HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

and

LIKUMBO MAKASA
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues Arising on the Appeal

2. Whether the Appellant had the power to exercise his discretion under s501(2) of the *Migration Act 1958* (Cth) (**the MA**) to cancel the Respondent's visa in circumstances where the Appellant (acting through his delegate (**Delegate**)) had already exercised that power of cancellation, such cancellation had been set aside by the Administrative Appeals Tribunal (**Tribunal**), and where the Appellant relied on the same facts as the Tribunal to enliven the discretion in s501(2)?[1] (**Power**)
3. The Appellants' submissions and ground 2 of the Respondent's Notice of Contention (**NOC**) raise several related issues for consideration to resolve the preceding issue:
    a. What constitutes an exercise of executive power under s501(2) of the MA?
    b. Is the answer to (a) different for the Tribunal as distinct from the Delegate?
    c. In what circumstances (new facts, material new facts, or the same facts) can the s501(2) power be re-engaged with?
    d. Is the answer to (c) different for the Tribunal as distinct from the Delegate?
4. Additionally, grounds 1 and 3 of the NOC are postulated for resolution.

Part III: Notice Pursuant to Section 78B of the *Judiciary Act 1903* (Cth)

5. The Respondent does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

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[1] *Makasa v Minister for Immigration and Border Protection* [2020] FCAFC 22 [5] (***Makasa***).

Part IV: Material Facts

6. The material facts are reflected in the Appellant's Submissions **(AS)**[2] and chronology.

Part V: Argument

7. The question of whether the s501(2) power has been exercised in circumstances of an express decision not to cancel a visa; and whether following that process, the power is spent or exhausted, are distinct questions for resolution. However, it is not clear why (or if) the Appellant suggests that if there has been no exercise of power, that the power can only be engaged on the emergence of a new material fact that will bear upon the discretionary limb in s501(2).

A. An exercise of power

8. The Appellant submits that it is for Parliament to select the factum or "triggers" upon which the power to cancel a visa will operate.[3] For the Appellant, once a non-citizen is taken to fail the character test by reference to having a 'substantial criminal record' under s501(6)(a) of the MA, they will always fail the character test.[4] Whilst the facts giving rise to this state of affairs will always apply to an impugned visa holder, the effect of this, is not to support the contention that an express decision not to cancel the visa granted to a person means that there has been no exercise of power, or that the door remains open to a subsequent exercise of the discretionary limb.

9. The Appellant relies on the minority reasoning in *Brown* to support its view[5] but also seeks ostensible support from the approach of the majority in *Parker* and what is said to be implicitly accepted by the plurality in the context of earlier decisions by a delegate not to cancel the visa.[6]

10. For the reasons that will be developed below, the Respondent submits that not only is this approach not supported as contended, but nevertheless, it is not a sound construction of the s501(2) power.

11. The analysis may begin with the expression "exercise of power" and whether that expression is synonymous with an engagement with power or utilisation of power.

12. The concept, as postulated by Bromwich J at [68] of *Brown*, that describes the s501(2) power as not being a choice between two opposing powers but rather a choice not to exercise a single power, is with respect, submitted to be a characterisation without a difference.

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[2] Appellant's Submissions **(AS)**, 30 July 2020 [5]-[20], pp 3-10.
[3] AS [22], Line 25, p 10.
[4] AS [22], Lines 0-10, p 11.
[5] AS [254, Lines 30-32, p 11.
[6] AS [24], Lines 10-15, p 12.

13. True it is, that s501(2) provides for a discretionary power to cancel a visa granted to a person, but as these submissions suggest, an engagement with, or utilisation of that available power to yield an opposite choice, which has a discernable or apparent *legal effect upon rights*[7] must also carry with it, the imprimatur of executive power.

14. The AS focus on the effect of the purported cancellation of the 'visa' itself, without regard to the *human consequences* of the exercise of that power. Such a textual analysis omits an equal corresponding focus on "granted to a person" and otherwise does not sit well with the statutory purpose and context of the MA.

15. The statutory purpose being, in part, a process of regulating, through a continuum of administrative decision-making, the presence of visa holders who might pose a risk of harm to the Australian community. Rendering a decision of either the Delegate or the Tribunal nugatory, such that a visa holder might be subject to a 'ministerial change of mind' at any time is, with respect, an unpalatable construction with respect to the text, purpose and operating context of s501 MA.

16. The statutory language of s501(2)(a) poses a jurisdictional fact requirement as to whether the decision-maker '*reasonably suspects that the person does not pass the character test*' (**Limb 1A**). S501(2)(b) of the MA is expressed as follows: "… *the person does not satisfy the Minister that the person passes the character test*" (**Limb 1B**).

17. Accordingly, the statutory language reflected in s501(2) requires a decision-maker to form a state of satisfaction in resolving the jurisdictional facts reflected in Limbs 1A 1B. By forming a reasonable state of satisfaction, the repository of the power is exercising power under s501(2) of the MA.[8] A state of satisfaction that must be reached and concluded within the limits of judicial review.

18. Moreover, once Limb 1 is satisfied, the decision-maker is vested with a discretionary power to cancel a non-citizen's visa (**Limb 2**).[9] If a decision-maker decides not to exercise the discretion under s501(2) (the course taken by the Tribunal in this case),[10] that legal conclusion results in a decision favourable to the non-citizen. Considered in that context, not exercising the choice to cancel the visa is still the exercise of statutory power - resulting in a legally binding decision that has significant legal consequences for the non-citizen's continued migration status in Australia. It also forms the condition precedent to the exercise of the national interest power reflected in s501A of

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[7] See also *Hot Holdings Pty Ltd v Creasy & Others* (1996) 185 CLR 149.
[8] In this case, the Tribunal determined on 8 November 2013 that the Respondent did not pass the character test: see Appellant's Further Material **(AFM)** [17], p 10.
[9] *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200; (2017) 351 ALR 153 at 161-2 [35].
[10] AFM [18], p 10, [93] at p 26.

the MA.

