HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No S126/2023

KATHERINE ANNE VICTORIA PEARSON — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS — DEFENDANTS

Matter No B15/2024

JZQQ — APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR — RESPONDENTS

Matter No P10/2024

KINGSTON TAPIKI — APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS — RESPONDENT

Matter No S130/2024

MINISTER FOR HOME AFFAIRS & ANOR — APPLICANTS

AND

KATE PEARSON & ANOR — RESPONDENTS

Matter No P33/2024

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS — APPLICANT

AND

KINGSTON TAPIKI & ANOR — RESPONDENTS

Pearson v Commonwealth of Australia
JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs
Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs
Minister for Home Affairs v Pearson
Minister for Immigration, Citizenship and Multicultural Affairs v Tapiki
[2024] HCA 46
Date of Hearing: 9 & 10 October 2024
Date of Judgment: 4 December 2024
S126/2023, B15/2024, P10/2024, S130/2024 & P33/2024

ORDER

Matter No S126/2023

The questions stated for the opinion of the Full Court in the special case filed on 13 February 2024 be answered as follows:

Question 1: *On their proper construction, do sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the* Migration Amendment (Aggregate Sentences) Act 2023 *(Cth) (**Amendment Act**), as applied by s 3 of that Act, validate the decision of the third defendant to affirm the non-revocation decision?*

Answer: *Unnecessary to answer.*

Question 2: *Are sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the Amendment Act, as applied by s 3 of that Act, invalid in their operation in respect of the cancellation decision, the non-revocation decision and the AAT's decision, on the ground that they purport to impermissibly usurp or interfere with the exercise of the judicial power of the Commonwealth?*

Answer: *Unnecessary to answer.*

Question 3: What, if any, relief should be granted to the plaintiff?

Answer: None.

Question 4: Who should pay the costs of the special case?

Answer: The first and second defendants.

Matter No B15/2024

1. *Appeal dismissed.*

2. *The first respondent pay the appellant's reasonable costs of the second day of the hearing of the appeal on 10 October 2024.*

3. *The appellant pay the first respondent's costs of the appeal other than such reasonable costs as were incurred by the first respondent on 10 October 2024.*

Matter No P10/2024

1. *Appeal dismissed.*

2. *The respondent pay the appellant's costs of the appeal.*

Matter No S130/2024

1. *Special leave to appeal is granted.*

2. *Appeal allowed.*

3. *Set aside orders 3 and 4 made by the Full Court of the Federal Court of Australia on 24 January 2023 and, in their place, order that the Second Further Amended Originating Application be dismissed.*

4. *The appellants pay the first respondent's costs in this Court.*

5. *There be no set off of the first respondent's costs against any other costs order made in favour of any of the appellants against the first respondent.*

Matter No P33/2024

1. *Special leave to appeal is granted.*

2. *Appeal allowed.*

3. *Set aside orders 2, 4 and 5 made by the Full Court of the Federal Court of Australia on 14 February 2023 in proceeding WAD 111/2022 and, in their place, order that the application for judicial review be dismissed.*

4. *Set aside orders 2, 3, 5 and 6 made by the Full Court of the Federal Court of Australia on 14 February 2023 in proceeding NSD 296/2022 and, in their place, order that the appeal be dismissed.*

5. *The appellant pay the first respondent's costs in this Court.*

6. *There be no set off of the first respondent's costs against any other costs order made in favour of the appellant against the first respondent.*

On appeal from the Federal Court of Australia (B15/2024, P10/2024, S130/2024 and P33/2024)

Representation

B W Walker SC and E M Nekvapil SC with J R Murphy for the appellant in B15/2024 (instructed by Zarifi Lawyers)

D J Hooke SC and J R Murphy with M G S Crowley for the appellant in P10/2024 and the first respondent in P33/2024 (instructed by William Gerard Legal Pty Ltd)

D J Hooke SC with J D Donnelly and M G S Crowley for the plaintiff in S126/2023 and the first respondent in S130/2024 (instructed by Zarifi Lawyers)

C L Lenehan SC and Z C Heger SC with M P A Maynard for the first and second defendants in S126/2023, the first respondent in B15/2024, the respondent in P10/2024, and the applicants in S130/2024 and P33/2024, and for the Attorney-General of the Commonwealth, intervening in B15/2024 and P10/2024 (instructed by Australian Government Solicitor)

C S Bydder SC, Solicitor-General for the State of Western Australia, with S A Smith for the Attorney-General for the State of Western Australia, intervening in S126/2023, B15/2024 and P10/2024 (instructed by State Solicitor's Office (WA))

F J Nagorcka with K J E Blore for the Attorney-General of the State of Queensland, intervening in S126/2023, B15/2024 and P10/2024 (instructed by Crown Law (Qld))

L S Peattie for the Attorney-General for the Northern Territory, intervening in S126/2023, B15/2024 and P10/2024 (instructed by Solicitor for the Northern Territory)

Submitting appearances for the third defendant in S126/2023 and the second respondent in B15/2024, S130/2024 and P33/2024

CATCHWORDS

Pearson v Commonwealth of Australia
JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs
Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs
Minister for Home Affairs v Pearson
Minister for Immigration, Citizenship and Multicultural Affairs v Tapiki

Statutes – Construction – *Migration Act 1958* (Cth) – Aggregate sentences – Where visas subject to mandatory cancellation under s 501(3A) of *Migration Act* because plaintiff and appellants did not pass character test on basis of s 501(7)(c) – Where s 501(7)(c) engaged if person sentenced to a term of imprisonment of 12 months or more – Where plaintiff and appellants each convicted of multiple offences and received aggregate sentence of imprisonment of 12 months or more – Where items 4(3), 4(4) and 4(5)(b)(i) of Sch 1 to *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("Aggregate Sentences Act") purported to retrospectively validate decisions made under *Migration Act* rendered invalid by reason that aggregate sentence for 12 months or more was not considered "a term of imprisonment of 12 months or more" – Whether aggregate sentence "a term of imprisonment" within meaning of s 501(7)(c) – Whether Aggregate Sentences Act validated decisions of Administrative Appeals Tribunal affirming decisions not to revoke cancellation of visas – Whether items 4(3), 4(4) and 4(5)(b)(i) of Sch 1 to Aggregate Sentences Act invalid – Whether second applications for special leave should be granted.

