Supreme Court
New South Wales

Medium Neutral Citation:	**Norkin v University of New England [2022] NSWSC 819**
Hearing dates:	24 February 2022
Date of orders:	24 June 2022
Decision date:	24 June 2022
Jurisdiction:	Common Law
Before:	Davies J
Decision:	(1) I dismiss the amended summons filed 6 October 2021. (2) The plaintiff is to pay the defendant's costs.
Catchwords:	APPEAL – leave to appeal – from determination of the appeal panel of NSW Civil and Administrative Tribunal – *Civil and Administrative Tribunal Act 2013* (NSW) s 83 – university collection of personal information from plaintiff and his brother for purpose of pre-visa assessment – grounds of appeal against appeal panel determination unclear – plaintiff submitted collection of information was incompatible with fundamental rights to education and privacy – plaintiff alleged denial of procedural fairness – no error of law made by appeal panel to justify grant of leave – no question warranting grant of leave – plaintiff suffered no detriment from appeal panel's approach – summons dismissed
Legislation Cited:	Acts Interpretation Act 1901 (Cth) Civil and Administrative Tribunal Act 2013 (NSW) Commonwealth Education Services for Overseas Students Act 2000 (Cth) Commonwealth Migration Act 1958 (Cth) Invasion of Privacy Act 1971 (Qld) Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth) Migration Regulations 1994 (Cth) Privacy and Personal Information Detection Act 1998 (NSW)

	Uniform Civil Procedure Rules 2005 (NSW) University of New England Act 1993 (NSW)
Cases Cited:	Ashi Pty Limited v Karasco Investments Pty Ltd [2009] NSWSC 780 Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15 Collins v Urban [2014] NSWCATAP 17 DQU v University of New England [2020] NSWCATAD 226 DQV v University of New England [2021] NSWCATAP 208 Green v Daniels (1977) 51 ALJR 463 Halliday v Nevill (1984) 155 CLR 1 Kostov v Nationwide News Pty Ltd (No 1) [2018] NSWSC 1822 Plenty v Dillon (1991) 171 CLR 635 Tarrant v Australian Securities and Investments Commission [2015] FCAFC 8; (2015) 317 ALR 328 Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888 [2021] NSWSC 1315 Viro v The Queen (1979) 141 CLR 88; [1978] HCA 9 Watson v Lee (1979) 144 CLR 374
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Anton Norkin (Plaintiff) University of New England (First Defendant) New South Wales Civil and Administrative Tribunal (Second Defendant)
Representation:	Counsel: In person (Plaintiff) C Mantziaris (First Defendant) Submitting appearance (Second Defendant) Solicitors: Self-represented (Plaintiff) Sparke Helmore Lawyers (First Defendant) Crown Solicitors Office (Second Defendant)
File Number(s):	2021/224913
Publication restriction:	Nil

JUDGMENT

1 The plaintiff seeks leave to appeal pursuant to s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW) against a decision of the Appeal Panel of the Civil and Administrative Tribunal of New South Wales (NCAT) given on 9 July 2021: *DQV v*

University of New England [2021] NSWCATAP 208. That decision had dismissed an appeal from a decision of the Administrative and Equal Opportunity Division of NCAT given on 11 September 2020: *DQU v University of New England* [2020] NSWCATAD 226. The plaintiff was given the pseudonym DQV in NCAT. He will be referred to in this judgment as the plaintiff.

Background

2 The plaintiff is the brother of DQU and was his sponsor in an application by DQU to come to Australia as an overseas student to undertake postgraduate courses of study at the University of New England for one year.

3 As an overseas student seeking to undertake a course of postgraduate study in Australia, DQU first needed to obtain a formal offer of admission from an Australian university registered under Pt 2 of the *Commonwealth Education Services for Overseas Students Act 2000* (Cth) (ESOS Act). The University, established under the *University of New England Act 1993* (NSW) (UNE Act) is an education provider registered under the ESOS Act. As a registered education provider, the university is authorised to offer to provide, and to provide, postgraduate courses of study for overseas students. Any offer the University makes to an overseas student is subject to the student being granted a student visa. Without such a visa (a subclass 500 student visa), the overseas student cannot take up any formal offer of admission that is made.

4 Student visas are granted under the provisions of the *Commonwealth Migration Act 1958* (Cth) and the regulations made pursuant to that Act. A student visa can only be issued or granted by the Minister responsible for the Migration Act or his delegate. The University is not a delegate of the Minister.

5 DQU wanted to bring his wife and son with him, which meant they also needed to apply for and be granted visas.

6 On 18 May 2018, the University issued to DQU a revised conditional offer of admission for the courses he wished to study. The conditions of the offer were that DQU meet the Genuine Temporary Entrant (GTE) requirements as specified by the Australian Government Home Affairs, and that he meet the University's English language requirements for admission.

7 GTE requirements are those prescribed in cl 500.212 of Schedule 2 of the *Migration Regulations 1994* (Cth) for the issue/grant of a subclass 500 student visa. While the University does not have authority to issue/grant a student visa, in 2016 it elected, as an ESOS registered education provider, to be part of the Commonwealth "Simplified Student Visa Framework" (SSVF). Under the terms of the SSVF, the University elected to ensure, as part of its admission processes, that international students to whom it made an offer of admission:

(a) had an appropriate level of English (*Migration Regulations*, Sch 2 cl 500.213);

(b) had sufficient funds to support themselves and their attendance in Australia (*Migration Regulations*, Sch 2, cl 500.214);

(c) were a genuine temporary entrant (as noted above, *Migration Regulations,* Sch 2, cl 200.212)

8 The SSVF is an administrative arrangement whereby the University is authorised by the Commonwealth Department of Home Affairs to make its own inquiries during its admission processes as to whether a prospective overseas student can satisfy the prescribed criteria for the issue/grant of a student visa in the event that a formal offer of admission is made and accepted by the student. The object of this arrangement was to streamline student visa applications so that there would be minimal delay between a formal offer of admission being made by the University and the student applying for, and being granted or refused, a student visa by the Commonwealth.

9 To satisfy the GTE requirements, the University collected or sought to collect personal information about DQU, about the plaintiff, and about DQU's immediate family members. This included DQU's Year 10 and Year 11 equivalent educational qualifications, photographs of DQU's wedding, and certified copies of his wife's and child's passports. The University required DQU to complete a statement of purpose in his own handwriting. The University also sought information about the plaintiff's annual salary and annual tax return, and the name, age, place of residence, and marital status of relatives and ex-spouses of the plaintiff and of DQU.

