HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27A – Appellant's submissions
Note: see rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
Applicant

AND

JOSEPH LEON MCQUEEN
Respondent

APPLICANT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The issue arising in this proceeding is whether the Full Court erred in concluding that s 501CA(4) of the *Migration Act 1958* (Cth) does not permit the Minister to rely on a Departmental synthesis or summary of a person's representations but requires the Minister to read the actual documents submitted by the person.

PART III SECTION 78B NOTICE

3. The Minister does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth)

PART IV CITATION OF REASONS FOR JUDGMENT

4. The primary judge's reasons for judgment are unreported. The medium neutral citation for those reasons is [2022] FCA 258 **(PJ)** (**AB 262–306**).

5. The Full Court's reasons for judgment are reported at (2022) 292 FCR 595 (**FC**) (**AB 312–351**).

PART V FACTUAL BACKGROUND

6. The respondent is a citizen of the United States of America who was sentenced, in September 2019, to a term of imprisonment having been convicted of selling and

offering to sell or supply methylamphetamine, possession of methylamphetamine, possession of unlawful property and offering to sell or supply cannabis. As a result of that sentence, the respondent's visa was mandatorily cancelled on 13 November 2019 pursuant to s 501(3A) of the *Migration Act* (**PJ [1]** (**AB 266**)).

7. Section 501CA (quoted at **FC [3]** (**AB 315**)) requires the Minister to invite a person affected by such a mandatory cancellation to "make representations to the Minister" (sub-s (3)), and empowers the Minister to revoke such a cancellation if "the person makes representations in accordance with the invitation" and "the Minister is satisfied: (i) that the person passes the character test (as defined by s 501); or (ii) that there is another reason why the original decision should be revoked" (sub-s (4)). The Minister may delegate the power in s 501CA(4) pursuant to the general power of delegation in s 496.

8. Having been notified of the cancellation of his visa and invited to make representations about the revocation of that decision, the respondent submitted documents containing such representations and supporting material to the former Minister (**PJ [2]** (**AB 266**)). The former Minister was provided with a brief by his Department, which included (among other things):

   (a) a summary of the representations made by the respondent and their supporting material, cross-referenced to the documents actually submitted by the respondent (**AB 9–20**);

   (b) copies of all of the documents submitted by the respondent (**AB 22–25, 41–253**); and

   (c) a draft statement of reasons (which the Minister ultimately adopted) (**AB 26–40**).

9. On 14 April 2021, the former Minister personally decided not to revoke the cancellation. He signed a "decision record" and the draft statement of reasons (**AB 21, 40**).

10. Despite the fact that the signed statement of reasons stated twice that the former Minister had considered the representations made by the respondent ***and the documents***

submitted in support of those representations (**AB 26 [7], 27 [11]**), the primary judge found (**PJ [80]** (**AB 296**)) that the former Minister had not in fact done so. The Full Court upheld this finding (**FC [43]–[73]** (**AB 328–336**)). The Courts below found that the former Minister had read only the Departmental summary and draft statement of reasons. In this Court, the Minister does not challenge this factual finding. Rather, the Minister's challenge is directed to the conclusion of general importance by the Full Court, for which this finding provided the premise.

11. The Full Court concluded that where the Minister exercises the power under s 501CA(4), the Minister is required to read the actual documents submitted by a person before doing so. The Full Court held that the Minister cannot rely on a Departmental synthesis or summary of those documents (**FC [78]–[106]** (**AB 337–345**)).

12. The Full Court's conclusion was not reached on the orthodox basis that the particular Departmental summary at issue here was deficient in a material way, though the Full Court went on to give examples of differences of "impression" that might be conveyed by reading the actual documents (**FC [107]–[130]** (**AB 345–351**)). Rather, the Full Court's altogether more sweeping conclusion was that, for the Minister to read only a Departmental synthesis or summary of representations, rather than the actual documents submitted by the former visa holder, was of itself a jurisdictional error regardless of the accuracy and completeness of the Departmental brief.