Words and phrases – "aggregate sentence", "character test", "decision", "imprisonment", "mandatory cancellation of a visa", "punishment for an offence", "sentence", "substantial criminal record", "validity".

Migration Act 1958 (Cth), ss 501, 501CA.
Migration Amendment (Aggregate Sentences) Act 2023 (Cth), Sch 1, items 4(3), 4(4) and 4(5)(b)(i).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. Each of the plaintiff in a proceeding commenced in the original jurisdiction of this Court, Katherine Pearson, and the appellants in the two appeals from decisions of the Full Court of the Federal Court of Australia, JZQQ and Kingston Tapiki, seek to challenge the validity of items 4(3), 4(4) and 4(5)(b)(i) of Sch 1 to the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("the Aggregate Sentences Act"). They principally contend that those provisions constitute an impermissible interference with the judicial power of the Commonwealth vested in courts by Ch III of the *Constitution*. Items 4(3), 4(4) and 4(5)(b)(i) purport to retrospectively validate, relevantly, decisions that cancelled Ms Pearson's, Mr Tapiki's and JZQQ's visas under s 501(3A) of the *Migration Act 1958* (Cth), decisions under s 501CA(4) not to revoke those cancellations, and, according to the respondents to the appeals and the defendants to the special case, decisions of the Administrative Appeals Tribunal ("the AAT") to affirm the decisions not to revoke those cancellations.

2 In the cases of Ms Pearson and Mr Tapiki, those decisions were found to be invalid by the Full Court of the Federal Court in *Pearson v Minister for Home Affairs* ("*Pearson (No 1)*")[1] and *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* ("*Tapiki (No 1)*")[2] respectively. In *Pearson (No 1)* the Full Court held that an aggregate sentence of imprisonment for 12 months or more imposed for multiple offences did not constitute a "sentence[] to a term of imprisonment of 12 months or more" for the purposes of s 501(7)(c) of the *Migration Act* and thus did not engage the duty to cancel a person's visa imposed by s 501(3A).[3] In *Tapiki (No 1)* a differently constituted Full Court of the Federal Court followed *Pearson (No 1)*. The dispositive issue in the appeals now brought by JZQQ and Mr Tapiki and in the proceedings now commenced in the original jurisdiction of the Court by Ms Pearson is whether the Full Court in *Pearson (No 1)* erred in its construction of s 501(7)(c) of the *Migration Act* so as to exclude aggregate sentences of 12 months or more.

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1 (2022) 295 FCR 177.

2 (2023) 408 ALR 503.

3 *Pearson v Minister for Home Affairs* ("*Pearson (No 1)*") (2022) 295 FCR 177 at 191 [47]-[48].

3 For the reasons that follow, the construction of s 501(7)(c) so as to exclude aggregate sentences of 12 months or more from its scope, as adopted in *Pearson (No 1)*, was incorrect. It follows that the decisions to cancel each of Ms Pearson's, Mr Tapiki's and JZQQ's visas (and the decisions not to revoke those cancellations and to affirm those decisions not to revoke those cancellations) were not invalid by reason of aggregate sentences having been taken into account, and the challenges to the validity of items 4(3), 4(4) and 4(5)(b)(i) do not arise for determination. Mr Tapiki's and JZQQ's appeals should be dismissed, and the questions of law stated in Ms Pearson's special case should be answered accordingly.

"Character test" and "substantial criminal record"

4 Section 501(1)-(3) of the *Migration Act* confer on the Minister administering the Act discretionary powers to refuse to grant a visa to a person, or cancel a visa that has been granted to a person, on character grounds. The exercise of those powers is enlivened in circumstances where, relevantly, either the person concerned does not satisfy the Minister that they pass the "character test",[4] or the Minister reasonably suspects that they do not pass that test,[5] or both.[6]

5 Section 501(3A)(a) requires the Minister to cancel a person's visa where, relevantly, the Minister is satisfied that the person does not pass the "character test" because of the operation of sub-s (6)(a) on the basis of sub-s (7)(a), (7)(b) or (7)(c).[7] Sub-sections (3) and (3A) of s 501CA provide for the notification of such decisions to cancel a person's visa and the reasons for that decision, and an invitation to provide representations about whether to revoke that cancellation. Section 501CA(4) empowers the Minister to revoke a cancellation decision made under s 501(3A) if the person makes representations in accordance with the invitation under s 501CA(3)(b) and if the Minister is satisfied that the person passes the "character test" or that there is another reason to revoke the cancellation

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4 *Migration Act 1958* (Cth), s 501(1).

5 *Migration Act*, s 501(3)(c).

6 *Migration Act*, s 501(2).

7 *Migration Act*, s 501(3A)(a)(i).

decision. Where a decision not to revoke the cancellation of a visa is made by the Minister's delegate under s 501CA(4), the AAT may review the decision.[8]

6 Section 501(6) provides that a person does not pass the "character test" in various circumstances including those specified in sub-s (6)(a), namely that "the person has a substantial criminal record (as defined by subsection (7))". Section 501(7) provides:

> "For the purposes of the character test, a person has a ***substantial criminal record*** if:
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> (a) the person has been sentenced to death; or
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> (b) the person has been sentenced to imprisonment for life; or
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> (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
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> (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
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> (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:
>
> (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."

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8 *Migration Act*, s 500(1)(ba).

7 Section 501(12) provides that a "***sentence*** includes any form of determination of the punishment for an offence".

8 Section 501(7A) is addressed to a particular instance of s 501(7)(d), namely where a person has been sentenced to two or more terms of imprisonment which are to be served concurrently either in whole or in part. In that event the "whole of each term is to be counted in working out the total of the terms".

