

DEALING WITH ONSHORE VISA CANCELLATIONS UNDER SECTION 116 OF THE *MIGRATION ACT 1958* (CTH): A PRACTICAL OVERVIEW FOR MANDATORY CANCELLATION CASES

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Most legal representatives¹ working in immigration law will encounter a situation where a visa has been cancelled onshore under s116 of the Act; for example, students and visitors. Such cancellations are a common occurrence. It is essential that legal representatives understand the operation of Subdivisions D and E of the Act, as those subdivisions contain the relevant power to cancel and the procedure that must be complied with before cancellation can be made under s116. Understanding the provisions can be the difference between a person continuing to hold the visa or having a visa cancelled, resulting in potential detention and removal, or being otherwise adversely affected.

The relevant sections of Subdivisions D and E of the Act

The relevant sections relating to s116 cancellations are found in Subdivisions D and E of the Act; namely ss116-124.

Section 116

Section 116 gives the Minister a power to cancel a visa, if she is satisfied that a prescribed ground exists. However, the exercise of that power is discretionary, except in certain prescribed circumstances. Section 116 states:

- 116. (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:**
- (a) any circumstances which permitted the grant of the visa no longer exist; or**
 - (b) its holder has not complied with a condition of the visa; or**
 - (c) another person required to comply with a condition of the visa has not complied with that condition; or**
 - (d) if its holder has not entered Australia or has so entered but has not been immigration cleared - it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered and been immigration cleared; or**
 - (e) the presence of its holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community; or**
 - (f) the visa should not have been granted because the application for it, or its grant was in contravention of this Act or of another law of the Commonwealth; or**
 - (fa) in the case of a student visa:**

¹ Registered migration agents and or solicitors/barristers.

- (i) its holder is not, or is likely not to be, a genuine student; or
- (ii) its holder has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa; or
- (g) a prescribed ground for cancelling a visa applies to the holder.

(1A) The regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in paragraph (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.

(2) The Minister is not to cancel a visa if there exist prescribed circumstances in which a visa is not to be cancelled.

(3) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

That it is a discretionary power to cancel is apparent in the wording of s116(1) by the use of the word 'may':

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

The important qualifier, and which affects a significant number of visa holders, is that the discretion is subject to ss116(2) and (3).

Relevantly, the prescribed circumstances for s116, where the visa may be cancelled, are found in regulation 2.43 of the Migration Regulations 1994. The prescribed circumstances where the visa must be cancelled are set out in regulation 2.43 (2)(b):

2.43 (2) For subsection 116 (3) of the Act, the circumstances in which the Minister must cancel a visa are:

- (a) each of the circumstances comprising the grounds set out in paragraphs (1) (a) and (b); and
- (b) in the case of a Student (Temporary) (Class TU) visa, that the Minister is satisfied that the visa holder has not complied with:
 - (i) condition 8104 or 8105 (if the condition applies to the visa); or
 - (ii) condition 8202.

Paragraphs 2.43(1)(a) and (b) state:

2.43. (1) For the purposes of paragraph 116 (1) (g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are:

- (a) that the Foreign Minister has personally determined that the holder of the visa is a person whose presence in Australia:
 - (i) is, or would be, prejudicial to relations between Australia and a foreign country; or
 - (ii) may be directly or indirectly associated with the proliferation of weapons of mass destruction;

- (b) **that the holder of the visa has been assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security;**

This is confirmed in **Tian v MIMIA** [2004] FCAFC 238 (30 August 2004), where their Honours found:

65 [Section 116](#)(1) permits the Minister to cancel a visa for any of the reasons in that subsection. In exercising that discretion, the Minister would have regard to all of the surrounding circumstances to determine whether it is appropriate to cancel a visa for any of the reasons in that subsection.