19. For the Respondent, following the service of an earlier notice on 7 December 2010,[11] on 14 June 2017, the Appellant caused a 'Notice of intention to consider cancellation of [the Respondent's] visa under s 501 of the [MA] (**Second Cancellation Notice**) to be served on the Respondent.[12] In that Second Cancellation Notice, the Appellant invited the Respondent to comment, *inter alia*, on whether he passed the character test under s501 of the MA.

20. If the Appellant's argument is correct (i.e. that the Respondent can never again pass the character test in s501 of the MA), it can be readily seen that the Appellant's Second Cancellation Notice was a hollow invitation for the Respondent to address the question of whether he fell foul of the character test in s501.

21. The Appellant further submits that there 'appears to be an acceptance by [the plurality] that the decision not to cancel a visa is not an exercise of power in s 501(2) of the Act, and did not result in the power being "spent" or "exhausted".[13] However, that submission is directly in tension with what the plurality concluded in *Brown*:[14]

> 'It is unnecessary to consider the question… whether a consideration of whether to exercise a power to cancel a visa resulting in a decision not to cancel the visa is an exercise of the power to cancel the visa'.

22. A discretionary power, when engaged with, will always yield a tension between competing choices. The construction contended for by the Appellant has the effect of blurring the distinction between a repository of power refusing to engage with a discretionary power and engaging it to yield an outcome with practical and legal effect. As Mortimer J expressly stated in *Parker* at [69]:

> '… Whether the choice is, relevantly, to cancel a visa or not to cancel a visa, it is the making of the choice by the repository which constitutes the exercise of power'

23. In this regard, the decision-making process itself derives its legitimacy and authority from the power in s501(2), which embarks upon a series of ministerial processes from the dissemination of a visa cancellation notice, an invitation from the visa holder for contentions in response, and consideration of the same and, in the case of the Delegate or the Tribunal, a consideration of the relevant ministerial direction pursuant to s499 of the MA until a decision is made.[15]

24. Once a repository has decided to embark upon consideration of whether or not to exercise discretionary power, the power is exercised by a choice made after that consideration. So much is clear from the text of s499 MA which provides:

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[11] Respondents Further Materials **(RFM),** RM1.
[12] Respondent's Court Book **(RCB)**, 286-288. See further AS [22], Line 25, p 10.
[13] AS [25], Lines 15-20, p 12.
[14] *Minister for Home Affairs v Brown* [2020] FCAFC 21 [117] **(*Brown*)**.
[15] See RM435

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the **exercise of those powers.**

B. An exercise of power by the Tribunal

25. As to the Tribunal uniquely, central to the Appellant's reasoning appears to be the availability of s501A(1) of the MA to non-adverse decisions of a delegate and the Tribunal.[16] Whilst that may be so, it does not have the legal effect that there is no relevant difference between a decision of a 'delegate not to cancel' and a decision of the 'Tribunal not to cancel' a non-citizen's visa under s 501(2).

26. For the Tribunal, in particular, the combined operation of s500(1)(b) of the MA and s43(1) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) could not support such a hollow construction, even with the deeming provision of s43(6). For the Respondent, in 2013, Deputy President Tamberlin QC, exercising power under s43(1)(c)(i), directed that "that the decision of the [Appellant] to cancel [the Respondent's] visa is set aside and there is substituted the decision that the visa should not be cancelled." That must be, in itself, the exercise of power. The *practical and legal consequence* of this decision, amongst other things, was the Respondent's release from detention.

27. More fundamentally, there are significant differences in a decision made by a Delegate and a decision made by the Tribunal. The differences relate to matters of procedure and matters of substantive law.

28. First, unlike decisions made by a Delegate, members of the Tribunal are bound to apply carefully prescribed procedural rules for the resolution of administrative proceedings under the AAT Act.

29. Secondly, as a matter of substance, the Tribunal is required to give effect to the statutory objectives under s2A of the AAT Act: providing a mechanism of review that is accessible, fair, just, economical, informal, quick, and proportionate to the importance and complexity of the matter. In contrast, a Delegate of the Appellant is not bound by the statutory objectives reflected in the AAT Act.

30. Third, unlike a Delegate, while the Tribunal is not a primary decision-maker and can only review a decision that has already been made, it must determine whether the decision under review is the *correct or preferable one* on the material placed before

[16] AS [35], Lines 18-30, p 17.

it.[17] In this way, decisions made by a Delegate are not the same as decisions made by the Tribunal. Lawful decisions of the Tribunal bring an end to the merits review process and completes the executive's task in relation to the considerations going to the exercise of s501(2).

31. Fourth, the statutory power in s501(2) is exercised by the Tribunal subject to an implied restraint that it must be 'exercised' reasonably, and any decision must be made within jurisdiction providing avenues of prerogative relief to the Appellant and a visa-holder.[18] With respect, this analysis reveals the shortcoming in the Appellant's contention concerning the exercise of power question.

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C. A contrary intention to s33 of the AIA and the implied materiality test

32. The Appellant submitted that ss501(2)(a) and (b) will always be met concerning those non-citizens who fail an objective jurisdictional fact reflected in the character test under s501.[19] Based on that assumption, the Appellant submitted that he could make a further decision under s501(2) concerning a non-citizen who retains a visa, in circumstances where new facts emerge (after the earlier decision) which bear in some material way upon the exercise of discretion (**implied materiality consideration**).[20]

33. It is true that the Respondent's case involves a situation where it is said that a 'new fact' has emerged relevant to Limb 2. This was also the case in *Parker,* though in that

20 case the new fact followed an earlier decision made by a Delegate of the Minister not to cancel Mr. Parker's visa.

