HIGH COURT OF AUSTRALIA

GORDON A-CJ,
EDELMAN, STEWARD, JAGOT AND BEECH-JONES JJ

BIF23 BY HIS LITIGATION GUARDIAN
THE PUBLIC ADVOCATE APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS RESPONDENT

BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs
[2024] HCA 44
Date of Hearing: 3 September 2024
Date of Judgment: 4 December 2024
M44/2024

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 19 December 2023 and, in their place, order that:*

    (a) *the appeal be allowed with costs; and*

    (b) *orders 2 and 3 of the Federal Circuit and Family Court of Australia (Division 2) made on 7 June 2023 be set aside and, in their place, order that:*

        (i) *a declaration issue that the respondent is obliged to give BIF23, or if applicable his guardian, a written notice and invitation under s 501CA(3) of the* Migration Act 1958 *(Cth) in relation to the decision made on 24 November 2021 by the respondent's delegate to cancel BIF23's Class AH Subclass 101 Child (Permanent) visa ("the Decision");*

(ii) *a writ of certiorari issue to quash the notice and invitation purportedly given to BIF23 on 1 December 2021 under s 501CA(3) of the* Migration Act 1958 *(Cth);*

(iii) *a writ of mandamus issue directed to the respondent requiring the respondent to give BIF23 (by his litigation guardian, the Public Advocate) a written notice and invitation under s 501CA(3) of the* Migration Act 1958 *(Cth) in relation to the Decision; and*

(iv) *the respondent pay BIF23's costs.*

On appeal from the Federal Court of Australia

Representation

N M Wood SC with E A M Brumby for the appellant (instructed by Victoria Legal Aid)

G A Hill SC with J A Barrington for the respondent (instructed by Sparke Helmore Lawyers)

CATCHWORDS

BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs

Immigration – Visas – Cancellation of visa – Revocation of cancellation of visa – Where appellant convicted of offences and sentenced to aggregate term of imprisonment – Where appellant's visa mandatorily cancelled on the basis of "substantial criminal record" under s 501(3A) of *Migration Act 1958* (Cth) – Where appellant notified of cancellation and invited to make representations about revocation of cancellation decision within 28 days pursuant to s 501CA(3) of *Migration Act* ("notification") when appellant was receiving psychiatric care – Where appellant lacked legal capacity to make representations sought or to empower person to make decisions on his behalf at date of notification – Where appellant did not make representations sought within 28 days – Where guardian subsequently appointed to appellant pursuant to *Guardianship and Administration Act 2019* (Vic) – Whether notification valid – Whether Minister discharged duty in s 501CA(3) at date of notification.

Words and phrases – "cancellation", "capacity", "character test", "constructively unperformed", "fit to plead", "guardian", "invitation", "notification", "practicable", "representations", "revocation", "soundness of mind", "substantial criminal record", "unable to be held criminally responsible", "vitiate".

Migration Act 1958 (Cth), ss 501, 501CA.
Guardianship and Administration Act 2019 (Vic), ss 3(1), 5, 22, 30.

1 GORDON A-CJ, EDELMAN AND STEWARD JJ. The appellant was invited by the respondent ("the Minister") to make representations about the revocation of a decision to cancel his Class AH Subclass 101 Child (Permanent) visa pursuant to s 501CA of the *Migration Act 1958* (Cth) ("the Act") at a time when he lacked the legal capacity to do so (in the particular sense described below). The issue for determination is whether, in such specific circumstances, the invitation was validly made. For the reasons which follow, it was not.

Relevant background

2 The appellant is a citizen of Cambodia. He arrived in Australia with his mother at the age of 12. In 2021, the appellant was convicted of various offences, including theft, intentionally causing injury, and affray. He was sentenced to an aggregate term of imprisonment of 18 months. A certified extract of the court order records that the appellant "may be at risk due to the following: psychiatric illness". The order referred to a report prepared by "Forensicare" (otherwise known as the Victorian Institute of Forensic Mental Health) and noted that the appellant "appears incoherent". It recommended "all reasonable assessment and supervision to ensure safe custody".

3 The appellant was held at the Ravenhall Correctional Centre ("Ravenhall"). In October 2021, the Department of Home Affairs sent the appellant a "questionnaire" which he completed. It asked the appellant simple questions, such as where he was born and whether either of his parents were permanent residents. Nonetheless, in an email sent by an officer of Ravenhall to the Department, which attached the completed questionnaire, it was recorded that the appellant "was very confused by these questions".

4 In November 2021, a delegate of the Minister cancelled the appellant's visa, pursuant to s 501(3A) of the Act. Given that the delegate was satisfied that the appellant had a "substantial criminal record" as defined (see below), cancellation was mandatory. Pursuant to s 501(5) of the Act, the rules of natural justice do not apply to a decision made under s 501(3A).

5 An email was sent by the Department to Ravenhall which contained a notification of the cancellation of the appellant's visa ("the notification"). At the time, the appellant was receiving psychiatric care at the Erskine Unit at Ravenhall. The notification gave reasons for that cancellation and then invited the appellant to make representations about the revocation of that cancellation decision. It said:

> "While your visa has been cancelled and you no longer hold a visa, you have an opportunity to make representations to the Minister about revoking the original decision to cancel your visa under s 501(3A).

> You are hereby invited to make representations to the Minister about revoking the original decision. The representations must be made in accordance with the instructions outlined below, under the headings 'How to make representations about revocation of the original decision' and 'Timeframe to make representations about revocation'."

6 The notification explained how the representations were to be made and, importantly, stated that the representations had to be made "within 28 days after the day the notice was handed to you". It was not in dispute that notification took place on 1 December 2021. The covering email stated that it was important that the full documentation be given to the appellant "without delay". It also said that the appellant was required to sign, and then return to the Department, a formal acknowledgement of receipt. This the appellant did on 1 December 2021.

7 On the same day, a social worker at Ravenhall contacted Victoria Legal Aid ("VLA") to seek urgent legal advice in relation to the cancellation of the appellant's visa. This was apparently done with the appellant's verbal consent. Two days later, a solicitor with VLA called the appellant by phone and advised him to seek revocation of the cancellation of his visa. VLA also referred the appellant to "Refugee Legal". It would appear that Refugee Legal were unable to assist the appellant at this stage.

8 On 23 December 2021, Forensicare made an urgent application for a guardianship order from the Victorian Civil and Administrative Tribunal ("VCAT") in relation to the appellant. In its reasons for application, Forensicare explained that the appellant's visa had been cancelled and that he had 28 days within which to respond. Forensicare recited that the appellant had been assessed on 17 December 2021 by a consultant psychiatrist as "having 'nil insight' into his circumstances and it was considered that entrenched, firmly held, bizarre and grandiose delusions were colouring [the appellant's] decision-making regarding his possible deportation".

9 The application recited that that assessment had been confirmed by another consultant psychiatrist. A report from that consultant psychiatrist was prepared on 23 December 2021 and provided to VCAT. It recited that after seeing the appellant that day, the psychiatrist concluded that the appellant had a "disability", namely:

> "He has a diagnosis of Schizoaffective disorder, which has been ongoing since July 2019. He has grandiose delusions, disorganisation, visual hallucinations and absent insight."

10 The appellant was described as "singing and dancing in the courtyard", with partial hygiene and no insight into his illness. Relevantly, the report recorded the conclusion of the psychiatrist that the appellant understood that he was taking

medication but was unable to understand its purpose because he did not believe he had a mental illness. The report also recorded the conclusion that the appellant was not able to make decisions about his general living circumstances, and had no decision-making capacity about his financial and property affairs. The report recorded in relation to the appellant's grandiose delusions that he believed, for instance, that he could raise people from the dead and will be given $10,000 to $50,000 by the Australian Government. These delusions, it was said, significantly impacted on his ability to weigh information as part of a decision-making process. The psychiatrist was of the view that the appellant was "currently significantly mentally unwell".

11 On 11 January 2022, VCAT appointed the Public Advocate to be the guardian of the appellant pursuant to s 30 of the *Guardianship and Administration Act 2019* (Vic) ("the Guardianship Act"). Amongst other things, the guardian:

> "has power to start and defend legal proceedings, on behalf of [the appellant] only about:
>
> undertake legal proceedings relating to personal matters, including the represented person's immigration visa and parole application."

12 This is the relevant sense in which it should be concluded that the appellant lacked legal capacity on 1 December 2021 (discussed in more detail below). By 11 January 2022, the 28-day period had, of course, expired.

13 On 25 March 2022, the Public Advocate delegated her powers to an Advocate Guardian at the Office of the Public Advocate. On 18 July 2022, Refugee Legal, now acting for the appellant with the consent of the Public Advocate, made a request to the Department that it re-notify the decision to cancel the appellant's visa. The Department refused to do so. It was of the view that the notification given on 1 December 2021 was validly made pursuant to s 501CA(3).

14 On 8 September 2022, the Public Advocate applied to VCAT for reassessment of the guardianship order for it to be amended to ensure that it was clear there was power pursuant to s 40 of the Guardianship Act for the Public Advocate to bring and defend these proceedings. On the same date, VCAT appointed the Public Advocate as the appellant's guardian and gave the Public Advocate power to decide to start and to defend legal proceedings regarding the appellant's "Australian residency status" including any options open to the appellant under the Act. That order recorded that due to a disability the appellant did "not have capacity to make decisions" about those matters.

15 On the next day, 9 September 2022, the Public Advocate requested VCAT to provide any medical and psychiatric reports that had been submitted for the

appellant because the initial file that had been provided to the Office of the Public Advocate did not contain the medical evidence that was attached to the application lodged by Forensicare. The Public Advocate received four medical reports from VCAT, dated 17 November 2017, 2 February 2018, 22 June 2020 and 23 December 2021. The last report is the same report that was attached to Forensicare's application lodged with VCAT on 23 December 2021 which has been set out above. It is not clear whether the earlier reports were before VCAT when it made the order on 11 January 2022.