66 [Section 116](#)(3) does not permit the Minister to exercise any discretion at all. If the prescribed circumstances exist, and they are the circumstances provided for in regulation 2.43(2), the Minister must cancel the visa. In our opinion, the words of the section are clear. The subsection is mandatory. No discretion arises if the prescribed circumstances referred to in [s 116](#)(3) and provided for in regulation 2.43(2) exist. The Minister must cancel the visa. Where Condition 8202 has been imposed as a condition of the visa, the failure to comply with that condition is a prescribed circumstance and obliges the Minister to cancel the visa.

67 In this case, there was no certificate which would comply with Condition 8202(3)(b). The appellant argued that the ‘fault’ for the absence of the condition lay with the Department which had asked Danebank the wrong question.

It would be a rare case where the prescribed circumstances under regulation 2.43(1)(a) and (b) are encountered. More often than not, legal representatives will encounter mandatory cancellation in relation to student visa holders.

A common mistake made by legal representatives is that, assuming there has been a breach of Conditions 8104, 8105 or 8202 so that visa cancellation is mandatory pursuant to s116 and regulation 2.43(2), any decision to cancel the visa under s116 cannot be set aside at the MRT or declared invalid by way of judicial review. As discussed below, it is not so clear cut.

Essential precondition to the valid exercise of power to cancel under s116?

Is it an essential precondition to the valid exercise of power that the provisions of s119 are complied with before a s116 visa cancellation can be considered to be authorised under the Act. Section 119 is a notification provision:

119. (1) Subject to Subdivision F (non-citizens outside Australia), if the Minister is considering cancelling a visa, whether its holder is in or outside Australia, under section 116, the Minister must notify the holder that there appear to be grounds for cancelling it and:

- (a) give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist; and**
- (b) invite the holder to show within a specified time that:**
 - (i) those grounds do not exist; or**
 - (ii) there is a reason why it should not be cancelled.**

(2) The holder is to be notified in the prescribed way or, if there is no prescribed way, a way that the Minister considers to be appropriate.

(3) The way of notifying the holder, whether prescribed or considered appropriate, may, without limiting the generality of subsection (2), be orally.

(4) The other provisions of this Subdivision do not apply to a cancellation:

- (a) under a provision other than section 116; or**
- (b) to which Subdivision F applies.**

Where there has been a failure to provide the notice required, cancellation cannot take place: s124. Any cancellation made in such circumstances should be no cancellation at all.² The visa purportedly cancelled should therefore remain in force (unless it has expired). In Shahid Ahmed's case, Driver FM stated:

27. However, the MRT, like the AAT, stands in the shoes of the original decision maker. If the original decision maker had no shoes to begin with, the review tribunal cannot go barefoot. To put it another way, the stream cannot rise higher than its source. If the original decision maker had no jurisdiction to make the decision purportedly made, upon review, the tribunal cannot affirm that decision. The only available power under [s.349\(1\)](#) of the [Migration Act](#) would be to set the decision aside. However, the MRT could not substitute a new decision if the jurisdictional pre-requisite for the making of a new decision did not exist. In order to have jurisdiction to cancel a visa under [s.116](#) of [the Act](#) the Minister, or her delegate, must follow the procedures set out in [ss.119](#) and [120](#). The procedure set out in [s.121](#) may not be a jurisdictional pre-requisite to the exercise of power: *NAHV v Minister for Immigration* [2003] FCAFC 102, but the procedure set out in [ss.119\(1\)](#) and [120](#) is a jurisdictional pre-requisite to the exercise of power: *Zubair* at [19]. It follows, in my view, that the presiding member was correct in finding that if the procedure in [ss.119](#)

² *Shahid Ahmed v Minister for Immigration* [2004] FMCA 127 (8 April 2004) at paragraph 27.

and [120](#) was not followed, there was no power in the MRT to affirm the decision under review. It is probably correct to say that these sections are a statutory expression of procedural fairness. But they are more than that. They are a jurisdictional pre-requisite to the exercise of power. It follows that a breach of these sections is not simply a jurisdictional error in the form of a want of procedural fairness; it is a jurisdictional error removing the very foundation of the decision subject to review.

