HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

and

LIKUMBO MAKASA
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues arising on the appeal

2. Whether the Appellant may exercise the discretion conferred by s 501(2) of the *Migration Act 1958* (Cth) (**Act**) to cancel a person's visa where the Administrative Appeals Tribunal (**Tribunal**) has set aside a delegate's decision to cancel a visa under that sub-section and decided instead not to cancel the visa; and, if so, whether the Appellant may rely on the same facts to not be satisfied that the person passes the character test as did the Tribunal?

Part III: Notice pursuant to section 78B of the *Judiciary Act 1903* (Cth)

3. The Appellant does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of the judgments below

4. The judgment of the primary Judge (Burley J) is *Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639. The judgment of the Full Court of the Federal Court of Australia (Allsop CJ, Kenny, Besanko, Bromwich and Banks-Smith JJ) here under appeal is *Makasa v Minister for Immigration and Border Protection* [2020] FCAFC 22; (2020) 376 ALR 191. Allsop CJ, Kenny and Banks-Smith JJ (**the plurality**) there relied on their own reasoning in *Minister for Immigration and Border Protection v Brown* [2020] FCAFC 21 (***Brown***), which was heard by the same Full Court together with *Makasa*. The Full Court's reasons in *Brown* are now reported at (2020) 376 ALR 133.

Part V: Facts

Factual Background

5. The relevant facts were set out by Bromwich J (**Makasa [24]-[30]**)[1] and were essentially as follows. The Respondent is a citizen of Zambia who first arrived in Australia in 2001. In 2005, he was convicted of three counts of common assault, and received concurrent 18-month good behavior bonds for each. In 2007, he was convicted of negligent driving, driving without a license and drink driving with a high range prescribed concentration of alcohol. In 2009, the Respondent was tried in relation to sexual offences alleged to have taken place on the night of 30 August 2006 or the early hours of 31 August 2006, and also later in the morning of 31 August 2006. In relation to the events occurring later in the morning of 31 August 2006, the Respondent was found guilty on three counts of having sexual intercourse when he did not have an honest and reasonable belief that the complainant was over the age of 16. He was sentenced to three concurrent terms of imprisonment of 2 years, with a single 12-month non-parole period[2].

6. In 2011, a delegate of the Minister cancelled the Respondent's visa pursuant to s 501(2) of the Act. The Respondent sought review of that decision by the Tribunal. In 2013, the Tribunal made a decision which it described as one which "*sets aside the Minister's decision and substitutes a decision that [the Respondent's] visa should not be cancelled*".[3]

7. On 24 January 2017, the Respondent was convicted of failing to report his use of social media and fined $300. On 3 May 2017, the Respondent was convicted of drink driving with a mid-range prescribed concentration of alcohol. He was disqualified from driving for 12 months and fined $1,200[4].

8. On 18 October 2017, the Minister personally cancelled the Respondent's visa under s 501(2) of the Act. The Minister's decision and reasons are at Core Appeal Book (**CAB**) 4-21. On account of the Respondent's 2009 conviction and sentences of imprisonment, the Minister found that the Respondent failed the character test (as a result of s

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[1] The plurality agreed with his Honour's statement of the facts (**Makasa [4]**).
[2] See also the Primary Judge (**PJ**) at [3].
[3] See *Likumbo Makasa and Minister for Immigration and Citizenship* [2013] AATA 790 at [93].
[4] **Makasa** [28]

501(6)(a) of the Act, because the Respondent had a "*substantial criminal record*" as defined by s 501(7)(c)) of the Act), and the Respondent also did not satisfy the Minister that he did pass the character test. It is not disputed that the 2017 convictions were not relied upon by the Minister in relation to his findings as to s 501(2)(a)-(b) or the character test, and were only relied upon by him as being relevant to the discretion to exercise the power to cancel the visa in s 501(2).

The primary Judge's decision

9. Before the primary Judge, the Respondent had alleged (Ground One) that the Minister's decision was legally unreasonable, in circumstances where the Minister found there to be an unacceptable risk that sexual offences of the kind committed in 2006 would be repeated. It was alleged this finding was not logically open to the Minister, including because the 2017 offences could not have any logical bearing upon the risk of repeating the 2006 offending (**PJ [27]-[31]**). His Honour found that there was material before the Minister upon which it was open for him to conclude that alcohol was a factor in the Respondent's criminal conduct to date (including when the sexual offences were committed). His most recent (post Tribunal decision) alcohol related offences indicated that the Respondent had not been rehabilitated in relation to his use of alcohol and, as a consequence, the Minister found that there was a low risk that the Respondent would re-offend in a sexual nature. That course of reasoning, his Honour found, was not legally unreasonable (**PJ [40]-[45]**). (There was another legal unreasonableness argument dismissed by his Honour at [46]-[49], but that has fallen away.)