The Aggregate Sentences Act

9 The Aggregate Sentences Act inserted s 5AB into the *Migration Act*.[9] Section 5AB addresses *Pearson (No 1)* by providing that the provisions of the *Migration Act* and the *Migration Regulations 1994* (Cth) "apply no differently in relation to a single sentence imposed by a court in respect of 2 or more offences to the way in which those provisions apply in relation to a sentence imposed by a court in respect of a single offence". Item 3 of Sch 1 to the Aggregate Sentences Act applies s 5AB to the "doing of a thing on or after" the commencement of the Aggregate Sentences Act on 17 February 2023 even if that "thing" relates to events and circumstances that existed prior to the commencement, such as making a decision on or after 17 February 2023 to cancel a person's visa based upon an aggregate sentence imposed on them before that time. To "do a thing" is defined to include making a decision, exercising a power, performing a function, complying with an obligation, discharging a duty and "do[ing] anything else".[10]

10 Item 4 of Sch 1 purports to validate certain "things done" prior to the commencement of the Aggregate Sentences Act. Item 4(1) addresses the application of item 4 as follows:

> "This item applies if a thing done, or purportedly done, before commencement under a law, or provision of a law, covered by subitem (2) would, apart from this item, be wholly or partly invalid only *because* a sentence, taken into account in doing, or purporting to do, the thing, was imposed in respect of 2 or more offences." (emphasis added)

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9 *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("Aggregate Sentences Act"), Sch 1, item 1.

10 Aggregate Sentences Act, Sch 1, item 2.

11 The laws "covered by subitem (2)" include the *Migration Act*, but do not include the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act").

12 If item 4(1) is engaged, then item 4(3) provides that the "thing done, or purportedly done, is taken for all purposes to be valid and to have always been valid". Item 4(4) provides that the command in item 4(3) operates "despite any effect that [it] may have on the accrued rights of any person". Item 4(5) applies item 4 to civil and criminal proceedings instituted on or after commencement (item 4(5)(a)), and civil and criminal proceedings instituted before commencement that are concluded either before (item 4(5)(b)(i)) or on or after (item 4(5)(b)(ii)) commencement.

13 An example of the operation of item 4 is that if, before 17 February 2023, a decision was made to cancel or refuse a visa because the relevant person did not satisfy the character test, and that decision was invalid only because it was based on an aggregate sentence imposed in respect of two or more offences, then that decision is taken to have been valid for all purposes, and the validation applies in relation to all proceedings whenever instituted and whenever concluded.

JZQQ's appeal

14 JZQQ is a citizen of New Zealand who came to Australia in 2011. He received a Class TY Subclass 444 Special Category (Temporary) visa on his arrival. On 1 September 2021, he was sentenced by the Magistrates' Court of Victoria to an aggregate term of imprisonment of 15 months for offences of making threats to kill and intentionally causing injury. Subject to immaterial exceptions, s 9(1) of the *Sentencing Act 1991* (Vic) enables such a sentence to be imposed where an offender "is convicted by a court of two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character".

15 On 20 September 2021, JZQQ's visa was purportedly cancelled under s 501(3A) on account of that aggregate sentence. On 1 June 2022, a delegate of the Minister decided not to revoke the cancellation. That decision was affirmed by the AAT on 29 August 2022. In February 2022, following the conclusion of his sentence of imprisonment, JZQQ was taken into immigration detention.

16 In September 2022, JZQQ commenced judicial review proceedings challenging the AAT's decision. By an amended originating application filed in the Federal Court on 31 January 2023, JZQQ contended, amongst other grounds, that

it followed from *Pearson (No 1)* that the mandatory cancellation provisions were not engaged by his aggregate sentence. On 23 December 2022, being the day after reasons in *Pearson (No 1)* were published and prior to the determination of the judicial review application, JZQQ was released from immigration detention.

17 JZQQ's application for judicial review was heard and determined by the Full Court of the Federal Court on 19 October 2023, after the Aggregate Sentences Act came into force.[11] Before the Full Court, JZQQ contended that, as a matter of construction, item 4 of Sch 1 to the Aggregate Sentences Act did not affect his reliance on *Pearson (No 1)* to challenge the AAT's decision but, if it did, it was invalid. The Full Court rejected those contentions (and all of JZQQ's other grounds of challenge to the AAT decision).[12]

18 JZQQ was granted special leave to appeal to this Court from the Full Court's decision. In this Court, JZQQ contended that, because his challenge was to a decision of the AAT and its decision was made under the AAT Act, which was not one of the "law[s] … covered by subitem (2)"[13] of item 4, item 4(3) did not deem the AAT's decision to be valid. In the alternative, JZQQ contended that, if item 4 purported to validate an invalid decision of the AAT, then it was inconsistent with Ch III of the *Constitution* because, in its application to the proceedings commenced by JZQQ that were on foot but not determined at the time the Aggregate Sentences Act was enacted, it constituted an impermissible direction to the Federal Court to treat *Pearson (No 1)* as wrongly decided. JZQQ also contended that item 4 is invalid because it derogates from the constitutionally entrenched jurisdiction conferred by s 75(v) of the *Constitution*.

19 The Minister and the intervenors[14] disputed those submissions**.** Further, by a notice of contention, the Minister sought to remove the premise of JZQQ's

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11 *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 370.

12 *JZQQ* (2023) 300 FCR 370 at 395 [109].

13 See above at [11].

14 The Attorney-General of the Commonwealth, the Attorney-General of the State of Queensland, the Attorney-General for the Northern Territory and the Attorney-General for the State of Western Australia.

arguments by contending that the AAT's decision was valid because JZQQ's aggregate sentence satisfied s 501(7)(c) of the *Migration Act*; ie, that *Pearson (No 1)* was wrongly decided.

20 A formal submission that *Pearson (No 1)* was wrongly decided had been made on behalf of the Minister to the Full Court in JZQQ's case. Even so, it was contended on behalf of JZQQ that the Minister's notice of contention should not be addressed because the Commonwealth Parliament enacted the Aggregate Sentences Act on the basis that *Pearson (No 1)* invalidated mandatory visa cancellations that relied on aggregate sentences, and it would now be inconsistent for the executive to argue in this Court that *Pearson (No 1)* was wrongly decided.