16 The report dated 17 November 2017 recorded that a psychiatric registrar who had last seen the appellant on 9 November 2017 had, at that time, proposed a "[c]urrent working differential of schizophrenia ... due to ongoing psychotic symptoms". The report described the appellant's mental health disorder as "Polysubstance Abuse" and "Drug Induced Psychosis". That medical report further recorded that the appellant's disability fluctuated and, by 2017, had been evident for approximately four years and had led to a steady decline in the appellant's functioning throughout 2017. The copy of the report provided by VCAT recorded that the report was sent by facsimile from the "Dandenong Community Care Team" on 23 November 2017.

17 The second report, dated just a few months later on 2 February 2018, was from the appellant's general practitioner and was provided to VCAT by email dated 20 February 2018. The medical report recorded that the doctor had been his medical practitioner for four and a half years and last saw him that day. The general practitioner described the appellant's disability, evident for more than five years, as schizophrenia, dependence on opiates and abuse of amphetamines (the last of which was reported to have ceased by the appellant's psychiatric care manager).

18 The third report, dated 22 June 2020, was provided to VCAT on that day. The author of the report, a psychiatry registrar, recorded that the appellant was then being case managed on a community treatment order and had a diagnosis of schizophrenia and severe polysubstance abuse disorder which had been evident for more than seven years and was fluctuating. The opinion of the author was that at that time the appellant did not have decision-making capacity about his financial and property affairs including legal matters even with support.

19 In explaining their reasons for that opinion, the author stated that "[a]s a result of [his] mental illness, he has difficulty retaining information & weighing the information to make an informed decision". The report recorded that this observation about the appellant was "evident on frequent assessments" with Dandenong Continuing Care Team. The report further recorded that the appellant's "decision making capacity continues to remain impaired, despite support from Social Workers & his Case Manager".

20 On 12 October 2022, the appellant lodged an application for judicial review in Division 2 of the Federal Circuit and Family Court of Australia. It was filed late (by nine months and 22 days). Nonetheless, Judge Mansini ordered a necessary extension of time. This is not challenged.

The appellant's legal capacity

21 On 1 December 2021 the appellant lacked the legal capacity to make the representations sought, and lacked also the ability to empower a person to make decisions on his behalf such as by granting an enduring power of attorney, or by applying for a guardian to be appointed, in either case for the purpose of making any such representations on the appellant's behalf. The appellant's lack of legal capacity to make the representations, or to empower another to make the representations, meant that with or without assistance it was impossible for the appellant to make the representations sought. The Department did not know about this state of affairs.

22 Although the Minister sought to emphasise that the appellant had some legal capacity to do some things such as to consent for Forensicare to contact VLA on 1 December 2021, it was not otherwise seriously doubted that on 1 December 2021, the appellant did not have the legal capacity to respond to the invitation made in the notification, or to formally empower a person to make decisions on his behalf by granting an enduring power of attorney or seeking the appointment of a guardian. On that date, and throughout the entire course of the 28-day period within which the appellant was entitled to make representations in response to the invitation made in the notification, the inference to be drawn, on the balance of probabilities, from the whole of the evidence before the Court is that the appellant did not have the legal capacity to respond to the invitation made in the notification, or to formally empower a person to make decisions on his behalf by granting an enduring power of attorney or seeking the appointment of a guardian. That inference arises from the contents of the report of the consultant psychiatrist upon which VCAT relied when it appointed a guardian on 11 January 2022. It also arises from the terms of the guardian's appointment, which included the power to undertake legal proceedings relating to the appellant's "immigration visa". It follows that in January 2022 VCAT must have been satisfied that the appellant did not have "decision-making capacity", as defined in the Guardianship Act, in order to be able to make representations to the Minister for the purpose of s 501CA(3) of the Act. The three earlier reports reinforce that finding.

Section 501CA

23 It is necessary to set out the relevant parts of s 501CA as it was in 2021. It relevantly provides:

"(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

(2) For the purposes of this section, ***relevant information*** is information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

(b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

(3) 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:

(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.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked."

24 The phrase "in the way that the Minister considers appropriate in the circumstances" which appeared in s 501CA(3)(a) has since been repealed. It has been replaced by new s 501CA(3A), which provides:

"The notice under subsection (3) must be given in the prescribed way."

25 As mentioned above, the appellant's visa was mandatorily cancelled given that, for the purposes of s 501(3A), the Minister was satisfied that the appellant did not pass the character test, because he had a "substantial criminal record", and he was serving a sentence of imprisonment. The definition of a person having a "substantial criminal record" is set out in s 501(7) of the Act. The appellant satisfied s 501(7)(c) of the Act because he had been sentenced to a term of imprisonment of 12 months or more. Contextually, it is important to note s 501(7)(e) and (f), which provide as follows:

> "(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
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> (f) the person has:
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> (i) been found by a court to not be fit to plead, in relation to an offence; and
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> (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
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> (iii) as a result, the person has been detained in a facility or institution."

26 Both s 501(7)(e) and (f) address the circumstances of a person who lacks legal capacity in relation to their criminal offending. It is accepted that the visa of such a person cannot be mandatorily cancelled pursuant to s 501(3A) and thus will never trigger an application of s 501CA. That is because s 501(3A)(a)(i) refers only to a person having a substantial criminal record because of an application of s 501(7)(a), (b) or (c); paras (e) and (f) are not mentioned. Instead, the visa of such a person may be cancelled on a discretionary basis pursuant to s 501(2) of the Act, in which case the rules of procedural fairness apply.

The proceedings below

27 Before Judge Mansini the appellant pursued three grounds of judicial review: first, that it was not "practicable", to use the language of s 501CA(3), to deliver the notification to the appellant given his lack of legal capacity at the time; secondly, that the purported delivery of the notification constituted a denial of procedural fairness; and thirdly, that the Minister had acted unreasonably, irrationally or illogically. Each of these grounds was dismissed. Relevantly, Judge Mansini decided that the phrase "as soon as practicable" was "properly construed as a condition or limitation on the time by which the Minister is to

deliver written notice of a visa cancellation decision and invite representations and does not extend beyond physical delivery to a requirement that the Minister ensure or consider the person's understanding or capacity to understand".[1] In reaching this conclusion, her Honour applied the decision of this Court in *Minister for Immigration and Border Protection v EFX17*[2] (discussed below in more detail). In that case, this Court decided that the words "give" and "invite" in s 501CA refer only to the physical acts of giving and inviting, and do not refer to the capacity of the recipient to understand what is contained in the notification they had been served with.

28 Before the Full Court of the Federal Court of Australia, the appellant persisted with the ground that the giving of the notification was not "practicable" and with the ground that the Minister had acted unreasonably. He added a further ground which was wholly new, namely that the court below should have found that the notification could have been reissued and that it would be legally unreasonable for the Minister not to reissue the notification, especially as the appellant by that time had a guardian to represent his interests. The Full Court unanimously rejected each ground. Relevantly, as to the first ground, and relying upon *EFX17*,[3] Markovic and Anderson JJ (with whom Derrington J agreed) said:[4]

> "The text of s 501CA(3) of the Act is clear. As the Minister submits, the assessment of whether and when it is practicable to give a notice and invitation in conformity with the requirements of the section focusses only on when it is practicable or feasible for the Minister to send the communication. It does not require the Minister to assess whether the person receiving the notice understands it or has the capacity to do so. That was also the conclusion reached by the primary judge (at [74] of *BIF23*). Her Honour was correct to do so."

29 Again relevantly, the Full Court refused to grant the appellant leave to rely on his new ground as it was found to have no reasonable prospects of success, and because there was no explanation as to why the ground was not raised below. The Full Court found that the new ground had no reasonable prospects of success

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1 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 377 FLR 409 at 420 [74] (emphasis omitted).

2 (2021) 271 CLR 112.

3 (2021) 271 CLR 112.

4 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 229 at 247 [78].

principally in reliance upon the applicable statutory scheme, which included s 198(2B)(c). This provision obliges an officer to remove an unlawful non-citizen who has been "invited" to make representations in accordance with s 501CA when either no representations have been made within the 28-day period or, in a case where such representations have been made, the Minister has decided not to revoke the cancellation decision. Markovic and Anderson JJ relied heavily on the earlier judgment of the Full Court of the Federal Court in *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[5] and relevantly reasoned:[6]

> "[Section] 198(2B)(c) of the Act sets out how the obligation to remove can be deferred pending the outcome of the process in s 501CA(3) and (4) and, by its language, implies that the process which leads to a deferral can only be invoked by a single invitation. The period for deferral will come to an end when the prescribed period for making representations ends and the invitation to make representations was not taken up, or when the Minister makes a decision not to revoke the cancellation decision, at which time the obligation is to remove the non-citizen from Australia as soon as reasonably practicable."

The appeal to this Court

30 The appellant's case had originally sought to avoid the impact of *EFX17* in two ways. First, the appellant sought to do so on the ground that there was a distinction to be drawn between a person having no legal capacity for the purpose of responding to the Minister's s 501CA invitation and a person who merely had a difficulty or difficulties in undertaking that task. That distinction is discussed below. Secondly, he observed that the phrase "as soon as practicable" in s 501CA(3) had not been the subject of any argument in *EFX17*. He persisted with his contention, made below, that this phrase controls the timing of when the Minister's invitation should be made. In that respect, he submitted that it could not be practicable to invite the appellant here to make submissions when he lacked the capacity to do so. What is "practicable" connoted an inquiry by the court into the ability of the appellant to provide a meaningful response. *EFX17* was thus distinguishable.

31 During the course of oral argument before this Court further possible grounds emerged. With the leave of the Court, an amended notice of appeal was

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5 (2021) 285 FCR 43.

