HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN: **XMBQ**

Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Respondent

APPELLANT'S REPLY

PART I CERTIFICATION

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

PART II CONCISE REPLY

Principle of construction

2. The Minister acknowledges a relevant common law principle of construction, as stated at **RS [6]**: "Where a statute confers power to do a thing upon the occurrence of a particular event, but does not specify the period in which the thing is to be done, there exists a relevant principle of construction that, subject to a contrary intention, the power is to be performed within a "reasonable time"." This expression of the principle is substantially identical to the appellant's at **AS [2]**. It is, however, contrary to the premise of the Full Court's reasoning below: **AS [22]**; **FC [1]**, **[24]**, **[78]**, **[90]**, **[117]**.

3. Yet despite the clarity and simplicity of this expression of principle, the Minister's submissions elsewhere are apt to introduce confusion and contradiction.

(1) It is unclear what the Minister means in stating that the principle is "responsive to the statutory text and context": **RS [6]**, **[32]**. If the Minister only means: "the principle may be displaced by contrary intention, gleaned from the statutory text and context", that is uncontroversial.

(2) But the Minister also states that, where the principle applies to a power rather than a duty, it "requires clear support in the statutory text and context" (**RS [6]**, **[39]**). That is a contradiction: the very circumstance in which the principle is engaged is a statute that is *silent* as to any "period in which the thing is to be done". The principle therefore need not be "suggested by the words of a statute" (cf **RS [32]**). The principle, of its nature, applies presumptively: see, esp., **AS [40]**. The same contradiction may explain the otherwise confusing use of the word "may" (rather than "should" or "must") in the Minister's summary submission at **RS [3]**.

(3) While querying the historical provenance of the principle (as to which, see [11] below), the Minister states that it is "clear" that Dixon J's statement of principle in *Koon Wing Lau* has been applied in subsequent decisions of this Court: **RS [38]**. Yet the Minister goes on to say that what his Honour described as the "ordinary rule" has only been applied to a statute which "in effect" "confers" a duty: **RS [39]**. The latter proposition is wrong: the provision at issue in *CPCF*, for example, concerned a power: see **AS [33]-[37]**.

4. The Minister submits the principle will be "readily" displaced in its application to powers, as distinct to duties: **RS [6]**, **[39]**, **[47]**, **[49]**. This proposition is too general. The strength of the principle – put another way, what may be sufficient indication in the statutory text and context to displace it – will be affected by the nature of the power and the wider statutory context. In particular, and adapting by analogy what this Court held in *Stephens v The Queen*, "the less [the exercise of a power] would defeat reasonable expectations, and the less injustice it would cause" if exercised at *any time*, "the less force there will be in the presumption" and the more readily it will be displaced.[1]

Proper construction of s 501BA

<u>The principle applies to the construction of s 501BA</u>

5. The Minister submits that the relevant principle of construction is not engaged by s 501BA because the section "does not confer a power which arises upon the occurrence of a particular event": **RS [7]**, **[33]**; cf **PJ [135]**. The Minister seeks to justify this

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[1] (2022) 273 CLR 635, [34]-[35] (Keane, Gordon, Edelman and Gleeson JJ). See also, e.g., by analogy to what is required to displace a presumptive implication of a duty of procedural fairness: *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515, [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

proposition only by noting that the power in s 501BA is non-compellable: **RS [48]**. But that is just another way of saying s 501BA confers a power, and does not impose a duty.[2] Yet the Minister agrees that the principle applies to both duties and powers (setting to one side any debate as to the "strength" of the principle in its application to powers). Section 501BA *is* engaged upon the occurrence of an event (the making of a revocation decision under s 501CA): see s 501BA(1).[3] Accordingly, the principle of construction is engaged.[4]

No contrary intention to the application of the principle in s 501BA

6. As the primary judge held, there cannot be discerned from the statutory text and context a contrary intention to the application of the principle: **AS [21]**; **PJ [140]**. In addition to specific replies below, the appellant relies on his submissions in chief, and the primary judge's reasoning, in answer to the matters identified by the Minister: **RS [49]-[59]**.

7. The Minister heavily relies on the "national interest" state of satisfaction preconditioning the power; this is said to "uncouple" the power from the original decision: **RS [52]-[53]**. But that is to imply that the power in s 501BA has some sort of freestanding character, which the Minister elsewhere correctly accepts that it does not have: **RS [52]**. The power is not a *general* national interest cancellation power; rather, as the Minister acknowledges, it is an "extraordinary and exceptional" power to "reverse" a *particular decision*: **RS [7]**. Thus, the power allows the Minister, in whom Parliament has entrusted a political judgment, to "reverse" a particular decision made by a delegate or the Tribunal that the Minister may consider is "at odds with community standards and expectations": see **AS [50]**, referring to extrinsic material.

8. The Minister submits that the purpose of s 501BA is protective as it "authorises the Minister to protect the safety of the Australian community by overriding what is

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2 The powers in *Koon Wing Lau* and *CPCF* were also non-compellable.

