HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

Margaret Archer
Appellant

and

Minister for Immigration and Citizenship
Respondent

APPELLANT'S REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: REPLY

Ground 1

2. **The Minister now concedes there is a common law principle of construction that an act must be effected within a reasonable time**.[1] However, it is not correct that the principle of construction must be suggested by the words of the statute or be directly suggested by rules or principles not disapplied by statute: cf RS [10]. The "ordinary rule" is itself a principle of construction, and whether it applies is a question of construction. The Minister asserts that the ordinary rule will apply with "less force" or "be more readily displaced, where the statute confers a discretionary power": RS [19]. No authority is cited, and no such qualification exists. Even if there was, the proper construction of s 501BA(2) would still attract application of the rule.

3. The Minister rationalises the application of the rule in *Koon Wing Lau* as that the expiry of the power there "was a predicate of constitutional validity": RS [32]. But this was not how Dixon J nor Williams J reasoned.[2]

4. The Minister's reliance at RS [23] on the reasoning of Thawley J below is misplaced: his Honour's reasoning merely emphasises that whether the rule applies resolves to a question of construction of the particular provision. A belated performance of a *duty* "has legal effect", but to say that this is also the case for a belated exercise of *power* assumes the correctness of the premise. The Minister's reliance on Thawley J's reasoning about a power being "extinguished" is also inapt. The appellant's argument (see AS [26]) is that any exercise of the power in s 501BA(2) that is beyond a reasonable time is unreasonable. It would be unreasonable whether the power ceased to be available, or because its exercise was affected by "substantive" unreasonableness: cf RS [23]. Power exercised ultra vires is still ultra vires, whether ultra vires in a broad or narrow sense.

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1 Respondent's Submissions dated 20 October 2026 (**RS**) [3], [18]. Cf Response of the Minister dated 29 April 2026 to the *Archer* special leave application at [15]; Response of the Minister in dated 29 April 2026 to the *XMBQ* special leave application at [16]-[19].

2 Dixon J dealt with constructional and constitutional issues separately: *Koon Wing Lau* (1949) 80 CLR 533 at 573-574, cf 576 (Dixon J). Similarly, Williams J's application of the ordinary rule at 590 simply drew on *Folkhard v Metropolitan Railway Co* (1873) LR 8 CP 470.

5. **On its proper construction, s 501BA(2) is subject to a time limit.** The Minister's contentions (RS [24]-[34]) are not faithful to the text, context or purpose of s 501BA(2).

6. *First*, just because "national interest" might, in the abstract, be understood in a broad ambulatory way, it does not follow that any power conditioned on the "national interest" must be indefinitely available: cf RS [29], [38]. Those broad words must still be understood in the context of the relevant statute: AS [33]. That is so even before recognising that s 501BA affects individual rights.

7. The Minister gives cursory acknowledgement of the impact on individual rights, and, indirectly but no less importantly, liberty, when he contends that the temporary restoration of a visa is "wholly meaningful", "unless and until disturbed" by s 501BA(2): RS [30]. But the "unless and until" is the very problem. This indeterminacy is an "unsatisfactory and potentially inhumane contingency about that person's life in the Australian community",[3] not clearly intended by the words Parliament has chosen.

8. The Minister says that the "same class of visa holder may have different conditions attached to their visa", in answer to the appellant's point about equality within a visa class: RS [40]. However, this misses the point. The fact that visa holders within the same class of visa may be subject to different conditions obscures that these conditions do not set up a hierarchy of durability of the right to be present in Australia in the way that the Minister's construction of s 501BA does: cf AS [38].

9. *Second*, s 501BA(2) is enlivened upon the occurrence of a favourable decision under s 501CA(4): s 501BA(1)-(2), cf RS [24]. The language of s 501BA(2) ("may set aside the original decision and cancel a visa") makes explicit that the power is conferred precisely for the purpose of responding to, and overriding, the s 501CA(4) decision: cf RS [29], [36]. It is circular to contend that the power is not temporal on the anterior Tribunal decision just because the Minister might only later *choose* to consider exercising the s 501BA(2) power: RS [28]. The delay in getting to that point, when the power has been "available for exercise" for some time (RS [28]), is the very problem.

10. *Third*, the absence of explicit temporal language in s 501BA(2) supports the implication of the ordinary rule. This is because there is no need to apply the "ordinary rule" where temporal periods are already expressly specified (s 501CA(3), s 500(6L)(c)): cf RS [27].

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[3] *Minister for Home Affairs v Brown* (2020) 275 FCR 188 at [30] (Allsop CJ, Kenny and Banks-Smith JJ).

11. *Fourth*, the Minister accepts that his construction means the power in s 501BA(2) may duplicate the power in s 501(3): RS [31]. Section 501H of the Act does not assist the Minister: cf RS [31]. That section simply confirms that the suite of "character" refusal and cancellation powers (ss 501, 501A, 501B and 501BA) is in addition to other non-character refusal and cancellation powers (such as s 65, or s 116). It does not cut across this Court's reasoning in *Minister for Immigration and Border Protection v Makasa*.[4]

12. *Fifth*, reliance on analogy with s 501A(2) is inapt: cf RS [32]. It is important to remember that s 501A(2) comprises two separate powers: one in relation to refusals (par (a)), and a different one in relation to cancellations (par (b)). Assuming the correctness of *KDSP*,[5] that case is only authority for the proposition the power in s 501A(2)(a) does not "lapse" precisely because it can be enforced by mandamus in respect of the duty to make a decision on the visa application under s 65 of the Act. The duty to make a decision under s 65 (including any constituent s 501A(2)(a) decision) must be performed within a reasonable time, because this is what makes mandamus available. Contrary to the Minister's submissions, the limitation of a reasonable time coherently applies to both s 501A(2)(a) and (b). The difference between (a) and (b) is the *consequence* (mandamus compared to expiry of power): it does not dictate there be no time limit.

