HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, EDELMAN AND STEWARD JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION — APPELLANT

AND

EFX17 — RESPONDENT

Minister for Immigration and Border Protection v EFX17
[2021] HCA 9
Date of Hearing: 4 December 2020
Date of Judgment: 10 March 2021
B43/2020

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

G T Johnson SC with B D Kaplan for the appellant (instructed by Clayton Utz)

A M Mitchelmore SC with D K Fuller for the respondent (instructed by Prisoners' Legal Service Inc)

CATCHWORDS

Minister for Immigration and Border Protection v EFX17

Immigration – Cancellation of protection visa – Notice of cancellation – Where delegate of Minister cancelled respondent's visa under s 501(3A) of *Migration Act 1958* (Cth) – Where pursuant to duties in s 501CA(3) letter from delegate and enclosures sent explaining decision to cancel respondent's visa and opportunity to make representations about revoking decision – Where letter and enclosures given to respondent by corrective services officer – Where letter incorrectly stated date on which respondent taken to have received notice – Whether Minister complied with duty to "give" written notice and particulars and "invite" representations under s 501CA(3) – Whether capacity of respondent to understand written notice, particulars, and invitation relevant to whether duties in s 501CA(3) were performed – Whether Minister or delegate required personally to perform duties in s 501CA(3) – Whether Minister failed to invite representations as letter did not specify period within which to make representations in accordance with *Migration Regulations 1994* (Cth).

Words and phrases – "capacity to understand", "deliver", "give", "in the way that the Minister considers appropriate in the circumstances", "incapacity", "invite", "method of delivery", "notice", "ordinary meaning", "personally to perform", "requesting formally", "service", "substantive content", "within the period and in the manner ascertained in accordance with the regulations".

Migration Act 1958 (Cth), ss 496, 497, 501(3A), 501CA(3).
Migration Regulations 1994 (Cth), regs 2.52, 2.55.

KIEFEL CJ, GAGELER, KEANE, EDELMAN AND STEWARD JJ.

Introduction

1 This appeal concerns the meaning and operation of s 501CA(3) of the *Migration Act 1958* (Cth), which requires the Minister to give a person whose visa has been cancelled particular information and an invitation to make representations within the period and in the manner ascertained in accordance with the *Migration Regulations 1994* (Cth). The Minister appeals from a decision of the Full Court of the Federal Court of Australia, which held by majority that (i) the sub-section required that the recipient be capable of understanding the information and invitation and (ii) the information and invitation be given to the recipient by the Minister, or the Minister's delegate, personally.

2 For the reasons below, the Minister's grounds of appeal on these two issues should be upheld. But the appeal should be dismissed on the basis of the respondent's notice of contention; the decision of the Full Court should be upheld because the invitation to make representations did not provide a way to ascertain the period within which the representations were required to be made by the *Migration Regulations*.

Background

3 The respondent to this appeal, EFX17, is a citizen of Afghanistan. He arrived in Australia in 2009, and on 16 December 2009 he was granted a protection visa. In 2016, he was convicted of the offence of committing acts intended to cause grievous bodily harm under s 317 of the *Criminal Code* (Qld). He was sentenced to seven years' imprisonment.

4 On 3 January 2017, a delegate of the Minister made a decision to cancel the respondent's visa under s 501(3A) of the *Migration Act*. This decision was described in a four-page letter from the delegate of the Minister to the respondent together with "enclosures". The enclosures accompanying the letter included an "Important Information sheet", a "Revocation Request Form", a "Personal Circumstances Form", forms for "Advice by a migration agent/exempt person of providing immigration assistance" and "Appointment or withdrawal of an authorised recipient", information about legal aid assistance in Australia, provisions of the *Migration Act* and *Migration Regulations*, and other information.

5 The letter from the delegate was dated 3 January 2017. In the letter, the delegate explained, among other things and by reference to various provisions of the *Migration Act*, that under s 501(3A) of the *Migration Act* the Minister was

required to cancel the respondent's visa because the delegate was satisfied that the respondent had a "substantial criminal record", having satisfied the requirement of being sentenced to a term of imprisonment of 12 months or more[1].

