HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

JOSEPH LEON MCQUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. There are two issues in this case.

3. The first issue is whether the Full Court erred in the construction of s 501CA of the *Migration Act 1958* (Cth) (the **Act**), in concluding that when the Minister is deciding whether to revoke the decision to cancel a person's visa, in order to validly form the state of satisfaction required by subs (4)(b), the Minister must consider the person's representations and not just a summary of those representations.

4. The second issue is whether, even if in a general case the Minister may not be prevented from relying on a summary of the person's representations, in this case the summary failed to convey '*the full sense and content of the representations*', and by relying on the summary the former Minister failed to perform the statutory task of forming the state of satisfaction required by s 501CA(4)(b)(ii) of the Act.

Part III: Section 78B notice

5. The Respondent agrees with the Minister that no notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Factual background

6. Supplemented by the further matters below, the Respondent agrees with the Minister's factual background.[1]

7. At **AS [8]**, the Minister identifies two steps in the chronology: (i) the Respondent made representations, by giving to the Department a number of documents which contained the representation he wanted to make to the former Minister; and (ii) the Department provided a brief to the former Minister.

8. Between the two steps, the former Minister asked for that brief to be prepared.[2] The former Minister did not have to make that decision. Had the former Minister not made it, it may be inferred that under some form of administrative arrangements it would have been a delegate who would have considered the possible exercise of the power in s 501CA(4) of the Act, and the Respondent would have had the benefit of independent merits review should the delegate have decided adversely to him. Further, it may also be inferred that, under administrative arrangements, at an earlier time the Department had presented to the former Minister those cases, at that time requiring a decision because the person had made representations, and had requested the former Minister's input as to which ones, if any, should be the subject of a brief to him.

9. At **AS [9]**, the Minister refers to the former Minister personally deciding not to revoke the decision under s 501(3A) of the Act to revoke the Respondent's visa.

10. Prior to this decision, the former Minister decided that he would make that decision personally, instead of leaving it to be decided by one of his delegates.[3]

11. It follows that the sequence of steps and decisions, taken in respect of a power that is capable of being exercised either by the Minister personally or by a delegate but with different consequences, was as follows:

    a. administrative arrangements were put in place by the former Minister, assisted by his Department, to permit him to know what were the cases (or at least some of them, satisfying some selection criteria), at that time still requiring resolution, of cancellation of visas that had been effected pursuant to s 501(3A) of the Act, where the person had made representations;

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1 Applicant's Submissions (**AS**) dated 29 September 2023, **[6]-[13]**.

2 Primary judge's reasons (**PJ**) **[2]** (Application Book (**AB**) **266**).

3 **AB 8**.

b. pursuant to those arrangements, the Department brought the Respondent's case to the attention of the former Minister;

c. the former Minister asked for a brief to be prepared;

d. the Department prepared the brief and provided it to the former Minister (noting that nowhere in that brief is the former Minister advised that he should consider the actual representations[4]);

e. the former Minister decided that he would consider the Respondent's case;

f. the former Minister followed the order set out by the Department as to the steps in the process of decision-making,[5] and limited his consideration to a summary of the representations made by and on behalf of the Respondent; and

g. the former Minister recorded that he was not satisfied there was '*another reason why*' the decision to cancel the Respondent's visa '*should be revoked*'.[6]

Part V: Argument

Two distinct issues

12. The two issues that arise in respect of this application are distinct.

13. The primary judge understood that those were the two issues, in that order.[7] Most of the analysis was devoted to the first issue[8] because, on the facts as his Honour found them in particular that the Minister had not personally considered and understood the actual representations,[9] it was determinative. For completeness, the primary judge also dealt with the second issue.[10]

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4 **PJ [79]** (**AB 295**).

5 **AB 8**; **PJ [5], [7], [35]-[36], [79]-[80]** (**AB 267-268, 278-279, 295-296**).

6 **AB 21**.

7 **PJ [73]** (**AB 293**): '*[W]here the Minister's task requires the consideration of representations made, the Minister must consider the representations personally and in most instances that will require a consideration of the representations themselves (**either because** the deliberative obligation requires their personal consideration **or because** the detail and nuance of such representations is apt to be lost through any attempt to summarise them with the consequence that the Minister would not be personally informed by the actual content of the representations in undertaking the required deliberation*' (emphasis added).

As to the consideration by the primary judge of the first issue, see As to the second issue, see

8 **PJ [47], [63], [73]-[74], [78], [90]** (**AB 282-283, 290, 293, 294-295, 299**). See also **PJ [112]-[119]** (**AB 302-305**), for the primary judge's analysis of why ss 501(3A) and 501CA must be considered together.