10. The Respondent also alleged (Ground Two) that s 501(2) was not available on the same facts and circumstances, where there had been an earlier decision under s 501(2) not to cancel the visa. His Honour rejected the argument (**PJ [50]-[54]**), relying on s 33(1) of the *Acts Interpretation Act 1901* (**the AIA**) and the judgment of Griffiths and Perry JJ in *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500, in which their Honours held (at [36]) that "*where a new relevant fact which potentially bears upon the exercise of the power under s 501(2), that power may be exercised in an appropriate case to cancel a person's visa notwithstanding that there was an earlier decision based on more limited facts not to cancel the visa*".

The Full Court's decision

11. The plurality stated (**Makasa [3]**) that both appeals (*Makasa* and *Brown*) "*gave rise to the following question: whether the Minister can re-exercise the discretion conferred by s 501(2) of the Migration Act 1958 (Cth) to cancel a person's visa where the [Administrative Appeals] Tribunal has set aside a delegate's decision to cancel the visa under s 501(2) and decided instead not to cancel the visa; and if so, whether the Minister can rely on the very same facts to enliven the discretion in s 501(2) as the Tribunal did on review?*". The plurality found (**Makasa [5]**) that "*the Minister had no power to re-exercise his discretion under s 501(2) of the Migration Act to cancel [the Respondent's] visa in circumstances where the Minister (acting through his delegate) had already exercised that power of cancellation, such cancellation had been set aside by the Tribunal, and where the Minister relied on the same facts as the Tribunal to enliven the discretion in s 501(2)*". Their Honours further stated (**Makasa** [6]) that "*it was open to the Minister, acting personally, to set aside the decision of the Tribunal and substitute the Minister's own decision under s 501A (providing the conditions enlivening the power in ss 501A(2) or (3) were met) but it was not open to the Minister to re-exercise the power in s 501(2) with respect to [the Respondent], relying on the same 2009 convictions as the Tribunal to enliven the power*".

12. The plurality relied entirely on their reasoning in *Brown* (**Makasa [2], [5]**), and they did not address the Respondent's unreasonableness argument. Besanko J and Bromwich J also relied on their (dissenting) reasoning in *Brown* (in relation to the issue of whether the power in s 501(2) was available to the Minister (**Makasa [10], [49]**)). It is thus necessary to deal with the reasoning in *Brown* on those issues.

13. The plurality summarised its conclusions at **Brown [15]-[17]**. Their Honours stated that "*the Minister has no power to re-exercise the discretion relying upon the same facts…to enliven the discretion in s 501(2) as were before the Tribunal*" (**Brown [15]**). Their Honours purportedly drew this conclusion from the terms and structure of the Act as a whole, the existence of the power in s 501A(2) to set aside the Tribunal's decision, and the nature and character of the Tribunal in providing independent merits review, including what they described as the "*necessary degree of stability and finality*" in a reasoned decision of the Tribunal setting aside a cancellation decision

made by the Minister's delegate. Their Honours clarified (**Brown [16]**) that their judgment did not mean that the Minister is "*precluded from re-exercising the discretion relying on the same facts to enliven the discretion in s 501(2) if, previously, a delegate had decided not to exercise the power in s 501(2) cancel the visa*". In such cases, the plurality held, the Minister may act under s 501(2) even if he has not availed himself of the power in s 501A(2) of the Act.[5] However, their Honours held (**Brown [17]**) that where, "*after a contested proceeding*", the Tribunal sets aside a decision of a delegate (under s 501(2)) to cancel a visa and substitutes a decision not to exercise the power to cancel, and the Minister does not "*set aside*" the Tribunal decision under s 501A(2), "*the power in s 501(2), having been since exercised, and set aside on review, should be seen as exhausted insofar as it was enlivened by a particular set of factual circumstances (here s 501(6)(a))*" (See also **Brown [93]-[115]**, but especially **Brown [107]- [110]; [115]**).

14. One matter at the heart of the plurality's reasoning was that the earlier decision of the delegate to cancel the visa was an exercise of the power in s 501(2) of the Act to cancel a visa, even though that decision was later set aside by the Tribunal and a decision not to cancel the visa was substituted in its place (see eg. **Makasa [3], [5]-[6]** and **Brown [15]-[17]; [107], [109]-[110], [114]-[115]**). The consequence was said to be that the power in s 501(2) was "*spent*" or "*exhausted*" upon the delegate's earlier decision being made – notwithstanding the Tribunal later setting aside the delegate's decision and substituting a decision not to exercise the power in s 501(2) to cancel the visa (see eg. **Brown [17]; [107]; [109]; [110]**). A further consequence was that the Minister's later decision under s 501(2) (ie. the October 2017 decision in *Makasa*) was said to be a "*re-exercise*" of the power in s 501(2) (see eg. **Brown [15]; [91]; [103]; [109]; [115]**), and it was suggested that the Minister was, in effect, attempting to "*reconsider*", "*set aside*" or "*undo*" the earlier Tribunal's decision (**Brown [67]; [104]-[105]; [108]**). Both minority judges disagreed with this reasoning. The minority judges saw the power in s 501(2) to cancel the visa as not having previously been exercised at all where the cancellation decision of the delegate was set aside by the Tribunal (and