However, in **Zubair v MIMIA** [2004] FCAFC 248, the Full Court of the Federal Court, which is binding authority, found that the MRT was able to cure the defect in the delegate's decision. In Zubair's case, the learned Federal Magistrate found that there had been a breach of ss119(a) and 121. The Full Court found that:

32 It should therefore be concluded that the Tribunal did have power to review the delegate's decision. The Tribunal was, in consequence, able to "cure" the defect in the delegate's decision: see *Twist v Randwick Municipal Council* (1976) [136 CLR 106](#) at 116. Because of our conclusion it is unnecessary to enter upon the question whether a direct challenge could have been made to the delegate's decision in judicial review proceedings in disregard of the procedure for Tribunal review: cf *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) [206 CLR 57](#).

With great respect to the Full Court, I am of the view that the judgment is incorrect in so far as it confirms that even if the requisite notice, being a precondition to the valid exercise of power to cancel, is not given (because of a breach of s119), the MRT could affirm the decision under review. The MRT never issued a notice of intention to cancel and it was not purporting to do so. It simply cannot be that the safeguards put in by Parliament could be ignored and that this would be satisfactory because a merits review has been undertaken.

DIMIA often has grounds for cancellation of the student visa in question, but it is the failure by some delegates to provide the notice required under s119 that invalidates the visa cancellation. It is therefore important to understand how the notice can be given, what the notice must contain, and how long a visa holder has to respond.

How a notice is given

A s119 notice can be given orally, or in writing, or a combination of both. There can be more than one notification.³ Practitioners should note Justice Katz's ruling⁴ in relation to when the notice can be given:

³ Above 2 at paragraph 30.

⁴ **Erinfolami v MIMA** [2001] FCA 956 (20 July 2001).

37 Secondly, neither party referred me during argument to subs 497(2) of the Act. However, that provision, which tells one of tasks which a person with a power, by delegation, to cancel visas is not required to perform, appears to me, like the previous matter which I have discussed, not to affect in any way **the clear requirement in subs 119(1) of the Act that someone with the power to cancel a visa be considering doing so at the time of the giving of the notice under the provision.**

The content of the notice

Section 119 requires that the notice contain the following:

1. A statement that that there appear to be grounds for cancelling the visa.
2. The particulars of those grounds be given.
3. That the particulars of the information (not being non-disclosable information) because of which the grounds appear to exist be given.
4. That there be an invitation to the holder to show within a specified time that those grounds do not exist or there is a reason why it should not be cancelled.

It is not often that oral notifications will occur. Usually, notice is given in writing. Sometimes the notification is given by way of a letter sent to a visa holder. In other cases, a Form 1099 is given. The giving of a Form 1099 is common for cancellations made in the field; for example, after a DIMIA visit to a workplace, or to a visa holder's residence. Because notification can be both written and oral, it is important that legal representatives establish if there was oral notification and what was notified orally. Legal representatives should also be aware that it is only after the notice required is given that the interview can proceed (assuming the visa holder wants an interview).

The statement that there is a ground for cancellation is invariably notified. Form 1099 has ground s116(1) set out, with the delegate to complete the relevant paragraph (for example; s116(1)(b)). However, the errors are in relation to providing the particulars of the ground and the particulars of the information because of which the grounds appear to exist.

It is also important to take into account ss120, 121 and 122, which relate to what information must be given and to prescribed time periods for a visa holder to respond to a notice of cancellation:

120. (1) In this section, relevant information means information (other than non-disclosable information) that the Minister considers:

- (a) **would be the reason, or a part of the reason, for cancelling a visa; and**
- (b) **is specifically about the holder or another person and is not just about a class of persons of which the holder or other person is a member; and**
- (c) **was not given by the holder; and**
- (d) **was not disclosed to the holder in the notification under section 119.**

(2) The Minister must:

- (a) **give particulars of the relevant information to the holder; and**

- (b) ensure, as far as reasonably practicable, that the holder understands why it is relevant to the cancellation; and**
 - (c) invite the holder to comment on it.**
- (3) The particulars and invitation are to be given in the way that the Minister considers appropriate in the circumstances.**

Section 121. Invitation to give comments etc.