6 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 229 at 253-254 [109].

filed shortly thereafter. His first ground of the amended notice of appeal was wholly new and contended that in circumstances where on 1 December 2021 the appellant lacked "decision-making capacity", the Full Court of the Federal Court erred in failing to find:

(a) that the delegate did not on 1 December 2021 discharge their duty under s 501CA(3) to give written notice to the appellant of the decision to cancel his visa, and to invite the appellant to make representations to the Minister (ground 1(a)); or

(b) no duty existed on 1 December 2021 to give written notice to the appellant of the decision to cancel his visa and to invite the appellant to make representations, and that duty was not enlivened until the appointment of his guardian on 11 January 2022 (ground 1(b));

and in either case that the Full Federal Court erred in not finding that the Minister had thereby failed to discharge his duty under s 501CA.

32 Neither Judge Mansini nor the Full Court of the Federal Court was ever asked to consider this ground.

33 The appellant's second ground of appeal remained that the Minister had the power to reissue the notification and should now do so (ground 2).

34 For the reasons that follow, ground 1(a) should be allowed.

Legal incapacity

35 Originally, the control of a "lunatic" and of the "lunatic's estate" was the subject of royal prerogative.[7] It was a "parental and protective" jurisdiction or power to do what was for the benefit of the "lunatic".[8] That protective obligation of the State should not be underestimated. The prerogative was eventually delegated to the Court of Chancery. Thus, in *Lord Falkland v Bertie*, Lord Somers LC said:[9]

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7 Prerogativa Regis, cc 11, 12 (17 Edw 2, st 1, cc 9, 10, Ruff).

8 Theobald, *The Law Relating to Lunacy* (1924) at 4.

9 (1696) 2 Vern 333 at 342 [23 ER 814 at 818]; see also Holdsworth, *A History of English Law*, 2nd ed (1936), vol VI at 648; *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345 at 350-351.

> "In this court there were several things that belonged to the *King* as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, &c., afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute; but upon the dissolution of that court, came back again to the Chancery".

36 The nature of the prerogative was described by Edelman J in *Perpetual Trustee Co Ltd v Cheyne* as follows:[10]

> "The prerogative was virtually unlimited. Sir Edward Coke said of a person falling within the jurisdiction of the Chancery court that 'there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King': *Beverley's Case of Non Compos Mentis* (1603) 4 Co Rep 123b at 126; (1603) 76 ER 1118 at 1124. The scope of the prerogative power has never been limited: *Re Eve* (1986) 31 DLR (4th) 1 at 16 per La Forest J. It is based on the care that the King has for those who cannot take care of themselves: *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; (1827) 38 ER 236 at 243 per Lord Eldon LC; *Health and Community Services, Secretary, Department of v JWB (Marion's Case)* (1992) 175 CLR 218 at 258 per Mason CJ, Dawson, Toohey and Gaudron JJ."

37 Two observations should be made. First, it is a fundamental principle that, in order for a person to do a legally effective act, they must have the necessary legal capacity to do so.[11] Secondly, there is a presumption that every person of full age has the mental capacity to manage their own affairs. The burden of proving to the contrary rests with those asserting incapacity.[12] These principles, generally speaking, apply to a step taken in litigation. Thus, court rules have been developed

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10 (2011) 42 WAR 209 at 222 [61].

11 *Masterman-Lister v Brutton & Co [Nos 1 and 2]* [2003] 1 WLR 1511 at 1533 [57]; [2003] 3 All ER 162 at 182; *Goddard Elliott v Fritsch* [2012] VSC 87 at [547]; *Vishniakov v Lay* (2019) 58 VR 375 at 385 [30]; *Burnett v Browne [No 2]* [2021] FCA 373 at [3].

12 *Masterman-Lister v Brutton & Co [Nos 1 and 2]* [2003] 1 WLR 1511 at 1520 [17]; [2003] 3 All ER 162 at 169; *Murphy v Doman* (2003) 58 NSWLR 51 at 58 [36]; *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432 at 438-439 [26]; *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398 at 414-415 [66]-[68]; *Slaveski v Victoria* (2009) 25 VR 160 at 182-183 [25]-[26]; *A v City of Swan [No 5]* [2010] WASC 204 at [66]; *Goddard Elliott v Fritsch* [2012] VSC 87 at [546]; *Vishniakov v Lay* (2019) 58 VR 375 at 385 [30].

over time, to ensure that steps in litigation are taken by or against persons without legal capacity (whether minors or persons with a disability) through a representative, being a "next friend", "tutor", "guardian ad litem", "litigation guardian" or "litigation representative", or some other third person with responsibility for the incapacitated person's care and/or the conduct of their affairs. Thus, r 21.08.1 of the *High Court Rules 2004* (Cth) provides that a person under disability shall commence or defend a proceeding by litigation guardian. The jurisdiction to make such rules derives from the *parens patriae* jurisdiction of the Court of Chancery.

38 That a lack of capacity remains a central concern of the courts is reflected in a number of other related principles. For example, it is established that the involuntary detention of individuals who are mentally unwell is legitimate; such detention may be characterised as protective of the person and thus as non-punitive.[13]

39 The common law's concern to protect those who, for whatever reason, lack capacity is reflected in the provisions of the Guardianship Act. Pursuant to s 22 of that Act, and generally speaking, a person may apply to VCAT for a guardianship order that appoints a guardian for a person with a "disability". The term "disability" is defined in s 3(1) to mean "neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability or dementia". Pursuant to s 30(2), relevantly, VCAT cannot appoint a guardian or an administrator unless it is satisfied that the person does not have "decision-making capacity" in relation to a number of matters. The phrase "decision-making capacity" is defined in s 5(1) as follows:

> "For the purposes of this Act, a person has capacity to make a decision in relation to a matter (***decision-making capacity***) if the person is able—
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> (a) to understand the information relevant to the decision and the effect of the decision; and
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> (b) to retain that information to the extent necessary to make the decision; and
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> (c) to use or weigh that information as part of the process of making the decision; and

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13 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28.

(d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means."

The assumption of legal capacity in s 501CA

40 The appellant's original reliance upon the phrase "as soon as practicable" and the notion of practicability, with respect, is misconceived for the reasons given by the Full Court below. The phrase "as soon as practicable" is bound up with the act of giving notification. As this Court observed in *EFX17*, the word "give" connotes the physical performance of an act, namely service of the notification, as distinct from the consequences which follow thereafter.[14] As soon as it becomes practicable for that act to be performed, following the cancellation of a visa, the duty on the Minister arises to give notification. In other words, the phrase "as soon as practicable" is directed only at the physical step of giving notification and no more.

41 The appellant's lack of legal capacity on 1 December 2021 is otherwise dispositive of this appeal in the sense contended for in new ground 1(a). That is because the requirement to "give" the notice and "invite" the “person" to make representations presupposes that the person has the legal capacity to make such decisions as are necessary to respond to the notice and the invitation or to empower someone to do so on their behalf. In other words, the giving of the notice, particulars and invitation under s 501CA(3) will not be legally efficacious if those documents are given to a person who lacks legal capacity to make decisions with respect to the notice and invitation at the time the notice and invitation was delivered to them, including lacking the capacity to grant an enduring power of attorney or to apply for a guardian to be appointed in relation to the notice and invitation. In such a case, there is no reason to doubt that service will be effective if the person has a validly appointed guardian who has power to make representations to the Minister on the person's behalf. In such a case, notification should be made to that guardian. There are a number of reasons for this conclusion.

The foundations for the assumption in s 501CA

42 The first is that Parliament must be taken to have known that, under our legal system, the law generally requires that a person must have sufficient legal capacity if that person is to do a legally effective act or make a legally effective

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14 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 125 [23].

decision.[15] This is a principle that is at least as fundamental and well-established as common presuppositions in legislation such as a requirement of intention or knowledge for statutory offences or, as the Minister accepted, that the factual exercise of authority would be free from fraud so that the exercise of fraud could disable an authority from "the due discharge of its imperative statutory functions".[16] Like an assumption of absence of fraud, the assumption of legal capacity does not depend on the knowledge of the Minister. The statutory regime thus assumes, if it is to be effective, that there is a "person" (including a guardian of a person) with legal capacity to whom the notice may be given and who is then invited to "make representations". The invitation would be pointless if it could never be answered in a way which was legally efficacious.

The language of s 501CA

43 Given the concern of the law to protect those who lack capacity, it would require very clear language to support a conclusion that Parliament intended that valid invitations could be made to persons who have no legal capacity. No such language may be found in s 501CA. Instead, the composite phrases "give the person, in the way that the Minister considers appropriate" and "invite the person to make representations to the Minister", in the context of the entire language of s 501CA(3), must be construed as referring to giving notification to a person with relevant legal capacity and to inviting such a person to make representations.

44 In oral argument, senior counsel for the Minister said that the foregoing read too much into the language of "give", "invite" and "person". The "person" who is identified in s 501CA is merely the "person" identified in s 501CA(1); namely, a person whose visa has been cancelled. This necessarily included the appellant. Under the statutory scheme, it was said, such a "person" must receive the notice under s 501CA(3) as soon as is practicable following cancellation of a visa. The Minister has no room, it was suggested, to do otherwise.

45 With respect, that submission is misconceived. It is true that a person to whom a notice is given under s 501CA(3) must necessarily be a person for the purposes of s 501CA(1). But, for the reasons set out above, the duty to give a notification under s 501CA(3) only arises where there is a person who also has the legal capacity to respond to the Minister's invitation to make representations.

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15 *Masterman-Lister v Brutton & Co [Nos 1 and 2]* [2003] 1 WLR 1511 at 1533 [57]; [2003] 3 All ER 162 at 182; *Goddard Elliott v Fritsch* [2012] VSC 87 at [547]; *Vishniakov v Lay* (2019) 58 VR 375 at 385 [30]; *Burnett v Browne [No 2]* [2021] FCA 373 at [3].