6 In the letter, the delegate also explained that the respondent had an opportunity to make representations about revoking the decision to cancel his visa. The delegate said, further, that the representations "must be made in accordance with the instructions outlined below". Those instructions included a section entitled "Time-frame to make representations about revocation". In that section it was explained that representations must be made within the prescribed timeframe, which was said to be "within 28 days after you are taken to have received this notice". It was also said:

> "As this notice was transmitted to you by email, you are taken to have received it at the end of the day it was transmitted."

7 The delegate's letter and the enclosures were sent by the delegate to the Brisbane Correctional Centre as attachments to an email sent at 2.51 pm on 3 January 2017. The body of the email emphasised the importance and urgency of providing the documents to the respondent and asked for the respondent to complete a formal notice acknowledging receipt or, alternatively, for the recipient of the email to acknowledge receipt.

8 The letter and enclosures were handed to the respondent by an officer of the Queensland Department of Corrective Services on 4 January 2017. The case note that described the provision of the letter and enclosures to the respondent described a number of matters which the respondent was told orally, including that his visa had been cancelled due to his substantial criminal record and that he could request a revocation of the cancellation by writing to the Australian Border Force within 28 days. The author of the case note also observed that the respondent "advised that he can understand English while talking, but cannot read or write well. He also advised that he wishes to leave Australia and will not be seeking a revocation of the cancellation."

9 The respondent signed the formal acknowledgement of receipt, and he dated that acknowledgement 4 January 2017. But although the respondent provided the formal acknowledgement of receipt of the letter and enclosures, it appears that he was confused about the contents. His native language is Hazaragi. He spoke broken English, his ability to read or write in English was limited, and

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1 See *Migration Act 1958* (Cth), s 501(6)(a) read with s 501(7)(c).

he had been suffering from a schizophrenic illness due to substance abuse and traumatic events at the hands of Taliban soldiers. A further case note entry on 4 January 2017 recorded that the respondent "expressed concern with reading and understanding the deportation documentation provided to him during the interview".

10 In the further case note entry dated 4 January 2017, it was recorded that the respondent asked for assistance from another prisoner and from the Prisoners' Legal Service and requested a special phone call to enable him to speak with another prisoner. Although there is no record of whether any assistance was provided at that time, a representative from the Prisoners' Legal Service spoke with the respondent using an interpreter on 6 January 2017. The Prisoners' Legal Service was subsequently appointed to represent the respondent.

11 On 9 June 2017, following enquiries by the Prisoners' Legal Service, and their receipt of documents relating to the respondent's application for a protection visa and the cancellation of it, the Prisoners' Legal Service wrote to the Department of Immigration and Border Protection ("the Department") requesting that the notice of cancellation of the respondent's visa be reissued because the respondent's capacity to understand the nature of the visa cancellation and revocation process was "significantly impaired". It was asserted that all the communications between the Prisoners' Legal Service and the respondent had been through the use of a Hazaragi interpreter but even with that interpreter the respondent had difficulty understanding advice and instructions on simple topics.

12 On 15 August 2017, the Department wrote to the Prisoners' Legal Service advising that the notice of cancellation of the respondent's visa would not be reissued because it was "legally effective".

Section 501CA of the *Migration Act* and related provisions

13 Section 501CA(1) of the *Migration Act* provides that s 501CA applies if the Minister makes a decision ("the original decision") under s 501(3A) to cancel a person's visa. Section 501CA(3) provides:

> "As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
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> (i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision."

Section 501CA(4) sets out conditions precedent for the Minister to revoke the original decision, including that "the person makes representations in accordance with the invitation".

14 As s 501CA(3)(b) contemplates, the *Migration Regulations* provide for the period and manner in which the representations should be made. These requirements include that the representations must be made within 28 days after the person is given the written notice and the particulars[2]. The *Migration Regulations* also provide that the invitation to make representations to the Minister can be given by email[3] or by handing it to the person[4] and, if handed to the person, the person is taken to have received it at that time[5].