9 **PJ [79]-[80], [90]** (**AB 295-296, 299**).

10 **PJ [85], [90]** (**AB 298, 299**).

14. After first rejecting the Minister's challenge to the factual finding that the Minister had not personally considered the representations,[11] the Full Court's analysis also centered on the first issue,[12] which was again resolved against the Minister.[13] Accordingly, the second issue did not squarely arise. Nevertheless, the Full Court gave consideration to why the representations that had been made by and on behalf of the Respondent could not be, and were not, summarised in a manner that may have permitted the Minister to "consider" them purely by reference to the Department's summary of them.[14]

15. In respect of the reasons of both the primary judge and the Full Court, statutory analysis was interspersed with consideration of *dicta* in other cases, having regard to the different statutes at issue in those other cases. The many paragraphs on *dicta* are due primarily to the fact that the Minister had argued against the Respondent's ground of review by relying on those other cases. The form of reasons does not mean that the courts below did not, first and foremost, construe s 501CA of the Act having regard to text, context and purpose. As the Respondent had submitted should be done.

Unchallenged finding

16. The primary judge found that the Departmental summary, part of the brief, failed to convey '*the full sense and content of the representations*'.[15]

17. This factual finding was not challenged on appeal. Rather, ground 2 of the Notice of Appeal was premised on the contention that, unless a summary could be shown to have left out a matter that had to be mandatorily considered, there is no error in a Minister relying on the summary instead of considering the actual representations.[16]

18. The appeal was argued in conformity with the notice of appeal, with no challenge made to the finding referred to above.[17] The Full Court rejected the Minister's submissions

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11 Full Court's reasons (**FC**) **[73]** (**AB 336**).

12 **FC [6], [74], [78]-[80], [82], [87]-[89], [90], [100], [103], [106], [130]** (**AB 317, 336-340, 345, 351**).

13 **FC [130]-[131]** (**AB 351**).

14 **FC [91], [107]-[125]** (**AB 340, 345-350**).

15 **PJ [85]** (**AB 298**): '*No attempt was made by the Minister to justify the Submission as a complete and accurate summary of the representations […] such that the consideration of the Submission may be equivalent to a personal consideration by the Minister of the representations themselves. In any event, the content of the Submission was not of that character. It was not possible to discern the full sense and content of the representations made without regard to the documents in which the representations were expressed. It follows that the Minister was assisted by departmental officers in undertaking the statutory task in a manner that was not lawful. In doing so, he failed to undertake his deliberative task of forming a personal state of satisfaction by considering and understanding the representations. Instead, he acted on the basis of the summary of the content of those representations provided in the Submission.*'

16 **AB 310**.

17 **FC [10(b)]** (**AB 318**), **[74]-[77]** (**AB 336-337**).

as to why the primary judge was said to have erred, by dealing with those submissions as they had been advanced.[18] The Full Court agreed with the primary judge's finding that the summary failed to convey '*the full sense and content of the representations*'.[19]

19. Finally, in this Court, that finding of fact is not challenged in the application for special leave to appeal,[20] and, conformably, no submissions are made directed at attacking it.

20. The Minister's submissions at **AS [42(a)-(d)]** are a distraction.[21] They are random, and unfounded, criticisms of the Full Court's illustration of why direct engagement with the representations is qualitatively different from having them mediated by a summary prepared by officers in the Department.[22] The Minister's submissions would only, possibly, require consideration if the contention at **AS [41]** were to be accepted, i.e., that the correct approach is 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*'.

21. Accordingly, the two critical findings, unchallenged in this Court, are that:

    a. the summary, which was one part of the brief, failed to convey '*the full sense and content of the representations*'; and

    b. although the brief annexed the representations made by and on behalf of the Respondent, the Minister did not read any of them.

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18 **FC [82]** (**AB 338**).

19 **FC [91]** (**AB 340**).

20 **AB 360**.

21 They also irrelevantly seek to float a suggestion of denial of procedural fairness by the Full Court, even though no proposed ground of appeal to that effect is articulated, and there is no evidence before this Court as to what submissions the parties made below in writing, orally or by way of post-hearing supplemental submissions, and no evidence of what matters the Full Court may have raised with parties.

22 FC [107] (AB 345): '*The **significance** of the importance of considering the representations as opposed to a summary prepared by another in the particular circumstances of this case **may be demonstrated by a limited number of examples***' (emphasis added).

Whether reliance may validly be placed on a Departmental summary depending on its quality, i.e., whether it does justice to the persuasive force of the representations as a whole (rather than purely list the matters raised in those representation), was the subject of *dicta* in two of the cases upon which the Minister relies, *Tickner v Chapman* (1995) 57 FCR 451 and *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352. They are considered later.