21 It is not necessary to address all the difficulties with that contention. It suffices to note that the Aggregate Sentences Act does not assert or even assume that *Pearson (No 1)* was correct. Instead, it is neutral on that issue. The effect of items 4(1) and 4(3) is that they only deem the relevant "thing done" to be, and to have always been, valid *if* that thing was otherwise rendered invalid by reason of the holding in *Pearson (No 1)*. Otherwise, it was accepted on behalf of JZQQ that no relevant prejudice was occasioned by the Minister raising the correctness of *Pearson (No 1)* in JZQQ's appeal in this Court. However, before that contention is addressed, it is necessary to explain how that issue arises in Ms Pearson's special case and Mr Tapiki's appeal.

Ms Pearson's special case

22 Ms Pearson is a citizen of New Zealand who received a Class TY Subclass 444 Special Category (Temporary) visa on her arrival in Australia on 25 June 2012. On 28 February 2019, she was convicted by the District Court of New South Wales of 10 offences associated with the supply of illegal drugs. She was sentenced to an aggregate sentence of imprisonment for four years and three months.

23 On 17 July 2019, Ms Pearson's visa was purportedly cancelled under s 501(3A) of the *Migration Act*. In June 2020, a delegate of the Minister for Home Affairs decided not to revoke that cancellation. The AAT later affirmed that decision. On 30 July 2020, Ms Pearson was taken into immigration detention. On 22 December 2022, the Full Court published reasons in *Pearson (No 1)*. Ms Pearson was released from immigration detention later that day. On 24 January 2023, the Full Court issued writs of certiorari quashing the decision to cancel Ms Pearson's visa and quashing the AAT's decision. The Full Court declared that

the decision to cancel her visa, the decision to not revoke the cancellation and the AAT's decision to affirm the non-revocation decision were invalid.

24 On 21 February 2023, the Minister for Home Affairs and the Secretary of the Department of Home Affairs filed an application for special leave to appeal from *Pearson (No 1)*. The application was heard and refused by Kiefel CJ and Gleeson J on 11 August 2023.[15] In dismissing the application, their Honours noted that the effect of the Aggregate Sentences Act, "the validity of which [was] not challenged", was such that the only matter that would be determined in any appeal from *Pearson (No 1)* would be the question of costs, which was "not a sufficient basis for the grant of special leave".[16]

25 On 6 September 2023, Ms Pearson was again taken into immigration detention based on an understanding that the Aggregate Sentences Act validated the decision to cancel her visa.

26 On 10 October 2023, Ms Pearson filed an application for a constitutional or other writ in this Court seeking, relevantly, declaratory relief to the effect that items 4(3), 4(4) and 4(5)(b)(i) of Sch 1 to the Aggregate Sentences Act are invalid and a writ of habeas corpus to secure her release.

27 Pursuant to leave granted by Jagot J on 7 March 2024,[17] the parties agreed to pose questions of law in the form of a special case for the opinion of the Full Court of this Court, namely: (i) whether, on their proper construction, items 4(3), 4(4) and 4(5)(b)(i) validated the decision of the AAT to affirm the non-revocation of the cancellation of Ms Pearson's visa; and (ii) if so, whether those provisions are invalid in their operation in respect of the decision to cancel Ms Pearson's visa, the decision not to revoke the cancellation and the AAT's decision affirming the non-revocation of the cancellation of her visa.

28 In this Court, Ms Pearson adopted JZQQ's arguments concerning the application of item 4 to the AAT decision concerning her visa and concerning the validity of items 4(3), 4(4) and 4(5)(b)(i), except that Ms Pearson did not contend

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15 *Minister for Home Affairs v Pearson* [2023] HCATrans 105, lines 282-283.

16 *Minister for Home Affairs v Pearson* [2023] HCATrans 105, lines 279-282.

17 *High Court Rules 2004* (Cth), r 27.08.1.

that items 4(3), 4(4) and 4(5)(b)(i) were invalid because they interfered with proceedings that had been instituted but not determined at the time the Aggregate Sentences Act came into force. At the time of the enactment of the Aggregate Sentences Act, there were no proceedings on foot initiated by Ms Pearson that challenged the validity of the decisions concerning the cancellation of her visa. Instead those decisions had already been declared invalid by the orders made following *Pearson (No 1)*. Hence, Ms Pearson contended that items 4(3), 4(4) and 4(5)(b)(i) were invalid because they purported to declare valid administrative decisions that had already been declared invalid and set aside by the exercise of judicial power under Ch III of the *Constitution* in *Pearson (No 1)*.

Mr Tapiki's appeal

29 Mr Tapiki is a citizen of New Zealand who arrived in Australia when he was 18 months old. In December 2009, Mr Tapiki received a Class TY Subclass 444 Special Category (Temporary) visa. He is now 31 years old. On 30 September 2020, he was convicted by the Local Court of New South Wales and sentenced to an aggregate sentence of 12 months imprisonment for multiple offences.

30 On 29 October 2020, Mr Tapiki's visa was purportedly cancelled under s 501(3A) of the *Migration Act* based on that aggregate sentence. In November 2020, Mr Tapiki made representations seeking revocation of the cancellation decision. In February 2021, a delegate of the Minister decided not to revoke that cancellation. On 11 May 2021, the AAT affirmed that non-revocation decision. In the meantime, on 19 November 2020, Mr Tapiki was taken into immigration detention. He was released on 23 December 2022 after the publication of reasons in *Pearson (No 1)*.