16 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [51].

Construed correctly, the language of s 501CA(3) as a whole is not engaged when the person whose visa has been cancelled is not legally capable of taking any step until a guardian is appointed.

46 The Minister also submitted that the proposition that an act taken by a person without legal capacity has no legal effect has never been an absolute proposition, especially where the step benefits the person in question. For example, it was said that if court proceedings terminate in favour of a child (who is not represented by a friend or guardian), the child may have the benefit of that.[17] Moreover, and correctly, the significance of a lack of capacity must be answered by a consideration of statutory intent. Thus, for example, in *Odhiambo v Minister for Immigration and Multicultural Affairs* it was held that it was competent for a minor to seek review of a decision of the Refugee Review Tribunal in the Federal Court of Australia without the involvement of a next friend.[18] Here, it was said, s 501CA was intended to confer a benefit on a person who is, once served, given an opportunity to have a decision to cancel their visa revoked. As such, the provision should be read so that this benefit is preserved, and not defeated, in the case of a person lacking capacity.

47 It may be accepted that the legal inefficacy of acts taken by someone without capacity may not be absolute and that legal incapacity may extend to some acts and not others.[19] It may also be accepted that a statute may expressly or by implication displace an assumption such as capacity.[20] But the language of s 501CA, read with an assumption of capacity, does not deny the benefit of making representations to a person without capacity. Rather, the language requires that the benefit be provided to a person with capacity or, if the person lacks capacity, to an appointed representative of that person.

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17 *SBAH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 126 FCR 552 at 553 [1]; *Fernando v Minister for Immigration and Citizenship [No 9]* [2009] FCA 833 at [16]; *CDN16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 699 at [178].

18 (2002) 122 FCR 29 at 50 [105]-[106]; see also *SFTB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 222 at 224-225 [7], [10]-[11].

19 *Gibbons v Wright* (1954) 91 CLR 423 at 437-438; *Adamson v Enever* (2021) 9 QR 33 at 38 [6]. See also *Slaveski v Victoria* (2009) 25 VR 160 at 183-184 [26]-[31]; *In the Estate of Park, Decd; Park v Park* [1954] P 112 at 136.

20 *Haines v Leves* (1987) 8 NSWLR 442 at 449-451; *Jaffari v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 10 at 14 [14].

Statutory context

48 The foregoing construction is supported by the statutory context and purpose of s 501CA. Statutory context includes s 501(3A) and (7)(e) and (f), which are set out above. It will be recalled that paras (e) and (f) address criminal offending where there has been unsoundness of mind or insanity, or where a court has found that a person is not fit to plead. Whilst each category of case can result in there being a person who has a "substantial criminal record" for the purposes of the character test in s 501(6), neither category can satisfy s 501(3A); they are excluded from its reach. Consequently, such offending can never trigger an application of s 501CA. This statutory regime is a recognition by Parliament that individuals who lack legal capacity at the time of offending, or at the time of their criminal trial, should not be subject to the s 501CA regime. Given this statutory context, it would be anomalous to conclude that the Minister can efficaciously give a notification, for the purposes of s 501CA(3), to a person who equally lacks legal capacity.

49 The fact that the Act elsewhere addresses in express terms the case of a person who lacks legal capacity justifies no contrary conclusion. For example, s 261AM refers to a "person who is an incapable person". Such a person is only required under Div 13AA of Pt 2 of the Act to provide a "personal identifier" of a certain kind.[21] If anything, these express acknowledgements by Parliament of the fact that the provisions of the Act may need to operate in relation to a person who lacks capacity reinforce the construction of s 501CA(3) set out above.

The purpose of s 501CA

50 The foregoing is also supported by the manifest purpose of s 501CA. That purpose is to provide procedural fairness to a person whose visa has been mandatorily cancelled pursuant to s 501(3A), in circumstances where, by reason of s 501(5), the rules of natural justice do not apply to such a decision.[22] Section 501CA was introduced into the Act by the *Migration Amendment*

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21 Other examples of the Act dealing expressly with the issue of capacity include ss 48(1A), 48A(1AA), 252B and 501E(1A).

22 *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430; *Dunn v Minister for Immigration and Border Protection* (2018) 267 FCR 246; *Stowers v Minister for Immigration and Border Protection* (2018) 265 FCR 177; *Karan v Minister for Home Affairs* [2019] FCAFC 139; *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 286 FCR 89; *QKJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 233; *EXT20 v Minister for Home Affairs* (2022) 291 FCR 55.

(Character and General Visa Cancellation) Act 2014 (Cth). The Explanatory Memorandum which accompanied the Bill which became that Act expressly states that the purpose of s 501CA is to afford "natural justice".[23] In relation to s 501CA(3) the Memorandum states:[24]

> "The requirement to give notice to the person and invite the person to make representations about revocation of the decision to cancel allows the person *the opportunity* to satisfy the Minister or delegate that the person passes the character test, or that there is another reason why the original decision should be revoked."

51 The reference to "the opportunity to satisfy the Minister" is important. Where a person is simply legally unable to avail themselves of that opportunity because of a failure of capacity, the very rationale of the provision is wholly defeated; its operation, in such a case, would be stultified. In short, the section provides for an exchange on the part of the Minister and a relevant applicant; the Minister gives and invites, and the person makes representations in accordance with the invitation. Parliament cannot have intended that such a scheme is fulfilled when only one half of the exchange – the giving and inviting – can be performed and no more.

EFX17

52 The decision of this Court in *Minister for Immigration and Border Protection v EFX17*[25] was a key feature of the reasoning below and, before us, was heavily relied upon by the Minister. *EFX17* has nothing to say about the operation of s 501CA(3) in circumstances of legal incapacity of the person who receives a notice.

53 Like the appellant here, the respondent's visa in *EFX17* had been cancelled pursuant to s 501(3A) of the Act after he had been convicted of causing grievous bodily harm. Again, like the appellant here, the respondent in that case had been given a notification pursuant to s 501CA(3) inviting him to make representations about revocation. This was received whilst he was in prison. He gave formal

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23 Australia, House of Representatives, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Explanatory Memorandum at 15 [84].

24 Australia, House of Representatives, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Explanatory Memorandum at 16 [92] (emphasis added).

25 (2021) 271 CLR 112.

notification of the receipt of the notification. However, he only spoke broken English, his ability to read or write in English was limited, and he had been suffering from a schizophrenic illness due to substance abuse and certain traumatic events in the past. It appeared that he was confused about the contents of the notification. He made no response.[26]

54 The respondent in *EFX17* sought, amongst other remedies, a declaration that the delivery of the notification did not comply with s 501CA(3) because of his inability to understand its contents.[27] The Full Court of the Federal Court of Australia upheld the respondent's claim, which was based upon the words "give" and "invite" in s 501CA(3).[28] Greenwood J decided that it should be implied that the requirement to "give" the notification and to "invite" the respondent to make representations about revoking the cancellation of his visa imported an "irreducible minimum standard". That standard had not been met given the respondent's disadvantages.[29] Rares J agreed. His Honour decided that it should be implied that it was essential that any invitation to give reasons be "intelligible" in fact to the person to whom it had been given.[30]

55 This Court unanimously overturned the decision of the Full Federal Court. Importantly, whilst in its reasons this Court referred to the "respondent's incapacity to understand" the notification, that was not a reference to any claimed lack of legal capacity.[31] It was a reference to an inability to comprehend the notification due to the respondent's difficulties with English. There was never any suggestion, unlike

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26 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 119-121 [3]-[12].

27 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 122 [16]-[17].

28 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 122-123 [17]-[18]; see also *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508.

29 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 122-123 [18]; *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 528 [89]-[90], 538-540 [133]-[137].

30 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 123 [19]; *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 547-548 [173]-[175].

31 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 122 [17].

in this appeal, that the respondent in *EFX17* suffered from an actual lack of legal capacity, such that he could only respond to the notification through a validly appointed attorney or guardian.

56 This Court rejected any need for an "irreducible minimum standard" of giving the notification or that it was essential that the invitation be "intelligible in fact". The Court said:[32]

> "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."

57 The Court also observed that the phrase "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" of the notification.[33] Whilst it was accepted that there were grave consequences for a person who could not understand a notification, this nonetheless did not "provide sufficient foundation" for the sort of implication drawn by the majority of the Full Federal Court.[34] Any such implication would "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".[35] That in turn would lead to "administrative difficulties" which could not have been intended.[36]

58 In *EFX17* the respondent had legal capacity; his representations, if they had been made, and regardless of their content, would have been legally effective. In that respect, the appellant's contention in this appeal that a legally meaningful distinction between a person who lacks legal capacity to take some step or

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32 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 125 [23].

33 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 126 [25].

34 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 128 [30].

35 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 127 [28].

36 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 127 [28].

particular action, and a person who might have a difficulty, or experience difficulties, in taking that step or action, should be accepted.

59 Had the respondent in *EFX17* made representations, regardless of their content, they would have constituted "representations" made "in accordance with the invitation" for the purposes of s 501CA(4), and thus would have triggered a duty on the Minister to consider those representations and then to decide whether the respondent passed the character test or whether there was another reason to revoke the cancellation decision.[37] Moreover, whilst disadvantaged in the sense described above, there was no suggestion that the respondent lacked the ability to seek assistance. He could, for example, have sought a translation of the notification sent to him, at least in part. In that respect, the argument in *EFX17* was limited to the construction of the words "give" and "invite". It was not concerned with the composite phrases "give the person, in the way that the Minister considers appropriate" and "invite the person to make representations to the Minister" and the entire language of s 501CA(3). Those composite phrases direct attention to the legal capacity of the person to be given a notification which invites them to make representations.

