



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B43 of 2020

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

and

EFX17
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I. Certification

1. This outline of oral argument is in a form suitable for publication on the internet.

PART II. Outline

Construction of s 501CA(3) (grounds 1 and 2)

2. Construing s 501CA(3) requires particular attention to (RS [14]-[25]):

- (a) the circumstances of its application, in particular, its limitation, by reason of the terms of s 501(3A), to a class of persons with the defining characteristic of being in full-time imprisonment in a custodial institution;
- (b) the context in which it arises for application, with the rules of natural justice disapplied to the visa cancellation decision under s 501(3A);
- (c) its function of providing an opportunity for a person in custody to make representations on a matter of critical significance to them: cancellation of their visa and change in immigration status; and
- (d) the conditional nature of the entitlement that it confers, in particular that the Minister's discretion to revoke a cancellation decision is enlivened only if the person concerned has made representations in accordance with the invitation referred to in s 501CA(3)(b).

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30 3. The requirements of s 501CA(3)(a) and (b) are complementary and should be construed accordingly.

4. The requirement in s 501CA(3)(a) to give a written notice and particulars of the relevant information, in the way that the Minister considers appropriate in the circumstances, is directed at more than the manner of physical delivery.
5. If one brings to account the opportunity that the giving facilitates, and to which s 501CA(3)(b) refers, the requirement to consider the way to give that the Minister considers appropriate in the circumstances is directed at the particular recipient, and in what way the material in (i) and (ii) is appropriately to be given to them, so as to complement the invitation in paragraph (b) (RS [38]-[39]).
- 10 6. What the invitation requirement in s 501CA(3)(b) entails, having regard to the nature of the subject matter and the purpose of the provision, is the conferral of an opportunity of substance, to make representations about the revocation, and not an invitation that simply satisfies matters of form (RS [26]).
7. The substance, or meaningfulness, of an invitation (or lack thereof) is demonstrated by the capacity (or lack thereof) of the recipient to comprehend it, as the Full Court found (RS [28]).
8. The decision in *WACB v Minister for Immigration, Multicultural and Indigenous Affairs* [2004] HCA 50; (2004) 210 ALR 190 does not call for a contrary conclusion, because the text of s 501CA says more than the provision considered in that case, and it arises in a different context (RS [31], [40]). Other provisions in the Act which have similar language also need to be considered in their context (RS [25]).
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The respondent's onus of proof (ground 3)

9. It is necessary to consider this ground if the Court finds that s 501CA(3) required the Minister to consider the respondent's capacity matters, but not that the respondent was actually able to comprehend the invitation, notice and particulars given to him.
10. There was evidence before the court below from which actual or constructive knowledge of certain capacity matters could be inferred, and from which it could be shown that the Minister did not consider those matters (RS [46]-[48]).

Delegation (ground 4)

11. The starting point is that, where a statutory provision requires an identified person to do something, it must be done personally by that person (RS [50]). That principle is subject, in the *Migration Act*, to the Minister's power in s 496 to make a written and signed
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delegation of his “powers under” the Act. Nobody involved in taking the steps in s 501CA(3) in relation to the respondent held a delegation in relation to that provision.

12. Section 497 is not a source of power for someone other than the Minister or a s 496 delegate to take those steps. Section 497 is expressed in negative terms, as clarifying what is *not* entailed or implied by a delegation made under s 496 (RS [55]). That clarifying purpose is confirmed by the legislative history and materials (RS [58]).

13. Nothing in the terms or context of s 497 indicates that it qualifies or detracts from s 496. Rather, those matters indicate that the reference to “any task in connection with” the exercise of a power to grant, refuse or cancel a visa does not encompass a power conferred expressly upon the Minister under the Act, which would otherwise be the subject of s 496(1) (RS [53]-[58]).

Notice of contention

14. The material handed to the respondent did not invite the respondent to make representations within “the period ... ascertained in accordance with the regulations” as required by s 501CA(3)(b). That required that the respondent be invited to make representations within a closed, finite period with discernible start and end points, or, at least, a period ascertainable by the recipient as such.

15. The material handed to the respondent identified the commencement of the period for making representations by reference to the material being transmitted to the respondent by email, which was not correct (RS [62]-[65]). It contained no point of reference by which the respondent could ascertain the correct period (RS [65]).

16. In those circumstances, it was not an invitation conforming with s 501CA(3)(b) (RS [67]).

Dated 4 December 2020

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