General principles

22. A Minister may be assisted by officers of the Department in carrying out a statutory duty or power.[23] Such assistance, however, cannot take the form of others performing a function or task, or some part of it, which the statute requires be done by the Minister personally.[24]

23. The question of what are the limits of the assistance that a Department may provide to a Minister is to be resolved by the application of settled principles of construction to the particular statute. It is not to be resolved by invocation of what the Minister calls an '*orthodox approach*'.[25]

24. Even if there is no transgression of the limits of the assistance that may be provided to a Minister, it is possible that reliance upon that assistance may lead the Minister into error. This could be, for example, because a Departmental brief contained an error in the legal advice it provided and, absent evidence that the Minister did not rely on that brief for that issue, an inference may be drawn that the Minister exercised the power, or discharged the duty, on an incorrect understanding of the law.[26]

25. Or it could be because, the Minister having relied on the Department for identification of the relevant considerations in respect of the particular case, the Departmental brief failed to identify one. Absent evidence that the Minister had not relied solely on the brief, an inference may be drawn of a failure by the Minister to take into account a relevant consideration. The error may also be characterised as a failure by the Minister to engage with the merits of the case as had been advanced by the individual.

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23 In principle, but subject always to the statute not providing to the contrary expressly or by implication, there is no reason why any administrative decision-maker, not just a Minister, may not receive assistance from others, provided it remains precisely that – assistance, and what is done by those others does not amount to the execution of the power or discharge of the duty (or some part of it).

24 See, in respect of s 351 of the Act, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [14]-[15], [18], [29] (Kiefel CJ, Gageler and Gleeson JJ), [66], [91]-[97], [101]-[102] (Gordon J), [109], [114], [138]-[141], [147], [170]-[171] (Edelman J), [251]-[254], [292]-[295] (Jagot J). Justice Steward, in dissent, did not say anything doubting the proposition that Departmental assistance cannot take the form of doing what the statute requires the Minister to do.

25 This expression is used seven times in the Minister's submissions.

26 If there are reasons given by the Minister (sometimes there are none, e.g. in respect of decisions by the Attorney-General pursuant to the *Extradition Act 1988* (Cth)), they may also provide some evidence of a legal error, or they may be silent or ambiguous; in either case, the Court will consider all the available evidence in deciding what is the correct inference to be drawn.

On the topic of an administrative decision-maker's reasons as evidence, see also, generally: *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162; Aronson, "Ministers' signatures – What do they prove?" (2023) 30 *AJ Admin L* 10.

Peko-Wallsend

26. This second example is based on similar facts to *Peko-Wallsend*.[27] The Department had prepared a brief for the Minister which, however, failed to note that representations on detriment had been provided by Peko-Wallsend to the Minister's predecessors,[28] which post-dated the Commissioner's report. The Full Court of the Federal Court had found that those representations had to be considered by the Minister in order for any decision to be lawfully made. There was no evidence of the Minister having received, or being aware of the existence of, those representations. Against that background, in this Court the Minister made the following submissions, as alternative pathways of reasoning to succeeding on the appeal:[29]

> The Minister is not bound to take into account matters put to him directly. He is only bound to consider matters contained in the Commissioner's report.
>
> The fact that the Minister acts on summaries made by departmental officers of submissions made to him which omit certain facts, does not mean that he has failed to take into account a relevant consideration. He is entitled to split decision-making between himself and his staff, so that the staff decides what is relevant, and the Minister makes the ultimate decision on reduced facts.

27. The Minister's appeal failed. The first submission was rejected, in light of the effect of this Court's decision in *Ex parte Meneling Station*[30] (which limited the role of the Commissioner's report) and upon the proper construction of the statute.[31]

28. In respect of the second submission, Mason J (with whom Gibbs CJ[32] and Dawson J[33] generally agreed) said that, having been raised for the first time in the appeal and being one that may have been answered by evidence, it should be rejected.[34] In the course of so deciding, Mason J considered that the submission appeared to relate to the *Carltona* principle,[35] however the power had to be exercised by the Minister personally unless

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27 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

28 They had been provided to the Department, rather than to the Minister's predecessors personally.

29 *Peko-Wallsend* (1986) 162 CLR 24, 27.

30 *Re Toohey; Ex parte Meneling Station Pty Ltd* (1982) 57 ALJR 59.

31 *Peko-Wallsend* (1986) 162 CLR 24 at 30 (Gibbs CJ), 43-44, 46 (Mason J), 71 (Dawson J). See also at 67-69 (Deane J, also expressing reservations about *Ex parte Meneling*).