15 In relation to making a decision, s 496 of the *Migration Act* provides that the Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under the *Migration Act*. Section 497(2) confirms that if the Minister delegates the power to cancel visas, "the delegation does not require the delegate personally to perform any task in connection with the cancellation, except the taking of a decision in each case whether a visa should be cancelled". Section 497(3) relevantly provides:

"Nothing in [s 497(2)] shall be taken to imply that:

(a) a person on whom a power is conferred by or under this or any other Act; or

(b) a delegate of such a person;

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2 *Migration Regulations 1994* (Cth), reg 2.52(2)(b).

3 *Migration Regulations*, reg 2.55(3)(d)(ii) read with regs 2.55(1)(a), 2.55(1)(c).

4 *Migration Regulations*, reg 2.55(3)(a) read with regs 2.55(1)(a), 2.55(1)(c).

5 *Migration Regulations*, reg 2.55(5).

is required personally to perform all administrative and clerical tasks connected with the exercise of the power."

The decisions of the Federal Circuit Court and the Full Court of the Federal Court

16 The respondent commenced proceedings in the Federal Circuit Court of Australia seeking a declaration that the delivery of the letter, the written notice, did not comply with s 501CA(3) and a writ of mandamus to require the Minister to perform the duties in s 501CA(3) according to law. Before the Federal Circuit Court and before the Full Court of the Federal Court the Minister unsuccessfully contested the jurisdiction of the Federal Circuit Court to review the validity of the notice, but that issue was not raised in this Court. There was also no dispute that the delegate's letter to the respondent and its enclosures included the original decision and the particulars of the "relevant information"[6].

17 The respondent's submissions that the letter and enclosures did not comply with s 501CA(3) fell into essentially two categories. First, it was submitted that the Minister did not have regard to the facts that established the respondent's incapacity to understand the letter and enclosures. It was submitted that the Minister was required to have regard to circumstances of incapacity by the requirements in s 501CA(3) that the Minister "give" the notice to the respondent, give "particulars", and "invite" the respondent to make representations and that this was to be done "in the way that the Minister considers appropriate in the circumstances". Secondly, the respondent submitted that the delivery of the letter and enclosures to the respondent did not comply with s 501CA(3) because the person who delivered them was not a delegate of the Minister under s 496 of the *Migration Act*.

18 These submissions were not accepted by the Federal Circuit Court (Judge Egan)[7]. But an appeal to the Full Court of the Federal Court was allowed, by majority, for both reasons[8]. As to the issue concerning the capacity of the respondent to understand the letter and enclosures, Greenwood J (with whom Rares J generally agreed) held that the requirement in s 501CA(3) for the Minister

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6 As defined in *Migration Act*, s 501CA(2).

7 *EFX17 v Minister for Immigration and Border Protection* (2018) 341 FLR 286.

8 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508.

to "give" the notice and the particulars and to "invite" the representations contrasted with mere "service" of documents and imported an "irreducible minimum standard" of "giving" to which effect must be given "in the way the Minister considers appropriate (not at large, but rather 'in the circumstances')"[9]. Greenwood J concluded that in all the circumstances the Minister had not met the irreducible minimum standard of giving the respondent notice of the cancellation decision and the required particulars or of inviting the respondent to make representations about revocation of the original decision[10].

19 Although Greenwood J held that a factor of "real importance"[11] was that it must have been apparent to the Department that the respondent suffered special disadvantage, his Honour's reasoning about the irreducible minimum standard did not require knowledge by the Department of all the respondent's circumstances. For instance, one of the circumstances upon which his Honour relied to conclude that the irreducible minimum standard had not been met was evidence of interactions between the respondent and the Prisoners' Legal Service on 6 January 2017 and 2 February 2017, which was not before the Minister at the time of his decision to cancel the visa[12]. Rares J added that the strict 28-day time limit for the person to make representations and the circumstance that the person receiving the notice, particulars and invitation will be in prison made it "essential" that the invitation is "intelligible, in fact" to the person to whom it is given[13].