10 Both the plaintiff and DQU contended that the personal information the University collected went beyond that which the University was lawfully entitled to collect, and that it intruded to an unreasonable extent on their personal affairs. They applied to the University for an internal review under the *Privacy and Personal Information Detection Act 1998 No 133* (NSW) ("PPIP Act").

11 The University found that it had complied with the Information Protection Principles concerning collection in the PPIP Act.

12 Both the plaintiff and DQU then applied to NCAT for a review of the University's conduct.

13 NCAT found that the University had not contravened the Information Protection Principles in ss 8, 9, 10(c) or 11 of the PPIP Act. The Tribunal also found that the SSVF authorised the University to undertake, as part of its admission processes for overseas students, pre-student visa assessment of prospective overseas students, and that the collection of personal information from a prospective overseas student for the purpose of the pre-visa assessment was for a lawful purpose, and was directly related to the University's functions in ss 6(2)(c), 6(2)(d) of the UNE Act. On that basis, the Tribunal decided not to take any action on the matter, pursuant to s 55(2) of the PPIP Act.

14 The plaintiff (but not DQU) appealed to the appeal panel of NCAT against the decision of the Administrative and Equal Opportunity Division. At the hearing of the appeal, the plaintiff said that he was appealing on three grounds. His main ground was that NCAT

had misapplied s 8 of the PPIP Act and, in particular, it had misapplied the meaning of the words "directly related to a function" in s 8(1)(a). The second ground was that the Tribunal's reasons in para [138] of its decision were inadequate. The third ground was that the Tribunal had made a jurisdictional error because, when requesting personal information from the plaintiff, the University relied upon a policy which (a) had not been published, and (b) was not a clear statutory provision.

15 In its judgment, the appeal panel found that the Tribunal made an error of fact, being that the collection of the appellant's personal information for the purpose of conducting a pre-visa assessment of his brother was "directly related" to its functions of providing courses to students and developing admission policies. However, the appeal panel determined not to grant leave to appeal on that ground, because the collection purpose was directly related to the University's activity of assessing visa applications, and so was permissible under the privacy legislation. The appeal panel held that the grant of leave would serve no useful purpose and would not be consistent with the application of the Tribunal's guiding principles for the "just, quick and cheap" determination of issues.

16 The appeal panel also determined that the Tribunal had not made any other error. Accordingly, the appeal was dismissed.

17 The plaintiff purported to appeal from the decision of the appeal panel to the Court of Appeal, pursuant to r 50.12 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR). He did this by filing a summons seeking leave to appeal, and filing a white book as required by r 51.12. Rule 50.12 does not provide for the filing of a white book. The requirements of r 50.12 were not complied with. The appeal ought to have been filed in the Common Law Division of this Court. The Court of Appeal remitted the proceedings to the Common Law division.

18 The plaintiff then filed a document headed "draft notice of appeal" (although an amended summons had been directed to be filed by the Registrar), which set out the appeal grounds on which he relies. The document contained not only what purport to be grounds of appeal but appeared to be fresh submissions in relation to each such ground. The document reads as follows:

> 1. Does conclusion that, incorrect identification of legal norm is question of fact, constitute appealable ground?
>
> Par.49 states: "…Tribunal made an error of fact in concluding that ... collection ... directly related to ... s 6(2)(c) and (g) of the UNE Act".
>
> ~~In relation to the First Ground as it was identified by Appeal Panel of NCAT, the Tribunal is wrong by characterising a mistake as a question of fact.~~ *This is a mistake in* interpretation of law, so it is an error of law. Parties do not have factual disputes to make possible *f*or Tribunal to be mistake in that area.
>
> 2. Was appellant denied of procedural fairness by AP NCAT by not given opportunity to put arguments in relation to substitution of legal norms?
>
> ~~Further in relation to the Fist Ground,~~ *In par. 51* the Tribunal substituted reasons for decision by replacing Respondent's function of provision course of study (section 6(2)(c) of UNE Act and PPIP 8(1)(a) -function) to ~~incidental function (section 6(3)(c))~~/activity *under PPIP 8(1)(a)-activity (without references to UNE Act at all).* Doing so, Tribunal denied me **procedural fairness** as I was not able to reply to that interpretation. *Being*

initiative in speculations without any support of the parties the Tribunal were not always correct, for example, results of assessments mentioned at the end of par.51 are not provided to the Commonwealth.

2.1. Are findings of AP NCAT illogical by qualifying pre-visa assessment at same time as "purpose" and "activity" for the purpose of section 8 of PPIP Act?

The section 8(1)(a) of PPIP Act operates three different categories represented by model:

Collection – for purpose – for function/activity.

The following application of that model was submitted by the Respondent and accepted by the Tribunal at the first instance:

Collection – for SSVF – for purposes of courses of study

The Appeal Panel by its own initiative has finally offered and approved the content:

Collection – for …? – For SSVF (as activity)

The statement of Tribunal: "… Given that there was not dispute that one of the University's activities was conducting visa assessment … ~~would be a little utility in granting leave to appeal …~~" (par 52) is ~~incorrect (as it is expressly contested that function is legally vested to the Respondent) and, moreover~~, **illogical** as contracted to par 45 and 46 and 69 there they call pre-visa assessment as "purpose" not an "activity" of "function". In single summary par. 4 the AP NCAT has tried to merge these distinct categories. Adjudicative body such as NCAT cannot impose the collection purpose and function as it is for organisation to decide why the collect.

3. Is it possible for decisionmaker to provide adequate reasons if she asks *herself a wrong question? Is AP NCAT mistaken by ignoring this submission?*

~~In relation to the Second Ground~~, Tribunal is mistaken that application of **wrong test** ("can be relevant") (at par. 54, correct test "is reasonable necessary for that purpose" s. 8 of the PPIP Act), would make possible to provide sufficient **and adequate reasons**. NB. In appeal not only reasonableness of collection of hand writing samples was questioned, but also place of residence of ex-spouses (in appeal itself) and income of sponsor (par 3 submission 3 February 2021).

4. *Do entitlements to education, petition and privacy warrant clear statutory provision for being curtailed? If so, Is Tribunal mistaken by not applying Coco v R [1994] HCA and Green v Daniels [1977] HCA?*

~~In relation to the Third Ground~~, the Tribunal made an **error of law by refusing to apply *Coco v Queen*** *[1994] HCA 15.*

The SSVF, in short, is a regime to establish penalty by downgrading in "Education provider risk ratings under SSVF" if their prospective students were refused with visa application. For that reason, some institutions agreed (in different degree) to try to make a guess about possible visa outcome by incorporating pre-visa assessment into their admission policies.