13. On 11 August 2023, Gordon and Gleeson JJ referred the Minister's application for special leave to appeal to be heard by the Full Court as if on appeal (**AB 375**). Among other things, two matters were raised during the course of the oral hearing on that day which are addressed further below: *first*, whether the Full Court's reasons are indeed to be understood in the way summarised immediately above; and *secondly*, whether this matter is an inappropriate vehicle for a grant of special leave because the Department brief here was materially deficient.

14. Given the general significance of the Full Court's conclusion, both to the operation of s 501CA(4) of the *Migration Act* and Ministerial reliance upon Departmental briefs more generally, the Minister's application for special leave was, and is, made on the basis of not seeking to disturb the costs orders in favour of the respondent in the Courts below and paying the respondent's costs in this Court in any event.

PART VI ARGUMENT

The orthodox approach

15. There is a well-established line of authority — including in the *Migration Act* context — concerning the extent to which a Minister, required by statute to "consider" certain documents, may be assisted by a synthesis or summary prepared by their Department. Without seeking to be exhaustive, the following appellate authorities are of note.

16. *First*, in this Court, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[1] Gibbs CJ said:

> Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law.

17. Justice Brennan made a similar statement:[2]

> Part of a Department's function is to undertake an analysis, evaluation and précis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and précis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-

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[1] (1986) 162 CLR 24 at 30–31.

[2] (1986) 162 CLR 24 at 65–66.

> making while being assisted to make the decision by departmental analysis, evaluation and précis of the material relevant to that decision.

18. *Secondly*, in *Tickner v Chapman*,[3] each member of the Full Court of the Federal Court accepted that, as a matter of principle, the Minister could, depending on the circumstances, rely on a Departmental summary. Thus, Black CJ "would not rule out the possibility of some representations being quite capable of effective summary, yet there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it".[4] Burchett J referred expressly to Gibbs CJ's comments quoted above.[5] Kiefel J (as the Chief Justice then was) said:[6]

> A "consideration" of the representations does not in my view require him to personally read each representation. But it may be as well for him to do so, for if his staff are to convey what is contained within them, they must do so in a way which provides a full account of what is in them. If they do not, the Minister will not have considered something he is obliged to, and in this respect the observations of Gibbs CJ in *Peko-Wallsend* at 30 as to what results are apposite. It may vitiate his decision.

19. Contrary to **FC [102]** (**AB 344**), for the reasons just explained Kiefel J's observations did not go further than those of the other members of the Court in *Tickner*. Nor, given this fact and the support provided by *Peko-Wallsend*, were they to be put aside on the basis that they were mere *dicta*. Consistently with the passages from *Peko-Wallsend* quoted above, each member of the Court in *Tickner* expressed a nuanced view contrary to the uncompromising conclusion of the Full Court in this case.[7] Likewise, the Full Court here was simply wrong to say at the end of **FC [98]** (**AB 343**) that the Court in

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[3] (1995) 57 FCR 451.

[4] (1995) 57 FCR 451 at 464.

[5] (1995) 57 FCR 451 at 477.

[6] (1995) 57 FCR 451 at 497.

[7] See also *Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 at [169] per Jagot J: "As observed by Mason P in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [211], the reasoning in *Tickner v Chapman* does not exclude the capacity for a decision-maker to consider a matter by relying upon another person's description or summary of the matter. As the decision of the trial judge in that matter … disclosed, the facts were unusual";. *Minister for Aboriginal Affairs and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40 (FC) at 61 per *curiam*, citing *Tickner*: "it may be possible for a Minister to have the contents of representations conveyed to him".

Tickner concluded that the Minister had to personally read the representations in order to "consider" them. Whether or not that was so depended on all the circumstances.

