HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P2/2023
File Title:	Minister for Immigration, Citizenship and Multicultural Affairs
Registry:	Perth
Document filed:	Applicant's Reply
Filing party:	Applicant
Date filed:	10 Nov 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

APPLICANT'S REPLY

PART I CERTIFICATION

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

PART II REPLY

2. There are three matters which arise by way of reply to the respondent's submissions (**RS**).[1]

Agreement between the parties as to the nature of the Full Court's conclusion

3. As noted in the applicant's submissions (**AS**) **at [13]**, a question raised during the special leave hearing on 11 August 2023 was whether — as the Minister submits — the Full Court's reasons are indeed to be understood as involving a conclusion 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. **AS [25]–[29]** explain why that is a correct understanding of the Full Court's reasoning. It is evident the respondent agrees and seeks to defend that conclusion (see **RS [3], [14], [46]–[47]**). No further doubt should be entertained on this point.

[1] Additional factual matters are set out at **RS [7]-[11]**, where the respondent lists a number of inferences he apparently asks this Court to draw about the process leading to the decision by the Minister. It is not apparent from the balance of the **RS** that these asserted inferences have any relationship to the issue of principle to be determined by the proposed ground of appeal. That is likely why the respondent did not attempt, at trial, to prove these steps and the unparticularised "administrative arrangements". In those circumstances, those paragraphs of the submissions can be put to one side.

Section 501CA(4) permits reliance on a Departmental summary

4. The respondent criticises the Minister for referring to an "orthodox approach" (**RS [23], [35], [49]**). But it is telling that the respondent is unable to identify any other case where it has been held that the Minister cannot rely on an accurate Departmental summary. The attempt by the respondent to distinguish each of *Peko-Wallsend*, *Tickner*, *Carrascalao* and *Davis*, and to minimise reasoning within them as *dicta*, tends to prove the Minister's point: that the Full Court's decision sits at odds with long-standing authorities condoning the use of summaries in administrative decision-making.

5. Unless the statute prohibits the Minister from relying — in all cases — upon a Departmental synthesis or summary of those representations, the Full Court's conclusion that ***mere*** reliance on such a summary will be sufficient to establish jurisdictional error must be in error. As explained at **AS [24]**, there must be some recognised species of jurisdictional error established ***as a result*** of the Minister's reliance on the summary. So much appears to be accepted at **RS [22]-[25]**, yet the balance of the respondent's submissions seek to depart from that approach. In addition to the matters addressed in the applicant's submissions, there are four matters warranting a specific reply.

6. *First*, at **RS [31]** it is suggested that "fairness is the cornerstone concept". Accepting as much, it is thus impossible to see how jurisdictional error can arise in the absence of any demonstration of any material error or omission in the Departmental summary. Among other things, the Full Court's decision introduces incoherence with the requirement that any jurisdictional error be material, ie one capable of leading to a different outcome. On the Full Court's approach here, if the Minister's decision is made by reading a summary of the representations, no matter how materially accurate and complete, there will always be jurisdictional error.

7. *Secondly*, the respondent focuses on an absence of a right to seek merits review of a personal Ministerial exercise of power under s 501CA(4) (**RS [8], [39], [42]**). The absence of a right to seek merits review is not unique to the Minister's personal exercise of power under s 501CA(4). For example, there is no right or entitlement to merits review of a decision made by the Minister acting personally under s 501(1),

(2), (3) *or* 501CA(4) (cf **RS [40]-[41]**).[2] The respondent's point seems to be that this might be the one chance a person gets to make representations. But that is unconnected to whether, on its proper construction, s 501CA(4) precludes a Minister from relying on a materially accurate and complete Departmental summary of those representations. If it were otherwise, it would mean some lesser standard of decision-making applies where a person can later avail themselves of the opportunity to have a "second go" before the Tribunal (see also **AS [40(d)]**).