32 *Peko-Wallsend* (1986) 162 CLR 24 at 30.

33 *Peko-Wallsend* (1986) 162 CLR 24 at 71.

34 *Peko-Wallsend* (1986) 162 CLR 24 at 37-39.

35 In *R (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Sedley LJ described this submission by the Minister in *Peko-Wallsend* as one that sought to '*refine* Carltona *into a doctrine of split or partial delegation*': at [28].

it had been delegated (hence the principle had no relevance). His Honour rejected the Minister's contention that requiring consideration of every submission touching on the making of a land grant would cause great practical difficulties, noting that an available solution was to delegate the power.[36]

29. Justice Brennan (with whom Deane J generally agreed[37]) decided the case not on the basis that the Minister had failed to take into account a relevant consideration, rather on the basis that the Minister was not free to proceed to make the decision in ignorance of the existence of the recent representations on detriment by Peko-Wallsend. Pursuant to this analysis, the brief by the Department was no more than evidence of the fact that the Minister's attention had not been drawn to the existence of, or the information contained in, those representations. It is in this context, and having regard to the terms of the Minister's second submission (quoted above), that Brennan J made comments on the respective roles of a Minister and the Department.[38]

30. Critically, Brennan J said that the Minister '*cannot be regarded in his exercise of the power as unaware of information possessed by his Department*'.[39] As a matter of fairness, and further reflecting the practical reality that communications from members of the public go to the Department rather than directly to a Minister, the Minister would be taken to have had constructive knowledge of the existence of the more recent Peko-Wallsend representations.

31. That fairness is the cornerstone concept, not only for the remarks of Brennan J but also for the *dictum* by Lord Diplock in *Bushell*,[40] was made clear by the Court of Appeal of England and Wales in *R (on the application of National Association of Health Stores) v Department of Health*.[41] In that case, similarly to *Peko-Wallsend*, the ground of review was failure to take into account a relevant matter. The Minister, advancing a wrong interpretation of the *dictum* in *Bushell*, unsuccessfully argued for a version of the submission about split roles which had been rejected in *Peko-Wallsend*.

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36 *Peko-Wallsend* (1986) 162 CLR 24 at 46.

37 *Peko-Wallsend* (1986) 162 CLR 24 at 70.

38 *Peko-Wallsend* (1986) 162 CLR 24 at 65-66.

39 *Peko-Wallsend* (1986) 162 CLR 24 at 66.

40 *Bushell v Environment Secretary* (1981) AC 75, 95.

41 [2005] EWCA Civ 154.

32. On the evidence, the Minister had relied on the Department's '*analysis, evaluation and precis*'[42] of what were the salient facts.[43] To do so did not amount to a splitting of the decision-making power because '*Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being* ***assisted*** *to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision*'.[44]

33. It is apparent from the above that it was not in issue in *Peko-Wallsend*, thus Brennan J cannot be said to have decided, whether the statute required the Minister's personal consideration of the actual submissions.[45]

34. Chief Justice Gibbs, adding to his agreement with Mason J, made what could be read as the widest *obiter* remarks: '*Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter*'.[46] Read in the context of the issue for decision and the submissions that were being advanced by the Minister,[47] it is sufficiently clear that his Honour was not seeking to pronounce a rule that, in any case of personal decision-making by a Minister, the statute is to be construed upon the basis that the Minister does not have to read and engage with the representations.

First issue

35. The Minister's submissions in this case, in substance the contention that there is an '*orthodox approach*' from which the Full Court is said to have wrongly departed, are an example of the fallacy of the converse (also known as affirming the consequent).

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42 *Peko-Wallsend* (1986) 162 CLR 24 at 65.

43 *Peko-Wallsend* (1986) 162 CLR 24 at 66.

44 *Peko-Wallsend* (1986) 162 CLR 24 at 66.

45 See also **PJ [61]** (**AB 289**): '*It can be seen that the extent to which the Minister might draw upon assistance from departmental officers in making his personal decision was not part of what the Court was required to determine in* Peko-Wallsend*. The issue in that case concerned the significance of the fact that the department did not draw to the attention of the Minister matters that the Court found the Minister was required to take into account (even though they were not to be found in the report on which the Minister might otherwise act in making his personal decision). It was not suggested that the Minister had done so by relying on some form of briefing from his department. Therefore, the Court was not dealing with the issue that arose in* Tickner v Chapman *and arises in the present case which concerns the extent to which an obligation to consider the contents of particular documents (and make findings based upon those contents) which the Minister must undertake personally can be assisted by officers from the Minister's department*'.