20. *Thirdly*, the Full Court of the Federal Court has correctly applied these authorities in the context of s 501(3) of the *Migration Act*. In *Carrascalao v Minister for Immigration and Border Protection*,[8] the Full Court accepted that the Minister could, depending on the circumstances, rely only on a Departmental summary of material submitted by a visa holder and rejected a challenge to the Minister's decision to cancel a visa on the basis that the Minister had relied only on such a summary:

> Subject to the qualifications to which we referred earlier, the Minister was entitled to have regard to the Department's summary of the material. Mr Carrascalao did not contend that any aspect of that summary was inaccurate, incomplete, or did not convey the force of the argument made on his behalf. The Department's submission also directed the Minister's attention to the material itself, which was included as an attachment to the submission. The Minister needed to turn his mind to whether or not he needed to refer to the attachment itself, as opposed to rely upon the Department's summary of this material.

21. Contrary to **FC [84]** (**AB 338**), *Carrascalao* addressed precisely the same point as that at issue in this case, albeit in the context of a slightly different character cancellation provision. Consistently with earlier authority, in the context of s 501(3) there was no necessary failure by the Minister to "consider" material by reading, not the material itself, but a Departmental summary of that material. Whether or not this was sufficient was said to depend on whether the summary was "inaccurate, incomplete, or did not convey the force of the argument made".

22. *Fourthly*, this orthodox approach to the use of a Departmental synthesis or summary was recently referred to by members of this Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[9] Thus, Kiefel CJ, Gageler and Gleeson JJ said that "[t]he relationship between a Minister and the department administered by the Minister which can ordinarily be taken to be contemplated by the Parliament when conferring a discretionary statutory power on a Minister is that described by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*".[10]

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8 (2017) 232 FCR 352 at [61], [62], [138] per *curiam*.

9 (2023) 97 ALJR 214.

10 (2023) 97 ALJR 214 at [25].

Referring to the same passage in *Peko-Wallsend*, Gordon J said: "the Minister may personally make a statutory decision while relying on the department's summary, provided the Minister does in fact have regard to all relevant considerations that condition the exercise of the power".[11] Again referring to the same passage, Jagot J said: "The fact that a Minister's appreciation of a case to be considered may depend 'to a great extent' on the analysis and advice of departmental officers does not mean that the Minister, in deciding a response to a request based on that analysis and advice, is not personally making the decision".[12]

23. *Fifthly*, the same orthodox approach has been accepted in the United Kingdom. As *De Smith's Judicial Review* notes,[13] the "leading case" is the Court of Appeal decision in *R (on the application of National Association of Health Stores) v Department of Health*.[14] The Court of Appeal quoted and followed the approach in the reasons of Gibbs CJ and Brennan J in *Peko-Wallsend*.[15]

24. In short, unless the relevant statute provides otherwise, for a Minister to make a decision relying on a Departmental synthesis or summary is not *per se* a jurisdictional error. There is error if, and only if, the result of relying on the Departmental brief is that the Minister makes some recognised species of jurisdictional error. For instance, if the brief omits a matter which the Minister is required to consider, and consideration of that matter could realistically have made a difference to the outcome, the Minister will have made a jurisdictional error by failing to take into account a material mandatory consideration. Such a process of reasoning may be encapsulated by the shorthand of saying that the Minister may rely on a Departmental brief which is materially accurate and complete. But that shorthand must not distract from the necessity to ask in any given case whether an asserted deficiency in a brief has resulted in the Minister making some recognised species of jurisdictional error. Reliance on a Departmental brief which

11 (2023) 97 ALJR 214 at [91].

12 (2023) 97 ALJR 214 at [295].

13 Hare et al (eds), *De Smith's Judicial Review* (9th ed, 2023) at 293 [5-118].

14 [2005] EWCA Civ 154; *Times*, 9 March 2005.

15 [2005] EWCA Civ 154; *Times*, 9 March 2005 at [29], [61]–[65] per Sedley LJ, [73] per Keene LJ, [88] per Bennett J. See also *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] AC 551 (PC) at 569 per Viscount Dilhorne, for the Board: "In some circumstances it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the board."

is asserted to be deficient in some way is not, itself, a jurisdictional error. Still less is reliance on a Departmental brief ***irrespective*** of whether it is deficient.