121. (1) An invitation under paragraph 119 (1) (b) or 120 (2) (c) is to specify whether the response to the invitation may be given:

- (a) in writing; or**
- (b) at an interview between the holder and an officer; or**
- (c) by telephone.**

(2) Subject to subsection (4), if the invitation is to respond otherwise than at an interview, the response is to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

(3) Subject to subsection (5), if the invitation is to respond at an interview, the interview is to take place:

- (a) at a place specified in the invitation, being a prescribed place or, if no place is prescribed, a reasonable place; and**
- (b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, within a reasonable period.**

(4) If a person is to respond to an invitation within a prescribed period, that period may be extended by the Minister for a prescribed further period, and then the response is to be given in the extended period.

(5) If a person is to respond to an invitation at an interview at a time within a prescribed period, that time may be changed by the Minister to:

- (a) a later time within that period; or**
- (b) a time within that period as extended by the Minister for a prescribed further period;**

and then the response is to be given at an interview at the new time.

(6) This section is subject to sections 125 and 126.

Section 122. Prescribed periods

122. Regulations prescribing a period or other time limit relating to a step in considering the cancellation of a visa may prescribe different limits relating to that step and specify when a particular limit is to apply, which, without limiting the generality of the power, may be to:

- (a) visas of a specified class; or**
- (b) visa holders in specified circumstances; or**

- (c) visa holders in a specified class of persons (which may be visa holders in a specified place); or
- (d) visa holders in a specified class of persons (which may be visa holders in a specified place) in specified circumstances.

Whether or not these requirements have been met will depend on a careful analysis of the notice (oral and written); consider two examples (A and B) of DIMIA notices given by way of Form 1099.

Example A

Example A states the ground as s116(1)(b). However, the notice states the following:

Breach of Condition 8105-working in excess of 20 hours per week during course time.

On its face, there are no particulars of the information on which the allegation of a breach of condition 8105 is based. As such, there has been a fundamental failure to comply with s119. A cancellation that follows from this 'notice', considered on its own, would not be a cancellation authorised under the Act. One would think that the MRT would have no choice except to set aside the cancellation on the basis that it cannot affirm the decision under review for reason of such non-compliance, as the requisite notice has not been given. However, the Full Court in Zubair's case appears to confirm that the MRT can still affirm the decision under review.

The Full Court in Zubair's case also rejected a contention that the MRT does not have jurisdiction to review a purported decision to cancel; the argument had been put that the MRT can only review a decision. The cancellation in question is not a decision under the Act because it is infected with jurisdictional error and therefore the MRT cannot review it. Relief by way of judicial review should be sought. Alternatively, the argument was put that even if merits review to the MRT is pursued, judicial review of the delegate's decision (and of the MRT's decision) to cancel can still be undertaken. Their Honours found:

27 In our view, the clear words of [s 338](#) indicate that the decision of the delegate of the respondent to cancel the visa was an 'MRT-reviewable decision' and the Tribunal was not only entitled to, but obliged to, review it.

28 The expression 'decision' is not otherwise defined in [the Act](#). There is no textual suggestion that the expression 'MRT-reviewable decision' should be restricted in some way so as to refer only to decisions which have been made by a delegate of the respondent after full compliance with the mandatory procedural prescriptions of [ss 119 – 121](#) (in the case of the cancellation of a visa) or other procedural prescriptions applicable to other forms of MRT- reviewable decisions. There is no qualification upon the