31 On 14 February 2023, the Full Court of the Federal Court published reasons in *Tapiki (No 1)*. Their Honours made orders in two sets of proceedings, the effect of which was to set aside the AAT decision and the decision to cancel Mr Tapiki's visa. The Court declared that Mr Tapiki continued to hold a valid visa.[18]

32 On the same day that the Aggregate Sentences Act came into effect (ie, 17 February 2023), Mr Tapiki was notified by the Department of Home Affairs

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18 *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 408 ALR 503 at 507.

that it considered that the effect of that Act was that the decision to cancel his visa was valid. On 8 March 2023, he was again detained. On 21 March 2023, Mr Tapiki commenced proceedings in the Federal Court challenging the validity of items 4(3), 4(4) and 4(5)(b)(i) of Sch 1 to the Aggregate Sentences Act and seeking a writ of habeas corpus to secure his release from immigration detention.

33 In early July 2023, the Minister filed two applications for special leave to appeal from the orders made in the two proceedings determined by *Tapiki (No 1)* (and extensions of time to make those applications). Those applications were withdrawn on 22 August 2023 after the refusal of special leave to appeal from *Pearson (No 1)*. During the hearing of the application for special leave to appeal from *Pearson (No 1)* before Kiefel CJ and Gleeson J, reference was made to Mr Tapiki's challenge to the validity of the Aggregate Sentences Act.[19]

34 In August 2023, Mr Tapiki amended his originating application in the Federal Court to seek damages for false imprisonment in respect of his detention between 22 and 23 December 2022. On 19 October 2023, the Full Court of the Federal Court rejected Mr Tapiki's challenge to the validity of items 4(3), 4(4) and 4(5)(b)(i) ("*Tapiki (No 2)*").[20] On 7 March 2024, Mr Tapiki was granted special leave to appeal to this Court from *Tapiki (No 2)*.

35 In this Court, Mr Tapiki relied on the same contentions as those advanced by Ms Pearson. He further contended that items 4(3), 4(4) and 4(5)(b)(i) were invalid as they effected an acquisition of his property, being his right to sue for false imprisonment in respect of his detention between 22 and 23 December 2022, and did not afford just terms in conformity with s 51(xxxi) of the *Constitution*.

The applications for special leave to appeal from *Pearson (No 1)* and *Tapiki (No 1)*

36 During the hearing before this Court, the Minister for Home Affairs and the Secretary of the Department of Home Affairs again applied for special leave to

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19 *Minister for Home Affairs v Pearson* [2023] HCATrans 105, lines 34-42.

20 *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 354 at 369 [65].

appeal from *Pearson (No 1)* and the Minister again applied for special leave to appeal from *Tapiki (No 1)* following an invitation to do so by the Court.

37 An application for special leave to appeal is an interlocutory proceeding, the refusal of which does not create a res judicata.[21] Nevertheless, absent "exceptional circumstances" or a "compelling explanation or circumstance" or the like, ordinarily the making of a further application for special leave on the same grounds as previously put forward will amount to an abuse of process.[22]

38 With respect to *Pearson (No 1)*, the Minister for Home Affairs and the Secretary contended that a compelling circumstance was demonstrated because the first application for special leave to appeal was refused when there was no challenge to the validity of the Aggregate Sentences Act on foot, whereas there is now such a challenge. The Minister for Home Affairs and the Secretary also contended that, if the challenge to *Pearson (No 1)* in JZQQ's appeal succeeded, but that holding was not applicable in Ms Pearson's case, then this Court would be required to deal with constitutional questions concerning the validity of the substantive provisions of item 4 "on a premise it knows to be incorrect".

39 The Minister made the same submission in relation to the application for special leave to appeal from *Tapiki (No 1)* save that, at the time the Minister decided to withdraw the first application for special leave to appeal from *Tapiki (No 1)*, Mr Tapiki had already challenged the validity of the relevant provisions of the Aggregate Sentences Act in the Federal Court.

40 In opposing a grant of special leave in each case, Ms Pearson and Mr Tapiki relied on the submission put on behalf of JZQQ about the supposed inconsistency between the executive challenging *Pearson (No 1)* in this Court and the Commonwealth Parliament legislating to reverse its effect. That contention has already been addressed. Otherwise, the submissions focused on the failure of the respective Ministers to have the first application seeking special leave to appeal from *Tapiki (No 1)* heard at the same time as the application in *Pearson (No 1)*, and the subsequent withdrawal of the application in respect of *Tapiki (No 1)* even though, unlike Ms Pearson, Mr Tapiki did then challenge the validity of the relevant provisions of the Aggregate Sentences Act. It was contended that the

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21 *Re Sinanovic's Application* (2001) 180 ALR 448 at 450 [7].

22 *Re Golding* (2020) 94 ALJR 1014 at 1018 [11]; 384 ALR 204 at 207-208.

Commonwealth (and its Ministers) should be bound by its "legislative and litigious choices".

41 In the case of the application for special leave to appeal from *Pearson (No 1)* the matters pointed to by the Minister for Home Affairs and the Secretary warrant a grant of special leave to appeal. In the case of the application for special leave to appeal from *Tapiki (No 1)* the position is less clear, but the end result is the same. The circumstances in which a sophisticated litigant, such as the Commonwealth or its Ministers, will be allowed to reconsider its litigious choices will necessarily be rare. In such cases, the occasioning of any prejudice, other than costs, to a respondent from that reconsideration will often prove decisive. However, in both cases, the applications for special leave to appeal have arisen out of challenges to the validity of provisions of the Aggregate Sentences Act to which the respective Ministers are responding and in circumstances where, by way of a notice of contention in JZQQ's appeal, they maintain a challenge to the correctness of *Pearson (No 1)*.

42 In circumstances where Ms Pearson and Mr Tapiki initiated the challenge to the substantive provisions of item 4, the only identified prejudice to them that would result from the grant of special leave to appeal in each case is the incurring of costs. Costs are addressed below, but it suffices to observe that, in this case, that form of prejudice does not bear upon the decision whether to grant or refuse special leave to appeal.

43 In the end result what is decisive is that it would be untenable for this Court to determine JZQQ's appeal on the basis that *Pearson (No 1)* was wrongly decided yet determine Ms Pearson's special case and Mr Tapiki's appeal on a contrary basis. Accordingly, special leave to appeal from each of the decisions in *Pearson (No 1)* and *Tapiki (No 1)* should be granted.