46 *Peko-Wallsend* (1986) 162 CLR 24 at 30.

47 In *R (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Sedley LJ explained why what was said by Gibbs CJ was also, and simply, a rejection of the Minister's submission on '*split or partial delegation*': at [29].

36. As already noted, the Minister may be assisted by the Department, usually by provision of a written brief, in discharging a statutory power or executing a duty. A consequence of this assistance may be that if the Department fails to bring a relevant consideration (or a salient fact) to the attention of the Minister, the Minister's decision may be held to lack validity because it was made disregarding that matter. Erroneously, the Minister seeks to infer the converse, as an almost irrebuttable presumption – the Minister can always proceed by relying on a Departmental brief; for the Minister's decision to lack validity, that brief must be shown to have been defective in some way.[48]

37. Turning then to the proper construction of the statute at issue in this case, as well as the Full Court's analysis of it.

38. The starting point is that there are many powers and duties which the Act confers on the Minister.[49] Some are delegable, some are not. The distinction between those that are personal to the Minister and those that can be delegated is to be found in the statute: e.g. ss 501(1), (2) (may be delegated), 501(3) (may not be delegated).

39. In the case of s 501, subss (1) to (3) (read with subs (4)), the distinction is predicated upon Parliament's intention that consideration of what is in the national interest should be reserved for the Minister. The Act then provides there should be no merits review of a decision that required that consideration.[50]

40. Only in one case can the power (coupled with a duty) be delegated but also, although the power is expressed in the exact same terms, there will be different consequences depending on whether the decision is made by the Minister personally or by a delegate. That case is s 501CA(4). The different consequence is the exclusion of merits review.[51]

41. Further, one only gets to s 501CA of the Act, in particular the power in subs (4), after a change in the *status quo* (the person, until then a lawful non-citizen, becomes an unlawful non-citizen), which is effected by operation of s 501(3A).

42. Section 501(3A) of the Act is a power that may be exercised by the Minister personally or delegated, with no difference in content, preconditions for exercise or consequences, depending on the identity of the decision-maker. When exercised, the person's visa is

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48 In the present case, the summary was deficient for failing to convey the full content and sense of the representations. This is relevant to resolution of the second issue, not to the first issue, which is directed solely at construction of the statute.

49 Some are conferred on others, such as the Secretary, or the Tribunal.

50 Section 500(1)(b), (3) and (4) of the Act.

51 Sections 476(2)(c) and 500(1)(ba) of the Act.

cancelled without any consideration of the merits not to do so. There is no obligation to afford procedural fairness,[52] and merits review is excluded.[53]

43. The above matters are all relevant to the task of statutory construction. In particular, while this particular scheme under the Act has some similarities to the one constituted by s 501(3) (the cancellation power, which was considered in *Carrascalao*) and s 501C (the corresponding power to revoke the cancellation decision), it is different. For one thing, under the scheme constituted by ss 501(3A) and 501CA(4), there is no similar restraint upon the grave effect on the person's liberty to that which is provided by the requirement in s 501(3) that cancelling of a person's visa can only be done when the Minister is satisfied that it is in the national interest to do so.

44. In a very real sense, all the individual (by now, an unlawful non-citizen) has left, is ***an opportunity to persuade*** that there exists '*another reason why*' the decision to cancel the visa, effected pursuant to s 501(3A), '*should be revoked*'.

45. The entry point for that opportunity, and in fact a condition precedent to the power to revoke the cancellation decision, is the making of '*representations to the Minister*': s 501CA(3)(b) and (4)(a). True it is that the actual communications will be with the Department. Nevertheless, the statute contemplates the making of representations, directed at having liberty restored, ***to the decision-maker*** and, unless the Minister delegates the task, this will be the Minister personally. Again, there is a clear difference with the scheme in *Carrascalao*, where the power to revoke in s 501C(4)(b) permits consideration only of whether there had been error in an earlier finding that the person did not satisfy the character test.

46. The single, simple question presented by the first issue of this application is whether Parliament intended that, when the Minister chooses that:

    a. there should be no independent merits review; and

    b. it should not be left to a delegate to consider the representations that have been made by the person whose visa has been cancelled and, after that consideration, form a state of satisfaction,

    the Minister must engage with the representations directly, rather than as mediated by a summary prepared by the Department.

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52 Section 501(5) of the Act.

53 Section 500 of the Act.

47. For the reasons set out above, the answer is yes – when the Minister decides that the person's opportunity should be to persuade the Minister, it is the Minister that must consider and understand the representations made, and that requires reading them.