[5] In support of this proposition, the plurality cited *Parker* – but also purported, still at **Brown [16]**, to distinguish *Parker*. Also, the plurality wrongly state at **Brown [16]** that the "*Appellant*" (ie. the Minister) submitted that *Parker* was plainly wrong. That submission was made by *amicus curiae* – the Minister relied, before the Full Court, on the reasoning in *Parker* (and still does so on the present appeal).

the Tribunal did not itself exercise the discretion to cancel the visa). In those circumstances, the power in s 501(2) could not have been "*exhausted*" or "*spent*". (See further below at [21]-[30]). Also, as is discussed below (at [35]), the plurality's use of terms such as "*reconsider*", "*set aside*" and "*undo*" to describe what occurred in the making of Minister's later (ie. in *Makasa*, 2017) cancellation decision is erroneous – and highlights the plurality's apparent misunderstanding both of the nature of the decision in fact made by the Minister and of the proper role of s 501A of the Act (which does permit the Minister to "*set aside*" a decision of the Tribunal, but which power was *not* exercised by the Minister in either *Brown* or *Makasa*).

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15. The plurality examined a variety of provisions in the Act, at **Brown [93]-[100]** and **[104]-[108]**, but nothing in those provisions was shown to tell against the availability of the power under s 501(2) to the Minister. Particular reliance was placed by the plurality upon s 501A. See especially **Brown [108]**, where the plurality stated that "*once the Tribunal makes a favourable decision to the visa holder, s 501A provided the only source of power to set aside the Tribunals decision and cancel the visa*".[6] The plurality view assumes, incorrectly, that s 501A has a reach beyond cases where the Minister is "*setting aside*" what is defined in s 501A(1) as an "*original decision*" (namely, a decision of a delegate, or the Tribunal, not to exercise the power in s 501(2)
20 to cancel a visa) (See further at [34]-[36], below). The Minister did not, in *Makasa* (or *Brown*), and did not purport to, "*set aside*" any "*original decision*" (relevantly, the Tribunal's decision). Rather, the Minister engaged (in 2017, approximately 4 years after the Tribunal's decision) in a later and fresh exercise of power under s 501(2), in the presence of changed factual circumstances which the Minister saw as relevant to the exercise of his discretion.

16. The plurality found nothing in the Act or the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) "*to support the proposition*" that the decision of the Tribunal (under s 43(1)(c)(i) of the AAT Act) can "*revive*" the power in s 501(2), which "*was*
30 *spent when the delegate made the visa cancellation decision*", and then stated that "*taken together, the decision (of the Minister by his delegate) to cancel the visa and the decision (of the Tribunal) to set that aside and to substitute in its place a decision not*

[6] See also **Brown [15], [17], [114]-[115]**.

to cancel the visa is the completion of the statutory process of consideration of the visa holder's position on the given facts that enliven the exercise of the power under s 501 (here through s 501(6)(a))" (**Brown [107]**). This is a negative statement that in fact begs whether there is support for the proposition that the power under s 501(2) was in fact "*spent*" as the Full Court surmised. Moreover, in reaching this conclusion, the plurality did not confront the effect of s 43(6) of the AAT Act – which deems a decision made by the Tribunal in substitution for a decision of a person, "*for all purposes*", to be a decision of that person "*on and from the day on which the decision under review...had effect*". Bromwich J (correctly) saw the effect of s 43(6) as being contrary to the correctness of the plurality's conclusions (**Brown [207]**). (See further at [26]-[27], below).

17. The plurality also referred to what it saw as the "*unsatisfactory basis for continued residence in this country*" of a person remaining susceptible to s 501(2)) following a favourable decision by the Tribunal (**Brown [112]**), the "*importance*" to the visa holder and others of any right to remain in Australia (**Brown [113]**), and the potential for "*inconsistency*" where repeated decisions could occur over time (**Brown [113]**). The plurality did not, however, explain how any of those considerations led them to a construction of the text of any provision that was inconsistent with the Minister's decision, or would justify departure from the ordinary meaning of the words. (See further at [37], below).