***Pearson (No 1)* was wrongly decided**

44 The aggregate sentences were imposed on each of Ms Pearson and Mr Tapiki pursuant to s 53A(1) of the *Crimes* (*Sentencing Procedure) Act 1999* (NSW). That provision authorises the imposition of an aggregate sentence of imprisonment "with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each".

45 Section 53A(2)(b) obliges a court when imposing such a sentence to "indicate" to the offender "the sentence that would have been imposed for each

offence ... had separate sentences been imposed instead of an aggregate sentence". Such indications are often referred to as "indicative sentences".[23] However, they are not orders or sentences and cannot be the subject of an appeal in their own right.[24]

46 As explained by R A Hulme J in *JM v The Queen*,[25] s 53A was introduced to ameliorate the perceived difficulties that arose from applying *Pearce v The Queen*[26] when sentencing for multiple offences, including obviating the need to specify staggered start and end dates for multiple individual sentences when accumulating the terms of such sentences and applying the totality principle.[27]

The Full Court's reasons in Pearson (No 1)

47 Three related reasons informed the Full Court's conclusion in *Pearson (No 1)* that an aggregate sentence was not a "sentence[] to a term of imprisonment" for the purposes of s 501(7)(c) of the *Migration Act*.

48 First, according to the Full Court, the definition of "sentence" and the balance of the provisions of s 501 suggested that s 501(7)(c) is only enlivened by a sentence of imprisonment for 12 months or more that is imposed for a single offence.[28] Second, the Full Court considered that the mandatory cancellation of visas on character grounds is reserved for the most serious offences, whereas "[s]elf-evidently, an aggregate sentence may be arrived at after conviction of a series of lesser offences".[29] Third, the Full Court considered that, in some circumstances, an aggregate sentence will not provide any objective means to

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23 *JM v The Queen* (2014) 246 A Crim R 528 at 535 [39(3)].

24 *Cullen v The Queen* [2014] NSWCCA 162 at [31]-[32]; *JM* (2014) 246 A Crim R 528 at 537 [40(11)], cited in *Lee v The Queen* [2020] NSWCCA 244 at [32].

25 (2014) 246 A Crim R 528 at 535 [39(1)].

26 (1998) 194 CLR 610.

27 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [45].

28 *Pearson (No 1)* (2022) 295 FCR 177 at 189 [43].

29 *Pearson (No 1)* (2022) 295 FCR 177 at 188 [41], 191 [47].

enable the Minister to form a "reasonable suspicion, on the basis of s 501(7)(c), as to whether a person's visa ought to be mandatorily cancelled".[30]

49 With respect to the first of these reasons, the Full Court did not accept that s 23(b) of the *Acts Interpretation Act 1901* (Cth), which provides that, subject to any contrary intention, words in the singular number include the plural, applied to the definition of "sentence" in s 501(12) so that it included any form of determination of punishment for an offence or offences.[31] The Full Court ascertained a contrary intention in s 501 from the deliberate use of the singular or the plural in referring to convictions throughout ss 501(6) and 501(7).[32]

50 However, the definition of "sentence" in s 501(12) is inclusive. The natural meaning of the word "sentence" in the context of imprisonment is a "judicial judgment or pronouncement fixing a term of imprisonment".[33] Taking into account that natural meaning, a person who has received an aggregate sentence of imprisonment for 12 months or more has "been sentenced to a term of imprisonment of 12 months or more" within the meaning of s 501(7)(c). The inclusive definition of "sentence" in s 501(12) appears to extend that meaning to include "any form of determination of the punishment for an offence", even if that determination is not labelled a "sentence". In any event, given the natural meaning of "sentence", there is no textual basis for construing the definition of "sentence" so that it *excludes* a single form of punishment for more than one offence.

51 With respect to the second of the Full Court's reasons, the exclusion of aggregate sentences of 12 months or more from the scope of s 501(7)(c) is not "consistent with the apparent purpose of s 501(3A), namely that only the most serious offending subjects a person to mandatory cancellation of a visa".[34]

52 Even if s 501(3A) is confined to "only the most serious offending", that would not justify the exclusion of aggregate sentences from s 501(7)(c). The

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30 *Pearson (No 1)* (2022) 295 FCR 177 at 191 [45].

31 *Pearson (No 1)* (2022) 295 FCR 177 at 189 [43].

32 *Pearson (No 1)* (2022) 295 FCR 177 at 189 [43].

33 *Winsor v Boaden* (1953) 90 CLR 345 at 347.

34 *Pearson (No 1)* (2022) 295 FCR 177 at 191 [47].

rationale for the imposition of aggregate sentences has already been explained. They are not specifically tailored for lesser offences. Aggregate sentences are commonly imposed for extremely serious offending, such as multiple murders,[35] multiple counts of manslaughter[36] and combinations of those offences and other serious offences involving extreme violence and robbery.[37] Lengthy aggregate sentences are commonly imposed for multiple child sexual offences.[38] Nevertheless, the effect of the Full Court's construction is that aggregate sentences of that length for such offences can never satisfy the definition of a "substantial criminal record" in s 501(7) and can, for that reason, never be the basis upon which a person fails to satisfy the character test in s 501(6) (although the convictions or criminal conduct which give rise to the aggregate sentence might be relied on as failing to satisfy the character test for other reasons[39]).

53 The assumption by the Full Court that an aggregate sentence will not involve sufficiently serious offending to satisfy s 501(7)(c) if it is imposed after conviction of a series of lesser offences is also inconsistent with s 501(7)(d). That provision recognises that a person has a substantial criminal record if the person has been sentenced to two or more terms of imprisonment for such lesser, related offences but where those terms are accumulated with a total of 12 months or more.

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35 See, eg, *R v Haines [No 3]* [2016] NSWSC 1812; *R v Davis [No 2]* [2016] NSWSC 1785; *R v Poynton [No 4]* [2018] NSWSC 1693.