Consequently, access to **education** become a subject to additional condition. Right to education is recognised by sections 26 UDHR and 13 ICESCR. *Under s.30 of UNE Admission Undergraduate and Postgraduate (Coursework) Procedures (current to that date), the UNE reserves the right to withdraw an Admission offer to any person: (c) where an international applicant is identified as not being a Genuine Temporary Entrant ...*

Refusal to provide information requested for that assessment, will deprive from other entitlements - petition to Ombudsman. **Right to petition** is fundamental entitlement under the law *mentioned by Sir William Blackstone.*

Other fundamental right - rights to privacy (sections 12 UDHR and 17 CCPR). Right to privacy deeply rooted in **common law**, including **right to use more than one name** or pseudonym.

All these three fundamental rights were subjected to curtailment under SSVF.

In case if these rights will not be recognised as "fundamental freedoms", there is the HCA authority of Green and Daniels which extends this protection for entitlements lesser than legal rights.

4.2. (sic) *Is Tribunal mistaken by not identifying specific provisions of Migration Regulations 2016?*

In final submission (made according to Tribunal's direction 22/03/2021) the Respondent states that "SSVF is a label of administrative convenience used to denote a series of regulations inserted into the Migration Regulation 1994 (Cth) by Schedule 4 of the Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)" (par 3.1.of Respondent's submission 22/03/2021). Tribunal has acknowledged these Rules in par.67.4, but left this statement (statutory nature of SSFV) without any attention, and continue to treat SSVF as a policy (par.68). It represents an error of law - **to identify and apply specific provision** of Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth) enabling the Respondent to conduct pre-visa assessment. ~~If SSVF is pure policy, it cannot be used to curtail the basics rights (education, petition and privacy).~~

4.1. (sic) *Is Tribunal mistaken by applying unpublished policy (SSVF)?*

In last sentence of par.68 the Tribunal accepted that there is no evidence of publication of SSVF. Tribunal was mistaken not applying provisions of NSW GIPA and Commonwealth FOI Acts, which prescribe mandatory regime of publication of policies. It would be illogical to assume that if SSVF is a legislative instrument (*according to Respondent's final submission*) - publication is compulsory, and if policy kind instrument - not.

5. Is tribunal mistaken by not applying section 4A(c) of ESOS Act?

In par.8 AP NCAT identifies the statutory framework of Respondent's participation in migration relation which is ESOS Act, however, Appeal Panel has not taken into account my written submission on 28 October 2020 (par 4) *which* states that education providers (according to s. 4A(c) of *ESOS Act 2000 Cth*) are entitled to collect information in relation to the law (not policy) regulating student visa process., ~~was left without consideration~~ *It is* representing both error of law and net taken to account ignorance of relevant consideration known to the decision makers ~~which, however, was not articulated during hearing by the applicant.~~

6. Is Tribunal mistaken by considering AP NCAT decisions as binding authority

Lastly, *the Appeal Panel* of the Tribunal by mentioning in its reasons as authority several decisions of ~~its Appeal~~ *from that* Panel, made a mistake in law as only decision of superior court of record are binding. Decisions of administrative tribunal do not satisfy that requirement. Characteristics of idea of precedent is discussed in *Viro v Queen [1978] HCA*.

19 The right to appeal to this Court from NCAT is found in s 83 *Civil and Administrative Tribunal Act 2013* (NSW) which provides:

> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.
>
> (2) A person on whom a civil penalty has been imposed by the Tribunal in proceedings in exercise of its enforcement or general jurisdiction may appeal to the appropriate appeal court for the appeal on a question of law against any decision made by the Tribunal in the proceedings.
>
> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following -
>
> (a) an order affirming, varying or setting aside the decision of the Tribunal,
>
> (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.
>
> (4) Without limiting subsection (3), the appropriate appeal court for an appeal against a civil penalty may substitute its own decision for the decision of the Tribunal that is under appeal.
>
> (5) Subject to any interlocutory order made by the court hearing the appeal, an appeal under this section does not affect the operation of the appealable decision of the Tribunal under appeal or prevent the taking of action to implement the decision.

20 It may be observed that an appeal is available only on a question of law and only with the leave of this Court.

21

It is not at all clear that the grounds relied upon by the plaintiff are grounds which identify questions of law. Although the plaintiff appears for himself in the proceedings, it ought to be noted that he is a solicitor of this Court, and has been for some years. It can reasonably be expected that where he brings an appeal which is dependent on identifying a question of law, the summons should be drafted in such a fashion as to identify clearly what the question of law is said to be.

22 It should also be noted that without any leave being given, the plaintiff appeared by audio visual link at a hearing designated as a live hearing. The plaintiff was in an unknown foreign country; the quality of the AVL was poor, with the result that it was at times difficult to hear and understand the plaintiff, as the transcript shows; and the plaintiff's first language was not English. The submissions set out at [18] above provide some indication of the form of the plaintiff's oral submissions. A close perusal of the transcript frequently fails to make clear the submissions the plaintiff was endeavouring to make.

23 Counsel for the University in his submissions has helpfully reconstructed the grounds of appeal by reading together what appears in the draft notice of appeal and the Summary of Argument filed by the plaintiff with the white book in the Court of Appeal. The plaintiff did not take issues with this reconstruction. In that way, the grounds are these:

> Ground 1 – **Error in the categorisation of error**: that the tribunal erred in law by concluding that the information collection directly related to ss 6(2)(c) and (g) *UNE* Act. The appeal panel erred by classifying this error of law as an error of fact.
>
> Ground 2 – **Breach of procedural fairness**: that the plaintiff was denied the opportunity to make submissions on the "activity" of the University.
>
> Ground 2.1 – **Illogicality**: that in its decision, the Appeal Panel improperly merged the discrete statutory concepts of "purpose" and "activity" in a way that was illogical.
>
> Ground 3 – **Application of incorrect test / inadequacy of reasons**: that the Appeal Panel misapplied the test in s 8(1)(b) PPIP Act in relation to the Tribunal's consideration whether the collection was "reasonably necessary" for the purpose of University's pre-visa assessment.
>
> Ground 4 – **Error of law by impermissibly qualifying fundamental common law rights**: an argument made by reference to *Coco v R* (1994) 179 CLR 427.
>
> Ground 4.1 – **Mischaracterisation of separate legal requirements**: that the SSVF was a policy and not a legal requirement.
>
> Ground 5 – **Failure to consider submission and error of law**: that the tribunal erred in not applying s 4(a)(c) ESOS Act which states a legislative object "to complement Australia's Migration laws by ensuring providers collect and report information relevant to the administration of laws relating to student visas".
>
> Ground 6 – **That the appeal panel erred by considering its own decisions as binding "authority**".