34. The Court in *Parker* reasoned that the emergence of a new fact (not being the jurisdictional fact) but a fact relevant to the discretion is sufficient to invoke the re-exercise of the jurisdiction (see at [36]). It was said by Griffiths & Perry JJ at [37] that such an approach was consistent with s33 of the *Acts Interpretation Act 1901* (Cth) **(AIA)** and that no contrary intention is manifested in the MA.

35. Mortimer J at [71] described the *ratio* in *Parker* as follows:

> The uncontentious operation of s 33(1) of the *Acts Interpretation Act 1901*(Cth) is that set out in the reasons of Griffiths and Perry JJ at [36]–[38]: namely, the implication into statutory powers and
30 functions of an ability to exercise the power, or perform the function, more than once and "from time to time" in order to pursue or give effect to the purposes for which the power or function is conferred.

36. In the Respondent's submission, the reasoning of the Court in *Watson* aptly

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[17] *Drake v Minister for Immigration and Ethnic Affairs* [1979] 2 ALD 60; (1979) 46 FLR 409 at 419; 24 ALR 577; *Kasupene v Minister for Immigration and Citizenship* (2008) 49 AAR 77; [2008] FCA 1609 [19]; *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 555 at 558; 150 ALR 397 at 401.

[18] See for example *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394.

[19] AS [23], Lines 20-28, p 11.

[20] AS [23], Lines 20-28, p 11.

demonstrates, in a universal manner, that the exercise of the s501(2) power (by way of purported revocation of a decision or a re-exercise of a previous decision) derives its legitimacy from the text and structure of the MA, which reveals contrary intention to the operation of s33(1) of the AIA.

37. The Full Court in *Watson* was not confronted with the question of whether a new fact could support the re-exercise of the s501(2) power, but dealt with the question of whether there was a power to revoke an earlier decision to cancel a visa. In resolving that question, the Court concluded in, what the Respondent submits is a principled contention, that the power, once exercised, could not be re-exercised despite s33(1) of the AIA (see per Dowsett J at [7] Hely J at [23], [24] and Lander J at [138] and [139]).

38. *Parker* acknowledged that the existence of the question whether the power can be re-exercised on the same facts awaits determination in a proper case. Justice Mortimer at [70] expressly disavowed answering this question. The judgment of Griffiths and Perry JJ accept that it was unnecessary to resolve this question at [51].

39. Relevantly, the appellant in *Parker*, seeking to rely on the principle in *Watson*, contended that the same facts were being used to re-exercise the power. It was contended that the annulment of the later conviction (being the later/new fact) constituted a nullity for all purposes thereby being re-exercise of the power on the same facts. In rejecting that submission, the Court noted that the appellant's reliance on the principles of *Watson* was misdirected.[21]

40. Whilst a new fact has emerged in this case (as distinct from the mere effluxion of time), as contended below, the Respondent contends that it is clearly not a new fact bearing upon the discretionary choice available in Limb 2.

41. It follows, in determining whether or not the Respondent's case is the vehicle that Mortimer J contemplated in *Parker* (that is whether the same facts can ground a re-exercise or reconsideration), the proper resolution must start with a consideration of what kind of fact becomes a material fact, and if a fact might be a material fact, whether the power can be reconsidered on the same facts.

42. Bromwich J seemingly answers this in *Brown* by reference to the availability of s501A, with the effect that it will cover the field for all occasions where the Minister wishes to set aside the original decision upon the same facts but with the added statutory criterion of the national interest. It is clear that the text of s501A is not so confined. The Appellant does not cite this reasoning but ultimately endorses the

[21] See *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185 [42] **(*Parker*)**, where the Court suggested that Dowsett J's contentions about a singular action were only relevant to a circumstance where the facts are the same. It was for this reason that the Court did not attend to consider the correctness or otherwise of the principles addressed in *Watson*.

reasoning of Bromwich J and the judgment of *Parker* that there is a requirement of a material new circumstance before the power can be exercised under s501(2) of the MA.

43. In any event, this implication ought not be sustained for a number of reasons.

44. First, as noted earlier, there is a tension between the Appellant's submission, that there has been no earlier exercise of power and that the subsequent exercise is impliedly constrained to material considerations. In this regard, Bromwich J concluded a requirement of a materiality of changed circumstances even with his preferred construction that a decision not to cancel is not an exercise of the power.[22]

45. Second, even if there was such an implied materiality consideration, the Appellant has failed to identify the emergence of the material fact - and how that bore upon his discretion to cancel the Respondent's visa - when the exclusive focus of the discretion was on the Respondent's risk of sexual offending.[23] As identified in the submissions in relation to the unreasonableness ground below, there is no material change between the Tribunal's risk assessment of sexual of reoffending in 2013[24] and Appellant's decision in 2017.[25]

46. Third, there is no explanation found in the Appellant's argument as to how the implied materiality consideration is a mandatory consideration to resolve Limb 2 by reference to the subject matter, scope, and purpose of the MA.[26]

47. Fourth, the statutory language of s501(2) does not expressly support the implied materiality consideration contended for by the Appellant.[27]

48. Fifth, the surrounding provisions also reveal a contrary intention. As Colvin J explained in *Brown* at first instance:

> 'If it were the case that the power under s 501(2) could be exercised in all cases from time to time irrespective of whether there had been a previous decision concerning the exercise of the power then it would not have been necessary to include the provisions in s 501A'.[28]

49. In this sense, s501(6)(c), is also noteworthy, as it gives the Appellant a broad power to invoke the jurisdictional fact, by relying on past general conduct to constitute a fresh exercise of the power.