8. A similar point can be made in relation to the fact that representations made under s 501CA(4) are intended to persuade the Minister why there is another reason to reinstate a visa (**RS [44], [47]**). That is not a relevant or distinguishing feature of the legislative scheme that supports the respondent's construction. Representations made for the purposes of ss 501(1) or (2) or 501C(4) would also serve the same purpose of persuading a decision-maker not to refuse or cancel a visa (or to revoke a decision refusing or cancelling a visa) (see also **AS [40(a)**]).

9. *Thirdly*, the respondent emphasises the possibility that at the time a decision under s 501CA(4) is made, a person will be detained as an unlawful non-citizen as a result of the mandatory cancellation of their visa under s 501(3A) (**RS [43], [45], [48]**). A decision to cancel a visa under ss 501(2) or (3) would similarly have the consequence of rendering a person an unlawful non-citizen and liable to be detained pursuant to s 189 of the *Migration Act*. Yet in *Carrascalao* (at [138]) the Full Court accepted in the context of s 501(3) that the Minister could rely on a Departmental summary. The fact that s 501(3) requires the Minister to consider the national interest when deciding whether or not to cancel a visa does not provide any relevant distinction, for the purposes of construction, as to how the Minister can permissibly discharge the decision-making function under s 501(3) as compared to s 501CA(4) (**cf RS [43]**).

10. More generally, the question whether a statute permits a Minister to rely on a departmental summary is not one of interpreting a statute which interferes with liberty and choosing a construction which does so the least. The degree of interference with liberty is the same whether or not such reliance is permitted. That

[2] *Migration Act 1958* (Cth), s 500(1)(b) and (ba).

is why reference to the fact that liberty is involved smacks of unfocussed invocation of the principle of legality (see also **AS [40(e)]**).

11. *Fourthly*, the respondent emphasises (as the Full Court did) that the Minister could have delegated the decision (**RS [8], [10], [11], [46]**). It appears that this is directed to assuaging the concern that the Full Court has imposed an entirely unreasonable administrative burden on Ministers of the Crown. Thus, at **FC [106] AB 345** it was said that "[i]f the Minister does not wish to take that time, they can delegate the entire task. Parliament has given them that choice". But if one is having regard to such considerations, there are equally cogent reasons to think it important that the Minister does personally make decisions on non-revocation. At the most complex end, such decisions involve the release into the Australian community of persons who have been convicted of serious crimes. There is a significance in it being the Minister who personally decides to make that decision, and bears public responsibility for it, having regard to the myriad competing public interests at play. But that does not entail any reason to depart from the usual ability of a Minister to rely on a materially accurate and complete Departmental summary (see also **AS [40(b)]**).

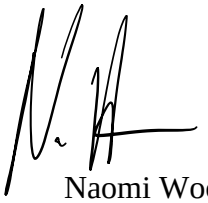
No finding of fact by the Full Court as to inadequacy of the summary

12. If the Minister is correct, error will not be established simply because a Departmental summary does not convey "the full sense and content of the representations". That will be so for ***every*** summary, by its very nature as a summary. It is necessary to identify some material jurisdictional error caused by reliance upon the Departmental summary. That is not established by the "finding" upon which the respondent relies that the Departmental brief here did not convey "the full sense and content of the representations" (**RS [16]–[19], [72]–[73]**). If the omitted "sense" and "content" was not matter the Minister was required to consider or was not matter that could have made a difference to the outcome, the fact that it was omitted is simply incapable of establishing a material jurisdictional error.

13. To sustain the Full Court's conclusion, it is necessary for the respondent to go further. The respondent does not attempt to do so. The respondent does not respond to the substance of the Minister's submissions at **AS [42]** as to why the matters identified by the Full Court at **FC [107]-[125]** do not demonstrate any material deficiency in the Departmental brief here. The respondent criticises those submissions as a

"distraction" (**RS [20]**). They are not; to the contrary, for the reasons explained, unless such a material deficiency is identified, the Minister must succeed. The respondent criticises those submissions as "random". They are not; they address each of the matters the Full Court identified. The respondent criticises those submissions as "unfounded". They are not; the respondent has provided no answer to them.

Dated: 10 November 2023



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