Conclusion

60 The giving of the notification to the appellant on 1 December 2021 wholly miscarried because he lacked the legal capacity to make decisions about it, including the making of representations in accordance with its invitation to do so. It was legally inefficacious. The fact that the Minister and the Department did not know of this is irrelevant. The Minister had, and has, the duty in s 501CA(3) but the legal incapacity of the appellant to make representations meant that the Minister could not discharge that duty until the appellant obtained capacity or the Minister (or any other person) arranged for the appointment of a guardian for the appellant for the purposes of making representations. It follows that the Minister has yet to discharge his duty to give notification in accordance with s 501CA(3). As the appellant now has a guardian appointed for his benefit, the Minister may discharge that duty by giving notification to the appellant's guardian.

Other grounds

61 For the reasons above, the better view is that the duty in s 501CA(3) existed on 1 December 2021, but, for the reasons set out above, it has yet to be discharged.

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37 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 406 [13]; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 598-599 [24].

Ground 1(b) cannot be accepted. Given the conclusion concerning ground 1(a), it is not necessary to consider ground 2.

Disposition

62 Certiorari should issue to quash the notice and the invitation. The appellant also sought an order for mandamus. A writ of mandamus should issue because the Minister insisted on the validity of the notice and is therefore yet to discharge his duty to give notice in accordance with s 501CA(3).

63 The orders of the Court should be:

(1) Appeal allowed with costs.

(2) Set aside the orders of the Full Court of the Federal Court of Australia made on 19 December 2023 and, in their place, order that:

(a) the appeal be allowed with costs; and

(b) orders 2 and 3 of the Federal Circuit and Family Court of Australia (Division 2) made on 7 June 2023 be set aside and, in their place, order that:

(i) a declaration issue that the respondent is obliged to give BIF23, or if applicable his guardian, a written notice and invitation under s 501CA(3) of the *Migration Act 1958* (Cth) in relation to the decision made on 24 November 2021 by the respondent's delegate to cancel BIF23's Class AH Subclass 101 Child (Permanent) visa ("the Decision");

(ii) a writ of certiorari issue to quash the notice and invitation purportedly given to BIF23 on 1 December 2021 under s 501CA(3) of the *Migration Act 1958* (Cth);

(iii) a writ of mandamus issue directed to the respondent requiring the respondent to give BIF23 (by his litigation guardian, the Public Advocate) a written notice and invitation under s 501CA(3) of the *Migration Act 1958* (Cth) in relation to the Decision; and

(iv) the respondent pay BIF23's costs.

64 JAGOT AND BEECH-JONES JJ. Two questions determine the outcome of this appeal. The first is a question of law. It is whether a requisite mental incapacity of a person whose visa has been subject to mandatory cancellation under s 501(3A) of the *Migration Act 1958* (Cth) at the time the Minister gives the person written notice of that cancellation and particulars of the relevant information ("the notice") and invites the person to make representations about the cancellation of the visa under s 501CA(3), if the person at that time also did not have a validly appointed guardian,[38] means that the giving of the notice is vitiated and the Minister's duties under that latter provision remain constructively unperformed.[39] For these purposes, and assuming that the person at the relevant time did not have a validly appointed guardian,[40] a requisite "mental incapacity" is one which, because of its substantive effect on a person's ability to understand, act, or make decisions, gives rise to a "legal incapacity" with respect to s 501CA(3). As explained further below, the nature and degree of "mental incapacity" that is required before it will be of legal significance for the purposes of s 501CA(3) is to be understood by reference to the statutory context of the mandatory cancellation regime. The second question is a question of fact. It is whether the appellant was subject to a requisite mental incapacity giving rise to a legal incapacity with respect to s 501CA(3) on 1 December 2021, being the day on which the Minister gave the appellant the notice and invited the appellant to make representations in response.

65 Those two questions did not emerge as determinative until the hearing in this Court. The arguments put to the primary judge[41] and the Full Court of the Federal Court of Australia[42] were different and did not raise these questions. The

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38 Further, the guardian must have had legal authority to make decisions on the person's behalf with respect to the visa cancellation. The appellant did not have such a person appointed at the time of the giving of the notice and the making of the invitation on 1 December 2021. A relevant guardianship order in respect of the appellant was only made on 11 January 2022.

39 The Minister is empowered to delegate the performance of the duty in s 501(3A) and associated duties in s 501CA(3): s 496 of the *Migration Act 1958* (Cth). See also *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 129 [34].

40 In the event the person did have a validly appointed guardian, the existence of a mental incapacity would be immaterial.

41 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 377 FLR 409.

42 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 229.

arguments put to this Court were also different until, during the hearing, the possibility of the appellant's lack of mental capacity (as a legal and not a psychiatric construct) at the date of the giving of the notice under s 501CA(3) was raised as possibly analogous in its vitiating consequence to a third-party fraud on the decision-maker.[43] This caused the appellant to file an amended notice of appeal after the hearing framing the two questions above in several ways. The Minister properly took no objection to the filing of the amended notice of appeal given that both parties had been heard on the new issues.

66 For the following reasons, the answer to both questions is "yes". Accordingly, the appeal must be allowed and consequential orders made.

Statutory scheme

67 Section 501(3A) of the *Migration Act* provides that:

"The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory."

68 Sections 501(6) and 501(7) relevantly state:

"*Character test*

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

...

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43 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or

...

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

...

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution."

69 Importantly, paras (e) and (f) of s 501(7), while giving rise to a "substantial criminal record" under that section, are not bases for the mandatory cancellation of a person's visa under s 501(3A)(a)(i).

70 Section 501CA(1) provides that s 501CA applies "if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person". Section 501CA(3) and s 501CA(4) stated at the relevant time:[44]

> "(3) 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:
>
> (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.
>
> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked."

71 By s 501CA(2), "relevant information" for the purposes of s 501CA is information (other than non-disclosable information) that the Minister considers: would be the reason, or a part of the reason, for making the original decision; and is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member. The period within which a person may make representations under s 501CA(3)(b) is prescribed under the

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44 That part of s 501CA(3)(a) which reads "in the way that the Minister considers appropriate in the circumstances" was subsequently repealed. Section 501CA(3A), which was inserted by item 30 of Sch 1 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth), now states that "[t]he notice under subsection (3) must be given in the prescribed way".

regulations as 28 days after the person is given the notice and particulars of the relevant information.[45]

72 By s 501CA(7), a decision not to exercise the power conferred by s 501CA(4) is not reviewable under Pt 5 or Pt 7 of the *Migration Act*.

Mental capacity the predicate of mandatory cancellation scheme

Assumption of requisite mental capacity

73 Sections 501(7)(e) and 501(7)(f), which are excluded from the mandatory cancellation provision of s 501(3A), cover two circumstances. The first, s 501(7)(e), concerns where the person did not have the mental capacity that the law requires for the person to be held criminally responsible for the physical acts and states of mind that would otherwise constitute the commission of an offence at the time of what would otherwise have been the commission of the offence. The second, s 501(7)(f), concerns where the person (whether they would have had the necessary mental capacity at the time of commission of the offence to be held criminally responsible or not) lacks the mental capacity to participate in the criminal trial at the time the matter comes before the court (that is, the person is not fit to plead). In neither case does the deemed "substantial criminal record" of the person suffering from such a mental incapacity and detained as a result in a facility or institution empower the mandatory cancellation provision in s 501(3A).

74 The combined terms of ss 501(3A), 501(6)(a) and 501(7)(e) and (f) manifest a clear statutory intention that the visa of a person who is detained in a facility or institution because of either a lack of the necessary mental capacity to commit a crime at the time of their potentially criminal acts or a lack of mental capacity at the time the person was brought before a court to plead to the commission of the crime is not to be subject to mandatory cancellation on the basis of the person's "substantial criminal record". Paragraphs (e) and (f) of s 501(7) reflect our law's long-standing approach to criminal responsibility and criminal punishment. A person of sufficiently unsound mind is not held responsible for acts committed while so afflicted; such a person, in our law, cannot as a general principle be held criminally responsible for what they have done. Similarly, a person of unsound mind is also unable to meaningfully participate in a criminal trial and therefore cannot be fairly tried. Such persons are also not amenable to criminal sentence because the principal purposes of criminal sentence (to punish the wrongdoer and deter future criminal offending) cannot be achieved.

75 That the mandatory cancellation provision will be engaged in the circumstances set out in paras (a), (b) and (c) of s 501(7) but will not be engaged

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

in either of the circumstances set out in paras (e) and (f) of s 501(7) exposes an important assumption about the operation of the mandatory cancellation scheme. That is, in the context of an individual deemed to have a substantial criminal record under s 501(7), the mandatory cancellation scheme assumes that a person whose visa is cancelled under s 501(3A) will not have been found, in the criminal proceedings that preceded the cancellation of their visa, to have lacked the mental capacity required for them to be criminally responsible or fit to plead. Therefore, the mandatory cancellation scheme pre-supposes that persons whose visas are subject to cancellation on account of a substantial criminal record under s 501(7) will not be subject to a mental incapacity, at least in the sense that they did not previously lack the capacity to be held criminally responsible or fit to plead. This assumption underlies s 501CA(3), which concerns mandatory cancellation of a person's visa under s 501(3A), so that a requisite level of mental capacity on the part of a person whose visa is subject to cancellation is a predicate to the performance of the Minister's duties under s 501CA(3).

76 Section 501(3A)(b) reinforces this conclusion. It provides that any person whose visa is subject to mandatory cancellation under s 501(3A) must (in addition to satisfying the criteria set out in s 501(3A)(a)) be "serving a sentence of imprisonment ... for an offence against a law of the Commonwealth, a State or a Territory". Under the statutory regimes in operation around Australia,[46] persons who commit potentially criminal acts but because of a mental incapacity are unable to be held criminally responsible or are unfit to plead may be subject to supervision orders or detention in a facility or institution for their own protection or the safety of others. Such persons, however, would not have been convicted of an offence because of their acts and would not be detained for the purposes of punishing them through "serving a sentence of imprisonment ... for an offence". Importantly, in circumstances where a condition of mandatory cancellation under s 501(3A)(b) is that "the person is serving a sentence of imprisonment", s 501(12) provides that, for the purposes of s 501, imprisonment "includes any form of punitive detention in a facility or institution" and sentence "includes any form of determination of the punishment for an offence". Detention of persons in an appropriate facility or institution on account of a mental incapacity (that resulted in their being unable to be held criminally responsible or unfit to plead) does not constitute a form of "punitive detention" or "punishment for an offence" under s 501.