13. *Sixth*, the appellant's construction does not produce incoherent results: cf RS [33]. A possibility of "different assessments by different courts" is not consistent with what is well-understood: that reasonableness admits of only one correct answer: AS [43]. The only basis offered by the Minister to explain what he alleges gives rise to incoherence is the "inherently variable nature of the "national interest"": RS [39]. But this again *assumes* that "national interest" in s 501BA(2) should be given an ever-ambulatory operation.

14. *Seventh,* the Minister's acceptance of what he calls "substantive" reasonableness at RS [34] as a safeguard is incomplete, because "substantive" reasonableness has been recognised as including a measure of time: AS [26] n 28.

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4 (2021) 270 CLR 430.

5 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1. The alleged incoherence at RS [32] may otherwise say more about the correctness of *KDSP* than provide a reason to disapply the ordinary rule to s 501BA: see [128] (Bromberg J).

Ground 2

Assessment of "reasonable time"

15. While "capriciousness" or "neglect, oversight or perversity" may be useful heuristics, reasonableness has no precise textual formulary: cf RS [52]-[53].[6]

16. The appellant's approach to discerning a reasonable time does not deny that a Minister may draw on the assistance of their department: cf RS [47]. It is however another thing to suppose that the Act authorises the Minister to permit their department to deprioritise time-sensitive exercises of extraordinary personal power, with the result that a reasonable time to make a s 501BA decision is "augmented" rather than truncated: cf RS [45]. Nothing in the Act authorises such a wide-reaching conclusion. On the appellant's approach, resourcing remains a matter for the executive: cf RS [57]. It just means that the executive bears legal responsibility for the consequences of those resourcing decisions: an unsurprising outcome. The Minister's argument that he has a "need to prioritise decision-making in cases in which detention of a non-citizen would be prolonged" (RS [49]), as if it were an absolute justification, presents a false dichotomy.

17. The Minister's objection to judicial engagement on "strict judgment on matters of indoor management" is therefore overstated: cf RS [57]. Indeed, although the appellant does not go so far, the Privy Council had little difficulty in laying down a general rule of a period of one year being a reasonable time for determining a citizenship application in Antigua.[7] Separately, Lord Denning MR entered into precisely what the Minister complains here of as sacrosanct "indoor management" on an argument about unreasonable delay.[8]

18. The Minister says that the Canadian Federal Court of Appeal "has never sanctioned" the *Conille* approach: RS [59] n 3.[9] But the Federal Court of Appeal recently endorsed *Conille* in ***Benison*** *v Canada (Royal Canadian Mounted Police External Review Committee)*, 2026 FCA 53.

19. *Conille* has indeed been explained as comprising three steps: the first two being for the applicant to show that the delay is longer than the nature of the process required, *prima*

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6 Compare *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [5]-[11] (Allsop CJ). See *Northern Disability Services Pty Ltd v National Disability Insurance Agency* [2024] FCA 892 at [113] (Horan J); *Song v Minister for Immigration and Citizenship* [2025] FCA 1351 at [88], [93] (Hill J).

7 *Oliveira v The Attorney General (Antigua and Barbuda)* [2016] UKPC 24 at [42].

8 Ibid at [43], explaining *R v Secretary of State for the Home Department, Ex p Phansopkar* [1976] QB 606 (CA) at 622.

9 Citing ***Thomas*** *v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at [29]. The Minister omitted the very next paragraph in which Fothergill J went on to apply the principles identified in *Conille*.

facie, and that the applicant is not responsible for the delay; the third being an onus on the government respondent to provide a "satisfactory explanation": cf RS [60].[10] But generalised resourcing explanations are not satisfactory explanations; there must be evidence tethered to the delay actually experienced by the person concerned.[11] In *Thomas*, Fothergill J did not accept a "backlog" explanation: *Thomas* at [30]-[31], cf RS [59] n 69. The proposition that "backlog" justifies delay is also inconsistent with *Benison* which emphatically rejected a "we will get to your appeal slowly but surely, in a methodical and principled manner, as quickly as our resources allow and depending on the number of higher priority appeals we receive" explanation: see [119] (Heckman JA).

10 *The period in this case was not a reasonable time*

20. The fifteen months between the s 501CA(4) decision and the purported s 501BA(2) decision were not justified. Ms D'Amico did not have direct knowledge of what had occurred on the appellant's matter between 21 March and 2 November 2023: RS [10]. The generalised evidence of Ms D'Amico did not explain the seven months of inaction *on the applicant's particular matter*: cf RS [11]. There was no evidence that the appellant had a case officer between 21 March 2023 and 7 November 2023, let alone that case officer having been diverted to other tasks. Even if this assumed diversion had been subject of evidence, it would be irrelevant since the inherent requirements of making a s 501BA(2) decision do not pause because the Department may have chosen to prioritise
20 other matters: cf AS [62].

Dated: 10 November 2026

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10 See e.g. *Roghangar v Canada (Citizenship and Immigration)*, 2026 FC 987 at [14]-[15] (Conroy J); *A.B. v Canada (Citizenship and Immigration)*, 2026 FC 1249 at [21] (Thorne J).

11 See e.g. *Benison* at [99], [118] (Heckman JA) (Locke and Mactavish JJA agreeing).