48. The Full Court's analysis, at **FC [78]-[80], [82], [87]-[89], [90], [100], [103], [106]** and **[130]** (**AB 337-340, 345, 351**), is correct. Notably, apart from a submission that reliance on the effect of the decision '*smacks of unfocused and inapposite invocation of the principle of legality*' (**AS [40(e)]**), the Minister does not contend that the Full Court failed to apply, or incorrectly applied, settled principles of construction. And as to that specific criticism, the Full Court read strictly what the donee of the power must do to validly exercise it, and that reading was warranted by reason of the right to liberty being at issue. There is nothing '*unfocused*' or '*inapposite*' in so construing the power.

49. Rather than engaging with the statutory task, the Minister simply contends that the Full Court's error was departing from an '*orthodox approach*' which, it is contended, is established by a number of cases. One of the cases is *Peko-Wallsend*, analysed above. The other cases are *Plaintiff M1*,[54] *Tickner v Chapman*, *Carrascalao*, and *Davis*.

50. Of those cases, only this Court's decision in *Plaintiff M1* has considered s 501CA. The narrow issue in dispute is stated at [21] of the plurality's reasons and resolved at [29]-[30]. It was not in issue whether s 501CA(4) required the Minister, when deciding personally, to read, engage with and consider the actual representations.[55] In fact, there are indications an assumption may have been made, corresponding to the facts of the case, that the decision-maker was and/or would be a delegate. See, e.g., the reference to then Ministerial Direction 65 at footnotes 58 and 60, which did not apply when the Minister made the decision personally.

51. It would be wrong to read the considered *dicta* of the plurality in *Plaintiff M1* at [22]-[27] as having addressed the question of construction presented in this case.[56] What remains true is that, in order to validly form the state of satisfaction required by s 501CA(4)(b)(ii), the representation must be considered, and for that to occur, they must first be read and understood. So much is consistent with what the plurality said at [32]. Importantly, this Court made clear that the required reading and understanding,

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54 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17.

55 Nor was the issue considered in this Court's earlier decision of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398.

56 See also Aronson, "Ministers' signatures – What do they prove?" (2023) 30 *AJ Admin L* 10, 19 fn 64.

in the context of consideration, applies to all the representations that have been made, not solely those deemed mandatorily relevant.

52. The next case to consider is *Ticker v Chapman*, where the Full Court determined the scope of the Minister's duty to '*consider*' a '*report and any representations attached to the report*' found in s 10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the **ATSI HP Act**). Consideration of those two matters, the report and the representations, conditioned the non-delegable discretionary power in s 10(1) to make a declaration in relation to an area that the Minister was satisfied was both a significant Aboriginal area and under threat of injury or desecration.

53. Significant differences exist between the statute in *Ticker v Chapman*, and the statute in this case:

    a. the power in s 10(1) of the ATSI HP Act was non-delegable, while the power in s 501CA(4) of the Act is delegable;

    b. in s 10(1)(c) of the ATSI HP Act there was an express reference to '*consider*',[57] but the obligation to do so did not condition a state of satisfaction, while in the case of s 501CA(4) of the Act, the obligation to '*consider*' is implicit from the structure of the provision and the fact that the '*representations*' are the only thing capable of affecting the state of satisfaction of there being '*another reason*';

    c. under the ATSI HP Act, there was an obligation to appoint a reporter who had to give a public notice inviting representations, receive all the representations, consider them and then provide a report to the Minister which also attached those representations;

    d. the Minister had to consider not just the representations, but the report itself;

    e. while Parliament, in respect of the ATSI HP Act, could be taken to have intended the possibility of numerous submissions and differing positions on a matter of considerable public interest, in the case of s 501CA(4) Parliament must be taken to have intended that there would be more limited submissions, privately made and directed at advancing a singular position – persuading the Minister that there existed another reason to restore the person's visa.[58]

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57 See also *Carrascalao* (2017) 252 FCR 352 at [36]-[44], [46].

58 See also *Viane* (2021) 274 CLR 398 at [12]-[14], considered by the primary judge (**PJ [78]** (**AB 294-295**)); see also the reference to *Viane* by the Full Court (**FC [129]** (**AB 351**)).

54. Every member of the Full Court concluded that the primary judge had been correct in holding that, because there had not been the required personal involvement on the part of the Minister with the representations, there had been a failure to comply with the statute and this vitiated the decision.[59]

55. It is true there are *dicta* suggesting that, in a different case where there was no issue of representation by Indigenous women not being viewed at all by the Minister, or where a summary of the various public representations (or at least of some of them, i.e. those amenable to being summarised by others) conveyed all that needed to be, a finding might be made that, although the Minister had relied on the summary in some way, the required consideration had been given to the representations.

