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

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the Internet.

Part II: Reply

Section 501CA(3)(a)

2. The duty cast upon the Minister by s 501CA(3)(a) of the *Migration Act 1958* (Cth) (**Act**) requires nothing more than to *give* the written notice and the particulars of relevant information. That is a physical act. The words "in the way that the Minister considers appropriate in the circumstances" should be understood to *permit* the Minister choice as to the *way* of giving the things listed in s 501CA(3)(a), not to expand *what* is to be given, or to provide (*cf* RS [33]-[36]) an objective question for a court to determine what way *is* appropriate in the circumstances. The subparagraph does not "entai[l] a minimum standard as to the comprehensibility of the notice and particulars" (RS [34]), or demand inquiry into, and identification of, whatever "*may* affect [the former visa holder's] capacity to receive, understand and make representations" (RS [2(a)]), emphasis added), or require that understanding be achieved. The words in the chapeau to s 501CA(3)(a) do not allow such extensive additions to be read into the provision.

3. Section 501CA(3)(a) is clear as to *what* is to be given to the former visa holder (*cf* RS [34], [36]-[37]). As to s 501CA(3)(a)(i), the notice of the cancellation decision must be given in writing ("written notice") and it need only state that the former visa holder's visa was cancelled pursuant to s 501(3A).[1] As to s 501CA(3)(a)(ii), the content of the "particulars of the relevant information" is to be understood in terms of the definition of "relevant information" in s 501CA(2). The meaning of exact analogues of that definition has been settled by this Court.[2] All that the Minister is required to do is to "give" the things identified in s 501CA(3)(a) – not further explanation or actual understanding (*cf* RS [38]).

4. The phrases "state of considered appropriateness", "irreducible minimum standard" and "minimum standard of comprehensibility" do not assist (*cf* RS [38]-[39], [41]) once it is accepted that s 501CA(3)(a) only requires the physical provision of the things listed. They serve only to illustrate the gap between the text of s 501CA(3) and the majority's construction below.

5. Contrary to the respondent's submissions (including RS [31]), *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 (***WACB***) cannot be relevantly distinguished. As to RS [31(a)], while s 430D did not include the words "in the way that the Minister considers appropriate in the circumstances", those words in

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1 *cf Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 at 319-321 per Tamberlin J, 324-326 per Sundberg J, 332 per Marshall J.

2 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195-1196 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [22] per French CJ, Heydon, Crennan, Kiefel and Bell JJ; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 223 [9] per Gageler, Keane and Nettle JJ.

s 501CA(3)(a) are, as previously submitted, only permissive and do not require more to be given. As to RS [31(b)], the fact that s 430D was not accompanied by a requirement to "invite" a response from the review applicant is of no present consequence, as the next step was judicial review, not representations to the administrative decision-maker to revoke the decision that was made. RS [31(b)]-[31(c)] also ignore that the provision of the written statement pursuant to s 430D did have real, significant consequences for the review applicant, as it triggered the time within which he could seek judicial review.

6. The administrative burden and uncertainty that would be generated by adopting the respondent's construction of s 501CA(3) are self-evident (AS [45], [51]-[53]; *cf* RS [42]). On the respondent's construction (illustrated by the breadth of the issue framed at RS [2(a)]), the Minister would fall under a duty or need to enquire as to the person's comprehension of English, mental and/or physical health, mental capacity and the available resources in the place in which he or she is incarcerated – even though the Department has no control over the processes of state prison authorities or means of compelling co-operation.

Section 501CA(3)(b)

7. The respondent seeks to read into this sub-paragraph a requirement of comprehension by the recipient. Any natural justice purpose of this provision does not envisage anything beyond its terms and the word "invite" does not import the obligation to ensure or achieve understanding contended for by the respondent (*cf* RS [23(a)], [26]).

8. The expressions "meaningful" and "real and meaningful" (RS [26]-[29], [32]) do not assist in the construction of s 501CA(3)(b) and, as submitted at AS [55]-[56], ss 360(1) and 425(1) provide no counterpart or true analogy (*cf* RS [27]-[29]). Their terms are very different from s 501CA(3)(b). They require, as a central feature[3] in the conduct of a "review" of a Part 5- or Part 7-reviewable decision, the Administrative Appeals Tribunal to invite a review applicant "to give evidence and present arguments relating to the issues arising in relation to the decision under review" at an oral hearing. This Court has explained the importance of the words "issues arising in relation to the decision under review".[4] Section 501CA(3)(b), however, imposes no corresponding duty to identify issues (*cf* RS [28]-[29]) and includes no requirement for an oral hearing. The terms of s 501CA(3)(b), bare as they are, leave no room for the respondent's submissions or the plurality's construction.