use of the word 'decision' requiring it to be a 'decision under [the Act](#)': cf *Plaintiff S157/2002 v Commonwealth of Australia* (2003) [211 CLR 476](#); [\[2003\] HCA 2](#). In particular, there is nothing in Pt 5 of [the Act](#) which would suggest that the Tribunal does not have the power or obligation to review a decision properly brought before it (see [s 347](#)) where the delegate of the respondent may, or may arguably, have failed to comply with a procedural requirement imposed by [the Act](#), or in some other way may, or may arguably, have committed an error of law either in determining the applicable law or in applying the law. There is no reason why [the Act](#), which provides for a full merits review by the Tribunal of decisions which may be brought to it, should impose upon the Tribunal the task of culling out those decisions which may involve jurisdictional error on the part of the original decision-maker. That would impose an unnecessary additional complexity upon the merits review process. Moreover, it may expose the Tribunal's decision as to the existence of a valid delegate's decision (a jurisdictional fact on the appellant's argument) to review by a Court even where (as here) the Tribunal has fully reviewed the decision on the merits. Administrative convenience strongly points to an alternative conclusion to that urged by senior counsel for the appellant. The review process applicable to the Tribunal is a full merits review. As with review under the [Administrative Appeals Tribunal Act 1975](#) (Cth) (the AAT Act), the Tribunal is given powers under s 349 to exercise all the powers and discretions that are conferred by [the Act](#) on the person who made the decision. It may affirm the decision, vary it, or remit the matter for reconsideration with directions or recommendations, or may set aside the decision and substitute a new decision. The only limit upon its power is that it may not, by varying or setting aside a decision and substituting a new decision, make a decision that is not authorised by [the Act](#) or the regulations (s 349(4)). That is similar to the review powers of the Administrative Appeals Tribunal (AAT): see AAT Act, [s 43](#). In that context it has been held that the review by the AAT is available even though the decision-maker at first instance may have made a decision which is legally ineffective: see e.g.

Clements v Independent Indigenous Advisory Committee [2003] FCAFC 143 at [38] – [39].

29 That approach accords with a line of decisions of this Court beginning with *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 (*Lawlor*). In that case the Court had to decide whether the AAT had jurisdiction to review the purported revocation of a licence where (the Court held) there was no statutory power to revoke the licence. Bowen CJ at 314 stated that ‘decision’ in [s 25](#) of the AAT Act refers to ‘a decision in fact made, regardless of whether or not it is a legally effective decision’. Smithers J at 337 held that where a decision is made beyond power, even though the legal effect the decision maker sought to achieve is denied, the jurisdiction of a court or appeal tribunal to review the decision is not removed. The jurisdiction of the court or tribunal depends upon the law creating the right to review and conferring jurisdiction. His Honour further pointed out that a ‘decision’, as used in the relevant statute, relating to the right to apply for review, referred to a decision ‘made in fact’ and not the legal effect the decision may have had. Although Deane J was in dissent in the result, his Honour recognised at 342 – 343 that the AAT’s powers of review would include a decision resulting from a wrong assessment of the content of a power or a mistaken determination that conditions precedent have or have not been fulfilled.

The notice in Example A also revealed an extremely disturbing fact. The notice was given at 410am. The response was to be given at 415am. Such a short period of time, in particular circumstances, can rightly be deemed to have not been reasonable. In **Zubair’s case**⁵ at first instance, Raphael FM found:

19. There is no doubt that the failure to provide particulars was a failure to comply with the mandatory requirement of [the Act](#). In contrast to [s.119](#) and to [s.120](#) in both of which the word "must" is used, [s.121](#) uses the present imperative of the verb "to be". It states that an invitation "is to specify" and

⁵ **Zubair v MIMIA** [2003] FMCA 440 (13 October 2003)

the interview "is to take place". I am of the view that these sections all complement one another and are all mandatory. In order to give the sections their effectiveness the obligation on the Tribunal would seem to be to do all the things required by the sections. The sections are placed into [the Act](#) in order to provide a form of procedural fairness to an applicant. How fair is it if part of the process is mandatory but the other part is not? What avails the applicant if the information with which he is provided is not capable of being considered by him for sufficient time in order to respond? It seems to me that in this case that the lack of response time was so unreasonable, particularly bearing in mind the time of night at which the information was provided, that it would amount in any event to a failure to provide the applicant with procedural fairness.

