



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No. S103 of 2020

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

and

LIKUMBO MAKASA
 Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This Outline is in a form is in a form suitable for publication on the internet.

Part II: Outline of Appellant's oral submissions

2. The issues on the appeal are set out at Appellant's Submissions (**AS**) [2] and the plurality at [3]: Can the Minister exercise the power to cancel under s 501(2) of the *Migration Act 1958* (Cth) (**Act**) where the Administrative Appeals Tribunal (**AAT**) has set aside a delegate's decision to cancel under that sub-section and decided instead not to exercise the power to cancel the visa and, if so, whether the Minister may rely on the same facts, as did the AAT, not to be satisfied that the person passes the character test.
3. The Respondent had been convicted on 25 October 2009 of three counts of having sexual intercourse without an honest and reasonable belief that the complainant was over the age of 16 years on 31 August 2006, for which he was sentenced to three concurrent terms of imprisonment of 2 years with a single 12 month non-parole period: at [3] per primary Judge (**PJ**); at [26] per Bromwich J (with whose summary of the facts the plurality of the Full Court agreed at [4]). Those were the only convictions that were relied upon by the AAT in its decision (8 November 2013)¹, and by the Minister in his cancellation decision (18 October 2017)², to be satisfied that the Respondent did not pass the character test. There was also later offending, after the AAT decision, as found by Bromwich J at [28], including a conviction on 3 May 2017 for mid-range PCA. That was

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¹ Appellant's Further Materials (**AFM**) pages 1-24 at [17], to be read with [9], [11], [12].

² Core Appeal Book (**CAB**) 1 [6]-[7].

taken into account by the Minister in the exercise of his discretion³, but not as to the character test.

4. The Full Court divided as to whether the Minister had power to cancel the Respondent's visa under s 501(2), relying upon the same failure to satisfy the character test as had the delegate and the AAT. The plurality at AB61 [5]-[6] found that the Minister did not, Besanko J and Bromwich J each disagreeing at [10] and [44]-[49] respectively.
5. All members of the Full Court adopted their prior reasons in *Minister for Home Affairs v Brown (Brown)* [2020] FCAFC 21 (2020); 376 ALR 133 in this respect, the Full Court also having similarly divided upon the issue in *Brown*: AS [12]. The plurality would not
10 have found the Minister without power to exercise his discretion under s 501(2) relying upon the same failure to satisfy the character test had the earlier delegate's decision been not to exercise the power to cancel under s 501: AS [25] (see *Brown* at [16]). The plurality reasoning in *Brown* is summarised at AS [13]-[17] and the contrary reasoning of Besanko J and of Bromwich J are each summarised at AS [18]-[20].
6. The plurality's reasoning is incorrect for the following reasons.
7. *First*, there is nothing in the text of s 501 or the Act that supports the limitation that they found: AS [15]-[16]. The Respondent objectively continued to fail the character test by reason of the above 2 year sentences (s 501(6)(a) and (7)(c)) and that was the only trigger necessary for the discretion to cancel under s 501(2) to arise: AS [22]-[23]. The
20 Minister's decision was a fresh decision in the presence of new material facts, particularly the recent PCA and its effect on the Minister's assessment of risk.
8. *Secondly*, there had not been a prior exercise of the power to cancel the Respondent's visa under s 501(2), given that the delegate's decision had been set aside (s 43(1)(c) of the *Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act)*) and the AAT had decided not to exercise the power to cancel the visa: AS [24]-[25]; Reply (R) [4]-[5]. Contrary to the plurality reasoning identified at AS [14], the Minister had not "re-exercised" the power under s 501(2), or sought to "reconsider", "set aside" or "undo" the earlier AAT decision and the power had not been "spent" or "exhausted". The minority were correct to disagree: AS [14], [18]-[20], [24], [35].
- 30 9. *Thirdly*, having regard to s 43(1)(c) and (6) of the AAT Act, the delegate's prior decision, once set aside by the AAT, had no legal or practical effect and could not have the effect

³ Minister's reasons (CAB 7-19) at [27], [31], [39], [43], [45]-[46], [49], [100]-[104].

that the power under s 501(2) was spent (Bromwich J at [207]). Also, having regard to s 43(6) of the AAT Act, an AAT decision not to cancel could not operate differently from a delegate's decision not to cancel: AS [16], [20], [26]-[28]; R [6], [8].

10. *Fourthly*, it may be accepted that the AAT undertakes independent merits review, and conducted a contested hearing, but the plurality point to no particular legislative provision in the Act, or the AAT Act, that has the effect that the AAT's decision operated to finally and conclusively determine into the future whether the Respondent's visa could be cancelled relying upon the same failure to satisfy the character test - much less in the presence of changed circumstances going to discretion: AS [29]; R [3].

10 11. *Fifthly*, even if the set aside delegate's decision, or the AAT decision, was, contrary to the Appellant's submissions and the minority findings, an exercise of the power under s 501(2) to cancel the visa, s 33(1) of the *Acts Interpretation Act 1903* (Cth) (**AIA**) applied and would have authorized the Minister's decision: AS [31]-[33]; [36]; R [7].

12. *Sixthly*, s 501A was not the only source of power available to the Minister to cancel the Respondent's visa when he did, based on the same failure to satisfy the character test. Nor would s 501A be rendered "otiose" by s 501(2) so operating. Section 501A is a power to "set aside" an "original decision" as there defined (namely, a decision of a delegate, or of the AAT, not to exercise the power to cancel a visa). To set aside the AAT decision would be of different legal effect from later cancelling a visa: AS [34]-[36].

20 Also, even if it were to be inferred from s 501A that a material change of circumstances was necessary, it was present (see above and R [8]).

13. Nor do the normative considerations, referred to by the plurality, justify finding that s 501(2) was unavailable to the Minister in the present case: AS [37]-[38].

Notice of Contention

14. Besanko J's finding of a failure to consider "a relevant consideration of great importance", taken up in the Notice of Contention, is answered by reasoning of Bromwich J (AS [39]-[40], R [11]) and by the PJ: AS [9].

30 15. So too, there was no legal unreasonableness by the Minister in seeing the 2017 PCA offence as bearing upon the risk posed by the Respondent, including as to sexual offences. On the Minister's findings, the Respondent's drinking had played a role in such offending and he had a need for further alcohol rehabilitation. There was evidence before the Minister to support these conclusions: R [9]. Nor was there legal unreasonableness

in the Minister's finding at [95] regarding the aunt and extended family in Zambia: R
[10].

Dated: 12 November 2020

G.T. Johnson SC

N.D.J. Swan