Leave to appeal

24 In *Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888* [2021] NSWSC 1315, Henry J said of the principles governing leave to appeal under s 83 *Civil and Administrative Tribunal Act* at [90]:

> The parties referred to the recent decisions of *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 (*Bronze Wing*) and *Corcoran v Far* [2019] NSWSC 1284 (*Corcoran*) for the applicable principles governing appeals to this Court, which were summarised as follows:

(a) appeals lie to the Supreme Court from the Appeal Panel on a question of law pursuant to s 83 of the CAT Act: *Bronze Wing* at [54];

(b) the appeal to the Supreme Court is confined to the decision of the Appeal Panel rather than the Tribunal: *Bronze Wing* at [10] (Basten JA), [37] (Gleeson JA), [61] (Leeming JA); *Corcoran* at [21];

(c) the appellants must demonstrate something more than that the decision of the Appeal Panel was arguably wrong. Ordinarily, leave will only be granted concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear in the sense of going beyond what is merely arguable: *Corcoran* at [24], citing *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46] (Campbell JA, Young and Meagher JJA agreeing); *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [33] (Basten JA, Tobias AJA agreeing); and

(d) the proper approach on an application under s 83 of the CAT Act is to identify the questions of law on which leave is sought in the Summons seeking leave to appeal: *Corcoran* at [26].

25 In *Ashi Pty Limited v Karasco Investments Pty Ltd* [2009] NSWSC 780, I said in relation to the issue of leave to appeal:

[31] In *Coulter v R* (1988) 164 CLR 350 at 359 Deane and Gaudron JJ said:

> "The requirement that leave or special leave be obtained before an appeal will lie is a necessary control device in certain areas of the administration of justice (e.g. appeals to a second appellate court) in this country. As a filter of the work which comes before some appellate courts, it promotes the availability, the speed and the efficiency of justice in those appeals which are, in all the circumstances, appropriate to proceed to a full hearing before the particular court. It also represents a constraint upon the overall cost of litigation by protecting parties, particularly respondents, from the costs of a full hearing of appeals which should not properly be entertained by the relevant court either because they are hopeless or, in the case of a civil appeal to a second appellate court, because they do not possess special features which outweigh the prima facie validity of the ordinary perception that the availability of cumulative appellate processes can, of itself, constitute a source of injustice."

[32] In *Chapmans Ltd v Yandell* [1999] NSWCA 361 Fitzgerald JA (with whom Mason P and Davies AJA agreed) said:

> "[10] Given the nature of the appeal under s208M of the [*Legal Profession] Act [1987*], I am satisfied that a master to whom an application for leave to appeal is made under that section should consider any material evidence which bears upon whether or not leave to appeal should be granted, including evidence which bears upon the likely outcome of the appeal if leave is granted: …
>
> [11] On the other hand, it is important to keep in mind the purpose of a requirement of leave to appeal. It is intended to act as a filter to ensure that unsuitable appellant proceedings which are not able to be brought with the demands which that places upon the resources of the Court and the burden which it places upon other parties and the delays which it causes to other litigants. …
>
> [12] It is also in my opinion important to keep in mind that s208M must be considered in the context of s208L, which restricts an appeal as of right to matters of law. In considering whether or not leave to appeal is granted, it must be decided whether or not, there not being a matter of law arising in the proceeding and there being an appeal as of right only as to a matter of law, there is some other matter which in justice requires that leave to appeal be granted to allow that matter to be relitigated. The party seeking leave to appeal obviously bears the burden of establishing that justice does require that leave to appeal be granted. Further, the master when considering whether to grant leave to appeal obviously has a very wide discretion: …" (citations omitted)

[33] In relation to those remarks of Fitzgerald JA it is to be noted that s 208L *Legal Profession Act* 1987 gave an appeal as of right in matters of law and that s 208M gave a right to seek leave to appeal in relation to dissatisfaction of a determination of a costs assessor on other grounds. A similar position obtains in the present case where s 39 *Local Court Act* 2007 gives a right of appeal where it is alleged the judgment is erroneous in point of law but otherwise, and in particular in relation to any order for costs, s 40 requires that leave be granted.

[34] The result is, in my opinion, that the party seeking leave to appeal needs to point to some other matter which in justice requires that leave to appeal be granted.

Grounds of appeal

Grounds 1, 2 and 2.1 – The appeal panel's categorisation of error, and procedural fairness

26 The plaintiff accepted that these grounds should be considered together.

27 Section 8 of the PPIP Act provides:

> **8 Collection of personal information for lawful purposes**
>
> (1) A public sector agency must not collect personal information unless -
>
> (a) the information is collected for a lawful purpose that is directly related to a function or activity of the agency, and
>
> (b) the collection of the information is reasonably necessary for that purpose.
>
> (2) A public sector agency must not collect personal information by any unlawful means.

28 Section 6 of the UNE Act sets out the objects and functions of the University as follows:

> **6 Object and functions of University**
>
> (1) The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.
>
> (2) The University has the following principal functions for the promotion of its object -
>
> (a) the provision of facilities for education and research of university standard,
>
> (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry,
>
> (c) the provision of courses of study or instruction across a range of fields, and the carrying out of research, to meet the needs of the community,
>
> (d) the participation in public discourse,
>
> (e) the conferring of degrees, including those of Bachelor, Master and Doctor, and the awarding of diplomas, certificates and other awards,
>
> (f) the provision of teaching and learning that engage with advanced knowledge and inquiry,
>
> (g) the development of governance, procedural rules, admission policies, financial arrangements and quality assurance processes that are underpinned by the values and goals referred to in the functions set out in this subsection, and that are sufficient to ensure the integrity of the University's academic programs.
>
> (3) The University has other functions as follows -
>
> (a) the University may exercise commercial functions comprising the commercial exploitation or development, for the University's benefit, of any facility, resource or property of the University or in which the University has a right or interest (including, for example, study, research, knowledge and intellectual property and the practical application of study, research, knowledge and intellectual property), whether alone or with others,
>
> (a1) without limiting paragraph (a), the University may generate revenue for the purpose of funding the promotion of its object and the carrying out of its principal functions,
>
> (b) the University may develop and provide cultural, sporting, professional, technical and vocational services to the community,
>
> (c) the University has such general and ancillary functions as may be necessary or convenient for enabling or assisting the University to promote the object and interests of the University, or as may complement or be incidental to the promotion of the object and interests of the University,

> (d) the University has such other functions as are conferred or imposed on it by or under this or any other Act.
>
> (4) The functions of the University may be exercised within or outside the State, including outside Australia.