9. The statement of principle in *WACB* (at 102 [43]) that the terms of the Act apply irrespective of differences in levels of comprehension between non-citizens would be turned on its head if the respondent's argument (RS [30]) that the provision of "a fair

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3 *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 at 552 [44] per Black CJ, Hill and Weinberg JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 560 [33]-[34] per Gray, Cooper and Selway JJ.

4 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162-164 [33]-[40] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

opportunity to individuals with different capacities" requires "appropriate adjustments [to be] made for those differences" were accepted.

The respondent's onus of proof

10. If the Minister succeeds in demonstrating that the majority in the Federal Court was wrong to hold that the performance of the duty in s 501CA(3) required comprehension by the respondent of the contents of the notice, this issue does not arise (*cf* RS [44]).

11. Contrary to RS [45]-[49], the respondent did not discharge his onus of proof. No 'constructive knowledge' ought to be imputed to the delegate of what is said to have been known by QCS officers, who were relied upon to do no more than furnish documents to the respondent. While the knowledge of a departmental officer of a matter may be imputed to a minister of state required to take that matter into account as a mandatory relevant consideration,[5] that principle does not extend to impute to the Minister the knowledge of the QCS officers in this case (*cf* RS [45]). Departmental officers are not shown to have any awareness of, or control over, the processes of state prison authorities and the QCS officers here were not shown to have had any duty to give information to the Minister as to capacity matters. The respondent's reliance on cases such as *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, therefore, is misplaced.[6] Also, the lawyer/client relationship is no counterpart to that between QCS and the Minister (*cf* RS [46]).

12. None of RS [47]-[49] shows that the Minister either knew, or ought reasonably to have been aware, of the capacity matters prior to, or at the time that, the duty in s 501CA(3) fell to be performed. No protection visa file was in evidence (*cf* RS [47]-[48]). In any event, the grant of a protection visa does not suffice to show lack of capacity. The conversation between the respondent and the ABF officer post-dated the giving of the notice (*cf* RS [48]). As to RS [49], the Federal Court ought to have confined itself to the material that was before the Minister when the duty in s 501CA(3) was discharged (see AS [60]). No evidence was adduced by the respondent in either court below as to what enquiries were, or were not, made by the Minister in relation to the capacity matters.

Delegation

13. The theme running through the respondent's submissions on the question of delegation appears to be that a "power" cannot be a "task" (as understood in s 497) (RS [56]). That proposition should be rejected. Otherwise, there would be no need for the words "except the taking of a decision in each case whether a visa should be cancelled" in s 497(2).[7]

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5 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31 per Gibbs CJ, 45 per Mason J, 66 per Brennan J, 70 per Deane J.

6 See at 658-659, where Mason J explained that the proposition that the law imputes to a principal the knowledge of an agent gained in the course of a transaction in which the agent is employed on the principal's behalf applies where the agent is under a duty to communicate that knowledge to the principal.

7 See also *McCulloch v Minister for Home Affairs* [2019] FCA 54 (***McCulloch***) at [42] per Markovic J; *Minister for Home Affairs v CSH18* (2019) 269 FCR 206 at 220 [66] (penultimate sentence) per Jagot, Robertson and Stewart JJ.

14. Section 497 is not a "carve-out" from s 496 and the Minister does not contend otherwise (*cf* RS [52]-[53]). Section 497(2) draws no distinction between 'substantive' or 'non-substantive' exercises of power (*cf* RS [52], [57]) and is broad enough to encompass the steps in s 501CA(3) – being tasks in connection with the cancellation under s 501(3A) – even if the taking of those steps is properly characterised as the exercise of a power.

15. The respondent's submissions (including RS [54]-[55] and [59]), if accepted, would render s 497 otiose. The point of s 497(2) is that some tasks (which may be powers) in connection with cancellation of a visa do not require a delegation to be performed validly. The example to which the respondent refers at RS [59], being a task pre-dating the cancellation decision, is not exhaustive of the scope of s 497(2), which is wide enough also to cover steps consequent upon cancellation that are in connection with cancellation.[8] It is difficult to see what task in connection with cancellation other than compliance with s 501CA(3) would be required after cancellation.