Federal Magistrate Raphael found that the decision made by the delegate to cancel the visa, where such an unreasonable time had been given, was not a valid decision.⁶

However, Raphael FM found that because Mr Zubair sought merits review, that review cured the error as Mr Zubair knew the case against him and could prepare his case within a reasonable time.⁷

28. Whilst I would not be quite as critical of this applicant as Madgwick J was of Mr Bal because I do not believe that he had any understanding of his rights to impugn the delegate's findings or want of procedural fairness until he obtained legal advice. I do not think this detracts from the force of His Honour's arguments based upon the decision in *Twist* supra that if an applicant does exercise his right to merits review by a Tribunal and the Tribunal carries out that review properly, as the Tribunal here did, an existing invalidity, which arises out of a lack of procedural fairness, can be overcome. In this case the lack of procedural fairness that I have identified is a failure to give the applicant sufficient opportunity to deal with the allegation that he had been working for more than 20 hours per week. This was the very matter upon which considerable time was spent at the Tribunal. Once the applicant got his case into the Tribunal he could have

⁶ Above 5 at paragraph 20.

⁷ Above 5 at paragraph 28.

established to the Tribunal's satisfaction that he had not been working more than 20 hours per week and if he had done so then the Tribunal could set aside the delegate's decision and restore his visa. The applicant was unable to satisfy the Tribunal. This is a finding of fact by the Tribunal with which this court cannot interfere.

This approach, in relation to s121, has been supported by Driver FM, in Shahid Ahmed's case⁸ and by the Full Court in Zubair's case. This leaves a legal representative in an interesting position. If the client has clearly breached a mandatory condition, but the time to respond to a notice is unreasonable, an appeal to the MRT would cure the invalid decision to cancel, with the result that the MRT can affirm the cancellation. If the client decides to judicially review the cancellation, without going to the MRT, the MRT cannot cure the invalid decision. The result should be that relief is granted by the relevant court, unless the court exercises its general discretion to refuse relief because the client could have applied for merits review but chose not to do so. Furthermore, the risk is that by so doing, and by not appealing to the MRT, merits review will be lost, given time limits to appeal to the MRT. Such an approach might only be considered in clear cut cases of invalidity and clear cut breaches by a client of conditions 8105 and or 8202, where mandatory cancellation must otherwise follow.

Furthermore, the notice in Example A may have been complimented with oral notification of the particulars of the information. One must therefore be careful not to rely on the written notice alone. If the client maintains there was no oral notification, it might still be prudent to require DIMIA to give evidence relating to any oral notification (if oral notification is alleged).

Example B

Example B also raises the issue of whether or not five minutes to respond is reasonable. However, for the purposes of the example, attention is placed on the following in the notice.

Information received from Chalmers College stating a/n failed to meet his course requirements and has non attendance.

On its face, the notice fails to provide the requisite particulars of the information and it does not provide the requisite particulars of the grounds being relied upon. For the purposes of this example, assume a written notice was also given, with the following content:

Information received by the Department from CHALMERS INSTITUTE indicates that you have not complied with condition 8202, in that you failed to meet course requirements

⁸ Above 2 at paragraph 26.

From this information, it appears that your visa must be cancelled because you have not complied with condition 8202.

This is the situation that arose in Shahid Ahmed's case. In quashing the decision of the MRT and the delegate, Driver FM stated:

31. In my view, the presiding member erred in finding that these two documents, either singly or in combination, met the requirements of [s.119](#). The section requires that the decision maker must notify the visa holder of the grounds contemplated for cancelling the visa and further requires that particulars of those grounds be given. The proposed ground of cancellation is sufficiently identified in the letter of 19 October 2000 in that sufficient reference is made to condition 8202. However, particulars were required of how the visa holder had failed to comply with condition 8202. The only particular provided in the letter was the statement that information received from Chalmers Institute indicated that the applicant had "failed to meet course requirements" which was simply an erroneous reference to the 1994 version of condition 8202. That was uninformative both in terms of the wrong version of condition 8202 that was set out in the letter dated 19 October 2000 and the correct version. To the extent that the particular conveyed anything, it would have conveyed an implication that it was alleged that the applicant had failed to meet some unspecified course requirement imposed by the Institution. It might have had something to do with enrolment. It might have had something to do with attendance. It might have had something to do with academic performance. The applicant was not to know. Part A of the form given to the applicant on 26 October 2000 was no more informative. It lists as the ground contemplated for cancellation that there was information received from Chalmers Institute stating that the visa holder had failed to meet his course requirements and has non-attendance. This would have alerted the applicant to the issue of the 80 per cent attendance requirement. However, the reference to a failure to meet course requirements remained delphic. In order to satisfy the requirement for particulars, the notices given to the applicant needed to identify which parts of condition 8202, as