18. Each of Besanko J and Bromwich J disagreed with the plurality, and both accepted that the power under s 501(2) was available to be exercised by the Minister. Neither Judge saw a need for any further event, or new facts or different considerations, leading to the Minister not being satisfied that the visa holder passed the character test, before the discretion to cancel a visa conferred by s 501(2) could be exercised (see **Brown [120]; [138]** (Besanko J) and **[156]; [159]; [174]** (Bromwich J)). There was disagreement between Besanko J (**Brown [127]**) and Bromwich J (**Brown [174]-[180], [206]**) as to whether a material change in circumstances was necessary before the power to cancel the visa could be exercised by the Minister. However, each Judge considered the s 501(2) power exercised by the Minister to be available.

19. Both Judges found, contrary to the plurality, that the earlier decision by the Tribunal to set aside the delegate's decision and substitute a decision not to cancel the visa meant that the power in s 501(2) had not been exercised and was not "*spent*" (Brown **[120]; [138]** (Besanko J) and **[159]; [174]; [207]** (Bromwich J)). Justice Besanko (**Brown [138]**) specifically disagreed with the plurality's conclusion that it was "*not open to the Minister..... to seek to exercise the power in s 501(2) in light of the previous decisions of the delegate and the Tribunal respectively*". His Honour saw no distinction between a decision of a delegate of the Minister and one of the Tribunal and was not persuaded (contrary to the plurality's view) that "*the power in s 501(2) is spent when the delegate made the cancellation decision, even though the Tribunal on review of the delegate's decision, set aside that decision and substituted in its place a decision not to cancel the visa*". His Honour made clear (still at [138]) that he saw the prior decision-making by the delegate and the Tribunal as a situation "*where the administrative process was engaged to decide whether or not to exercise the power to cancel the visa*" and which "*resulted in a decision not to cancel the visa, that is to say, not to exercise the power*".

20. Similarly, Bromwich J found that there had been no prior exercise of power under s 501(2) to cancel the visa (**Brown [159]**). Accordingly, the power in s 501(2) could not have been "*spent*" at the time of the Minister's (2018) decision and no occasion for the application of s 33(1) of the AIA would arise (**Brown [156], [158], [174], [207]**). Bromwich J explained (**Brown [207]**) that this carried the consequence that the Minister's (2018) decision could not be a "*re-exercise of that power*". His Honour identified support for his approach in the plurality judgment in *Parker*. His Honour considered that the power in s 501(2) was expressed as a discretion to cancel a visa (once the jurisdictional pre-conditions were fulfilled) – that being a single power, rather than a choice between two opposed powers, to cancel or to not cancel (**Brown [167]-[168]**). Bromwich J also saw the definition of "*original decision*" in s 501A(1) ("*a decision not to exercise the power conferred by s 501(1) or s 501(2)*" (emphasis added)) as "*an express recognition that a decision not to cancel a visa does not entail the exercise of the s 501(2) visa cancellation power*" (**Brown [169]**). His Honour drew support from *Parker* at [38]-[39] (**Brown [170]**) and concluded (**Brown [174]**) that "*the Tribunal setting aside the delegate's decision and deciding not to cancel Mr Brown's visa under s 501(2)*" has the result that "*the power under s 501(2) had not*

been exercised and was thereby not spent". As noted above, Bromwich J also referred (**Brown [207]**) to s 43(1)(c)(i) and s 43(6) of the AAT Act, finding that those provisions seem "*to leave no room for the delegate's decision to cancel*" the visa "*to have any legal or practical effect once set aside, let alone to constitute the spending of the visa cancellation power in s 501(2)*". For that reason, his Honour stated (still at [207]) that "*the making of the delegate's decision is incapable of supporting the conclusion that the Minister's decision was a re-exercise of that power*". Finally, his Honour also pointed (**Brown [208]**) to some ways in which the plurality's construction may work undesirably or unfavourably to a visa holder or to the administration of the Act.

Part VI: Argument

The plurality erred in finding that the power in s 501(2) had been exercised by reason of the delegate's decision – such that the power in s 501(2) was exhausted or spent

21. The power to cancel a visa in s 501(2) of the Act forms part of the statutory scheme which advances the object of regulating the presence in Australia of non-citizens, and the removal or deportation of non-citizens whose presence in Australia is not permitted by the Act.[7] It provides:

> *(2) The Minister may cancel a visa that has been granted to a person if:*
> *(a) the Minister reasonably suspects that the person does not pass the character test; and*
> *(b) the person does not satisfy the Minister that the person passes the character test.*

22. It is for Parliament to select the factum or "*triggers*" upon which a power to cancel a visa will operate.[8] Here, the chosen trigger is that in s 501(2)(a)-(b), by reference to the defined concept of "*character test*". Section 501(6) provides that "*for the purposes of this section, a person does not pass the character test if…*" (various circumstances then being described in sub-paragraphs (a)-(h)). Those are what has been identified by Parliament as sufficient to make a person's visa liable to (discretionary) cancellation. Many of those call for an evaluative judgment to be made by the decision-maker who

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[7] See ss 4(1) and 4(4) of the Act; *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2; (2018) 262 CLR 333 at [9]-[12] per Kiefel CJ, Bell, Keane and Edelman JJ, [70]-[71] per Gageler and Gordon JJ, [92]-[93] per Nettle J (there speaking in particular of s 501(3A), which provides for the mandatory cancellation of a visa in certain circumstances).