The Full Court's departure from the orthodox approach

25. In that context, the Full Court's radical departure from the orthodox approach may be clearly identified.

26. At **FC [43]** (**AB 328**), the Full Court said: "we consider the primary judge was correct to approach this matter on the basis that the Minister was required personally to consider Mr McQueen's representations to him, and could not rely only on a summary produced to him by his officers in the Departmental brief". Nowhere did the Full Court qualify this absolute statement by reference to the accuracy or completeness of the summary.

27. At **FC [84]** (**AB 338**), the Full Court said: "Summaries provide a useful focus, but they do not relieve the repository of the power from the obligation to ***directly*** consider the representations made" (emphasis added). Evidently the Full Court used the word "directly" to contrast consideration of the substance of the representations made by reading a summary or synthesis of them in a Departmental brief.

28. At **FC [89]** (**AB 340**), the Full Court said of the reasons of Gibbs CJ in *Peko-Wallsend*: "His Honour's statement cannot simply be picked up and applied at face value to every statutory power reposted in a Minister. In our respectful opinion, it is not applicable to the power presently under consideration." It is precisely because of the absoluteness of the position taken by the Full Court that the Court was concerned to put aside the reasons of Gibbs CJ in *Peko-Wallsend* and, indeed, the reasons of Kiefel J in *Tickner* and the Full Court in *Carrascalao*, as noted in paragraphs 19 and 21 above.

29. It is true that from **FC [107]** (**AB 345**) to the end of its reasons, the Full Court gave examples of what it saw as the differences between the Departmental brief and the actual documents submitted by the respondent. But the Court was, in terms (see **FC [107]** (**AB 345**)), simply giving examples which it considered supported its conclusion that, as a matter of construction, it was necessary under s 501CA(4) of the *Migration Act* for the Minister to read the actual documents submitted by the former visa holder. Nowhere did the Full Court engage with whether the matters it identified

as differences were matters that were mandatory for the Minster to consider. Nowhere did the Full Court ask whether, given the way in which the Minister had in fact reasoned, the various different impressions the Full Court said could be gained had a realistic prospect of making a difference. That is because, on the Full Court's reasons, those questions were irrelevant: the mere fact of reliance only upon the Departmental brief was itself an error.

The correct approach to s 501CA(4) of the *Migration Act*

30. The Full Court's reasoning can thus be sustained if, and only if, the Court was correct to conclude that s 501CA(4) of the *Migration Act* was an exception to the orthodox approach to the use of Departmental synthesis and summary canvassed above. For the following reasons, the Full Court's conclusion was wrong.

31. In the first place, the Full Court's conclusion is inconsistent with various aspects of this Court's reasoning concerning s 501CA(4) in *Plaintiff M1/2021 v Minister for Home Affairs*.[16]

32. The Court began:[17]

> It is, however, improbable that Parliament intended for that broad discretionary power to be restricted or confined by requiring the decision-maker to treat every statement within representations made by a former visa holder as a mandatory relevant consideration.

33. If it is the case that the Minister need not consider every statement within the documents submitted by a former visa holder, it must logically follow that there is no failure to consider any mandatory relevant consideration if the Minister relies on a Departmental summary of representations which excludes material that the Minister is not required to consider at all.

34. This Court continued:[18]

> It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the

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[16] (2022) 96 ALJR 497.

[17] (2022) 96 ALJR 497 at [23] per *curiam*.

[18] (2022) 96 ALJR 497 at [25] per *curiam*.

> statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement — the degree of effort needed by the decision-maker — will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.

35. If it is the case that the Minister does not act unreasonably by not considering (for example) lengthy, unclear and apparently irrelevant representations, it must logically follow that the Minister does not act unreasonably by relying on a Departmental summary which excludes those representations. More generally, depending on the circumstances, it may be entirely reasonable for a Minister to rely on a Departmental synthesis or summary.

