



HIGH COURT OF AUSTRALIA

3 February 2021

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v MAKASA

[2021] HCA 1

On 12 November 2020, the High Court unanimously dismissed an appeal from a judgment of the Full Court of the Federal Court of Australia ("Full Court"). Today, the High Court published its reasons for that decision. The question for determination was whether the Minister for Immigration and Border Protection ("the Minister") could re-exercise the power conferred by s 501(2) of the *Migration Act 1958* (Cth) ("the Act") to cancel a visa on character grounds after the Administrative Appeals Tribunal ("AAT") had set aside a prior decision of the delegate of the Minister to cancel the visa and substituted a decision that the visa should not be cancelled.

Following the AAT's decision, the respondent was subsequently convicted and sentenced in relation to two further offences involving failing to comply with reporting obligations and driving under the influence of alcohol. Being satisfied that the respondent failed to pass the character test solely by reason of the sentences imposed in respect of the earlier convictions that formed the basis of the first cancellation decision, but taking the subsequent convictions into account in the exercise of discretion, the Minister personally purported to re-exercise the power conferred by s 501(2) of the Act to cancel the respondent's visa.

The respondent applied to the Federal Court of Australia for judicial review of the Minister's decision, which was dismissed at first instance. On appeal, the Full Court, by majority, allowed the respondent's appeal. By grant of special leave, the Minister appealed to the High Court. The High Court upheld the orders of the Full Court but gave different reasons for its decision.

The High Court reasoned that the answer to the question for determination turned on whether, and to what extent, there appeared sufficiently for the purposes of s 2 of the *Acts Interpretation Act 1901* (Cth) ("the AI Act") an intention contrary to the application of the general prescription in s 33(1) of the AI Act that a statutory power "may be exercised ... from time to time as occasion requires". The High Court held that, where there is no different factual basis on which to form a reasonable suspicion that a person does not pass the character test, such an intention emerges by reference to two principal considerations. The first is inherent in the nature of the merits review function of the AAT. The function of the AAT, the High Court observed, is "to do over again" that which was done by the primary decision-maker, and that function would be reduced to a mockery were the subject-matter of the primary decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review. The second is the existence of s 501A of the Act, which confers a power on the Minister to personally re-exercise the power conferred by s 501(2) in certain circumstances. The High Court held that the existence of the special power, subject to limitations and qualifications, means that the general power conferred by s 501(2) cannot be exercised to do that which is the subject of the special power. The result is that the Minister can only re-exercise the power under s 501(2) either in reliance on s 501A or where subsequent events or further information provide a different factual basis for forming a reasonable suspicion that the person does not pass the character test.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.