77 It may be accepted that in some cases individuals convicted of a criminal offence and serving a sentence of imprisonment will be subject to a mental incapacity. This could arise because persons previously of sound mind at the time of the commission of their acts and at the time of trial may develop a mental incapacity while imprisoned. In other cases, persons subject to a mental incapacity that might reasonably have been seen to render them unable to be held criminally

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46 See fn 48.

responsible or unfit to plead, in an imperfect criminal justice system, may still be tried and convicted and may still receive sentences of imprisonment. Nonetheless, given that, under s 501(3A)(b), persons subject to mandatory visa cancellation must currently be serving a "sentence of imprisonment ... for an offence" and that such persons, in the criminal proceedings that preceded their visa cancellation, should have been found not to be subject to a mental incapacity in the relevant sense, s 501(3A)(b) confirms that the scheme for mandatory cancellation of a visa for a person who does not pass the character test because of a "substantial criminal record" pre-supposes that persons whose visas are subject to such cancellation are not subject to a mental incapacity.

78 It is true that the visa of a person deemed to have a substantial criminal record under paras (e) and (f) of s 501(7) may still be cancelled under s 501(2) or s 501(3). Under s 501(2), the Minister or a delegate of the Minister "may" (not "must") cancel such a visa if "the Minister reasonably suspects that the person does not pass the character test" and "the person does not satisfy the Minister that the person passes the character test". Under s 501(3), the Minister "may" cancel such a visa if "the Minister reasonably suspects that the person does not pass the character test" and the Minister is satisfied, in accordance with s 501(3)(d), that the cancellation "is in the national interest". It is difficult to envisage the Minister considering that it would be in the national interest to cancel the visa of a person while the person is being held in a facility or institution due to their lack of mental capacity. In any event, the fact that discretionary powers of visa cancellation may apply with respect to persons subject to a mental incapacity does not negate the evident statutory assumption that the visas of such persons will not be subject to mandatory cancellation.

79 Other provisions of the *Migration Act*, by implication, reinforce that s 501CA(3) pre-supposes that a person subject to mandatory visa cancellation, on the basis of a "substantial criminal record", will not be subject to a relevant mental incapacity at the time the Minister performs the Minister's duties to give a notice and make an invitation under s 501CA(3). Section 48(1A) limits the kinds of visas for which certain non-citizens may apply. Section 48(1A)(b)(ii) and (iii) ensure that the limit applies to persons who, at the relevant time (of application for an earlier visa that was refused), were subject to the two most common kinds of legal incapacity. This is achieved by s 48(1A)(b)(ii) and (iii) providing that the limit applies whether or not "(ii) the non-citizen knew about, or understood the nature of, the application due to any mental impairment" and "(iii) the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor". Section 48A(1AA)(b)(ii) and (iii) contain the same provisions in respect of limits arising from an earlier application for a protection visa that has been refused. Similar provisions are contained in s 501E(1A)(b)(i) and (ii), concerning a person's capacity to make an application for a visa where the Minister has previously made a decision to refuse to grant a visa under certain sections of the *Migration Act*

specified in s 501E(1). In other words, at least in some circumstances, where the *Migration Act* is to apply to a person in a way that adversely affects their interests despite their lack of mental capacity at the time of the relevant event, its provisions expressly state their application in that circumstance.

80 Further reinforcing the underlying predicate that a person subject to mandatory visa cancellation will not be subject to a relevant mental incapacity at the time the Minister performs the Minister's duties to give a notice and make an invitation under s 501CA(3) is that the object of the Minister performing the duties in s 501CA(3) is to enable the person whose visa has been subject to mandatory cancellation to make representations to the Minister about revocation of the cancellation decision. The premise of the statutory scheme is that this person will not be subject to a requisite mental incapacity and therefore will be able to make a meaningful representation. In the language of jurisdictional error, the absence of a requisite mental incapacity at the relevant time (the date of the giving of the notice and invitation to make representations) of the person whose visa has been cancelled is an implicit "inviolable limitation or restraint"[47] on the Minister's discharge of the duties in s 501CA(3).

Requisite mental incapacity that will vitiate performance of Minister's duties under s 501CA(3)

81 The mental capacity on which the mandatory cancellation scheme is predicated, and therefore the nature of the "mental incapacity" that may vitiate the performance of the Minister's duties under s 501CA(3), must be understood by reference to the specific statutory context. The context of the relevant provisions of the *Migration Act*, particularly ss 501(7)(e) and 501(7)(f), include that the Commonwealth and every State and Territory in Australia has enacted legislation ensuring that persons who commit potentially criminal acts while unsound in mind or who are unfit to plead by reason of being unsound in mind are not subject to "criminal" conviction or sentence but, instead, may be committed to detention in an appropriate facility or institution.[48]

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47 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419, quoted in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]. See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248.

48 eg, *Criminal Code* (Qld), ss 613, 645, 647; *Crimes Act 1900* (ACT), Pt 13; *Criminal Code* (WA), s 27; *Crimes Act 1914* (Cth), ss 20B, 20BJ; *Criminal Law Consolidation Act 1935* (SA), Pt 8A, Divs 2, 3; *Criminal Code* (NT), Pt IIA; *Criminal Code* (Cth), s 7.3; *Crimes (Mental Impairment and Unfitness to be Tried)*

82 The details of these statutory regimes differ. With respect to whether a person has capacity to be held criminally responsible (which they will not be if a defence based on unsoundness of mind can be established), the statutory regimes are ultimately derived from the common law "*M'Naghten* rules".[49] In *M'Naghten's Case*, Tindal LCJ said that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act [they were] doing; or, if [they] did know it, that [they] did not know [they were] doing what was wrong".[50]

83 With respect to whether a person will be fit to plead at common law, the relevant test is set out in *Kesavarajah v The Queen*,[51] approving the criteria identified in *R v Presser*.[52] Those common law criteria, now generally replicated across local jurisdictions in their relevant statutory regimes,[53] require that a person have the ability "(1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge".[54]

84 Three aspects of the *Presser* criteria or their application should also be noted. First, they are trial and context dependent in that an accused person's fitness

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Act 1997 (Vic); *Criminal Justice (Mental Impairment) Act 1999* (Tas); *Criminal Code 2002* (ACT), Div 2.3.2; *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), Pts 3, 4; *Criminal Law (Mental Impairment) Act 2023* (WA).

49 See, eg, Williams, "Development and Change in Insanity and Related Defences" (2000) 24 *Melbourne University Law Review* 711 at 712.

50 (1843) 10 Cl & F 200 at 210 [8 ER 718 at 722].

51 (1994) 181 CLR 230.

52 [1958] VR 45.

53 See, eg, Commonwealth Director of Public Prosecutions, *National Legal Direction: Unfitness to be tried/to plead* (2023) at 5 (see also the relevant statutory provisions cited at fn 48).

54 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 245, citing *R v Presser* [1958] VR 45 at 48. See also *R v Pritchard* (1836) 7 Car & P 303 at 304 [173 ER 135 at 135]; *Eastman v The Queen* (2000) 203 CLR 1 at 14-15 [26]-[27].

is to be assessed in the context of the trial they face, including its length.[55] Second, the authorities do not exclude the accused satisfying these criteria with assistance. Therefore, where the accused is represented by counsel they may satisfy the above criteria "through [their] counsel by giving any necessary instructions and by letting [their] counsel know what [their] version of the facts is", if the accused is capable of doing so.[56] Third, if an accused person is unfit to be tried, then there can be "no trial" and any trial that takes place would effectively be a "nullity" due to "a fundamental failure in the trial process".[57]

85 These principles provide the ultimate basis in Australian law for ascertaining when a person's mental incapacity may be such as to render them unable to be held criminally responsible or unfit to plead. They therefore inform the nature of the mental incapacity that the mandatory cancellation scheme presupposes in persons whose visas are subject to mandatory cancellation on the basis of a "substantial criminal record" and, thereby, the nature of the incapacity that will vitiate the performance of the Minister's duties in s 501CA(3).

86 Mental incapacity is not, of course, a singular concept. As Lord Reid stated in *Crowther v Crowther*, "[t]here are many degrees of mental incapacity".[58] Further, not every form of "mental incapacity", as a psychiatric concept, will be of legal significance. Whether a "mental incapacity" will entail a relevant "legal incapacity" will vary depending on the context. In *Crago v McIntyre*, Holland J observed that "for the purposes of considering legal capacity, a person's mind is not one and indivisible".[59] For instance, a person "may be rendered partially unsound by the existence of delusions ... or other aberration, and yet be capable" at law of performing certain acts.[60] But if the "unsoundness has some governing and relevant influence" on particular acts sought to be performed, then that unsoundness "may result in legal incapacity with respect to" those acts.[61] In other words, depending on the nature of the impairment, a person with a mental incapacity may have legal capacity to conduct their business or manage their affairs in some respects but not in others. In *Gibbons v Wright*, when considering

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55 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 246, 248.

56 *R v Presser* [1958] VR 45 at 48.

57 *Eastman v The Queen* (2000) 203 CLR 1 at 21-22 [62].

58 [1951] AC 723 at 736.

59 [1976] 1 NSWLR 729 at 739, citing *Tipper v Moore* (1911) 13 CLR 248.

60 *Crago v McIntyre* [1976] 1 NSWLR 729 at 739.