36. To take what ought to be a trivial example of the points made immediately above, it is improbable that Parliament intended a Minister to be required to read highly repetitious documents restating, in perhaps identical words, the same content. It must have been intended that the Minister could rely on their Department to synthesise such representations into a document which states "the former visa holder has repeatedly submitted that" etc. Likewise, it is improbable that Parliament intended a Minister to be required to decipher a difficult to read handwritten document submitted by a former visa holder. It must have been intended that the Minister could rely on their Department to prepare a transcription. In each case, there could be no criticism of the Minister for failing to act reasonably and rationally in relying on their Department in this way.

37. The Full Court's conclusion denies even these examples. While the Full Court asserted (**FC [103]** (**AB 344**)) that its conclusion did not consign the Minister to a legal obligation to read every word on every page of every document, it is difficult to see how this can be avoided if — as the Full Court concluded — the Minister cannot rely on a Departmental summary of the kind mentioned above. Indeed, the Full Court later asserted that the repetitive nature of certain representations at issue here was a matter the Minister was required to take into account by considering the actual documents submitted (**FC [120]** (**AB 349**)). So too, the Full Court asserted that the handwritten nature of some of the documents at issue here was essential for the Minister to consider (**FC [124]** (**AB 350**)).

38. In the passage from *Plaintiff M1* quoted at paragraph 32 above, this Court cited the previous statement of the Full Court in *Minister for Home Affairs v Buadromo*[19] that the former visa holder's representations "are a mandatory relevant consideration as a whole and not as to the individual statements contained in the representations". To say that they are a relevant consideration "as a whole" is to point to the ***substance*** of the representations. It is inconsistent with this focus on substance to introduce a blanket insistence upon the Minister's considering the precise ***form*** in which they are submitted. Yet that is the purport of the Full Court's conclusion.

39. It may be accepted that, immediately following the passage from *Plaintiff M1* quoted in paragraph 32 above, this Court said: "Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations."[20] But it is evident this was not intended to deny the decision-maker's ability to do so through a materially accurate and complete summary or synthesis. To the contrary, two of the "well-established authorit[ies]" cited by the Court ***support*** the permissibility of a Minister's relying on Departmental synthesis or summary. One was *Tickner*, which has been referred to above. The other, *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah*,[21] referred to a failure to consider "the substance" of an application. For the reasons explained above, a focus on substance is fatal to the Full Court's conclusion.

40. Putting aside *Plaintiff M1*, nothing in the text or context of s 501CA(4) supports the Full Court's reasoning. The orthodox approach, which reflects the reality of Ministerial decision-making, must be taken to form the background upon which provisions like s 501CA(4) are enacted by the Parliament. The Full Court pointed to no authority where a provision had been approached in the manner in which the Full Court approached s 501CA(4). None of the matters to which the Full Court pointed in its reasons support such an approach:

    (a) The fact that the purpose of a representation in the context of s 501CA is to persuade, or that the "odds are already stacked against the individual", is hardly

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[19] (2018) 267 FCR 320 at [41] per *curiam*.

[20] (2022) 96 ALJR 497 at [24].

[21] (2001) 206 CLR 57 at [81]–[82].

unique (**FC [80]** (**AB 337–338**)). The same is so in relation to s 501(3), considered in *Carrascalao*.

(b) The fact that the Minister could choose to delegate the power under s 501CA(4) is of no moment (eg **FC [82], [84], [106]** (**AB 338, 345**)). The same was so in *Peko-Wallsend*.[22] More importantly, there is no reason to suppose that Parliament intended the Minister to be denied the ability to rely on a Departmental synthesis or summary of representations if the Minister wished to retain the ability to make the ultimate decision. Such reliance is, as the authorities show, an ordinary incident of Ministerial decision-making. That the existence or absence of a power of delegation is irrelevant is likewise supported by the application of *Peko-Wallsend* in *Tickner* and *Carrascalao*, where there was no power of delegation.