56. However, it is important to note precisely what was said by each of their Honours. The Full Court has extracted the important passages (**FC [96]-[97], [99], [101]** (**AB 343-344**)), and they are not here repeated. With respect to those passages, Kiefel J went further than Black CJ and Burchett J, and the Full Court was correct to so note (**FC [102]** (**AB 344**)).[60] In any event, the reasoning of each of their Honours is *dicta*.

57. Seeking to apply *dicta* from *Tickner v Chapman* as determinative of the construction of s 501CA(4) is to risk succumbing to the fallacy of the converse. The fallacy is to the effect that because the Full Court in the earlier case, dealing with a different statute, reasoned it might be possible to discharge a duty to consider without directly engaging with the representations, the Full Court in this case should have held that the former Minister's approach to "consideration" of the representations was not contrary to the relevant statutory scheme.

58. Turning next to *Carrascalao*, where the Full Court, in deciding two applications for judicial review at first instance, concluded there had been a failure by the Minister to give proper, genuine and realistic consideration to the merits of each of the two cases. The power purportedly exercised by the Minister was s 501(3) of the Act, which, as

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59 *Tickner v Chapman* (1995) 57 FCR 451 at 464 (Black CJ), 476 (Burchett J), 497 (Kiefel J).

The same Full Court subsequently decided *Minister of Aboriginal and Torres Strait Islander Affairs v Douglas* (1996) 67 FCR 40, also concerning s 10(1) of the ATSI HP Act. In that case, there was no summary of the representations, and the primary judge had found that the Minister had not read the representations. The Full Court upheld both that finding and the conclusion that the Minister had not performed the required statutory task of considering them.

60 Prof Aronson agrees with the Full Court's view: "Ministers' signatures – What do they prove?" (2023) 30 *AJ Admin L* 10, 19.

already noted, is non-delegable (subs (4)) and in respect of which procedural fairness, at common law or pursuant to other provisions of the Act, does not apply (subs (5)).

59. As a first step, the Full Court accepted that the authorities on the meaning of '*consider*' when it appears in a statute in relation to materials such as representations, in particular *Tickner v Chapman*, provided relevant guidance.[61] Next, the Full Court said there were '*several aspects of the particular statutory scheme here which help define the scope of, and give content to, the Minister's legal obligation to consider the individual merits of a case in deciding whether or not to cancel a visa under s 501(3) of the Act*'[62], and proceeded to identify and consider those aspects of the statute.[63]

60. Against that statutory context, the two applications for judicial review were decided on a factual basis, not on a novel question of principle. The Full Court found there had been insufficient time for the Minister to give proper consideration to the voluminous materials relevant to each of the two cases (which were being considered effectively at the same time), which consisted partly of Departmental summaries.

61. It was not in issue in that case, thus the Full Court did not decide, whether the power in s 501(3) of the Act permitted, at least in some cases, reliance by the Minister upon summaries of relevant materials. Nevertheless, the Full Court was prepared to accept that assistance would be permissible subject to three qualifications,[64] one of which was that the '*use of a departmental summary may not be appropriate when was is sought to be summarised is a substantive argument (as opposed to an assertion of fact). Attempts to summarise material of this kind may be fraught, because* ***the manner of the summary may cause some of the substantive force which the document may otherwise have had to be lost***'. Such is the tenor of what was found by the primary judge and affirmed by the Full Court.

62. The final authority to be considered is this Court's recent decision in *Davis*, where at issue was the validity of a specific form of Ministerial Instructions (**MIs**). These MIs purported to instruct in relation to what form of assistance the Department was to provide to the Minister in respect of the non-delegable power in s 351 of the Act.

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61 *Carrascalao* (2017) 252 FCR 352 at [36]-[46].

62 *Carrascalao* (2017) 252 FCR 352 at [53].

63 *Carrascalao* (2017) 252 FCR 352 at [54]-[60].

64 *Carrascalao* (2017) 252 FCR 352 at [61] (emphasis added).

Notably, the power being also non-compellable, it did not even require the Minister to consider a non-citizen's representations seeking to have it exercised in his/her favour.[65]

63. That being the issue presented in *Davis*, Kiefel CJ, Gageler and Gleeson JJ quoted the passage from Brennan J's reasons in *Peko-Wallsend* as supporting the following:[66]

> When conferring on a Minister a discretionary statutory power unaccompanied by any duty to consider its exercise, the Parliament can ordinarily be taken to contemplate that the Minister will be able to task the department administered by that Minister with sorting the wheat from the chaff so as to bring to the personal attention of the Minister only those requests for exercises of discretionary statutory powers which departmental officers assess to warrant the Minister's personal consideration.