29 At first instance the Tribunal held that there was no dispute that the provision of higher education courses and the development of admission policies fell within s 6(2)(c) and (g) of the UNE Act. The Tribunal held that this would include the provision of higher education courses to potential overseas students and the development of admission policies for such students. The Tribunal was satisfied that the collection of personal information from a prospective overseas student for the purpose of a pre-visa assessment by the University was for a lawful purpose that was directly related to the functions of the University as set out in s 6(2)(c) and (g) of the UNE Act.

30 The plaintiff's first ground of appeal to the appeal panel of NCAT was that the Tribunal had misapplied s 8 of the PPIP Act and, in particular, had misapplied the meaning of words "directly related to a function" in s 8(1)(a).

31 The appeal panel dealt with that ground of appeal by saying:

> [49] We consider that the Tribunal made an error of fact in concluding that the University's collection of personal information was directly related to its functions in s 6(2)(c) and (g) of the UNE Act. The appellant requires leave to appeal.
>
> [50] The error we have identified does not necessarily mean that the University's collection of the appellant's personal information was not directly related to a function or activity of the University. In addition to the functions already identified, the University "has such general and ancillary functions as may be necessary or convenient for enabling or assisting the University to promote the object and interests of the University, or as may complement or be incidental to the promotion of the object and interests of the University" (UNE Act, s 6(3)(c)). The Tribunal was not asked to consider whether the purpose of collecting the appellant's personal information directly related to a general or ancillary function of the University.
>
> [51] Further, an agency is permitted to collect personal information for a lawful purpose that is directly related to an activity of the agency (*Privacy and Personal Information Protection Act*, s 8(1)(a)). Whilst the University's "functions" are probably limited to those identified in s 6 of the UNE Act (including functions conferred or imposed on it by other Acts: s 6(3)(d)), the term "activity" is much broader. There was no dispute that one of the University's activities was undertaking pre-visa assessments for prospective overseas students. In these circumstances, there can be little doubt that the University collected the appellant's personal information for a purpose that was directly related to one of its activities (which could be characterised as undertaking pre-visa assessments or providing the results of those assessments to the Commonwealth).
>
> [52] In considering whether to grant leave to appeal on this ground, we have had regard to the factors in *Collins v Urban* [2014] NSWCATAP 17 at [84], which are set out above. We have also had regard to the guiding principle for the NCAT Act, being "to facilitate the just, quick and cheap resolution of the real issues in the proceedings" (NCAT Act, s 36(1)). Given that there was no dispute that one of the University's activities was conducting pre-visa assessments and providing the outcome of those assessments to the Commonwealth, we are of the view that there would be little utility in granting leave to appeal on this ground. That would not, in our view, facilitate the just, quick and cheap resolution of the real issues in the proceedings. Accordingly, we have decided to refuse leave to appeal on Ground One.

32 The University accepted that the appeal panel may have been in error in concluding that the Tribunal at first instance had made an error of fact. In *Tarrant v Australian Securities and Investments Commission* [2015] FCAFC 8; (2015) 317 ALR 328, the Full Court of the Federal Court said at [100(e)] that, ordinarily there is no error of law simply

in making a wrong finding of fact, but a determination of a question of fact may give rise to a question of law where the issue was whether facts found fall within a relevant statutory provision.

33 The question whether the University's collection of personal information fell within s 8 of the PPIP Act because it fell within s 6 of the UNE Act was a question of law, with the result that the plaintiff did not need leave to appeal to the Appeal Panel. However, the error made by the appeal panel in determining that the matter was a question of fact does not go anywhere, because the appeal panel dealt with the substance of the ground by finding that the data collection was "directly related to activity" of the University under s 8(1)(a) of the PPIP Act. They did so because they held, and it was not disputed, that one of the University's activities was conducting pre-visa assessments and providing the outcome of those assessments to the Commonwealth.

34 In my opinion, that determination was correct, with the result that nothing is achieved by giving leave to the plaintiff to argue that the appeal panel's determination that there was only an error of fact and not one of law is futile.

35 The complaint about a denial of procedural fairness was said by the plaintiff to be that the Tribunal went beyond the pleadings of the party in finding that the collection fell within the activities of the University. This submission was difficult to understand because, as I pointed out to the plaintiff, the matter did not proceed on pleadings either before the Tribunal at first instance or on appeal.

36 What the Tribunal at first instance relevantly had to determine under s 8(1), as the University accepts, was a question of law, namely, whether the information was collected for a lawful purpose that is directly related to a function or activity of the agency. The focus of the parties was on the functions of the University, and the Tribunal determined that the collection was directly related to a function of the University.

37 Nevertheless, at the conclusion of the hearing before the appeal panel, directions were made giving the plaintiff the opportunity to put on further submissions about three matters, one of which was the issue raised by ground 1, being the statutory construction issue. The plaintiff lodged further submissions on 24 March 2021. These submissions and accompanying documents are found in the Court Book between pp 389 and 430. The plaintiff made no submissions in relation to this ground of appeal. In those circumstances, there was no procedural unfairness in relation to this issue.

38 The Appeal Panel determined that the collection was not directly related to a function in s 6(2)(c) or (g) of the UNE Act, and in that way the Tribunal was said to have erred. However, the appeal panel went on to say:

> [51] **There was no dispute that one of the University's activities was undertaking pre-visa assessments for prospective overseas students**. In these circumstances, there can be little doubt that the University collected the appellant's personal information for a purpose that was directly related to one of its activities (which could be characterised as undertaking pre-visa assessments or providing the results of those assessments to the Commonwealth).

> [52] In considering whether to grant leave to appeal on this ground, we have had regard to the factors in *Collins v Urban* [2014] NSWCATAP 17 at [84], which are set out above. We have also had regard to the guiding principle for the NCAT Act, being "to facilitate the just, quick and cheap resolution of the real issues in the proceedings" (NCAT Act, s 36(1)). **Given that there was no dispute that one of the University's activities was conducting pre-visa assessments and providing the outcome of those assessments to the Commonwealth**, we are of the view that there would be little utility in granting leave to appeal on this ground. That would not, in our view, facilitate the just, quick and cheap resolution of the real issues in the proceedings. Accordingly, we have decided to refuse leave to appeal on Ground One.
>
> (emphasis added)

39 Since there was no dispute about the activities of the University in that regard, it is difficult to see how the plaintiff has been denied procedural fairness on the determination of a question of law, where the factual substratum underpinning the legal question was not in dispute. The appeal panel was entitled to reach a view on the question of law, although that view differed from the approach taken by the parties to the legal question. If the appeal panel was wrong in that conclusion, the hearing of the present appeal gave to the plaintiff the opportunity to argue the correctness of the conclusion. The plaintiff was not denied procedural fairness, because he was not deprived of leading other evidence than had been led in the Tribunal. That was because the underlying factual matters relevant to the conclusion were not in dispute.