[8] *Falzon* at [89] per Gageler and Gordon JJ; [95] per Nettle J; *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at [9] per Gleeson CJ; [43] per McHugh, Gummow, Hayne and Heydon JJ; [170] per Callinan J.

is assessing whether or not the visa holder passes the character test – see eg. s 501(6)(b), (c) and (d). Others, however, refer to matters of objective fact. In particular, s 501(6)(a) refers to whether a person "*has a substantive criminal record*", which is defined in s 501(7), which, in turn, includes where a person has been sentenced to life imprisonment (s 501(7)(b)), a term of imprisonment of 12 months or more (s 501(7)(c)), or two or more terms of imprisonment which total 12 months or more (s 501(7)(d)). Once a person has received such a sentence, they will *always* have a "*substantive criminal record*", will *always* fail the "*character test*", and hence the matters in s 501(2)(a) and (b) will *always* be made out in relation to them. That is the circumstance in the present case (and also *Brown*). Here, the Respondent received a sentence of two years imprisonment.

23. The task of statutory construction must begin and end with consideration of the statutory text, read in context.[9] Nothing in the plain and express words used by Parliament in s 501(2) suggests any limit on the power being exercised in the circumstances identified by the plurality. In particular, and contrary to the plurality's conclusions (**Brown [17]**, **[109]-[110]**, **[114]-[115]**), nothing in the plain words of s 501(2) suggests that, upon the making of a decision by a delegate to cancel the visa (later set aside by the Tribunal), the power in s 501(2) is "*exhausted*" (or "*spent*") in relation to the particular factual circumstances that led the visa-holder to fail the character test. The plurality's finding that the power was "*exhausted*" is inconsistent with the manner in which Parliament has relevantly defined the character test – and its choice that s 501(2)(a) and (b) will *always* be met, in relation to some persons, as a result of objective past facts (here, convictions carrying a particular penalty). It is not apparent why, in these circumstances, it is inconsistent or incompatible with the Act for the Minister to make a further decision, pursuant to s 501(2), in relation to a non-citizen who retains a visa, in circumstances where new facts emerge (after the earlier decision) which bear in some material way upon the exercise of discretion.

24. As Bromwich J explained (**Brown [159]-[174]**; Besanko J agreeing at **Brown [120]**), a decision not to cancel a visa is not an exercise of the power in s 501(2). The subject-

[9] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ; *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

matter of s 501(2) is a "*visa*"[10] (rather than a person). Section 501(2) confers a power to "*cancel a visa*". As his Honour said (**Brown [168]**), s 501(2) is *not* expressed in terms of being a power to cancel or not to cancel the visa. The decision-maker is not given a discretionary choice between the exercise of two opposing powers, but rather a discretionary choice as to whether to positively exercise a single power – to cancel a visa. This view of s 501(2) is consistent with the wording of not only s 501(2) itself, but also s 501A(1). That sub-section provides that s 501A applies if a delegate, or the Tribunal, "*makes a decision (the original decision)...(d) not to exercise the power conferred by subsection 501(2) to cancel a visa that has been granted to a person*" (emphasis added). The wording chosen by Parliament itself illustrates that a decision not to cancel the visa is a decision *not* to exercise the power in s 501(2). This is also consistent with the plurality judgment in *Parker*, where Griffiths and Perry JJ referred to a "*decision not to exercise the power*".[11]

25. The plurality took the view that, where a delegate decided *not* to cancel a visa pursuant to s 501(2), the power remained available in future cases (until a "*choice*" was made to cancel the visa) (**Brown [16], [109]-[110]**). That appears to be an acceptance by their Honours that a decision *not* to cancel a visa is not an exercise of the power in s 501(2) of the Act, and did not result in the power being "*spent*" or "*exhausted*". However, the plurality found that the power in s 501(2) was "*spent*" and "*cannot be exercised again with respect to that individual*", in circumstances where the delegate makes a decision to cancel the visa – even though that decision is later set aside by the Tribunal (**Brown [107]; [109]**). Their Honours held that the Tribunal's decision to set aside the delegate's decision and substitute a decision not to cancel the visa was "*the completion of the statutory process of consideration of the visa-holder's position on the given facts that enlivened the exercise of power under s 501*", and the Tribunal's decision could not "*revive*" the power in s 501(2) (**Brown [107]**).