50. Sixth, s501(2) seeks to strike a balance between competing interests, namely the protection of the Australian community and the effect of deportation on the non-citizen

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[22] *Makasa* [48].
[23] *Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639 [35] **(*Makasa first instance*)**, RM424; *Makasa* [16] (Besanko); see also RM402[13]; and *Brown* [127] (Besanko J).
[24] AFM [92], p 26.
[25] Appellant's Core Appeal Book **(ACAB)** [49], Line 0, p 7.
[26] *Moana v Minister for Immigration and Border Protection* [2015] FCAFC 54; 230 FCR 367 at [41]. See also *Price v Elder* [2000] FCA 133; 97 FCR 218 at [13]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 39-40.
[27] *Brown* [127] (Besanko J)
[28] *Brown v Minister for Home Affairs* [2018] FCA 1722 [31] **(*Brown first instance*)**.

and his or her family in Australia.[29] Thus, there are competing and conflicting interests as between an individual who may be excluded from Australia and the interests of the Australian community.[30] Considered closely, the competing purposes of s501(2) do not support the implied mandatory materiality consideration advanced by the Appellant. By a non-citizen taken to fail the character test under s501(2), it is clear that Parliament has prescribed that the non-citizen is taken to pose a risk of harm to members of the Australian community.

51. In the resolution of Limb 2, the decision-maker is generally affronted with carefully balancing considerations related to the protection of the Australian community, expectations of the Australian community, best interests of minor children in Australia, and other considerations usually favourable to a non-citizen (i.e. family ties, length of residence in Australia, international law obligations, and extent of impediments if removed from Australia).

52. Once Limb 2 is decided favourably to a non-citizen, that person is taken not to represent an unacceptable risk of harm to the Australian community. Accordingly, the statutory purpose associated with the protection of the Australian community has been resolved. Although the non-citizen may pose an ongoing risk to members of the Australian community, as a matter of discretion, it is a risk that the Australian community is deemed to tolerate.

53. Whilst perhaps having the attractive virtue to the Minster of enabling the Appellant to cancel a visa granted to a person whom he deems unsuitable, that interpretation may be of little assistance where a statutory provision strikes a balance between competing interests (as does s501).[31] Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the object is unlikely to solve the problem.[32]

54. As French J (as he then was) made plain in *Sloane*:[33]

> …While implication can be justified by necessity it should not be limited by that condition. …While it may be accepted that a power to reconsider a decision made in the exercise of a statutory discretion will have the advantage of convenience it cannot always claim the virtue of necessity. And in the context of the Migration Act as it presently stands with specific provisions for review of

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[29] Jason Donnelly, "Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door" (2017) 24 *Australian Journal of Administrative Law* 99, 105; *Djalic v Minster for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151 [73]; *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65 [104]; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11 [75] **(*Stretton*)**; *Misiura v Minister for Immigration and Multicultural Affairs* [2001] FCA 133 [18].

[30] *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [127]; Donnelly, n 27 above, 105.

[31] *Djalic v Minster for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151, [73]; *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65, [104]; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11, [75]; *Misiura v Minister for Immigration and Multicultural Affairs* [2001] FCA 133, [18].

[32] Donnelly, n 27 above, 104-105; *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 [5] (Gleeson CJ); *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673, [127].

[33] *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 443.

> decisions and the making of regulations relating thereto, I do not consider, in the absence of clear words, that it would be proper to imply such a power.

55. If the implied mandatory materiality test related to Limb 2 is applied (as propounded by the Appellant), it will create grave uncertainty as to the circumstances in which a non-citizen's visa would be liable for future cancellation under s501(2). Where such fundamental rights are at play, as they are in this case, the proposed implication of a materiality threshold relevant to the exercise of discretionary power in s501(2) mandates an unacceptable state of affairs.

10 56. On the Appellant's construction, it must then follow, once a person is taken to fail the character test (the jurisdictional fact having been satisfied), Limb 2 being engaged with; and following the making of a favourable decision to the visa holder, the visa holder falls into a 'holding pattern' that may subject him or her to a ministerial change of mind at any moment for the emergence of any fact, be it trivial or otherwise.

57. It follows, the introduction of an implied mandatory materiality consideration going to Limb 2 is inconsistent or incompatible with the carefully defined circumstances in which a person is deemed to pose a risk to the Australian community by reference to jurisdictional facts under Limb 1, but also with the elaborate scheme of granting and cancelling visas (see also Part 2 Div 3 of the MA and the prescribed ways in which a
20 visa might be cancelled); and the presence of the 'national interest power' in setting aside a decision of the delegate or the Tribunal (that is not confined temporally to the same facts) parliament intended to limit the ways in which a Minister can interfere with previous decisions.

58. Given the preceding, a conclusion that the power may be reconsidered for the introduction of a material fact (or worse, any fact, or even worse, the same facts) would confine a visa holder's remedy with respect to his or her fundamental human rights to a contention that the decision was not legally reasonable. That is, with respect, an unsatisfactory basis to confine judicial restraint on executive overreach in the context of the MA.

30 59. Nothing is more evident when one distils at a lower level of abstraction the extrapolated reasoning as to why it is said that the Respondent still poses a risk of sexual re-offending of a prescribed type, namely, a s66C(3) *Crimes Act 1900* (NSW) **(CA)** offence in the absence of the emergence of any relevant material fact going to that risk assessment that had taken place in 2013.

D. A contrary intention to s33 of the AIA and the legal effect of the Tribunal's decision

60. The Appellant submitted that s33(1) of the AIA was a complete answer to the plurality judgment in *Brown* and *Makasa*.[34] The Appellant submitted that the plurality did not directly identify any "contrary intention" for s33(1) of the AIA Act.[35] The Appellant submitted that the plurality's reasoning was contrary to past Full Court judgments, including *Parker*.[36] Finally, the Appellant submitted[37] that the plurality misapplied the decision of *MJD Foundation*.[38] These submissions should be rejected.