36 See, eg, *R v Reid [No 2]* [2021] NSWSC 475.

37 See, eg, *R v Billings* [2012] NSWSC 1020; *R v NK [No 3]* [2015] NSWSC 1257; *R v Turnbull [No 26]* [2016] NSWSC 847; *R v Cliff [No 6]* [2018] NSWSC 587; *Ney v The King* [2023] NSWCCA 252.

38 See, eg, *DC v The King* [2023] NSWCCA 82 at [94] (13 years, 6 months); *PN v The King* [2024] NSWCCA 86 at [2] (37 years); *NG v The King* [2024] NSWCCA 142 at [4] (14 years); *SR v The King* [2024] NSWCCA 109 at [8] (16 years); *RA v The King* [2024] NSWCCA 149 at [5] (20 years).

39 *Migration Act*, ss 501(6)(c), 501(6)(e).

54 With respect to the third of the Full Court's reasons, the Full Court noted that only the aggregate sentence itself could be the subject of an appeal and observed:[40]

> "The aggregate sentence of itself will say little to nothing about the seriousness of the individual offences for which indicative sentences have been given. Further, in the case where a sentencing judge fails to provide indicative sentences for individual offences, an aggregate sentence of imprisonment is not invalidated (s 53A(5)). In such circumstances, there could be no objective means by which the Minister could reach any reasonable suspicion, on the basis of s 501(7)(c), as to whether a person's visa ought to be mandatorily cancelled."

55 This passage misstates the effect of s 53A(5) of the *Crimes (Sentencing Procedure) Act* and the visa cancellation provisions in the *Migration Act*. In relation to the former, although s 53A(5) provides that the failure to specify an indicative sentence does not invalidate an aggregate sentence, that provision has been taken to mean only that the sentence will not be affected by jurisdictional error.[41] The failure to specify an indicative sentence would still be an error liable to correction on appeal by the specification of indicative sentences determined in accordance with sentencing principles as required by s 53A(2)(a).[42] Thus, in the ordinary course, the indicative sentences (and the aggregate sentence) will say something about the seriousness of the offending and the visa holder's overall criminality.

56 In relation to the latter, *Pearson (No 1)* was concerned with the mandatory cancellation of a visa pursuant to s 501(3A). Contrary to the Full Court's observation above, the obligation to cancel imposed by s 501(3A) does not require the formation of a reasonable suspicion[43] that a person does not pass the character

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40 *Pearson (No 1)* (2022) 295 FCR 177 at 191 [45].

41 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 101A; *Ibbotson (a pseudonym) v The Queen* [2020] NSWCCA 92 at [19].

42 *JM* (2014) 246 A Crim R 528 at 535 [39(3)], 536 [39(4)], 536-537 [39(6)].

43 As required by the discretionary provisions in ss 501(2) and 501(3) of the *Migration Act*.

test, but instead the Minister must be "satisfied that the person does not pass the character test". If the Minister is so satisfied on the basis of the aggregate sentence, then no question arises as to whether the visa "ought to be mandatorily cancelled";[44] it must be cancelled. The existence of a "reasonable suspicion ... as to whether a person's visa ought to be mandatorily cancelled"[45] is not a precondition to the existence of any power conferred by the *Migration Act*.

Legislative history

57 On behalf of JZQQ it was submitted that the legislative history of s 501(7)(c) supports *Pearson (No 1)*. By reference to the reasons in *Sciascia v Minister for Immigration and Ethnic Affairs*[46] it was submitted that the logic of the legislative antecedents to s 501(7)(c) was that the "actual sentence imposed for an offence" was an indicator of the seriousness of the offence and a proxy for a person's character. It was submitted that this approach could be justified only "so long as the sentence to which s 501(7)(c) directs attention accurately indicates 'the *quality of the offence* committed' by the person" (emphasis in original) and that this approach would be "skewed" if s 501(7)(c) is engaged where a series of "individually minor offences" are committed that "say little about [the visa holder's] enduring moral qualities", but attract an aggregate sentence that exceeds 12 months.

58 This submission rests upon the false premise that aggregate sentences are principally imposed for minor offences and the equally false premise that an aggregate sentence "says little" about a visa holder's character. The submission otherwise seeks to extract too much from the reasoning in *Sciascia*. Those decisions construed a predecessor to s 501(7)(d)[47] that empowered the making of a deportation order where a person had been convicted of two or more crimes and sentenced to imprisonment for a period *totalling* at least one year as excluding an

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44 See above at [48].

45 See above at [48].

46 (1991) 101 ALR 321; *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364.

47 Former s 20(1)(d)(iii) of the *Migration Act*.

accumulation of disparate (ie, not consecutive) sentences for minor offences.[48] The reasoning in *Sciascia* does not stand for any principle apposite to s 501(7)(c).

59 Otherwise, a consideration of the legislative history and the relevant secondary materials confirms that the ordinary meaning of "sentence" as used in s 501(7)(c) includes an aggregate sentence.[49]

60 The original form of s 501(6)-(12) was introduced into the *Migration Act* in 1998.[50] Sections 501(7)(a)-(c) and 501(12) were identical to their current form, although s 501(7)(d) referred to a person being sentenced to two or more terms of imprisonment that totalled two years or more. The relevant Explanatory Memorandum described s 501(7)(c) as being engaged by "one sentence of 12 months or more".[51] The relevant second reading speech described s 501(7)(c) as applying to "[n]on-citizens who have been convicted to [sic] a single sentence of detention of 12 months or more".[52] Both of those descriptions are apt to include aggregate sentences of imprisonment imposed for multiple offences.

Conclusion

61 The text of the provisions is clear. Section 501(7)(c) is satisfied where a person has "been sentenced to a term of imprisonment of 12 months or more". An aggregate sentence for a term of imprisonment plainly involves being "sentenced to a term of imprisonment". Section 501(7)(c) does not, in its terms, provide that the person must be sentenced to a term of imprisonment of 12 months or more for a single offence. The contended basis for that view is the terms of s 501(12), which define a "sentence" to include "... punishment for an offence". But, as explained, this definition seeks to expand the natural and ordinary meaning of "sentence" to

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48 *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321 at 327; *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364 at 374.