26. That reasoning is, with respect, erroneous, and it fails to grapple (at all) with s 43(6) of the AAT Act. That sub-section provides:

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[10] See s 29(1) of the Act.
[11] *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [38] and [49] per Griffiths and Perry JJ.

> *A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.*

27. Section 43(6) has the effect that the Tribunal's decision not to cancel the visa, in substitution for that of the delegate, is "*for all purposes*" deemed to be a decision of the delegate and is deemed to have had effect on an from the date of the delegate's decision.[12] As Bromwich J stated (**Brown [207]**), contrary to the plurality's reasoning, s 43(6) leaves no room for the delegate's (set aside) decision to have a continued operation and no room for the delegate's decision to "*spend*" or "*exhaust*" the power in s 501(2) – such that "*the making of the delegate's decision is incapable of supporting the conclusion that the Minister's [later] decision was a re-exercise of that power*". Given the effect of s 43(6), Besanko J was also correct (**Brown [138]**) not to see a distinction, for present purposes, between a decision of a delegate and of the Tribunal. As his Honour stated (still at [138]), "*it is appropriate to view the case as one where the administrative process was engaged to decide whether or not to exercise the power to cancel the visa and that process resulted in a decision not to cancel the visa, that is to say, not to exercise the power*". That is, with respect, consistent with this Court's statement that "*the [Tribunal] and the primary decision-maker exist within an administrative continuum*"[13] – which, here, culminated (as Besanko J observed) with a decision not to exercise the power in s 501(2) to cancel the visa. Also, s 501A(1) applies equally to decisions of a delegate and of the Tribunal not to exercise the power to cancel a visa, which also supports the proposition that there is no relevant difference between the two

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[12] *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 93 ALJR 629 at [41] per Bell, Gageler, Gordon and Edelman JJ; *Midland Metal Overseas Limited v Comptroller-General of Customs* (1991) 30 FCR 87 at 97 per Hill J; *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 181 FCR 130 at [61] and [66] per Downes and Jagot JJ ; *Minister for Immigration and Border Protection v Egan* [2018] FCAFC 169; (2018) 261 FCR 451 at [29] per Perram J (Allsop CJ and Jagot J agreeing); *Commonwealth of Australia v Snell* [2019] FCAFC 57; (2019) 269 FCR 18 at [38] per Allsop CJ, Reeves and Derrington JJ.

[13] *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 93 ALJR 629 at [53] per Bell, Gageler, Gordon and Edelman JJ. See also *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286 at [45]-[46] per Kirby J, where his Honour referred to the judgment of Davies J in *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333-334.

28. The plurality thus erred in finding (as explained above) that the power in s 501(2) was "*spent*" when the delegate made the decision to cancel the visa. For the same reasons, there was no warrant for the plurality to treat the decision of the Tribunal not to exercise the power to cancel the visa any differently from a decision of a delegate to the same effect, or to consider that a decision of a delegate to cancel the visa (later set aside by the Tribunal) continued to have legal effect (including by exhausting the power in s 501(2)). Their Honours erred in doing so, in particular at **Brown [15]-[17], [109]-[110], [115]**.

10 29. The plurality refer to the Tribunal being a provider of "*independent review of decisions of the Executive*", say that there was a "*degree of stability and finality in a fully reasoned decision of the Tribunal*" and observe that its decision was made "*after a contested hearing*". Their Honours suggest that these factors led to the Tribunal's decision "*exhaust[ing]*" the s 501(2) power in relation to the factual circumstances that enlivened it (**Brown [15]; [17]**). See also at **Brown [107]**, where the plurality refer to the delegate's decision, and the Tribunal's decision on review, being "*the completion of the statutory process of consideration of the visa-holder's position on the given facts that enliven the exercise of the power under s 501*". These passages indicate a view that the Tribunal's decision has the effect of finally determining or resolving certain issues
20 – here, presumably, whether the visa-holder's visa should be cancelled in respect of the particular factual matters which led him or her to fail the character test. However, the Tribunal's decision is merely administrative in nature, and the Tribunal does not and cannot finally determine issues in the same way a Chapter III Court does. The Tribunal's decision does not, for example, create any *res judicata* or issue estoppel.[14] The fact that the Tribunal has the features of a provider of independent merits review, or conducted a "*contested hearing*", does not have the consequence that its decision is to be treated in the way that the plurality suggest, especially given the terms of s 43(6) of the AAT Act. The plurality's approach, as explained above, is also inconsistent with the fact that Parliament has chosen to define the character test (in s 500(6)) by
30 reference to some matters which, once met, are always met (eg. as here, where the

[14] *W J & F Barnes Pty Ltd v Federal Commissioner of Taxation* (1957) 96 CLR 294 at 315 per Kitto J; *Midland Metal Overseas Limited v Comptroller-General of Customs* (1991) 30 FCR 87 at 97-98 per Hill J; *Commonwealth of Australia v Snell* [2019] FCAFC 57; (2019) 269 FCR 18 at [41]-[51] per Allsop CJ, Reeves and Derrington JJ.