61. First, the plurality identified the relevant matters said to have the effect of demonstrating a contrary intention for s33(1) of the AIA Act:

> 'For the reasons that follow we are of the view that the Minister has no power to re-exercise the discretion relying upon the same facts (here facts satisfying the terms of s 501(6)(a)) to enliven the discretion in s 501(2) as were before the Tribunal. By way of summary, we draw this conclusion in particular from the terms and structure of the Act as a whole, the existence of the power in s 501A(2) to set aside the Tribunal decision, and the nature and character of the function of the Tribunal in independent review of decisions of the Executive, including the necessary degree of stability and finality in a fully reasoned decision of the Tribunal setting aside a decision of the Minister by his delegate to cancel the applicant's visa.'[39]

62. Secondly, the plurality's reasoning was not contrary to the Full Court decision of *Parker*. As the plurality in *Brown* made plain, *Parker* was readily distinguishable.[40] Further, like the plurality in *Brown* and *Makasa*, Colvin J in *Brown* (at first instance) found that *Parker* was rightly distinguishable:[41]

63. Thirdly, contrary to the submissions of the Appellant, the plurality in *Brown* and *Makasa* did not misapply the decision of *MJD Foundation*.[42] Citing *MJD Foundation*, the plurality at [91] in *Brown* outlined that 's33(1) of the [AIA] adds little to the analysis'.[43] That comment must be read in context. Immediately preceding the impugned sentence, the plurality reasoned that 'the proper construction of s501(2) with respect to the occasions of its exercise ultimately depends on the text, context and purpose of the relevant provisions of the [MA]'.[44] With respect, there is nothing erroneous with that approach. The plurality merely repeated an important statutory interpretation principle to assist in construing the scope of the impugned statutory powers.

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[34] AS [31], Lines 15-17, p 15.
[35] AS [32], Lines 0-4, p 16.
[36] *Parker*.
[37] AS [33], Lines 27-30, p 16.
[38] *MJD Foundation Ltd v Minister for Indigenous Affairs* [2017] FCAFC 37; 230 FCR 31 (***MJD Foundation Ltd***).
[39] *Brown* [15].
[40] *Brown* [16].
[41] *Brown first instance* [67]-[70].
[42] *MJD Foundation Ltd*.
[43] *Brown* [91].
[44] *Brown* [91].

64. The Appellant further contended that the presence of s501A was 'wrongly seen by the plurality as constraining the availability of s501(2) to the Minister'.[45] The Appellant submitted that s501A of the MA indicates that a decision of the Tribunal favourable to a review applicant will not have the effect that a person's visa will always remain on foot, as assumed by the plurality.[46]

65. To this end, Bromwich J (in dissent – which the Appellant relies upon) also concluded that there was a limitation in the exercise of the power in s501(2) of the MA because of s501A:

> … s 501A supports a clear inference that a decision about whether or not to exercise the s 501(2) power to cancel Mr Brown's visa could not simply be revisited on the same facts and circumstances that were before the Tribunal. To conclude otherwise renders otiose the deliberate additional requirement in s 501A of satisfaction that visa cancellation (or refusal) is in the national interest before such a decision may be set aside by the Minister in person on the same facts and circumstances.[47] (our emphasis)

66. The difficulty with the preceding submissions of the Appellant is that the plurality did not adopt the purported assumption in *Brown*:

> 'The Parliament's intention that the Minister have the ultimate power to decide whether or not an individual should continue to have a visa is given effect in s 501A and the individual visa-holder remains at risk of future visa cancellation under that provision even after a favourable Tribunal decision."[48]

67. The statutory scope of s501A is wider than as proposed by the Appellant. As the plurality in *Brown* explained:

> For the reasons stated, in our opinion, s 501A would permit a decision of the Tribunal to be set aside by the Minister "on the same facts and circumstances" as those before the Tribunal (cf Parker at [67]). This provision would also permit the Minister to rely on different facts in the exercise of the Minister's discretion. There is nothing in the Migration Act to indicate that, contrary to the usual principles of sound administrative decision-making, the Minister cannot have regard to the facts and circumstances relevant to the exercise of the discretion at the time the Minister makes the decision to exercise the discretionary power in s 501A(2) or (3).[49]

68. The plurality reasoned that the prospect or potentiality of repeated decisions concerning that right (i.e. to remain in Australia), unquelled by a full review by the independent review tribunal, leads to a lack of certainty and potential for inconsistency incompatible with the prescriptive nature of the relevant provisions of the MA.[50] With respect, there is much force in that judicial reasoning as to suggest otherwise is contrary to the detailed and prescribed framework deeming a non-citizen to fail the character test under s501(2) (i.e. jurisdictional facts under Limb 1).

69. Where a decision-maker decides not to cancel a non-citizen's visa under s501(2), the

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[45] AS [35], Lines 3-6, p 18.
[46] AS [37], Lines 26-30, p 18.
[47] *Brown* [179].
[48] *Brown* [112].
[49] *Brown* [114].
[50] *Brown* [113].

ultimate controversy has been resolved. A favourable finding for a non-citizen in these prescribed circumstances dictates that the dispute associated with the jurisdictional fact (i.e. character test offence) that enlivened the power in the first place has been resolved. It then becomes difficult to contend that the same jurisdictional fact could be subsequently utilised as the foundation to cancel a non-citizen's visa.