64. It is clear from their Honours' conclusion that the manner in which the Minister had '*tasked*' the Department[67] had resulted in the Department acting in excess of executive power, that there will always be limits to the assistance that can be provided to a Minister. The precise limits will, in each case, depend on the terms of the statute.

65. The acceptance by Gordon J that the Department may lawfully assist the Minister with an '*evaluation, analysis and precis*' of materials that the Minister is bound to consider, was made in the context of affirming that in '*such a case, the department is assisting the Minister; it is not exercising a power on the Minister's behalf*'.[68] Her Honour also doubted the presumption of construction identified by Kiefel CJ, Gageler and Gleeson JJ (quoted above), and, citing *Peko-Wallsend*, made clear that determining what form of assistance the Department may lawfully give will always depend on the statute.[69]

66. Finally, Jagot J referred to *Peko-Wallsend* for the proposition that, by simply obtaining Departmental assistance, the Minister does not cease to make the decision personally.[70] Even in the case of the personal (because non-delegable) procedural decision which is required by reason of s 351(1) being non-compellable, of whether '*the Minister wishes to consider exercising the power*', the Minister can be assisted by a brief.

67. In summary, nothing said in any of the authorities relied upon by the Minister assists the Minister. To the contrary.

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65 See e.g. *Davis* [2023] HCA 10 at [19] (Kiefel CJ, Gageler and Gleeson JJ).

66 *Davis* [2023] HCA 10 at [26].

67 That is, with the particular MIs.

68 *Davis* [2023] HCA 10 at [91].

69 *Davis* [2023] HCA 10 at [93].

70 *Davis* [2023] HCA 10 at [295].

68. *Davis* strongly supports the proposition that, in each case, it is a matter of construing the statute to determine the limits of permissible assistance by the Department in the execution of a power that is and remains vested, in a manner that cannot be split, in the Minister. *Plaintiff M1* supports the proposition that the Minister must read and consider the representations, even when they do not raise, individually, to the level of mandatory consideration. *Ticker v Chapman* and *Carrascalao* support the proposition that, when a Departmental summary fails to convey, in full and with all their persuasive force, the matters sought to be presented by the person, and the Minister relies on that summary, the decision will be vitiated by jurisdictional error.

Second issue

69. The second issue, which only arises if the Court should be against the Respondent on the first issue, is whether, if the statutory scheme permits the Minister to consider the representations as mediated by a summary prepared by others, in this case the summary was deficient, not by reason of failing to identify a relevant consideration, but because it failed to convey the full content and persuasive force of those representations. That such failure would give rise to vitiating error is consistent with what was said, *obiter*, in both *Tickner v Chapman* and *Carrascalao*.

70. This Court should resolve this issue in favour of the Respondent.

71. A necessary premise, at this point of consideration of the parties' contentions, must be that, in the case of s 504CA(4)(b)(ii) and with respect to the representations, it may be permissible for the Minister to rely on a summary by the Department.

72. Accepting that premise for present purposes, the Respondent submits that the limits of what may be permissible assistance do not need to be determined in this case.[71] In light of the finding by the primary judge, affirmed by the Full Court and unchallenged, about the nature of the summary in this case, reliance by the former Minister upon it resulted in an error that is jurisdictional.

Conclusion

73. The application for special leave to appeal should be refused. The Full Court correctly construed the statute. Even if there was some doubt, the unchallenged finding is that

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[71] It need not be considered, for example, what might happen if some of the representations raised an issue similar to that which arose in *Tickner v Chapman*, namely cultural inappropriateness of a male Minister viewing representations made by an Indigenous woman.

the summary failed to convey the full content and force of the representations. That finding is fatal to the Minister's case.

74. If the Court were minded to grant special leave, the appeal should be dismissed.

75. The Minister accepts that he should pay costs, and that the costs orders below should not be disturbed.

Part VI: Notice of contention or of cross-appeal

76. The Part is relevant only if this Court were to grant special leave to appeal. In that case, the Respondent would not be relying on a notice of contention or of cross-appeal.

Part VII: Estimate of time

77. The Respondent estimates that oral argument will require 45 minutes.

Dated: 25 October 2023

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Annexure to Respondent's Submissions

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

No.	Statue	Version	Provision(s)
1.	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)	Compilation No. 17 21 October 2016	s 10
2.	*Judiciary Act 1903* (Cth)	Compilation No. 47 25 August 2018 – 31 August 2021	s 78B
3.	*Migration Act 1958* (Cth)	Compilation No. 150 22 March 2021- 24 May 2021	ss 476, 501, 501CA