20 Greenwood and Rares JJ also held that there had been a failure to comply with s 501CA(3) for the further reason that the Minister, or delegate, had not personally given the respondent the required notice, particulars, and invitation.

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9 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 528 [89]-[90], 538-539 [133], 540 [136]-[137].

10 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 539-540 [134]-[135], [137].

11 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 541 [139].

12 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 540 [134(8)]-[139].

13 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 547-548 [173]-[175].

Their Honours held to be inapplicable the provision in s 497(2) that a delegate of the Minister with power to cancel visas was not required personally to perform any task in connection with the cancellation, except to decide whether a visa should be cancelled. Their reasoning was that the obligations to give notice and particulars and to invite representations were not "tasks" because they were "substantive obligation[s]" and did not involve "ordinary administrative procedure[s] of a formal nature"[14]. In the course of considering this delegation issue, Rares J also reasoned that there was a third instance of non-compliance with s 501CA(3). This was that the letter and enclosures did not make clear "when the 28 day time limit begins or ends"[15]. This issue was mentioned, but not decided, by Greenwood J[16].

21 Logan J dissented. His Honour applied the ordinary meanings of "give" and "invite" and concluded that there was no basis in the text of s 501CA(3) to "distinguish between classes of holders of cancelled visas" on the basis of matters such as education or literacy[17]. Although there might be extreme cases where particular knowledge of the Minister meant that the manner of delivery of the notice that he considered "appropriate in the circumstances" was legally unreasonable, this was not such a case[18]. His Honour also held that giving the notice and particulars and inviting the representations were tasks which did not need to be performed personally by the Minister or his delegate[19]. The conclusion of Logan J on these issues was correct. However, because of the issue raised by

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14 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 543 [150]-[151], 549 [182].

15 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 549 [184]-[185].

16 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 541-542 [140]-[141].

17 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 560 [231].

18 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 560-563 [231]-[246].

19 *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 564 [254]-[255].

Rares J concerning the beginning and end of the 28-day time limit, which is contained in a notice of contention in this Court, the appeal should be dismissed.

The relevance of the respondent's capacity to understand

22 It was, rightly, common ground on this appeal that an implication, derived from an underlying assumption in s 501CA(3), is that the written notice, the particulars, and the invitation from the Minister would be expressed in English[20]. The Minister's first two grounds of appeal asserted that the majority of the Full Court erred in concluding that the Minister failed to "give" the respondent the notice and particulars and to "invite" the respondent to make representations, having regard to the circumstances of the respondent's literacy, capacity to understand English, mental capacity and health, and facilities available to him in custody.

23 The starting point is the common or ordinary meanings of the verbs "give" and "invite" in s 501CA(3). Those common meanings are, respectively, to deliver or hand over[21] and to request politely or formally[22]. The use of "give or deliver unto" in legislation has been described as the "exact equivalent" of "has been served on" in a context where a document "had come to the hands of the applicant"[23]. Section 28A of the *Acts Interpretation Act 1901* (Cth) is also premised upon the assumption that verbs such as "give", when used in Commonwealth legislation, are alternatives to "serve" so that one manner in which giving a document can be satisfied is "by delivering it". The verbs "give" and "invite" connote only the performance of an act rather than the consequences of that performance such as the recipient's capacity to comprehend the content of the English notice given or the English invitation made.

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20 *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 at 325-326. See also the express requirements for the representations in response: *Migration Regulations*, reg 2.52(3)(b).

21 *Macquarie Dictionary*, 8th ed (2020), vol 1 at 653, "give", sense 1.

22 *Macquarie Dictionary*, 8th ed (2020), vol 1 at 812, "invite", sense 2.

23 *Ex parte Portingell* [1892] 1 QB 15 at 17. See also *Capper v Thorpe* (1998) 194 CLR 342 at 352 [21]; *In re 88 Berkeley Road, NW9* [1971] Ch 648 at 652.