Respondent had a "*substantial criminal record*"), such that the matters in s 501(2)(a)-(b) will always be made out.

30. Thus, in summary: The power in s 501(2) of the Act was not exercised by reason of the delegate deciding, in 2011, to cancel the Respondent's visa and the Tribunal, in 2013, setting aside that decision and substituting a decision not to cancel the visa. The decision under review by the Court was therefore not a re-exercise of the power. Moreover, and in any event, the plurality misunderstood the effect of the provisions of the Act referred to, as well as the effect of the AAT Act, including s 43(6), and the effect of Tribunal review in terms of the continuing availability of the power under s 501(2) of the Act. There was no proper basis upon which to find that power under s 501(2) was not still available to be exercised by the Minister as it was. Both Besanko J and Bromwich J were correct to conclude that the power did remain so available.

Section 33(1) of the Acts Interpretation Act 1901 (Cth) applies

31. Alternatively, a complete answer to the majority judgment is supplied by section 33(1) of the AIA, which provides: "*where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires*". The purpose of s 33(1) is to make clear that powers, functions and duties conferred by the enabling statute can be exercised or performed repeatedly ("*as occasion requires*") rather than only once.[15] That may be in respect of different persons or subject matters, or it may be repeated exercises in relation to the same person.[16] Even if the power in s 501(2) was exercised in 2011 (by the delegate), s 33(1) of the AIA had the effect that the power was able to be exercised again in 2017 by the Minister.

32. Section 33(1) of the AIA would not have such an effect if a "*contrary intention*" was shown. Such may appear from the express terms or by necessary implication, or the

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[15] *Pfeiffer v Stevens* [2001] HCA 71; (2001) 209 CLR 57 at [25] per Gleeson CJ and Hayne J; at [51] per McHugh J. *Minister for Indigenous Affairs v MJD Foundation Limited* [2017] FCAFC 37; (2017) 230 FCR 31 at [138], [169], [172] per Mortimer J (Perry J agreeing); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow J.

[16] *Minister for Indigenous Affairs v MJD Foundation Limited* [2017] FCAFC 37; (2017) 230 FCR 31 at [136] per Mortimer J (Perry J agreeing).

general character of the legislation itself.[17] The plurality did not directly identify any "*contrary intention*" for the purpose of s 33(1), but instead stated that the provision "*adds little to the analysis*", citing *MJD Foundation* per Mortimer J (Perry J agreeing) – and did not further deal with s 33(1) (**Brown [91]**). That, with respect, is an erroneous approach. The need to show a contrary intention cannot be side-stepped in that fashion. The plurality reasoning was contrary to past Full Court judgments. In *Parker*, the Full Court expressly found that s 33(1) was applicable to s 501(2).[18] That conclusion was followed by another Full Court in *Asaad v Minister for Home Affairs (No 2)*, where it was stated (albeit in a case where the first decision was one refusing a bridging visa and the second decision was one cancelling a substantive visa) that:[19]

> *The Full Court [in Parker] held that the Migration Act did not manifest a contrary intention to displace the presumption created by s 33(1). Indeed, that presumption is consistent with the purposes for which the power was granted. The Minister's discretion under s 501(2) is unconfined, except to the extent that the subject matter, scope and purpose of the Migration Act evinces a legislative intention to exclude consideration of some matter: R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd (1979) 144 CLR 45 at 49 per Stephen, Mason, Murphy, Aickin and Wilson JJ. There is nothing in s 501(2) to indicate an intention to exclude consideration of a new, more recent, fact that occurs after the making of a decision.*

33. Further, although (as noted) the plurality cite *MJD Foundation* in support of their view that s 33(1) "*adds little*", Mortimer J (Perry J agreeing), at [172] of *MJD Foundation* discusses s 501(2) and states: "*if the power is exercised for the first time and no cancellation results, then there remains a visa upon which the power can be exercised again as the subject matter of the power – in my opinion, at least if there are new facts or circumstances. That is what s 33(1) means when it speaks of an exercise from time to time*" (emphasis added).[20] This passage of *MJD Foundation* supports the Minister's reliance upon s 33(1) of the AIA as to the availability of s 501(2) to him in the present case. (It is, with respect, misapplied by the plurality when they later refer to it, at **Brown [109]**).