70. The plurality's reference to various normative or policy considerations and features of the Tribunal was necessary to have regard to the 'context' and 'purpose' as a matter of statutory construction.[51]

71. The Appellant submitted the fact that the Tribunal has the features of a provider of independent merits review (i.e. stability and finality in a fully reasoned decision of the Tribunal) or conducted a "contested hearing" does not have the consequence that the Tribunal's decision exhausted the s501(2) power concerning the factual circumstances that enlivened it.[52]

72. First, the plurality reasoning in *Brown* and *Makasa* should be considered in its proper context. The plurality determined that s501(2) of the MA being exhausted was not to be answered merely by reference to the important legal character of the Tribunal.[53] For the plurality, it was the combined effect of the terms and structure of the MA considered as a whole, the existence of the power in s501A(2) to set aside the Tribunal decision, and the nature and character of the Tribunal.[54]

73. Secondly, the legal character of the Tribunal is important. A fully reasoned decision of the Tribunal after a contested proceeding provides the jurisdictional basis for the Tribunal to exercise the remedial powers reflected in s43(1)(c) of the MA. An independent review of a delegate's decision provides the foundational basis to potentially set aside the decision under review and make a decision in substitution so set aside. Considered in that context, the administrative continuum[55] ending in a decision of the Tribunal has obvious importance in administrative decision-making.

74. Thirdly, it is readily accepted that the Tribunal does not, and cannot, finally determine issues in the same way as a Chapter III Court does.[56] It is also accepted that a Tribunal's decision does not, for example, create any *res judicata* or issue estoppel.[57] However, once a final decision has been made by the Tribunal, orders are made under

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[51] *Brown* [51], [91] [155], [176]; *MJD Foundation Ltd v Minister for Indigenous Affairs* [2017] FCAFC 37; 230 FCR 31 [246] (Mortimer J, Perry J agreeing); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27 [5] (French CJ), [47] (Hayne, Heydon, Crennan and Kiefel JJ).
[52] AS [29, Lines 25-30, p 14.
[53] *Brown* [15], [17].
[54] *Brown* [15], [17].
[55] *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333.
[56] AS [29], Lines 23-25, p 14.
[57] AS [29], Lines 25-26, p 14.

s43(1) of the AAT Act, and assuming that the Tribunal decision is not affected by jurisdictional error, the legal consequence is that the Tribunal's decision is final in resolving the controversy between the parties.

75. Finally, the Appellant submitted that s43(6) of the AAT Act leaves no room for the delegate's decision (that has been set aside) to have a continuous operation and no room for the delegate's decision to "spend" or "exhaust" the power in s501(2) of the MA.[58] The Respondent responds as follows.

76. The Respondent accepts that the statutory effect of ss43(1) and (6) of the AAT Act meant that the decision of the Delegate (made on 5 July 2011)[59] had no continued legal operation (noting that the Delegate's decision was set aside by the Tribunal on 8 November 2013).[60]

77. The Respondent also accepts that the Delegate's decision (5 July 2011) did not have the legal effect to "spend" or "exhaust" the power in s501(2) of the MA (i.e. given the obvious conclusion that the Delegate's decision was set aside by the Tribunal).

78. However, that is not the end of the matter. Once the Tribunal decided not to cancel the Respondent's visa on 8 November 2011, that decision had the legal effect of exhausting the power; as s501A(1) of the MA and s43(1) of the AAT Act expressly recognises.

79. Section 43(1) of the AAT Act refers to the Tribunal being able to 'exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'. In this case, the Tribunal exercised the same power as the delegate in forming a state of satisfaction that the Respondent did not pass the character test under s501 of the MA. Regardless of the Tribunal not cancelling the Respondent's visa as a matter of discretion, that discretionary decision does not negate from the Tribunal's exercise of power in forming a state of satisfaction for Limb 1.

80. In the academic text titled *Federal Administrative Law*, the authors outline that:

> 'Section 43(1)(c) empowers the tribunal to set aside the decision under review and do one of two things. The first is to make a decision in substitution for the decision which is set aside. This involves the tribunal exercising and exhausting the powers of the primary decision-maker….'[61]

81. As the plurality rightly reasoned, the prospect of repeated decisions concerning the right of a non-citizen to remain in Australia, unquelled by a full review by the independent review tribunal, leads to a lack of certainty and potential for inconsistency

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[58] AS [27], Lines [12]-[18], p 13.
[59] Appellant's Chronology **(AC)**, p 3.
[60] AC, p 3.
[61] Donnelly J, Groves M and Weeks G, *Federal Administrative Law*, '[AAT43.200] Remitting a decision to make a decision – impermissible', Thomson Reuters, Westlaw, 2020.

incompatible with the prescriptive nature of the relevant provisions of the MA.[62]

Part VI: Respondent's Notice of Contention

82. The Respondent respectfully contends that the decision of the Court below should be affirmed on the reasoning advanced by the plurality and on ground 1 reflected in the NOC but in the alternative on Grounds 2 and 3.

Legal Unreasonableness

83. The Full Court in *Makasa*, save for Bromwich J, did not address the Respondent's legal unreasonableness ground.[63] At [41] of *Makasa*, Bromwich J noted:

> [41] … . The Minister sufficiently considered the effect of Mr Makasa's continued consumption of alcohol, in the context of the 2017 PCA conviction, and concluded that this contributed to a low, but continuing, risk of sexual re-offending. While this was a very pessimistic way in which to regard the effect of continued alcohol consumption-related summary offending on the risk of sexual re-offending, it cannot be said to rise to the level of legal unreasonableness