it applied at the time, were being relied upon. I see no objection to a notice identifying particulars bringing into play all elements of condition 8202 but it would have to clearly do so. The notices given to the applicant were sufficient to identify paragraph (b) of condition 8202 but the vague reference to a failure to meet course requirements left open the possibility that the decision maker might also be relying upon paragraphs (a), (c) or (d). The applicant could not even begin to ponder which paragraph might be relied upon because he was given the wrong version of condition 8202. Notices given to the applicant needed to contain sufficient particulars as to explain why the relevant parts of the applicable version of condition 8202 were proposed to be relied upon. The visa holder is entitled to know the case that he or she has to meet. Insufficient particulars were given to the applicant for that purpose. It follows that [s.119](#) was not complied with. Neither was the required information given pursuant to [s.120\(2\)](#). Accordingly, the MRT should have set aside the decision of the delegate.

32. The procedure followed by the delegate was also unfair in that inadequate time was given to the applicant to consider the proposed cancellation before the cancellation decision was made. The cancellation decision was made only about five minutes after the notice was given to the applicant on 26 October 2000. However, that want of procedural fairness was cured by the proceedings before the MRT for the reasons given by Federal Magistrate Raphael in *Zubair*. It is also strongly arguable that [s.121](#) was not complied with in that the letter of 19 October 2000 did not meet the requirements of an invitation for the purposes of that section. It is unnecessary to decide that issue. For the reasons already given I doubt that compliance with [s.121](#) is a jurisdictional pre-requisite. In any event, an invitation is meaningless without the requisite particulars and the requisite particulars were not given. That is a breach of a jurisdictional pre-requisite and the delegate had no jurisdiction in the circumstances to cancel the visa.

Section 20 ESOS and ss137J and K

There will also be a question to consider if a s20 ESOS notice is issued and there has been a breach of Conditions 8104, 8105 and or Condition 8202. Tactically, it might be obligatory to advise a client not to attend DIMIA, where a s116 cancellation can result, as opposed to a cancellation under s137J, as s137K can be used to get a discretion exercised where no such discretion exists under s116 for mandatory cancellation cases.

Conclusion

I have not dealt with situations where cancellation is discretionary; for example, a person breaching Condition 8101 of a tourist visa. Nor have I dealt with cancellations for persons offshore at the time of cancellation: s128. Those situations should be the subject of separate papers.

For onshore cancellations under s116, legal representatives must identify the ground for cancellation and see if s116(3) applies. If so, and if there has been a breach, then a careful analysis of the notice(s) is required, whether a delegated officer issued the notice, the time given to respond, and whether a delegated officer made the decision to cancel, as tactical decisions will need to be made in relation to whether judicial review is sought after cancellation or a review is made to the MRT (or arguably both).

One might ask why bother with this analysis, if there has been a breach and where cancellation under s116 could take place. First, it is imperative that delegates of the Minister act only within the powers conferred by Parliament. This is not a question of being petty by establishing such breaches. It goes to the heart of the democratic system of government in Australia. Secondly, your client is entitled to competent representation. Thirdly, if the cancellation is declared invalid, the visa might not be able to be cancelled, if it expires before cancellation can be lawfully effected. Having the decision to cancel quashed also removes an associated s48 barrier that would otherwise have been in existence.

This paper is just an overview. The Full Federal Court will hopefully clarify the issues raised in this paper when it determines the appeal in **Shahid Ahmed**.

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