(c) It is unclear why the fact that, in *Peko-Wallsend*, there was a previous inquiry and recommendation by a Land Commissioner was thought by the Full Court relevantly to distinguish the case (**FC [88]** (**AB 339–340**)). Reliance upon the case in *Carrascalao* demonstrates that it does not. The same points may be made about the features of the regime in *Tickner* identified by the Full Court (**FC [93]–[95]** (**AB 341–342**)).

(d) The fact that personal decision-making by the Minister, rather than by a delegate, has the consequence that merits review is unavailable is unconnected to whether the Minister, in making their personal decision, may rely on Departmental synthesis or summary of representations (**FC [89]** (**AB 340**)).

(e) The Full Court's reference to the fact that the decision affects the former visa holder's liberty and ability to remain in Australia smacks of unfocused and inapposite invocation of the principle of legality (**FC [90]** (**AB 340**)). In any event, the same points could be made about the decision at issue in *Carrascalao*.

(f) The Full Court's conclusion is not assisted by considering whether, where a decision under s 501CA(4) is made by a delegate rather than the Minister personally, the delegate may rely on a summary prepared by a more junior

[22] See the discussion by Mason J: (1986) 162 CLR 24 at 37–39.

officer (**FC [126]** (**AB 350**)). At the level of basic concept, the position is the same: mere reliance upon a summary or synthesis is not a jurisdictional error. However, the position concerning the Minister and a delegate may differ, as a matter of fact. For one thing, it may be (as was the case here) that a direction under s 499 of the *Migration Act* applies to require a delegate, but not the Minister, to take account of particular considerations when deciding whether to revoke a cancellation decision. For another, the nature of the responsibility and role of a Minister and delegate are clearly distinct, and may rationally and reasonably inform ***how*** the task required by s 501CA(4) may be performed. For another, s 497(2) may be significant. It provides: "If the Minister delegates the power to cancel visas, the delegation does not require the delegate personally to perform any task in connection with the cancellation, except the taking of a decision in each case whether a visa should be cancelled". The short point is that the ***Minister's*** entitlement to assistance from Departmental staff is clear, including by relying upon Departmental synthesis and summary. Whether or not a delegate could rely on a summary prepared by another Departmental officer (junior or otherwise) may raise distinct issues.

No jurisdictional error was established

41. In light of the matters above, the correct way to approach the present matter was not to adopt the general conclusion that s 501CA(4) prohibits reliance by the Minister on Departmental synthesis or summary. It was to ask whether reliance on the Departmental synthesis and summary here meant that the former Minister failed to consider something in the respondent's representations which he was required to consider and whether, if so, that could realistically have made a difference to the outcome. As noted in paragraph 29 above, the Full Court did not attempt that task.

42. Further, almost all of the matters identified by the Full Court at **FC [107]ff** (**AB 345**) were ones which had not been raised by the respondent, were not raised by the Court with the Minister and on which, accordingly, the Court received no submissions from

any party. None of the matters identified can credibly be suggested to meet either requirement identified above. By way of example:

(a) The fact that a document is handwritten, where its substance is included in a Departmental submission, is wholly immaterial (**FC [108], [123]–[124]** (**AB 345, 349–350**)). It is equally possible that, had the former Minister been required to wade through a handwritten narrative, he would have been less able to identify the material points. That is why the Departmental summary was arranged by reference to the headings in the relevant Ministerial direction (cf **FC** [108], [113] (**AB 345–346**)).