61 *Crago v McIntyre* [1976] 1 NSWLR 729 at 739.

the degree of mental incapacity required to render execution of a deed void, Dixon CJ, Kitto and Taylor JJ said that "[t]he law does not prescribe any fixed standard of sanity ... [but] requires, in relation to each particular matter ... that each party shall have such soundness of mind as to be capable of understanding the general nature of what [they are] doing".[62] Similarly, Hodson LJ observed in *Estate of Park* that "one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case".[63]

87 Those statements, so far as they concern the legal capacity of a person to validly enter into certain transactions such as a deed or contract, are not directly applicable to a person subject to the mandatory cancellation regime. However, they rightly emphasise that whether a person's mental incapacity constitutes a relevant legal incapacity is a question to be answered by reference to its context. Sections 501(7)(e) and 501(7)(f) expose that the mandatory cancellation regime, and s 501CA(3), which forms part of that regime, are concerned with a specific kind of mental incapacity – one which is tied to the underlying assumption that a person whose visa is subject to mandatory cancellation will not have been found to be incapable of being held criminally responsible or unfit to plead in the criminal processes that preceded the cancellation of their visa.

88 Accordingly, in the context of s 501CA(3), the requisite mental incapacity on the part of a person whose visa has been cancelled is not mere difficulty or even disability in understanding the notice, the invitation to make representations about the cancellation of the visa, or the potential consequences of not doing so (such as detention and removal from Australia if practicable). This reflects the principle that "partial unsoundness of mind does not necessarily spell total legal incapacity".[64] The converse is also true. Soundness of mind in a certain respect, or mental capacity to understand some things, does not mean total legal capacity. This is why, as discussed further below, the fact that the appellant may have had capacity to understand the notion of, and give "verbal consent" to, his social worker requesting assistance from Victoria Legal Aid ("VLA") does not mean the appellant had the legal capacity required for the purposes of s 501CA(3).

89 Understood within the statutory context of the mandatory cancellation regime (and assuming that the person at the relevant time did not have a validly appointed guardian), to be lacking legal capacity for the purposes of s 501CA(3) it must be found that, on the date of the notice being given, the person was subject

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62 (1954) 91 CLR 423 at 437.

63 [1954] P 112 at 136.

64 *Crago v McIntyre* [1976] 1 NSWLR 729 at 739. See also *Tipper v Moore* (1911) 13 CLR 248.

to a requisite mental incapacity such that they were unable to: (a) understand the nature of the notice and the invitation to make representations about the cancellation of the visa; (b) make representations about the cancellation of the visa in response to the invitation; and (c) understand the substantial effect of the notice and invitation, and the making of representations, on them. This lack of capacity, moreover, must have been insuperable at the relevant time – that is, not capable of amelioration by the assistance of an interpreter, lawyer, or other adviser. The requisite mental incapacity must also be an inherent quality of the person's condition of mind or body at the time, although it need not be permanent; the mental incapacity needs only to have existed at the date the notice was given.

90 These criteria for a requisite mental incapacity, which if satisfied at the relevant time will mean that, in the absence of a validly appointed guardian, a person's legal incapacity will vitiate the giving of a notice under s 501CA(3), accord with the fact that a person suffering from a disability (such as inability to speak English, illiteracy, poor cognition, or a range of mental illnesses) may be subject to some mental or legal incapacity, yet still be subject to the mandatory cancellation regime including the time limits prescribed for the making of representations in response to an invitation under s 501CA(3).[65] This possibility is undoubtedly why the Minister relied on *Minister for Immigration and Border Protection v EFX17*.[66] That case, however, did not concern the interaction between ss 501(6)(a) and 501(7)(e) and (f), and s 501CA(3). *EFX17* concerned only a lack of capacity in a loose sense, which related to the person's broader practical ability to understand the notice and the invitation to make representations "having regard to the circumstances of the [person's] literacy, capacity to understand English, mental capacity and health, and facilities available to him in custody".[67] Those issues do not reflect the specific type of legal incapacity, just described, that is the essential predicate for the operation of s 501CA(3) in the context of individuals deemed to have a "substantial criminal record". This is also why the Minister's submission that a sharp distinction between a lack of some legal capacity and a lack of full understanding does not exist is correct but immaterial. A mental incapacity occasioning a lack of some particular legal capacity (eg, to make a will or to enter a contract) is not the issue in respect of s 501CA(3), because that is not the criterion informing s 501(6)(a) or s 501(7)(e) or (f). What is relevant is a requisite mental incapacity (or physical disability involving a condition of mind or

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65 eg, *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94; 210 ALR 190; *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112.

66 (2021) 271 CLR 112.

67 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 124-125 [22].

body causing such incapacity) equivalent to that required to render a person unable to be held criminally responsible or unfit to plead. It is that kind and degree of legal incapacity which is an essential predicate of the performance of the Minister's duties under s 501CA(3).

91 Several other matters may also be put to one side. It may be accepted that, in s 501CA(3), "[a]s soon as practicable after making the original decision, the Minister must ..." means what it says. It imposes duties on the Minister which the Minister must discharge in a timely way. In context, timeliness is measured by reference only to the making of the original decision to cancel the visa. It is not measured by reference to any circumstance of the person whose visa has been cancelled. It follows that no purpose would be served by the Minister, in seeking to discharge those duties, making inquiries about the status or condition of that person. Nothing about that person's status or condition could affect the Minister's duties to give the notice and invite the making of representations as soon as reasonably practicable after making the decision. Nor is any such further inquiry contemplated by the statutory scheme because, as described, the scheme assumes persons receiving notice of their visa cancellation and being invited to make representations under s 501CA(3) will not be subject to a requisite mental incapacity. Further, "give" and "invite" in s 501CA(3) also mean what they say.[68] That is, they mean "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".[69] Equally, "person" just means "person" in s 501CA(3), irrespective of the person's legal capacity.

92 None of these matters of construction alter the fundamental premise on which the mandatory cancellation provisions operate – that the person who is given the notice and invited to make representations, at the time they are so given and so invited, will not be subject to a requisite mental incapacity such that, at that time, they lacked legal capacity as described above (or, if they do lack legal capacity, that there has not been appointed a guardian authorised to deal with the notice and invitation on that person's behalf). Such lack of legal capacity, at the time the notice is given and the invitation made, is fundamentally inconsistent with the factual predicate on which s 501CA(3) operates, being that the person will have such legal capacity. By analogy to the consequences of a third-party fraud upon a

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68 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 125 [23].

69 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 125 [23].

decision-maker in public law,[70] the effect of that fact not existing at the time of the giving of the notice and the making of the invitation, being so inconsistent with the fundamental premise of the mandatory cancellation provisions, would have "the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to"[71] the person whose visa has been cancelled. It would also disable[72] the Minister from performing the Minister's critical statutory function under s 501CA(4) to decide, by reference to the person's representations, whether the Minister is satisfied (or not) that "there is another reason why the original decision should be revoked" or that the person "passes the character test".[73] The consequence would be that, although the Minister sought to perform the statutory duties in accordance with s 501CA(3) by giving the person notice and inviting them to make representations (as the Minister must always do), in law the performance of those duties is vitiated and the duties remain constructively unperformed.[74] They will remain unperformed until the Minister gives notice and makes the invitation again at a time when the person is not subject to a requisite mental incapacity for the purposes of s 501CA(3) or, alternatively, has had a guardian validly appointed with the legal authority to make decisions with respect to their visa.

Was appellant subject to a requisite mental incapacity on 1 December 2021?

93 The appellant pleaded guilty to, and was convicted of, various offences for which he was sentenced to a term of imprisonment of 18 months in the Magistrates' Court of Victoria on 22 October 2021. The order of the Magistrates' Court noted that the appellant "may be at risk due to ... psychiatric illness" and "appears

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70 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189. See also *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at 400 [131].

71 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [49].

72 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [51].

73 A person might subsequently pass the character test at the time the Minister is considering revoking the original decision if, for example, the person was no longer deemed to have a "substantial criminal record" because their sentence was reduced or conviction quashed on appeal (and there was no other reason why the person did not pass the character test under s 501(6)).

74 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [52]. See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76].

incoherent". By s 20(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), the "defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that – (a) he or she did not know the nature and quality of the conduct; or (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong)". By s 20(2), "[i]f the defence of mental impairment is established, the person must be found not guilty because of mental impairment". Further, s 14C in Div 2 of Pt 2 of that Act ("Determination of unfitness to stand trial by judge alone") provides that the "question of a person's fitness to stand trial is to be determined on the balance of probabilities by the court at an investigation into the fitness of the accused to stand trial". Section 14F, amongst other relevant provisions, regulates what happens if the accused is found fit or not fit to stand trial. As, however, the appellant's plea of guilty was accepted and he was convicted and sentenced, it is to be assumed that he was not subject to a legal incapacity in the relevant sense at the time of the commission of his offences or at trial.

94 A delegate of the Minister made the original decision to cancel the appellant's visa on 24 November 2021. At that time the appellant was being held in the psychiatric unit of the prison where he was serving his sentence. On 1 December 2021, a correctional officer at the prison gave the appellant the notice and an invitation to make representations about the revocation of the original decision. The appellant signed an acknowledgement of receipt of the notice on that same day, inferentially at the request of the officer who had been instructed to seek the appellant's signature as acknowledgement.

95 On 23 December 2021, the Victorian Institute of Forensic Mental Health ("Forensicare") made an application for a guardianship order in respect of the appellant to the Victorian Civil and Administrative Tribunal ("VCAT"). That VCAT made a guardianship order on 11 January 2022, some six weeks after the service of the notice, is not determinative of the appellant's mental capacity at the time of service of the notice. VCAT can make a guardianship order depending on a disability of the person proposed to be represented.[75] VCAT is also not bound by the rules of evidence[76] and is not bound to make decisions on the balance of probabilities.[77] Rather, VCAT must "act fairly and according to the substantial

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75 See, eg, *Guardianship and Administration Act 2019* (Vic), ss 30, 34.