16. Section 497(2) refers to "any" task "in connection with" cancellation and is not limited to "administrative" or "clerical" tasks (*cf* RS [57(a)], [57(c)]). Section 497(3), on the other hand, does refer to "administrative and clerical tasks" and extends beyond delegations of the kind mentioned in ss 496(1) and (2). The terms of s 497(3) suggest that it was enacted to put beyond doubt that the *Carltona* principle continues to apply to the performance of administrative and clerical tasks under the Act and that the enactment of ss 497(1) and (2) should not be taken to suggest otherwise. Here, whether pursuant to s 497(2) or the *Carltona* principle, the giving of the notice, particulars of relevant information and invitation under s 501CA(3) was validly performed by the delegate who made the cancellation decision under s 501(3A).

Notice of contention

17. As to the notice and invitation given to the respondent on 4 January 2017, for the following reasons the statement appearing at CAB 11, the effect of which was that the respondent was taken to have received the notice and invitation on 3 January 2017, did not invalidate it as an invitation for the purposes of s 501CA(3)(b) (*cf* RS [67]).

18. *First*, contrary to any submission otherwise at RS [61] and [65]-[67] and Rares J at CAB 222 [184]-[185], s 501CA(3)(b) did not require the Minister to specify in the notice the date on which the respondent was taken to have received it or the date by which representations may be made.[9] The provision instead requires that the Minister "invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision". The "ascertain[ment]" of the "manner" in which, and the "period" within which,

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8 *McCulloch* at [42].

9 Indeed, not even s 66(2)(d)(ii) requires so much to be done (*cf* Rares J at CAB 222 [185]). It requires only that the Minister "state" the time within which merits review may be sought: *BMY18 v Minister for Home Affairs* (2019) 271 FCR 517 at 523 [19] per Reeves, Perram and Charlesworth JJ.

representations may be made is left by s 501CA(3)(b) to the recipient to determine. The notice in this case correctly stated that any representations must be made "within 28 days after [the respondent] [was] taken to have received th[e] notice" (CAB 10). That was sufficient compliance with s 501CA(3)(b) (*cf* RS [67] and Rares J at CAB 222 [184]-[185]). The fact that the Minister went on, at CAB 11, to identify the time at which the respondent was taken to have received the notice – and did so incorrectly (assuming that to be so) – is of no relevant consequence. If the Minister was not required to take that step, any error in doing so could not affect the validity of the invitation – or that of the notice.[10]

19. *Secondly*, the statement at CAB 11 was correct. The Minister purported to give to the respondent the notice and invitation by e-mail on 3 January 2017. Ordinarily, absent any error in giving by e-mail, reg 2.55(8) would operate to deem receipt on that date. However, here the Minister made an error in transmitting the notice and invitation by e-mail: he did not transmit them to an e-mail address nominated or permitted by the respondent; instead, they were transmitted by e-mail to the Brisbane Correctional Centre (RS [65]). Despite that error, reg 2.55(9)(c) would have operated to deem receipt at the time specified by reg 2.55(8) (i.e. at the end of 3 January 2017) such that the statement at CAB 11 was not incorrect. It is common ground, however, by reason of events the next day, that the notice and invitation were received by the respondent on 4 January 2017 (RS [62]). By force of reg 2.55(9)(d), the respondent was then taken to have received the notice and invitation on 4 January 2017, and the 28-day period commenced on that date. But none of that is to say that the statement at CAB 11 was wrong in the first place (*cf* RS [65]).

20. Whether the handing of the notice and invitation to the respondent by the QCS officer on 4 January 2017 is seen as giving by hand on that date (by reason of reg 2.55(5)), or an act to which regs 2.55(9)(b) and (d) applied (as submitted above), the 28-day period within which to make representations in fact commenced on 4 January 2017. But the question of whether the invitation was valid is not the same as when the 28-day period in fact started to run. For the reasons given at [18] above, or, alternatively, for those at [19], the statement at CAB 11 did not invalidate the invitation.

Dated: 9 October 2020

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[10] *cf*, in a different context, *Snedden v Minister for Justice* (2014) 230 FCR 82 at 109 [153] per Middleton and Wigney JJ, 126 [242] per Pagone J.