



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

S103/2020

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT
 OF AUSTRALIA

BETWEEN MINISTER FOR IMMIGRATION AND BORDER
 PROTECTION

Appellant

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and

LIKUMBO MAKASA
 Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

The outline is in a form suitable for publication on the internet.

20 Part II:

1. The issue arising on the appeal should be answered in the negative.
2. The respondent submits that the appellant is not entitled to exercise the discretionary power conferred by s501(2) of the *Migration Act* (the **MA**) to cancel a person's visa where there has been an earlier decision, of either the Administrative Appeals Tribunal (**Tribunal**) or the Minister's delegate (**Delegate**), to not cancel the visa where the facts giving rise to the satisfaction of the jurisdictional fact have not changed (the **Respondent's construction**).
- 30 3. Whilst the character and nature of the process reposed in the Tribunal is substantially different to that of the process undertaken by the Delegate, as matter of statutory construction, the answer is no different as between an earlier decision of the Delegate or the Tribunal.
4. The appellant contends that it may make a further decision, pursuant to s501(2), in relation to a non-citizen who retains a visa, in circumstances where new facts emerge (after the earlier decision) which bear in some material way upon the exercise of discretion (see AS [23]). This submission is advanced in two principle ways:
 - 40 i. That an earlier decision not to cancel a visa is not an exercise of executive power (AS [24] and [30]); and
 - ii. In the alternative to the above proposition, that s33 of the *Acts Interpretation Act* 1901 (Cth) (the **AIA**) provides the mechanism for the power to be re-exercised from time-to-time as occasion requires (AS [31]).
5. There are three constructional choices (or implications) that flow from the appellant's submission:
 - i. That the visa holder may be subject to repeated decisions on the same facts (as distinct from the mere effluxion of time – if that be even possible);

Morning Star Legal and Migration Services
 4 Johnson Avenue
 SEVEN HILLS NSW 2147

Telephone: 0478 173 474
 Fax: N/A
 Email: mipf@optusnet.com.au

- ii. That the power can be exercised upon the satisfaction of a jurisdictional fact, determination of which is left exclusively within the domain of the executive divorced from legislative constraints; or
- iii. Closely related to (i) above, the visa holder is liable to visa cancellation by reference to any new ancillary fact however trivial, in the sense that the discretionary limb is always open for exercise.

6. The respondent advances its construction set out above at [2] over the constructions open at [5]. The choice, to be viewed against:

- 10 i. The principle of legality and the requirement of stability and certainty in administrative decision making where fundamental rights are at play;
- ii. The proper functioning of the separation of powers between the executive and the legislature;
- iii. The implications upon the Court's supervisory jurisdiction in relation to satisfaction of jurisdictional facts and the circumstances in which a visa holder may be confronted with the subjective criteria going to that satisfaction (RS [43] to [59]); and
- iv. The function and utility of a Delegate's decision and, perhaps more significantly, the Tribunal's statutory purpose by the AAT Act as a merits reviewer whose decision ought to be taken to exhaust the statutory controversy raised by s501 (see RS [15] and 20 [25] to [31]).

7. What is clear from the reasoning discerned in *Parker* and the minority reasoning in *Brown/Makasa*, is that there is a reluctance to construe the power being available subsequently on the same facts. These authorities suggest that the subsequent decision must take into account the *change* of events from the earlier decision and the decision now being engaged with. In the case of Bromwich J in *Brown*, that was framed as an invocation of a new jurisdictional fact (see [180] and [205]) and in the case of Justice Besanko in *Brown*, it was framed as a mandatory consideration in the exercise of the discretion (from [122]).

30 **Questions arising before the Court**

8. Therefore, the appeal requires a closer and more detailed analysis of several cascading questions to which the respondent will address in sequence:

- i. Is the 2013 Tribunal decision the completion of a process that warrants the status of a final administrative decision to which the common law doctrine of *functus officio* applies? To this end:
 - a. Is the expression, an “exercise of power” in the context of s501(2), a question of the exercise of powers, duties, and functions as a matter of substance over form?
 - 40 b. What is the nature of the 2013 decision of the Tribunal and how does it affect legal rights?
- ii. What role does s33 AIA play in permitting a subsequent exercise of that power, duty or function? To this end:
 - a. In the context of s501(2) of the Act, what do the words “occasions require” mean? Is it a forward-looking concept?
 - b. Whether the deeming provisions in section 501(6) are the jurisdictional facts conditioning the exercise of power? Or rather, is it the suspicion and satisfaction in s501(2)(a) and s501(2)(b) of the Act.

- c. For the purposes of s501(2) what are the “occasions required” for a subsequent consideration of the visa cancellation power? Is it:
 - i. the approach proffered by Bromwich J (or the apparent approach of the Court in *Parker*) to imply a new jurisdictional fact?
 - ii. exercisable on the same facts? – a ministerial change of mind; or
 - iii. exercisable, consistent with the Act itself, on the jurisdictional basis set out in the Act, which may arise from time to time.
- d. What is the textual implication of s501(6C)? Does it provide a complete answer?

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- iii. If there is a jurisdictional requirement of a new material fact demonstrating change or difference, was this requirement fulfilled in the decision affecting Mr Makasa?

9. There are two remaining questions, to which the respondent will finally turn:

- i. Is the earlier decision to be treated as mandatory consideration of great importance? If so, was that done?

- ii. Was the decision legally reasonable by:

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- a. intelligible justification - by reference to the earlier Tribunal decision and, in itself; and/or
- b. an outcome focused approach - the demonstration of a logical connection between the evidence and conclusions drawn.

10. A detailed factual analysis of the materials will be required to resolve question 8(iii) and 9 above.

Dated: 12 November 2020



Awais Ahmad

Maurice Byers Chambers

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Dr Jason Donnelly

Latham Chambers