

completed on 26 March 2014. The Minister's delegate acted less than two weeks later to cancel Mr Molla's student visa. Mr Molla promptly sought review before the Tribunal. Mr Molla enrolled at the Holmes Institute in August 2014 so it follows that the period of non enrolment referable to Mr Molla's "inaction" was the period from 26 March 2014 to August 2014, a much shorter period than that which the Tribunal considered.

75. I conclude, therefore, that the Tribunal fell into error by misunderstanding and hence constructively failing to consider Mr Molla's claim concerning the breach by KOI of the National Code and the consequence of that breach for the purposes of the exercise of the Tribunal's discretion. The error goes to jurisdiction because the Tribunal's exercise of discretion miscarried. It follows that because the Tribunal fell into jurisdictional error in exercising its discretion, Mr Molla should receive the relief he seeks.

Ground 2 – did the Tribunal overlook Mr Molla's enrolment at KOI on 8 March 2014

Mr Molla's submissions

76. In support of his case that the discretion in s.116(1)(b) should not be exercised against him, Mr Molla made a claim that he had re-enrolled at KOI from about 18 March 2014 while his internal appeal was on foot. Mr Molla remained enrolled at KOI until on or about 10 April 2014.

77. This claim was articulated in Mr Molla's written submissions to the Tribunal[103]. It was also raised during the hearing[104].

78. Further, there was material before the Tribunal from which the claim squarely arose, namely:

    a) the e-mail from Mr Jones to the Department sent on 11 March 2014 at 10:16 am[105];

    b) [2] and [9] of the appeal panel's report[106];

[103] CB 109
[104] Hanna Affidavit, Exhibit GMH-1, pages 3, 5, 6, 10, 14
[105] CB 31

c) the COE issued to Mr Molla on 18 March 2014[107]; and

d) the e-mail from the Ombudsman to Mr Molla on or about 10 or 11 March 2014[108].

79. As with the claim the subject of Ground 1 in the amended application, this claim was not dealt with.

80. At various points in its reasons, the Tribunal stressed that Mr Molla had not been engaged in any study for a period of approximately 15 months from July 2013 and that, therefore, he was not fulfilling the purpose of his travel to, and stay in, Australia. The Tribunal characterised the breach of condition 8202(2)(a) as "significant" and the delay as "lengthy"[109]. It relied upon these matters to find that Mr Molla was not a genuine student[110].

81. At no stage, however, did the Tribunal deal with Mr Molla's claim that he was enrolled at KOI from March to April 2014. That was an important matter that went to the genuineness of Mr Molla's intention to study in Australia. It evinced a desire on Mr Molla's part to continue his studies. In the light of its importance, the Court can comfortably infer from the Tribunal's reasons, for the same reasons given at [50] above, that the Tribunal did not deal with the claim, thereby making a jurisdictional error.

82. This view is strengthened by the Tribunal's dismissal, during the hearing, of Mr Molla's claim that he had re-enrolled at KOI in March 2014[111].

83. If the Court were to accept these submissions, it need not determine whether the Tribunal failed to take into account a mandatory relevant consideration in the *Peko-Wallsend* sense. In any event, Mr Molla submits that the Tribunal must take into account the enrolment history of a student post-breach when exercising its discretion under s.116(1)(b), for the reason that it is essential to the determination of the genuineness of his or her desire to study in Australia and central to the

---

[106] CB 91-92
[107] CB 93
[108] CB 95-96
[109] CB 117 [12], 118 [16]-[18], 119 [23]
[110] CB 118 [18], 119 [23]
[111] Hanna Affidavit, Exhibit GMH-1, page 10

fulfilment of the purpose of a student visa. In the present case, the Tribunal overlooked an aspect of Mr Molla's post-breach enrolment history. It failed to take into account a mandatory relevant consideration, thereby falling into jurisdictional error.

Minister's submissions

84. In his second ground Mr Molla asserts that the Tribunal failed to consider a claim advanced, or squarely arising on the materials before the Tribunal, that he had been permitted to re-enrol with KOI from about 18 March 2014, while his internal appeal was underway. Mr Molla submits that the failure to consider this claim impacted adversely on the Tribunal's consideration of his purpose of his travel to and stay in Australia as a genuine student.