49 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(a).

50 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth), Sch 1, item 23.

51 Australia, Senate, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*, Explanatory Memorandum at 14 [53].

52 Australia, Senate, *Parliamentary Debates* (Hansard), 11 November 1998 at 60.

include kinds of punishment beyond those that would otherwise fall within the meaning of "sentence". The definition does not say that "sentence" *means* "any form of determination of the punishment for an offence". The definition therefore cannot be construed as a restriction on the meaning of "sentence". An aggregate sentence falls within the ordinary meaning of "sentence".

62 *Pearson (No 1)* was wrongly decided. Section 501(7)(c) should be construed according to its ordinary meaning so that it includes an aggregate sentence of imprisonment of 12 months or more imposed pursuant to s 53A of the *Crimes (Sentencing Procedure) Act*. Such a sentence was imposed on Ms Pearson and Mr Tapiki. Similarly, an aggregate sentence of 12 months or more imposed under s 9(1) of the *Sentencing Act* satisfies s 501(7)(c). Such a sentence was imposed on JZQQ.

Outcome of the appeals and the special case

63 It follows from the conclusion that *Pearson (No 1)* was wrongly decided that none of the "things" done or purportedly done in any of the matters before this Court were "wholly or partly invalid only because"[53] an aggregate sentence imposed in respect of two or more offences was taken into account. Accordingly, item 4 of Sch 1 to the Aggregate Sentences Act is not and does not need to be engaged. It further follows that the challenges to the validity of items 4(3), 4(4) and 4(5)(b)(i) are hypothetical. In those circumstances, and as there may never be circumstances in which item 4 is engaged, it would be inappropriate to address the constitutional challenge to the validity of those provisions.

64 Accordingly, the appeal brought by JZQQ should be dismissed. The parties agreed that, in that event, the Minister would pay JZQQ's reasonable costs of the second day of the hearing of the appeal on 10 October 2024, but that otherwise JZQQ would pay the Minister's costs.

65 In relation to the application for special leave to appeal from *Pearson (No 1)*, there should be a grant of special leave to appeal, the appeal should be allowed, the orders made by the Full Court should be set aside and the proceedings brought by Ms Pearson in the Federal Court should be dismissed.

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53 See above at [10].

66 In relation to Ms Pearson's special case, each of the substantive questions posed in this Court should be answered "unnecessary to answer".

67 The parties were in dispute as to the appropriate costs orders in the cases concerning Ms Pearson. The Commonwealth and the Minister for Home Affairs seek their costs, save that they accept that Ms Pearson should receive her costs of the application for special leave to appeal from *Pearson (No 1)* without set off and which they contend should be quantified by reference to the costs of the second day of the hearing in this Court. That submission overlooks that Ms Pearson was not able to consider her position and address the special leave applications until they were filed during the hearing in this Court. The Commonwealth and the Minister for Home Affairs should pay Ms Pearson's costs in this Court.

68 In relation to the application for special leave to appeal from the judgment in *Tapiki (No 1)*, there should be a grant of special leave to appeal, the appeal should be allowed, the orders made by the Full Court should be set aside and the proceedings brought by Mr Tapiki in the Federal Court that were the subject of *Tapiki (No 1)* should be dismissed.

69 In relation to Mr Tapiki's appeal, the appeal from *Tapiki (No 2)* should be dismissed.

70 The position with Mr Tapiki's costs is the same as Ms Pearson. The costs of the application for special leave to appeal from *Tapiki (No 1)* may not be set off against the costs order made in the Minister's favour in the Full Court of the Federal Court in *Tapiki (No 2)*.

Orders

71 In matter B15/2024:

(1) Appeal dismissed.

(2) The first respondent pay the appellant's reasonable costs of the second day of the hearing of the appeal on 10 October 2024.

(3) The appellant pay the first respondent's costs of the appeal other than such reasonable costs as were incurred by the first respondent on 10 October 2024.

72 In matter S126/2023 the questions of law posed for the Full Court be answered as follows:

(1) On their proper construction, do sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (**Amendment Act**), as applied by s 3 of that Act, validate the decision of the third defendant to affirm the non-revocation decision?

Answer: Unnecessary to answer.

(2) Are sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the Amendment Act, as applied by s 3 of that Act, invalid in their operation in respect of the cancellation decision, the non-revocation decision and the AAT's decision, on the ground that they purport to impermissibly usurp or interfere with the exercise of the judicial power of the Commonwealth?

Answer: Unnecessary to answer.

(3) What, if any, relief should be granted to the plaintiff?

Answer: None.

(4) Who should pay the costs of the special case?

Answer: The first and second defendants.

73 In matter S130/2024:

(1) Special leave to appeal is granted.

(2) Appeal allowed.

(3) Set aside Orders 3 and 4 made by the Full Court of the Federal Court of Australia on 24 January 2023 and, in their place, order that the Second Further Amended Originating Application be dismissed.

(4) The appellants pay the first respondent's costs in this Court.

(5) There be no set off of the first respondent's costs against any other costs order made in favour of any of the appellants against the first respondent.

74 In matter P10/2024:

(1) Appeal dismissed.

(2) The respondent pay the appellant's costs of the appeal.

75 In matter P33/2024:

(1) Special leave to appeal is granted.

(2) Appeal allowed.

(3) Set aside orders 2, 4 and 5 made by the Full Court of the Federal Court of Australia on 14 February 2023 in proceeding WAD 111/2022 and, in their place, order that the application for judicial review be dismissed.

(4) Set aside orders 2, 3, 5 and 6 made by the Full Court of the Federal Court of Australia on 14 February 2023 in proceeding NSD 296/2022 and, in their place, order that the appeal be dismissed.

(5) The appellant pay the first respondent's costs in this Court.

(6) There be no set off of the first respondent's costs against any other costs order made in favour of the appellant against the first respondent.