

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v MAKASA (S103/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 22

Date of judgment: 28 February 2020

Special leave granted: 12 June 2020

Mr Likumbu Makasa is a Zambian citizen who arrived in Australia in 2001, aged 18. In 2005 he was convicted of three counts of common assault and received concurrent good behaviour bonds for each offence. In 2007 he was convicted of a series of driving offences, including drink driving. In 2009 Mr Makasa was also found guilty of three counts of sexual intercourse, knowing that the Complainant was under 16. He was then sentenced to three concurrent terms of 2 years imprisonment, with a single 12 month non-parole period.

In 2011 the Minister's delegate cancelled Mr Makasa's visa under s 501(2) of the *Migration Act 1958* (Cth) ("Migration Act"), a decision that was later set aside by the Administrative Appeals Tribunal ("AAT") in 2013.

In 2017 Mr Makasa was convicted of a minor parole violation, while in a separate incident that year he was also convicted of a series of mid-level driving offences concerning alcohol. It was these two convictions that triggered a process of reconsideration of the cancellation of his visa. On 18 October 2017 the Minister then personally cancelled his visa under s 501(2) of the Migration Act. An unsuccessful application for judicial review then followed.

On 28 February 2020 the Full Federal Court (Allsop CJ, Kenny, Banks-Smith and Besanko JJ; Bromwich dissenting) upheld Mr Makasa's subsequent appeal. Allsop CJ, Kenny & Banks-Smith JJ held that the Minister had no power to re-exercise his discretion under s 501(2) of the Migration Act to cancel Mr Makasa's visa where the delegate had already exercised that power. This is in circumstances whereby the AAT had already set aside the delegate's cancellation and whereby the Minister was relying on the same facts as the AAT to enliven the discretion under s 501(2). Their Honours however held that the Minister, acting personally, could set aside the AAT's decision (and substitute his own decision under s 501A, providing that conditions enlivening the power in ss 501A(2) or (3) were met).

While also allowing Mr Makasa's appeal, Justice Besanko held that the Minister had failed to consider a relevant consideration, that being the earlier decision of the AAT not to cancel Mr Makasa's visa. Justice Bromwich however found that the Minister's conclusion that Mr Makasa represented a low, but continuing risk of sexual reoffending may have been pessimistic, but it was not legally unreasonable.

The grounds of appeal include:

- The Full Court erred by finding that the Minister did not, at the time of the decision under review, have power to exercise the discretion conferred by s 501(2) of the Migration Act to cancel Mr Makasa's visa.
- The Full Court erred by finding that the Minister was not able to rely upon the same offences to enliven the discretion in s 501(2) of the Migration Act as had been relied upon by a delegate and by the AAT in prior decision making as to whether the power to cancel Mr Makasa's visa should be exercised.