76 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(1)(b).

77 See, eg, *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at 546-547 [24]-[26].

merits of the case in all proceedings"[78] and "must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit".[79] Accordingly, the fact that VCAT made a guardianship order in respect of the appellant on 11 January 2022 (giving the guardian power to "start and defend legal proceedings" on behalf of the appellant, including about his visa) may be relevant to whether, but does not prove that, on 1 December 2021 the appellant lacked the requisite mental capacity to: (a) understand the nature of the notice and the invitation to make representations about the cancellation of the visa; (b) make representations about the cancellation of the visa in response to the invitation; and (c) understand the substantial effect of the notice and invitation, and the making of representations, on him. Nor does it prove that this lack of capacity was insuperable on 1 December 2021 and an inherent quality of the appellant's condition of mind or body.

96 The primary judge said that "this is a rare circumstance where the outcome for the [appellant] would appear objectively unfair, based on what is now known about the [appellant's] legal decision-making incapacity at and around the time of the Notice being handed to him on 1 December 2021".[80] The observation about objective unfairness is undoubtedly correct, but the finding (such as it is) of the appellant's mental incapacity on 1 December 2021, in context, reflects no more than VCAT's conclusion that the appellant is subject to a decision-making incapacity, rather than that he is (or on 1 December 2021 was) subject to a requisite mental incapacity so as to vitiate the giving of the notice under s 501CA(3).

97 There is other evidence, however. Medical opinions provided to VCAT refer to a working diagnosis in 2017 that the appellant had schizophrenia, the symptoms of which had been present for approximately four years, with a steady decline of the appellant's functioning throughout that year. In 2020, the appellant's treating psychiatrist reported that, although the appellant was subject to a community treatment order, his decision-making capacity remained impaired due to schizophrenia and ongoing substance abuse. The appellant was subject to further psychiatric reviews on 17 and 23 December 2021. Evidence of the 17 December 2021 psychiatric review indicates that the appellant had "'nil insight' into his circumstances and it was considered that entrenched, firmly held, bizarre and grandiose delusions were colouring his decision-making regarding his possible deportation". The psychiatrist conducting the 23 December 2021 review described

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78 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 97.

79 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(1)(d).

80 *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 377 FLR 409 at 423 [86].

the appellant as having schizoaffective disorder, ongoing since July 2019, including grandiose delusions, disorganisation, visual hallucinations, and no insight. It was also recorded that the appellant's delusions "significantly impact[ed] on [the] weighing of information as part of [his] decision-making process". According to the report of 23 December, the appellant's disability was said to have been evident for the previous two years and five months, the appellant having been held in the psychiatric unit of the prison for the past two months at that point (that is, from late October 2021). The psychiatrist also reported that the appellant generally had no decision-making capacity, except limited capacity in relation to his medical treatment, for which it was reported that he "understands that he is taking medication, but [he] is not able to understand its purpose as he does not believe he has a mental illness". The psychiatrist also stated that the appellant's behaviours and grandiose delusions included "singing and dancing in the courtyard", believing he could "raise people from the dead" and thinking he would "be given $10,000 to $50,000 by the Australian Government". The psychiatrist was therefore of the view that the appellant was "currently significantly mentally unwell".

98 The Minister submitted that it should be inferred that the appellant did have some legal capacity on 1 December 2021, or at least capacity to "ask for help" and so engage an agent "of some sorts". The Minister relied on the evidence that a social worker from Forensicare came to know about the notice the appellant received on 1 December 2021 and then sought legal assistance from VLA with the "verbal consent" of the appellant. There is evidence that, on 3 December 2021, VLA then provided advice over the telephone to the appellant that he should seek the revocation of the cancellation of his visa and referred the appellant to Refugee Legal. Further, VLA subsequently informed the social worker, again with the "verbal consent" of the appellant, that it had spoken to the appellant and referred him to Refugee Legal. When Forensicare again contacted VLA on 8 March 2022, VLA sought clarification from Refugee Legal on whether they were assisting the appellant. Refugee Legal advised that they were not assisting the appellant as he "had instructed them that he had sought revocation of the cancellation of his visa".

99 This evidence, which may suggest that the appellant had the capacity to provide "verbal consent", "ask for help" or give limited instructions, is not determinative. Even if the appellant's limited capacity in that respect is accepted, it does not establish that the appellant had the requisite mental capacity for the purposes of s 501CA(3). This is because, as previously described, soundness of mind in a certain respect, or sufficient legal capacity for some particular purpose, does not mean legal capacity for every purpose. Further, evidence of the appellant "asking for help" and giving "verbal consent" does not undermine the evidence of the psychiatric assessments, and certain other material, which compel the conclusion that the appellant was in fact subject to a requisite mental incapacity at the relevant time. That other material includes, first, the fact that the application to VCAT for the guardianship order lodged on 23 December 2021 by the social

worker records that Refugee Legal had advised that they could not assist the appellant for unknown reasons but it "is possible that [the appellant] has been assessed as not having capacity". If Refugee Legal had assessed the appellant as not having legal capacity, in the sense of being unable to give instructions or understand the general nature of the acts Refugee Legal would be performing on his behalf, then it would have been correct for Refugee Legal to conclude that the appellant could not appoint them as his lawyer.[81] This reflects the general proposition that "the authority ... of a lawyer to represent a client depends on the client having the requisite mental capacity".[82] This is because a "lawyer's authority can only ever occupy that range which is marked out by the client's mental capacity",[83] which may be demarcated by a client's capacity to give instructions on a matter and "understand the nature of the acts or transactions which [they] would be authorizing".[84] Further, the advice of Refugee Legal that the appellant had told them he was seeking revocation of the cancellation of his visa might well reflect what Refugee Legal were told, but it does not reflect the appellant's actual circumstances as the appellant had not in fact sought revocation of the cancellation of his visa but instead was the subject of a guardianship application by the social worker to, relevantly, enable decisions regarding his visa to be made on his behalf.

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81 See, eg, *Elliot v Ince* (1857) 7 De G M & G 475 at 486 [44 ER 186 at 190], cited in *Gibbons v Wright* (1954) 91 CLR 423 at 445; *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, cited in *Gibbons v Wright* (1954) 91 CLR 423 at 445; *Drew v Nunn* (1879) 4 QBD 661, cited in *Gibbons v Wright* (1954) 91 CLR 423 at 445; *Richmond v Branson & Son* [1914] 1 Ch 968 at 974, cited in *Goddard Elliott v Fritsch* [2012] VSC 87 at [550], *Doulaveras v Daher* (2009) 253 ALR 627 at 649 [118] and *Inglis v Moore [No 2]* (1979) 25 ALR 453 at 464; *Yonge v Toynbee* [1910] 1 KB 215 at 228, cited in *Goddard Elliott v Fritsch* [2012] VSC 87 at [550], *Burnett v Browne [No 2]* [2021] FCA 373 at [3] and *ABC v Catholic Archdiocese of Melbourne* [2021] VSC 87 at [12]. See also *Halsbury's Laws of Australia* (online edition, updated 24 September 2018), Lawyer-Client Relationship at [250-1100].

82 *Goddard Elliott v Fritsch* [2012] VSC 87 at [548], cited in *Burnett v Browne [No 2]* [2021] FCA 373 at [3], *ABC v Catholic Archdiocese of Melbourne* [2021] VSC 87 at [12], *Vishniakov v Lay* (2019) 58 VR 375 at 385 [30] and *Lee v Kennedy and State of Victoria (Ruling)* [2015] VSC 658 at [3]. See also *AEW v BW* [2016] NSWSC 905 at [23]-[25]; Law Council of Australia, *Australian Solicitors' Conduct Rules and Commentary* (2024) at 27-30.

83 *Goddard Elliott v Fritsch* [2012] VSC 87 at [550].

84 *Martin v Azzopardi* (1973) 20 FLR 345 at 348. See also *Goddard Elliott v Fritsch* [2012] VSC 87 at [418], [550], [569].

If anything, that is a further demonstration of the lack of insight the appellant had into his circumstances.

100 Ultimately, the evidence is sufficient to establish on the balance of probabilities that, on 1 December 2021, the appellant was subject to a requisite mental incapacity in the sense that he could not: (a) understand the nature of the notice and the invitation to make representations about the cancellation of the visa; (b) make representations about the cancellation of the visa in response to the invitation; and (c) understand the substantial effect of the notice and invitation, and the making of representations, on him. The evidence shows that the appellant was assessed by different psychiatrists on 17 and 23 December 2021 who both considered that, as a result of his schizophrenia/schizoaffective disorder, the appellant was seriously delusional, including about his possible deportation, had no insight into his circumstances (which would include the circumstances of his visa cancellation), and was suffering visual hallucinations, and that his delusions "significantly impact[ed] on [the] weighing of information as part of [his] decision-making process". Against this, the references to the appellant having been able to "ask for help" or give "verbal consent" to actions by the social worker and VLA, given the context of the social worker's attempts to obtain a guardianship order in respect of the appellant, are of little weight.

101 In these circumstances, it should be found on the balance of probabilities that the appellant, on 1 December 2021, by reason of then being subject to a requisite mental incapacity as described, lacked the legal capacity that is an essential or inviolable underlying predicate of the operation of s 501CA(3) of the *Migration Act*.

Consequence and orders

102 The consequence of the appellant having been subject to a requisite mental incapacity on 1 December 2021, coupled with the absence of a validly appointed guardian with authority to make relevant legal decisions on the appellant's behalf at that time, is that the Minister's giving of the notice and invitation to the appellant on 1 December 2021 is vitiated. The duties under s 501CA(3) remain constructively unperformed.

103 The orders set out by Gordon A-CJ, Edelman and Steward JJ should be made.