24 As Logan J observed in his dissenting reasons, the same approach was taken by this Court in relation to provisions of the *Migration Act* requiring the Minister to "give" a statement to an applicant and to "notify" an applicant of a decision in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*[24]. Section 430D(2), as it was then, provided that if the Tribunal gives an oral decision on an application for review by an applicant who is in immigration detention then the Tribunal must "give" the applicant and the Secretary a copy of a particular statement within 14 days. Section 478(1)(b) required that an application for judicial review had to be lodged within 28 days of the applicant being "notified of the decision". The appellant in that case had been an unaccompanied minor in immigration detention who had no education and could neither read nor write in English or in his native language. Gleeson CJ, McHugh, Gummow and Heydon JJ held that the word "give" was not defined and that it bore its ordinary meaning requiring "physical delivery, not some act of constructive delivery of possession which, at general law, may suffice to transfer property in a chattel"[25]. Their Honours also rejected the submission that the appellant's lack of education and illiteracy meant that he could only be "notified of the decision" by a translation of the decision into a language which the appellant could understand. They said[26]:

> "The Act does not distinguish between notification given to a person in the position of the appellant and any other visa applicant. Nor does it distinguish between applicants with differing levels of education or literacy."

25 When "giving" and "inviting" bear their ordinary meanings – respectively, of delivering and of requesting formally – with the implication that the delivery and request will be made in English, then it follows naturally that the expression "in the way that the Minister considers appropriate in the circumstances" is only concerned with the method of delivery and request rather than the content[27]. As senior counsel for the respondent properly accepted, a requirement that the

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24 (2004) 79 ALJR 94; 210 ALR 190.

25 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 at 101 [37]; 210 ALR 190 at 199.

26 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 at 102 [43]; 210 ALR 190 at 201.

27 See also *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 at 320-321, 325.

Minister consider the capacity of a person to understand the written notice or invitation would require more than physical delivery.

26 The statutory context, including other provisions of the *Migration Act*, reinforces the conclusions that in s 501CA(3) the verbs "give" and "invite" bear their ordinary meaning and that the expression "the way that the Minister considers appropriate in the circumstances" concerns only the method of delivery or invitation rather than the substantive content.

27 In the context of Pt 2, Div 3 of the *Migration Act*, concerning visas for non-citizens, ss 57(2)(a) and 57(2)(c) provide, in similar terms to s 501CA(3), that the Minister must "give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances" and that the Minister must "invite the applicant to comment on it". The assumption that merely requiring the Minister to give these particulars and to invite comment does not require the applicant to understand their contents is reflected in s 57(2)(b), which contains an additional requirement for the Minister to "ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application". The same structure, providing for (i) the giving of information, (ii) the inviting of comment, and (iii) ensuring understanding as far as is reasonably practicable, is adopted in ss 120(2), 359AA(1), 359A(1), 424AA(1), and 424A(1).

28 The approach of the majority of the Full Court was not limited to an implication that the Minister ensure, as far as is reasonably practicable, that the recipient understand the content of the written notice, the particulars, and the invitation. As explained above, the Full Court reached its conclusions about the respondent's lack of understanding by considering matters subsequent to the Minister's decision and matters of which the Minister might not have been aware. But even to draw a more limited implication from s 501CA(3) in the same terms as the express provisions above would go beyond attributing legal meaning to the statutory text[28]. It would also require consideration of the extent of the capacity of a recipient to understand material provided, identification of how limitations could be overcome, and the taking of steps to do so. The administrative difficulties that this would introduce would be in tension with the goal expressed in the Second Reading Speech of the Bill that introduced s 501CA(3) that the "measures

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28 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 556 [65]. See also at 548 [38].

proposed will ensure that the government can move quickly to take action against noncitizens who pose a risk to the Australian community"[29].

