

Notice of Decision Not to Cancel under section s116 (General Power) of the Migration Act 1958



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The Client was granted a Student Visa in November 2014, with the visa being valid until March 2019.

In the middle of 2016, the Client began experiencing personal hardship, with a family member in their home country suffering a stroke and being admitted into the Intensive Care Unit. This same family member was also undergoing treatment for Dengue Fever at the time of the stroke. The Client returned to their home country for a period of two weeks, before returning to Australia to continue their studies.

The Client had a troubled history with education providers, and was yet to complete a qualification at any level. In early 2017, while arranging for a transfer to a new education provider, the Client learned that the education provider who had offered them enrolment was being blacklisted and their qualifications were no longer being recognised by assessing bodies. The Client made the decision not to proceed with enrolment, and from late February 2017 was not enrolled in a course of study.

In August 2017, the Client commenced preparations to obtain enrolment in a Bachelor Degree, however on 27 September 2017 the Client received a Notice of Intention to Consider Cancellation under Section 116 of the Migration Act. This is the general cancellation power, which is usually exercised when a visa holder does not comply with a condition attached to a visa. The Client was given 5 working days to respond, with the option of an additional 5 working days upon request.

The Client made an appointment with Alasdair Dougall, who took over carriage of the matter. The option to extend the time to reply was requested, and an additional 5 working days was granted by the Cancellation Officer.

Extensive submissions were prepared in relation to this matter, however several issues existed:

- 1. The Client was not due to start their Bachelor Degree until November 2017, meaning that for a period of 10 months the Client would be non-compliant with Condition 8516; even though the Client was at the time completing an ELICOS Course from September 2017.*
- 2. No documents from a medical practitioner were available to evidence the mental stress experienced by the Client due to their family member's illness.*
- 3. Medical documents from the Client's home country failed to reference the family member having dengue fever, and only focused on the stroke.*

4. *The family member's illness did not cover the entire period of the non-enrolment period.*
5. *The Client had changed education providers multiple times, and had failed to complete any qualifications or achieve any reasonable academic progress prior to the non-compliance period.*

In the submissions presented to the Cancellation Officer, it was noted that the Client was worried that their course fees would require their family to pay further money during a time when a family member was incurring significant financial costs. It was submitted that this was the reason the non-compliance extended beyond the illness period. It was also submitted that while the family member was not receiving ongoing treatment, they were still weak from the extended period of time in which they had Dengue Fever. It was requested that the Cancellation Officer take into account the adverse impact the cancellation of the Client's visa would have on this family member, who was already weakened due to their medical condition.

It was also requested that the Cancellation Officer take into consideration the Client's total compliance with their visa conditions from November 2014 to January 2017, and that this was substantive evidence that the non-compliance was out of character and caused by the personal hardship the Client had experienced. Evidence was also provided that the Client's previous education provider had failed to notify them of the cancellation of their Confirmation of Enrolment until April 2017, and that the non-compliance from February 2017 to April 2017 was caused by the Client waiting for a release letter from their previous education provider; not knowing that their Enrolment has been cancelled.

Despite the abovementioned issues, and the strict approach that Cancellation Officers are currently taking towards non-compliance with enrolment conditions for student visa holders, the Cancellation Officer exercised significant discretion to not proceed with the cancellation of the student visa. This case highlights that even in matters where an individual concedes that they have failed to comply with a condition attached to their visa, Cancellation Officers have discretion to consider personal circumstances which contributed to non-compliance; and use these personal circumstances as a reason not to proceed with cancellation.

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