40 In any event, during the course of the hearing of the present appeal, I offered the plaintiff the opportunity to make submissions about the correctness or otherwise of the appeal panel's conclusion that the information collected was related to an activity of the University. The plaintiff again submitted that the appeal panel was wrong because its decision "went beyond the pleadings of the party". He said that this was all he wanted to say on the procedural unfairness ground. He otherwise made no submissions in relation to the correctness or otherwise of the appeal panel's decision on this point of statutory construction, about which this ground now complains.

41 In relation to ground 2.1, the plaintiff submitted that under s 8 of the PPIP Act, there are three elements that the agency needed to prove to justify collection of the information. Those three elements were said to be (1) collection for the (2) purpose, and (3) for the function or activity. The plaintiff submitted that the appeal panel confused the second and third of those elements.

42 The appeal panel said at [4]:

> [4] We have found that the Tribunal made an error of fact, being that the collection of the appellant's personal information for the purpose of conducting a pre-visa assessment of his brother was "directly related" to its functions of providing courses to students and developing admission policies. However, we have not granted leave to appeal on this ground, because the collection purpose was directly related to the University's activity of assessing visa applications (and so permissible under the privacy legislation). In these circumstances, a grant of leave would serve no useful purpose and would not be consistent with the application of the Tribunal's guiding principle.

43 The plaintiff did not clarify the point he was endeavouring to make in relation to para [4] above. However, it does not seem to me that there was any confusion of what the plaintiff maintains were separate elements in s 8 of PPIP Act. The appeal panel was expressing the terms of s 8 in a shorthand way.

44

Paragraph [4] was a summary of the determination on the point. The detailed reasons of the Appeal Panel on that ground of appeal are set out at paras [36] to [52] of its decision. Those reasons demonstrate no confusion about what are said by the plaintiff to be the separate element in s 8 of the PPIP Act. The appeal panel identified the purpose in paras [30] to [41] and [45]. The undisputed activity that was related to the purpose is identified in para [52].

45 The plaintiff does not demonstrate that the appeal panel made any error of law.

46 Even if there was error on the part of the appeal panel in its approach to substituting a view that the collection was related to an activity rather than a purpose, the error is not such that leave should be granted for an appeal to this Court. Where it was not disputed that the collection related to an activity of the University, the plaintiff fails to show anything more than that the appeal panel's decision was wrong: *Taylor Construction* at [90(c)]. The plaintiff suffers no detriment as a result of the appeal panel's approach.

47 Grounds 1, 2 and 2.1 should be rejected.

Ground 3 - Application of incorrect test/ adequacy of reasons

48 The plaintiff submitted that the reasons of the appeal panel at paragraph [54] were inadequate. He submitted that what he put to the appeal panel was that the Tribunal at first instance had asked itself the wrong question, but that the appeal panel had ignored his submission. He said that he had submitted that the statutory test was that the collection was reasonably necessary, but that the Tribunal had applied two tests, being whether the collection was relevant and whether it was reasonably necessary.

49 The appeal panel said at [54]:

> [54] Paragraph 138 occurs towards the end of the Tribunal's consideration of whether the collection of DQU's personal information (being certified copies of DQU's year 10 and year 12 equivalent education qualifications) was reasonably necessary for the purpose of the University's pre-visa assessments, within s 8(1)(b) of the Privacy and Personal Information Protection Act. The Tribunal found that it was (at [136]). It then stated, at [138]:
>
> In regard to the requirement that DQU complete the Statement of Purpose (SOP) in his own handwriting, I accept that a document in DQU's handwriting is the personal information of DQU. While the Migration Regulations nor Direction 69 make reference to this being a requirement, I accept that a document written in the handwriting of a prospective overseas student can be an important factor towards determining whether that student's application for a student visa is genuine. Hence, I am satisfied that the collection of personal information of this kind is reasonably necessary for the purpose of the University assessing, in its admission processes, whether DQU is a genuine student and a genuine temporary entrant. I note, DQU was not singled out in being required to complete the Statement of Purpose Form (SOP), as the University's pro-forma form expressly states that it is to be completed in the handwriting of the prospective overseas student.

50 Paragraph [54] of the appeal panel's decision and para [138] of the Tribunal's decision both concerned the collection of information from DQU. DQU did not appeal from the Tribunal's decision. If there was an error relating to DQU's claim, the plaintiff has no

right of appeal in respect of that error. When I raised this matter with the plaintiff at the hearing of the appeal, he appeared to accept that he was not entitled to appeal from the decision on that issue.

51 In any event, it is clear from para [138] that the Tribunal applied the proper test of whether the collection was reasonably necessary. Relevance was not mentioned or implied.

52 Ground 3 should be rejected.

Ground 4 – Fundamental common law rights

53 The plaintiff submitted that this ground went to the core issue of the appeal. Although the submission appeared to be that the regulations relied on to justify the collection of the information, and possibly the statute (although that was not clearly articulated) were incompatible with the fundamental rights which the plaintiff identified, the plaintiff said that his submission was that there were no legislative provisions that authorised the University to collect the information.

54 The plaintiff identified the fundamental common law rights as access to education and the right to privacy. He relied on what was said in *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15.

55 *Coco* concerned whether the *Invasion of Privacy Act 1971* (Qld) conferred authority on the judge, who approved the use of listening device, to authorise entry onto premises for the purpose of installing, maintain and retrieving the devices. The plaintiff placed considerable weight on this case to submit that it prevented the collection of the information the subject of the proceedings. It is necessary, therefore, to set out the significant statement of principle from that case.

56 The joint judgment of Mason CJ, Brennan, Gaudron & McHugh JJ said (at 435 - 438):

> Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law. Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon*: "[I]nconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights".
>
> In England, Lord Browne Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorise interference with the basic immunities which are the foundation of our freedom; to constitute such authorisation express words are required. That approach is consistent with statements of principle made by this Court, to which we shall shortly refer. An insistence on the necessity for express words is in conformity with earlier judicial statements in England which call for express authorisation by statute of any abrogation or curtailment of the citizen's common law rights or immunities.
>
> …

> The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.
>
> …
>
> The need for a clear expression of an unmistakable and unambiguous intention does not exclude the possibility that the presumption against statutory interference with fundamental rights may be displaced by implication. Sometimes it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasise that the test is a very stringent one. As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope.
>
> S43 of the Queensland Act does not contain express words conferring power upon a Supreme Court judge to authorise conduct which would otherwise be tortious and involve interference with a fundamental common law right. In this case, the installation of the listening device in the premises of Cosco Holdings Pty Ltd ("Cosco") infringed the fundamental right of a person to exclude others from his or her property.
>
> (citations omitted)

57 It is apparent that the fundamental right under consideration was “the right of a person in possession or entitled to possession of premises to exclude others from those premises”. There can be no doubt that such a right is a fundamental one: *Halliday v Nevill (1984)* 155 CLR 1 at 10; *Plenty v Dillon* (1991) 171 CLR 635 at 639. The right gave rise to the tort of trespass very early in the history of the common law.