84. On this issue, but under the umbrella of having regard to mandatory considerations, Besanko J noted:[64]

> [20] "As was seen earlier when considering the Minister's conclusion, his concern with reoffending was with serious crimes of a sexual nature. The passages to which the Court was referred come close to articulating a line of reasoning by the Minister that abuse of alcohol is the common thread in the sexual offending and the drive under the influence offence. In other words, the recent drive under the influence offence indicates that the appellant has a problem with alcohol which he does not have under control and this makes it more likely he will reoffend by way of sexual offences.
>
> [21] In my respectful opinion, if the Minister took that view then, in light of the previous decision of the Tribunal, he needed to clearly articulate it and presumably an increased risk (to whatever degree) of reoffending. He has not done that…

85. For the reasons that follow, the decision of the Appellant was legally unreasonable.

86. First, in 2013, the Tribunal found that the Respondent posed a 'relatively low risk to the Australian community' of engaging in further sex offences.[65] In the Appellant's decision in 2017, the Appellant concluded that the Respondent continued to pose a low risk of sexual reoffending.[66]

87. Despite the new facts that arose after the Tribunal decision, the Appellant did not find the Respondent posed an increased risk of harm of sexual offending to the Australian community compared to 2013. As such, the Appellant has not shown how the Respondent now posed an unacceptable risk of harm to the Australian community.

88. Given the Appellant's *exclusive focus* on cancelling the Respondent's visa was the

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[62] *Brown* [113].
[63] *Makasa*.
[64] *Makasa* [20]-[21].
[65] AFM [92], p 26.
[66] Appellant's Core Appeal Book **(ACAB)** [49], Line 0, p 7.

prospect of him engaging in further sexual offending,[67] the Appellant's 2017 decision is in substance a decision that disagrees with the Tribunal's 2013 decision. The risk assessment of the Respondent committing further sex offences of a similar kind that were committed in 2006 in the Australian community has not changed between 2013 and 2017, regardless of the 'new facts'. In that context, the decision of the Appellant has the character of being legally unreasonable.

89. Even still, for the following reasons, as distinct from an *ex post facto* analysis of what the Appellant may have been intending, the decision itself fails to expose a clearly articulated, rational and intelligible justification for the connection between the 2017 PCA conviction and his risk of perceived sexual re-offending. This in spite of the references in the decision to his prior history with alcohol.

90. The proper analysis begins with the nature and content of the perceived risk arising out of a similar offence to the one perpetrated pursuant to s66C(3) of the CA when the Respondent was just 23 (and the complainant was four months shy of being 16). The Respondent is now 37 and was 34 at the time of the Appellant's decision under review.

91. It may be readily accepted that a decision to drive a motor vehicle following the consumption of a quantity of alcohol beyond the mid-range prescribed limit does not carry with it a propensity to engage in consensual intercourse with someone between the ages of 14-16. The Respondent submits the following matters infected the Appellant's decision to make the conclusion legally unreasonable:

    a. There is no basis to conclude that the Respondent's 2017 PCA mid-range driving offence indicates the Respondent has a problem with alcohol or that alcohol was being consumed at a level that would exacerbate his risk of recidivism. A PCA conviction is evidence of a decision to drive a motor vehicle without regard for the legislatively mandated standard for ingestion of alcohol over the relevant period of time and is not of itself indicative of a person who drinks to excess or is engaging in alcohol abuse.

    b. The Appellant did not expressly find that alcohol was a factor in the Respondent's commission of the sex offences on 31 August 2006.

    c. The Appellant merely noted that the Respondent had been drinking on 30 August 2006, although expressly found that he would make no findings as to the events that occurred on the evening before the sex offences.

    d. The Appellant found that the Respondent required further rehabilitative progress concerning alcohol, given the Respondent's most recent drink-driving offence.

[67] *Makasa* [16] (Besanko J); *Makasa first instance* [35], RM424 see also RM402[13].

There was no analysis by the Appellant as to how alcohol played any role in the Respondent's commission of the sex offences on 31 August 2006, and even still, no analysis as to how that might contribute to his risk of sexual reoffending of a s66(C)(3) offence.

e. Even still, the decision did not engage with the absence of other contextual factors that were present in the 2006 sex offences that were known at 2013, for example, youth, immaturity, drinking with a group and how those factors might be likely to appear again in 2017.

92. Accordingly, Bromwich J (in dissent in *Makasa*) was wrong to conclude that there was evidence (or if there was, that it was articulated rationally) by which it was open to the Appellant to conclude[68] that alcohol consumption had been a factor in the Respondent's sexual offending on 31 August 2006.[69] The evidence went no higher than showing that the Respondent has been drinking on the evening prior to the sex offences that occurred over the course of the next day.

93. Dr Ashkar noted that the Respondent's offending 'occurred during a time when the [Respondent] was consuming large amounts of alcohol to manage stress'.[70] Read in its proper context, this was not evidence from Dr Ashkar that the Respondent was consuming large amounts of alcohol on 31 August 2006 when the sex offences occurred. Rather, this was evidence that the Respondent was generally consuming excessive alcohol during the August 2006 *period* of his life. Dr Ashkar merely noted that the Respondent had been drinking alcohol before the sex offences, citing the remarks on sentence of the learned sentencing judge.[71]

94. Justice Bromwich concluded that the Appellant 'sufficiently considered the effect of [the Respondent's] continued consumption of alcohol, in the context of the 2017 PCA conviction, and concluded that this contributed to a low, but continuing, risk of sexual re-offending'.[72] This reasoning cannot be discerned from the Minister's decision.[73]

95. Given the preceding, it follows that the Appellant's conclusion that the Respondent continued to pose a low risk of re-offending (which was the same finding made by the Tribunal in 2013) has the character of being legally unreasonable.

96. Finally, in assessing the extent of impediments the Respondent would face if removed to Zambia, the Appellant found that the Respondent's aunt and extended family in

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[68] ACAB [31], Lines 27-30, p 11.
[69] *Makasa* [37].
[70] *Makasa* [36] (Bromwich J judgment).
[71] ACAB [31], Lines 30-34, p 11.
[72] *Makasa* [41].
[73] ACAB [49], Lines 0-12, p 14.