29 The majority of the Full Court sought to support an implication that the recipient must understand the contents of the notice, particulars and invitation by drawing an analogy with the observation of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li*[30] that under s 360(1) of the *Migration Act* an invitation must "be meaningful, in the sense that it must provide the applicant for review with a real chance to present his or her case". But that sub-section concerns an invitation to "appear before the [Administrative Appeals] Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review", a matter concerned with the "core function"[31] of the Tribunal to review the decision. As their Honours said in *Li*, the invitation could not be an "empty gesture" such as a hearing scheduled by the Tribunal knowing that the applicant had not recovered from an incapacity so as to permit attendance. By contrast, it would never be an "empty gesture" under s 501CA(3) for the Minister to give written notice, particulars and an invitation in English, in any reasonable way that the Minister considers appropriate in the circumstances, where the notice and particulars contain the information required and the representations are invited within the period and in the manner ascertained in accordance with the *Migration Regulations*.

30 Senior counsel for the respondent also relied upon particular features of the statutory context in which s 501CA(3) appears as supporting an implication relating to capacity of a person to understand the notice, particulars and invitation, including the circumstances: that the person is in prison; that the Minister's decision to revoke a person's visa is one to which the rules of natural justice do not apply[32]; that the sub-section provides for the first notice of a visa cancellation decision; and that the making of representations is a condition precedent for the

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29 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2014 at 10327.

30 (2013) 249 CLR 332 at 362 [61].

31 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18]; 259 ALR 429 at 434.

32 *Migration Act*, s 501(5).

Minister to revoke the original decision[33]. All of these circumstances were accurately described. They emphasise the gravity of the consequences for a person who does not understand the notice, particulars and invitation provided. But they do not provide sufficient foundation for the implication, which is contrary to the ordinary meaning of the words of s 501CA(3).

31 For these reasons, the majority of the Full Court erred in reasoning that the capacity of a person to understand the written notice, particulars, or invitation described in s 501CA(3) was relevant to whether the written notice and particulars had been given or whether the invitation to make representations had been made. In light of this conclusion, the Minister's third ground of appeal, which was an alternative to his first two grounds, does not arise. The third ground asserted that the respondent failed to discharge his onus of proving that the Minister had knowledge of the issues affecting the respondent's understanding and had failed to act upon that knowledge.

Is the Minister or delegate required personally to perform the duties in s 501CA(3)?

32 The Minister's final, and cumulative, ground of appeal is that the Full Court erred by failing to find that s 497(2) of the *Migration Act* ensures that the delegate who exercised the power to cancel the respondent's visa under s 501(3A) was not required personally to give the respondent the written notice, particulars, or invitation required by s 501CA(3).

33 The duties upon the Minister in s 501CA(3) to give a written notice and particulars and to invite representations are not duties personally to do these acts but duties to ensure that the acts are done. They are matters that fall within the usual principle, based in part on administrative necessity, that "when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department"[34].

34 In contrast with the duties in s 501CA(3) of the *Migration Act*, without an express power of delegation the Minister's duty to cancel a visa under s 501(3A) would require personal performance by the Minister. It was common ground on

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33 *Migration Act*, s 501CA(4)(a).

34 *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11, discussing *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563. See also at 19-20, 31.

this appeal that the general power of delegation in s 496 empowers the Minister, by writing signed by him or her, to delegate the performance of the duty in s 501CA(3), which the Minister did. But this delegation did not require the delegate personally to perform the duties to give a written notice and particulars or personally to deliver the invitation to make representations any more than it required the Minister to do so.

35 The general principle based in part on administrative necessity is extended by s 497(2), which permits a delegate to act through a duly authorised officer of the Department in the performance of *any* task in connection with the cancellation of a visa other than the taking of a decision to cancel the visa. The Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994* (Cth), which introduced s 497(2), provided that a purpose of the amendment was to "put beyond doubt that a delegation to cancel visas does not require the delegate to personally perform any task except taking the decision as to whether the visa should be cancelled"[35].