85. Whilst the Tribunal makes no explicit mention of the arrangement agreed to by KOI permitting Mr Molla to enrol in courses at the institution for the duration of his internal review, Mr Molla overstates the significance of the arrangement agreed to by Mr Molla and KOI, permitting him to enrol whilst his internal review was conducted (a period less than one month). It is overlooked by Mr Molla that he did not in fact engage in, and has not claimed to have engaged in, any study in March 2014, or indeed at any time after July 2013. This point was made by the KOI appeal panel that conducted the internal review[112].

86. Whether Mr Molla's contention is understood as a failure to take into account a claim, a relevant consideration, or relevant material, the distinction may be immaterial[113]. The ultimate question is whether the Tribunal ignored "material" or evidence that was serious and went to the exercise of the Tribunal's function. It is well-established that there is no requirement for the Tribunal to refer to every piece of evidence submitted to it by an applicant[114], and that a failure by the Tribunal to refer to an item of evidence does not necessitate a conclusion that the evidence was overlooked[115].

---

[112] see CB 92, [9] and [12]
[113] *Minister for Immigration v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67, [54]
[114] *Applicant WAEE v Minister for Immigration* [2003] FCAFC 184, [45]
[115] *SZEHN v Minister for Immigration* [2005] FCA 1389, [58]

87. In any event, particularly when viewed in the context of the question the Tribunal was addressing in considering the genuineness of Mr Molla's study, and the actual findings of the Tribunal, it is clear that the arranged enrolment of Mr Molla by KOI in about March 2014 was not a matter upon which anything could have turned before the Tribunal. The question for the Tribunal was whether Mr Molla had been fulfilling the purpose of his travel to Australia since July 2013, that is, whether Mr Molla was engaged in any study during the relevant period. The Tribunal found, and it was open for the Tribunal to find, that Mr Molla's "failure to engage in any study for a period of almost one year since October 2013 suggested that he is not a genuine student and that he did not have the intention of studying in Australia"[116]. The Tribunal's finding was open to it, and Mr Molla's "claim" or "evidence" that he says was overlooked or not considered, was not substantial or consequential[117].

88. As it is advanced as an alternative argument, the Minister submits that Mr Molla's submission[118], that a student's post-breach enrolment history is a mandatory consideration for the purposes of the exercise of discretion under s.116(1)(b) of the Migration Act is baseless, including for the reasons given above.

Resolution

89. In my opinion, the failure by the Tribunal to mention the relatively brief period of enrolment during the period of the informal consideration of Mr Molla's appeal against the cancellation of his enrolment by KOI is not significant considered in isolation. To that extent, I agree with the Minister's submissions on this ground. However, the failure by the Tribunal to consider the period of enrolment during the currency of that informal appeals process becomes significant in the context of the first ground, as mentioned above. The significance of that period of enrolment is not the period of time involved but the fact that it reflects, in an informal way, the mandatory extension of enrolment pending an appeal against a notice of intention to cancel, until the outcome of that appeal. If Mr Molla had been notified of KOI's intention to cancel his enrolment, and if he

[116] CB 118, [18]
[117] *Minister for Immigration v SZRKT* [2013] FCA 317 ; (2013) 212 FCR 99, [111]-[112]
[118] at [59] of his written submissions

exercised his right of appeal in those circumstances (as he presumably would have) the extension of the enrolment period would have been for much longer than the period of approximately three weeks provided for in the informal process, after the enrolment had already been cancelled.

90. In my opinion, the Tribunal's error was not to overlook the three week period of enrolment during the informal appeals process but, rather, to overlook the extended enrolment period that Mr Molla had been deprived of because of the failure by KOI to comply with the National Code.

91. It follows, in my opinion, that while Ground 2 can be seen as incidentally supporting Ground 1, it is not separately made out.

Conclusion

92. Mr Molla has established that the decision of the Tribunal is affected by jurisdictional error. I will grant relief in the form of the constitutional writs of certiorari and mandamus.

93. I will hear the parties as to costs.

I certify that the preceding ninety-three (93) paragraphs are a true copy of the reasons for judgment of Judge Driver

Date: 20 May 2016