Zambia would "go some way to assisting" the Respondent adjust to life in that country.[74] For the Respondent, this finding both lacks a rational foundation and is devoid of intelligible justification:

a. The Appellant found that the Respondent does not have a relationship with his aunt.[75]

b. There is no evidence that the Respondent's extended family in Zambia would provide him with any assistance whatsoever in that country.

c. Without evidence of a relationship between the Respondent and his extended family in Zambia, it was not open for the Appellant to infer or speculate that the Respondent's extended family (including his aunt) in Zambia would provide him with any support whatsoever in that country.

97. For the preceding reasons, the Appellant's decision is legally unreasonable.

Mandatory Relevant Consideration

98. The Respondent respectfully adopts and relies upon the reasoning of Besanko J in *Brown*[76] and *Makasa*[77] concerning this ground. Besanko J reasoned as follows.

a. The Appellant failed to take into account a relevant consideration of great importance, namely, the earlier decision of the Tribunal in 2013, and that constituted jurisdictional error.[78]

b. In a case where there has been a prior decision under s501(2) of the MA 58 not to cancel a visa in circumstances where particular factual matters have satisfied the conditions in the subsection, the desirability of consistency in administrative decision-making, the related matter referred to by Dowsett J in *Watson*,[79] and the presence of related sections such as s501A of the Act leads to the conclusion that when consideration is given to the making of a further decision under s501(2) based on the same factual matters satisfying the conditions in the subsection, the previous decision under s501(2) is a mandatory relevant consideration of great importance.[80]

c. Of significant importance, in this case, was the protection of the Australian community from criminal or other serious conduct, and that included for consideration the seriousness and nature of the criminal conduct, the risk of

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[74] ACAB [95], Lines 0-7, p 19.
[75] ACAB [95], Lines 0-7, p 19.
[76] *Brown* [121]-[126].
[77] *Makasa* [11]-[21].
[78] *Makasa* [11].
[79] *Minister for Immigration and Multicultural Affairs v Watson* [2005] FCAFC 818; (2005) 145 FCR 542 [7] **(*Watson*)**.
[80] *Brown* [122] (Besanko J).

it being repeated, and the nature of its consequences if repeated.[81]

d. It is significant that the risk of reoffending of which the Appellant expresses concern is the risk of the Respondent reoffending in a similar fashion, that is, serious crimes of a sexual nature.[82]

e. It is not just a matter of referring to the 2013 Tribunal decision, but recognising that based on the same criminal conduct that engaged s501(2) and after a full review and with detailed reasons the Tribunal had decided some years before, that the Respondent's visa should not be cancelled.[83]

f. In circumstances where what might be described as the intermediate conclusions of the Tribunal (2013) and the Appellant (2017) are so similar, the inference should be drawn that the Appellant has failed to treat the decision of the Tribunal as a relevant consideration of great importance unless a clear and evident justification appears in the Appellant's reasons.[84]

g. The Appellant's line of reasoning was to the effect that the Respondent's recent drive under the influence offence indicates that the Respondent has a problem with alcohol which he does not have under control and this makes it more likely he will reoffend by way of sexual offences.[85] If the Appellant took that view then, in light of the previous decision of the Tribunal, he needed to clearly articulate it and presumably an increased risk (to whatever degree) of reoffending.[86] The Appellant has not done that, such that the proper inference is that the Appellant has not treated the earlier decision of the Tribunal as a relevant consideration of great importance.[87]

99. First, the Appellant submitted that he did not, contrary to Besanko J's finding, fail to consider the earlier Tribunal decision (having repeatedly referred to it).[88] Merely referring to various parts of the 2013 Tribunal decision does not mean that the Appellant engaged in an *active intellectual process*[89] with the findings of the Tribunal.

100. Secondly, the Appellant submitted that the relevant facts that postdated the 2013 Tribunal decision led the Appellant to a 'different decision'.[90] That submission should be rejected.

101. As Burley J outlined in *Makasa* at first instance, the 'Minister accepts that in his

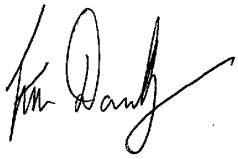
[81] *Makasa* [14].
[82] *Makasa* [16].
[83] *Makasa* [18].
[84] *Makasa* [18].
[85] *Makasa* [20].
[86] *Makasa* [21].
[87] *Makasa* [21].
[88] AS [40], Lines 14-18, p 20.
[89] *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; (2017) 347 ALR 173.
[90] AS [40], Lines 14-18, p 20.

conclusion the exclusive focus of his reason for deciding to exercise his discretion to cancel the visa is the possibility that [Respondent] will reoffend in a similar fashion to his 2006 underage sex offence'.[91]

102. In 2013, the Tribunal found that the Respondent posed a low risk of re-offending concerning sex offences.[92] The Appellant's 2017 decision did not change that risk assessment, also finding that the Respondent was a low risk of re-offending.[93] The Appellant has been unable to reasonably show that there has been any material change in circumstances since the 2013 Tribunal decision.[94] The foundation for the Appellant's decision was the Respondent's sex offences in 2006 with no marked change to the Respondent's risk of committing further sex offences in Australia.

Part VII: Respondent's oral presentation

103. The Respondent estimates that he will require between 90 to 120 minutes for the presentation of his oral argument.



Awais Ahmad **&** **Dr Jason Donnelly**

Maurice Byers Chambers **Latham Chambers**

Dated: 28 August 2020

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[91] *Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639 [35].
[92] AFM [92], p 26.
[93] ACAB [49], Line 0, p 7.
[94] *Brown* [205] (Bromwich J judgment).