3 Strictly speaking, the discretionary power is not enlivened until the Minister forms the states of satisfaction described in s 501BA(2)(a) and (b): see **RS [19]-[20]**. However, as the primary judge held: "the making of the original decision constitutes the factum that attracts the application of the section"; "[t]he matters of which the Minister must be satisfied under s 501BA(2)(a) and (b) themselves involve the exercise of an evaluative judgment, and it is artificial to divorce them from the discretionary aspects of the exercise of the power conferred by s 501BA(2), particularly for the purposes of any implied temporal requirement that the power must be exercised within a reasonable time" (**PJ [135]**). The Minister must be taken to have accepted this proposition, especially given that the Minister did not, on his appeal to the Full Court of the Federal Court below, complain about the primary judge's assessment that the time taken to make the Minister's decision was unreasonable. The primary judge calculated this time from the date of the original decision under s 501CA, not from the time that the states of satisfaction were formed: see **PJ [141]-[192]**.

4 For the avoidance of doubt, as was submitted in chief (**AS [23]**), the appellant maintains that, even if the principle is not applicable, the better construction of text, context and purpose would be that the power is only available within a reasonable time of the original decision.

otherwise the final decision in an administrative continuum": **RS [18]**; cf **AS [50]**. That s 501BA has a broadly protective purpose may be accepted (albeit that the "national interest" is not necessarily exhausted by the notion of "safety"). But it does not follow that Parliament intended the power to be available forever. That would transform the character of the power from one concerned with responding to the original decision to a kind of indefinite monitoring power (**PJ [132]**).

9. Ultimately, no rational legislative purpose can be discerned in subjecting – forever – all members of a "set" or "class" of persons (**RS [18]**, **[19]**, **[21]**), comprising persons who have received a favourable exercise of power under s 501CA, to the jeopardy of cancellation based on a "political"[5] judgment of the Minister. That is especially so, given that the Minister possesses a range of other cancellation powers (including in s 501) that are available to respond as appropriate to "new events and circumstances" in the future,[6] subject to particular rules or constraints:[7] **AS [47]-[48]**, **[58]**; *contra* **RS [28]**, **[53]-[56]; PJ [54]-[57]**, **[136]-[137]**.

10. It is unnecessary to decide whether the power in s 501A(2)(b) to cancel a visa (as distinct from the power in s 501A(2)(a) to refuse a visa) is conditioned by an implication that it be exercised in a reasonable time (cf **FC [103]**): **RS [57]**. That issue was not determined in *KDSP*. As Bromberg J there observed in *obiter*, the issue raises "very different contextual considerations" to the issue of whether the exercise of the refusal power in s 501A(2) is so limited and accordingly did not need to be considered in that case.[8] However, there would be no "incoherence" in recognising that: (a) the power in s 501A(2)(a) to refuse to grant a visa is exercisable only within the constraint of an overarching duty to determine a visa application within a reasonable time;[9] and (b) the

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5 The extrinsic material states that the power in s 501BA enables the Minister to "retain[] the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community": cf **RS [30]**: Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 15 [85].

6 The extrinsic material to what is now s 118 confirms that the provision ensures "the fact that a particular visa can, or cannot, be cancelled under one of the specified [cancellation] powers does not affect any power to cancel that visa under another of those specified powers": Explanatory Memorandum, Migration Reform Bill 1992 (Cth) 36 [134].

7 For example, with respect to the personal power of the Minister in s 501(3) to cancel a visa, without natural justice, if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that cancellation is in the national interest, the Minister must cause notice of the decision to be laid before each House of Parliament within 15 sitting days: s 501(4A), subject to s 501(4B). That rule does not apply to s 501BA.

8 (2020) 279 FCR 1, [128].

9 See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, [37] (Crennan, Bell, Gageler and Keane JJ), citing with approval: *Koon Wing Lau* (1949) 80 CLR 533, 573-574

power in s 501A(2)(b) to cancel a visa is constrained by the same presumptive principle that applies to the power in s 501BA(2) – i.e., that it can only be exercised within a reasonable time of the original decision.

11. Finally, the Minister suggests that the "harshness" of his construction of s 501BA is "moderated" by an implied condition of reasonableness constraining fact-finding (**RS [59]**). But the "moderating" effect of this constraint is modest: on the Minister's construction, the Minister need not rely on any "stale" information as to circumstances at the time of the original decision, but could cancel 30 years later based on information as to "recent" events. In any event, both the implied condition that a power is available for exercise only within a reasonable time of the occasion for its exercise, and the implied condition of reasonableness in fact-finding embraced by the Minister, emanate from the same "'fundamental values' anchored in the common law tradition".[10] Both reflect the common law's longstanding concern that public power is constrained by "rules of reason and justice."[11] "Reasonableness is not exhausted by rationality"[12] (i.e., "why a statutory decision is made"[13]). The principle of interpretation invoked by the appellant, and not displaced by s 501BA, rests upon a bedrock principle of public law laid before Federation and is accommodated in, and adapted to, Australia's constitutional setting: its expression by Dixon J in *Koon Wing Lau* was not some radical development of the law*:* cf **RS [38]**.[14]

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(Dixon J); *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36, 36 (Murphy J); *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163, [28] (French CJ, Gummow, Hayne and Bell JJ).

10 *Minister for Immigration v **SZVFW*** (2018) 264 CLR 541, [59]-[60] (Gageler J).

11 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189 (Kitto J), referring to *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury).

12 *SZVFW* (2018) 264 CLR 541, [59] (Gageler J). See also *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [9]-[11] (Allsop CJ).

13 *ABT17 v Minister for Immigration* (2020) 269 CLR 439, [19] (Kiefel CJ, Bell, Gageler and Keane JJ).

14 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [40] (Gaudron and Gummow JJ).