58 The plaintiff submitted that the right to privacy was a fundamental right. He submitted that the right not to have to disclose one’s name (presumably to a police officer when asked) showed that privacy was such a right. However, any right not to be required to answer questions by a police officer (unless varied by statute) is not a reflection of a right to privacy; rather it flows from the right to silence, associated with the right not to incriminate oneself. The right to silence may be said to be a fundamental right.

59 The question whether there is tort for a breach of privacy, or whether other remedies are available for a breach of privacy, is a current one. I discussed the authorities in *Kostov v Nationwide News Pty Ltd (No 1)* [2018] NSWSC 1822 at [59] to [67]. I concluded there that, to that point of the law’s development, no Australian superior court had recognised a generalised tort for breach of privacy. What flows from that conclusion is that a right to privacy cannot be considered a fundamental right. Privacy may come to be regarded as a right in due course. Indeed, the PPIP Act is one legislative step along that path. However, privacy cannot be regarded as a fundamental right of the kind that the High Court was dealing with in *Coco.*

60 The plaintiff submitted that the right to education is recognised in section 26 of the Universal Declaration of Human Rights. The plaintiff pointed to the Explanatory Statement attached to the *Migration Legislation Amendment (2016 Measures No 1)*

Regulation 2016 (Cth), and, particularly, to Attachment B to the Statement of Compatibility with Human Rights. He submitted that it showed that the right to education existed.

61 Even if that was true (and the Statement says nothing about a right to education), that does not mean that any right to education is a fundamental right of the kind the High Court was dealing with in *Coco.* The Universal Declaration of Human Rights is not part of the domestic law of New South Wales. Even if it were, rights created under that Declaration would not be a fundamental right in the *Coco* sense.

62 The plaintiff submitted further that there was no legislative provision which allowed or entitled the University to collect the information which they sought from him. That was because, he submitted, it breached the rights to privacy and education.

63 In the light of what is said in *Coco*, unless there was a fundamental right which could not be breached without legislation to authorise it, the University does not need legislative authority to do anything which is within its powers to do under the *University of New England Act*. There are no such fundamental rights which preclude the University seeking the information. On the other hand, the legislature has seen fit to give some protection to the privacy of persons dealing with it by the enactment of the PPIP Act, but the plaintiff was not successful in showing that the University breached that Act.

64 This ground should be rejected.

Ground 4.1 – The SSVF's status, and the need for its publication

65 The plaintiff submitted that SSVF was only a policy and not law. In that way, he submitted, the University could not justify its actions in relying on the SSVF. He made reference to *Green v Daniels* (1977) 51 ALJR 463. He also submitted that the policy had not been published at the time the University acted in accordance with it, and he made reference to what was said in *Watson v Lee* (1979) 144 CLR 374.

66 This ground or sub-ground of appeal largely mirrored part of ground 3 of the plaintiff's appeal to the appeal panel. The appeal panel described it this way at para [24]:

> The third ground, as articulated by [the plaintiff] at the hearing, is that the Tribunal made a jurisdictional error because, when requesting personal information from [the plaintiff], the University relied upon a policy which (1) had not been published, and (2) was not a clear statutory provision.

67 The appeal panel determined at para [68] that the SSVF had commenced well before the collection of the appellant's personal information and that there were publicly available documents about it, which the appeal panel identified. These were findings of fact which cannot be challenged on the present appeal, unless there was no evidence to justify the findings. The plaintiff did not assert that those findings were not open to the appeal panel on the evidence it had.

68 The appeal panel also held that whether the policy was "in force" did not depend on publication of the policy. The appeal panel said that whether the policy was in force was a question of fact.

69 The appeal panel was correct in those determinations. Reliance on *Watson v Lee* is misplaced. That was a case concerned with regulations made under an Act of Parliament, and compliance with the *Acts Interpretation Act 1901* (Cth). The decision says nothing about policies or publications of them.

70 In relation to whether the University was entitled to act pursuant to the SSVF when it was not an Act or a regulation, the appeal panel said correctly, at para [71], that the Commonwealth did not delegate the assessment of visa applications to the University. That function remained with a Commonwealth officer. That approach was entirely consistent with what was said in *Green v Daniels*, where Stephen J said at 467:

> …[I]t should be remarked that the function of the Director-General under s 107 is to be distinguished from that of tribunals, such as licensing justices, which, in their exercise of discretionary powers to grant or refuse licences, may give effect to some general policy that they see as desirable so long as in doing so they do not preclude themselves from considering on its merits the exceptional case. The Director-General is not concerned, in his administration of s 107, with the carrying out of any policy. No general discretion is conferred upon him; instead specific criteria are laid down by the Act and all that is left for him to do is to decide whether or not he attains a state of satisfaction that the circumstances exist to which each of these criteria refer. He must, no doubt, for the benefit of his delegates and in the interests of good and consistent administration, provide guidelines indicating what he regards as justifying such a state of satisfaction. But if, in the course of doing this, he issues instructions as to what will give rise to the requisite state of satisfaction on the part of his delegates and these are inconsistent with a proper observance of the statutory criteria he acts unlawfully; should his delegates then observe those instructions, their conclusions concerning an applicant's compliance with the criteria will be vitiated.

71 It was not improper or inappropriate for the University to act in accordance with a policy when it was not the decision maker in relation to the visa.

72 The plaintiff did not make clear at the hearing of the appeal how this ground was related to ground 4, although his oral submissions merged the two grounds. The relationship seemingly appears at para [72] of the Appeal Panel's reasons where this appears:

> The appellant made some submissions as to why the circumstance that the SSVF is not a "clear statutory provision" is relevant. In his email of 28 October 2020, he stated that "express statutory authority is required for any action that interferes with a fundamental freedom or immunity, but not a policy." He did not identify the "fundamental freedom or immunity" to which he refers. In submissions dated 21 April 2021, the appellant cited *Coco v R* [1994] HCA 15; (1994) 179 CLR 427 and stated: "As function of GTE (visa assessment) was bested to Dept of Home Affairs, was not delegated to university, so collection of information for that is illegal."

73 I have already determined that no fundamental right or freedom is transgressed by what the University did. The appeal panel similarly held at para [73] that no fundamental freedom or immunity was interfered with.