36 The reasoning of the majority of the Full Court that the reference to a "task" in s 497(2) is not to a "substantive obligation" but only to an administrative function finds no support in the text or purpose of that sub-section. The sub-section extends to all tasks in connection with the cancellation of a visa, not merely those that might be characterised as administrative or clerical. Section 497(3) further clarifies that s 497(2) goes beyond, and does not affect, the principle based in part on administrative necessity by providing that nothing in s 497(2) "shall be taken to imply" that the delegate "is required personally to perform all administrative and clerical tasks connected with the exercise of the power". Section 497(3) would not be necessary if s 497(2) extended only to administrative and clerical tasks.

37 The duties in s 501CA(3) were "tasks" to be performed. They were tasks concerned with whether the cancellation of the respondent's visa should be revoked. Since the wide effect intended by the words "in connection with"[36] extends the application of s 497(2) more broadly than those tasks involved in the original cancellation itself, the tasks relating to revocation of the cancellation were

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35 Australia, House of Representatives, *Migration Legislation Amendment Bill 1994*, Explanatory Memorandum at 39 [173].

36 See *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288-289.

in connection with the cancellation of the visa. This ground of appeal should also be allowed.

The notice of contention: the incorrect time period

38 By notice of contention, the respondent sought to uphold the decision of the Full Court on the ground that s 501CA(3) of the *Migration Act* required the Minister to invite the respondent to make representations "within the period and in the manner ascertained in accordance with the regulations" and that the letter did not do so. This issue was raised by Rares J during the course of oral argument in the Full Court and the views of Rares J were adopted by counsel for the respondent. The issue was decided in the respondent's favour by Rares J and mentioned, but not decided, by Greenwood J. It was not suggested in this Court that the issue could have been affected by any additional facts or evidence.

39 In his submissions in this Court, the Minister relied only upon the act of physically handing the letter to the respondent as the act by which the notice was "given" to the respondent. A separate submission that the email sent on 3 January 2017 to the Brisbane Correctional Centre involved "giving" the notice to the respondent was made by the Minister in the Full Court but abandoned in oral argument in that Court. It was not pressed in this Court by the Minister, who acknowledged that the email had not been sent to the email address nominated or permitted by the respondent. It was common ground that if the letter and enclosures complied with s 501CA(3) then the 28-day period would have started to run from 4 January 2017 when the letter and enclosures were delivered, and not from 3 January 2017.

40 The obligation in s 501CA(3)(b) of the *Migration Act* required the Minister to invite the respondent to make representations about revocation to the Minister "within the period and in the manner ascertained in accordance with the regulations". The letter from the delegate of the Minister contained an invitation to make representations in the manner ascertained in accordance with the regulations: for instance, it provided that the representations must be in writing and in English or accompanied by an English translation, referring to reg 2.52. And it correctly referred to the 28-day timeframe for making representations, which could not be extended. But in the absence of any manner of ascertaining that 28-day period, and by incorrectly saying that the respondent was "taken to have received [the letter] at the end of the day it was transmitted [by email]" (which was 3 January 2017), the letter did not invite representations "within the period ... ascertained in accordance with the regulations".

41 The Minister submitted that s 501CA(3)(b) did not require the Minister to specify the date by which representations must be made and he submitted that the period during which representations must be made may be left to the respondent to determine. These submissions can be accepted. But the words of s 501CA(3)(b) which require the Minister to invite a person to make representations "within the period and in the manner ascertained in accordance with the regulations" also require that there be sufficient information on the face of the invitation to permit the person to determine this period correctly. This conclusion is further supported by the condition upon the Minister's power to revoke the cancellation decision that representations be made within the prescribed time limit. It can hardly be supposed that Parliament intended that a person whose visa had been cancelled would not be given the information that would reveal the date by which representations must be made if the person is to avoid the strict consequences of failing to make representations[37].

42 For these reasons, an invitation to make representations "within the period ... ascertained in accordance with the regulations" must crystallise the period either expressly or by reference to correct objective facts from which the period can be ascertained on the face of the invitation such as "28 days from the day that you are handed this document". The invitation in the letter from the delegate of the Minister did not do so. The notice of contention should therefore be upheld.

Conclusion

43 The appeal should be dismissed. The Minister undertook to pay the costs of the respondent in this Court.

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37 *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350.