(b) Taking the matters at **FC [109]–[112]** (**AB 346**), nowhere did the Full Court explain what different impression may be gained by reading the material mentioned, as opposed to the Departmental brief, how that difference was something ***required*** to be considered or how, if it was, that could realistically have led the former Minister to make a different decision given the material which the Full Court accepted ***was*** included in the Departmental brief. The same is also true as it concerns **FC [124]** (**AB 350**). The Full Court identified no error or omission in the Departmental summary of the letters written by the respondent's children and instead directed itself to the form in which those letters were presented.[23]

(c) The same absence of reasoning applies to **FC [113]–[117]** (**AB 346–348**). The Full Court identified no error or omission in the Departmental summary of the Parole Board's decision. Further, the Minister's reasons accepted that the respondent had been granted conditional parole (pending identification of suitable accommodation) and that, in the Board's view, the release of the respondent would not present an unacceptable risk to the safety of the community for reasons set out by the Minister (**AB 37 [86]–[87]**). The Minister further accepted that if the respondent's visa was reinstated and he returned to the community, he would have the benefit of parole supervision until 13 June

[23] The letters from those children are at **AB 158–161**. The Departmental summary of those letters is at **AB 13 [33], 17 [67]**.

2022 (**AB 39 [99]**). The Departmental summary closely followed the Board's reasons for granting parole.[24]

(d) The Full Court's observation at **FC [121]** (**AB 349**) concerning material provided by the respondent's partner does not identify any omission, misstatement or error in the Department's summary. It focuses upon only one paragraph of the Departmental summary, where there were other paragraphs that relevantly addressed submissions made by and about the respondent's partner, including quoting directly from those submissions.[25] As to the Full Court's observation at **FC [122]** (**AB 349**) that medical reports gave a "vivid description" of the challenges being faced by the respondent's partner and children that were capable of "making an impression", the Minister did not doubt or make any finding against those challenges. No finding was made by the Full Court as to the insufficiency or incorrectness of the Departmental brief concerning those reports.[26] To take one example, one of the medical reports was a mental health referral from a general practitioner concerning one of the respondent's children. The Departmental summary identified the existence of the referral and its contents, including by using the same language used in the referral to describe the child's symptoms and experiences.[27]

43. Even if this Court concludes that the Departmental brief here was such that Minister failed to consider a mandatory matter, and that the Full Court's actual decision (albeit not its reasoning) must therefore be affirmed, this is still an appropriate matter in which to grant special leave, though the appeal would then be dismissed. That is because, even in that event, the matter will still have served the very valuable purpose of correcting a wrong turning by the Full Court on an important question of executive decision-making, in circumstances where there will be no costs risk to the respondent.

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[24] The Board's parole decision is at **AB 204**. The Departmental summary of that decision is at **AB 16–17 [59]–[60]**.

[25] The Departmental brief provided a summary of the representations made by the respondent's partner at **AB 12 [35], 13 [36]–[37], 17 [66]**. The partner's representations are at **AB 145–146, 206, 216–217, 252**.

[26] Medical reports concerning the respondent's partner are at **AB 147**.

[27] The referral is at **AB 154–157** and the Departmental summary is at **AB 11 [24]**.

PART VII ORDERS SOUGHT

44. Special leave be granted to the applicant to appeal to this Court from part of the judgment of the Full Court of the Federal Court of Australia given on 13 December 2022.

45. The appeal be allowed.

46. Order 1 of the orders of the Full Court be set aside and in its place it be ordered that:

    (a) the appeal to that Court be allowed;

    (b) orders 1, 2 and 3 of the orders of the Federal Court made on 23 March 2022 be set aside and in their place it be ordered that the proceeding in that Court be dismissed.

47. The appellant pay the respondent's costs.

PART VIII ORAL ADDRESS

48. It is estimated that 1 hour and 15 minutes will be required for the presentation of the oral argument of the Minister.

Dated: 29 September 2023

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Applicant

AND

JOSEPH LEON MCQUEEN
Respondent

Annexure to Applicant's Submissions

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Applicant sets out below a list of the particular statutes referred to in the submissions.

	Statute	Provision(s)	Version
1.	*Migration Act 1958* (Cth)	ss 496, 497, 499, 501(3), 501CA(3)-(4)	Compilation No. 150 22 March 2021 – 24 May 2021