74 This ground should be rejected.

Ground 5 – Error in not applying s 4 of the ESOS Act

75 The plaintiff agreed that this ground was not raised before the appeal panel. When I informed him that this Court was concerned only with errors of law by the appeal panel, and that there could not be an error of law if something had not been argued and decided by the appeal panel, the plaintiff withdrew this ground.

Ground 6 – The appeal panel's use of precedent

76 The plaintiff submitted that the appeal panel fell into error by considering that it was bound by its own previous decisions. The error was said to have occurred by what was said by the appeal panel at paragraph [74] of its reasons. The plaintiff made reference to *Viro v The Queen* (1979) 141 CLR 88; [1978] HCA 9 to submit that only decisions of superior court of record are binding decisions.

77 Paragraph [74] of the appeal panel's reasons says:

> Ground 3 lacks merit. None of the factors identified in *Collins v Urban* [2014] NSWCATAP 17 at [84] is present in this case and we can identify no other discretionary reason to grant leave to appeal.

78 As noted above, ground 3 of the appeal to the appeal panel largely mirrored what is Ground 4.1 in the present appeal.

79 *Collins v Urban [*2014] NSWCATAP 17 was a decision of an appeal panel of NCAT, and was one of the first matters dealing with appeals in residential tenancy matters after NCAT was established. The appeal was under s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW). At para [82] of that appeal panel's reasons, the panel said that principles governing the granting of leave by an appeal panel should generally be consistent with those applied by the Court when considering the question of leave to appeal. The appeal panel then proceeded to set out at para [84] the general principles which could be derived from a number of cases.

80 Nothing was said by the appeal panel to suggest that other appeal panels were bound by those principles. Nothing was said by the appeal panel in the present appeal to suggest that it considered itself bound by those principles or by what was said in *Collins v Urban*. Since a number of those principles were derived from superior courts, it may well be inappropriate for a subsequent appeal panel not to follow them in any event. Further, it would be inefficient generally for an appeal panel not to be able to follow a prior decision of an appeal panel if the earlier panel considered procedural guidelines or principles.

81 Reliance by the plaintiff on *Viro v The Queen* is misconceived. That case determined that the High Court of Australia was no longer bound by decisions of the Privy Council, and it gave guidance to courts below the High Court where there were conflicting decisions of the Privy Council and the High Court. Nothing was said to support the plaintiff's submission that "only decisions of superior courts are binding". The only relevant statement of principle appears in the judgment of Stephen J who said (at 129):

> The first duty of a court is to administer justice according to law. However, in the case of an inferior court operating within a system where the doctrine of precedent applies, the existence of authority binding upon it determines for it what it must understand to be the law. It must accept the law to be as that precedent authority has declared it to be, whatever may be its own inclinations in the matter. The sanction implicit in the doctrine of precedent is simple and effective: if an inferior court fails to observe the doctrine the superior court will correct its decision on appeal. Thus the existence of an appeal is inherent in and essential to the doctrine.

82 When I enquired of the plaintiff if he was saying that *Collins v Urban* was wrongly decided, he said that he did not know anything about that decision. His point was only that, because it was a decision of an administrative body it did not constitute law. The

plaintiff did not identify what error of substance was made, even if the appeal panel had wrongly followed what was said in *Collins v Urban*. Seen in those terms, the ground may be regarded as captious.

83 This ground should be rejected.

Leave to appeal

84 At the conclusion of his oral submissions, the plaintiff sought to tender a document at p 1152 of the Court Book. This was a document from the University headed "Postgraduate Admission for International Students – Operating Procedure". It was dated October 2021. It post-dated the events which led to the present proceedings. Its admission was opposed by the University for that reason.

85 The plaintiff submitted that its relevance was to the grant of leave, to show that the appeal was of public significance because the University was continuing to adopt the approach that was challenged by the plaintiff in these proceedings. On that basis I said that I would provisionally admit the document, and deal with its admissibility in this judgment.

86 I have not found that any of the grounds raised by the plaintiff have been made out. That is to say, no error has been demonstrated, except for the holding of the appeal panel that the Tribunal at first instance had made an error of fact, when the error was one of law. However, for the reasons given earlier, nothing flows from that error. In those circumstances, there is no need to determine if the plaintiff has demonstrated anything more than error on the part of the appeal panel to justify leave being given to appeal to this Court.

87 Accordingly, the document is rejected, because it is not relevant to any issue in the appeal.

88 There is one further matter. On 14 June 2018 the University sent an email to the plaintiff saying:

> Thank you for submitting the completed UNE GTE Form on behalf of [DQU]. As part of UNE's GTE procedure, your completed form and supporting documentation were scrutinised for a comprehensive assessment against Genuine Temporary Entrant (GTE) and financial evidence criteria. UNE now advise that you have **not** met GTE and financial evidence requirements for admission to UNE. On the basis of this advice UNE is not able to provide you with an offer without the condition of further GTE screening and so is not able to assist you further with admission to on-campus study at UNE.
>
> (emphasis in original)

89 On 28 August 2018 the University sent an email to DQU saying:

> Thank you for submitting your completed UNE GTE Form. As part of UNE's GTE procedure, your completed form and supporting documentation were sent to the University's GTE Assessor for a comprehensive assessment against Genuine Temporary Entrant (GTE) and financial evidence criteria. Based on the documentation that has been provided the Assessor has now advised that you have **not** met GTE and financial evidence requirements for admission to UNE.
>
> On the basis of this advice UNE is not able to provide you with an offer without the condition of further GTE screening and so is not able to assist you further with admission to on-campus study at UNE.

> Our Assessor believes that this applicant is high-risk and unlikely to meet the Department of Home Affairs (DHA) GTE requirements.
>
> (emphasis in original)

90 The affidavit from Ingrid Elliston, the Director of UNE International at the University, explained that the negative assessment came from DQU's very low level of English, his change of career from Medicine to Nursing, and his close family ties in Australia sponsoring DQU. It is apparent, therefore that the matters about which the plaintiff complains were not causally related to the rejection of DQU's application.

91 It is difficult to see, therefore, what the utility of the present appeal is. If the plaintiff had been successful on this appeal, it would not have changed anything as far as his brother's application was concerned. There would have been no utility to upholding the appeal. To the extent that the plaintiff seems to contend that the University had no right to seek the information as a matter of general principle, he has no standing to challenge such a decision.

Conclusion

92 Accordingly, I make the following orders:

(1) I dismiss the amended summons filed 6 October 2021.

(2) The plaintiff is to pay the defendant's costs.

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Decision last updated: 24 June 2022