The application of s 501A of the Act

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[17] *Pfeiffer v Stevens* [2001] HCA 71; (2001) 209 CLR 57 at [56] per McHugh J.
[18] *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [36]-[38] per Griffiths and Perry JJ; c.f. [71]–[73] per Mortimer J.
[19] *Asaad v Minister for Home Affairs (No 2)* [2019] FCAFC 214 at [31]-[32] per Rares, Katzmann and Markovic JJ.
[20] Also, both Mortimer J and Perry J were members of the Full Court in *Parker* – in which s 33(1) was found to be applicable to s 501(2). There is nothing in *MJD Foundation* to suggest that their Honours view of how s 33(1) operated had changed.

34. The arguments set out above do not have the consequence of rendering s 501A "otiose" (suggested by the plurality at **Brown** [117]) or without practical operation. That provision permits the Minister (acting personally) in the national interest to "*set aside*" a decision of a delegate or the Tribunal not to exercise the power to cancel a visa, and to then make his own decision to cancel the visa. As the Full Court explained in *Parker*,[21] s 501A is directed to a particular situation where the facts have not changed (from the delegate or Tribunal decision) and the Minister wants to set that earlier decision aside and substitute his own. It is, as Mortimer J described it, a "*personal 'override' power*", permitting him to "*change the outcome*" of the delegate's or Tribunal's decision.[22] That view is, with respect, consistent with the extrinsic materials concerning the amendments to the Act which inserted s 501A. The power was described in the Explanatory Memorandum as one "*to enable the Minister to personally exercise a special power to intervene in any case and substitute his/her own decision*".[23] In the second reading speech, it was explained that the Tribunal had made "*a number of character decisions that are clearly at odds with community standards and expectations*" and it was "*essential that the Minister, acting personally, have the power to intervene or set aside such decisions in the national interest*".[24]

35. The power in s 501A is thus one that arises where the Minister is considering "*setting aside*" an "*original decision*" (of a delegate or Tribunal) and substituting his own. It is, as noted above, plainly available (as *Parker* recognises) where exactly the same facts and circumstances pertain as were before the delegate or Tribunal – and the Minister wishes to intervene and override that decision. That is, of course, not the situation in the present matter (or *Brown*). In both cases, a number of years had passed and, importantly, significant new facts had emerged, namely later convictions (here also informing the risk posed by the person and the role of alcohol). The Minister did not, and did not purport to, act under s 501A, or "*set aside*", "*substitute*" or "*override*" the Tribunal's earlier decision. Instead, the Minister was plainly making a fresh decision under s 501(2), taking into account all relevant facts up to the date of his decision,

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[21] *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [37] per Griffiths and Perry JJ; at [67] per Mortimer J.
[22] *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [67] per Mortimer J.
[23] Explanatory Memorandum to the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998* (Cth) at [2];
[24] Commonwealth, *Parliamentary Debates*, Senate, 11 November 1998, 61 (Rod Kemp, Assistant Treasurer)

including the more recent convictions and his evaluation of their impact upon the exercise of the discretion in s 501(2).[25] The presence of s 501A in the Act did not prevent the Minister from exercising the power in s 501(2) as he did – and the presence of s 501A was wrongly seen by the majority as constraining the availability of s 501(2) to the Minister. Also, at various points, the plurality refer to the earlier decision not to cancel the visa as being "*reconsidered*" (**Brown [103], [104]**) or being "*set aside*" (**Brown [108]**) by the Minister. That, with respect, misconstrues and misdescribes what the Minister was doing in this case (and in *Brown*) – and that error may explain why the plurality wrongly saw s 501A as preventing the exercise of s 501(2) in this case.

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36. Thus, for these reasons, the presence of s 501A does not show a "*contrary intention*" for the purpose of s 33(1) of the AIA with respect to s 501(2). Earlier Full Court findings in *Parker* at [37], and in *Asaad (No 2)* at [31]-[32], that s 33(1) did apply to s 501(2) were, with respect, correct.

Other matters relied on by the plurality

37. The plurality also refer (in particular, at **Brown [111]-[113]**) to various normative or policy considerations which were said to support its view as to the unavailability of s 501(2) in the present case. However, none of these matters justify any departure from
20 the ordinary meaning of the text of either s 501(2) or s 501A. These considerations included what the plurality saw as the visa holder "*continu[ing] to be at significant risk of a future visa cancellation, notwithstanding the favourable decision made by the Tribunal on review*", which was said to be an "*unsatisfactory basis for continued residence in this country*" (**Brown [112]**). However, it is not apparent why it is an "*unsatisfactory basis*" for a person to reside in Australia if the Minister is able, in changed circumstances at a future time, to engage is a (fresh) exercise of power under s 501(2) if he or she sees fit. Section 501A is not contrary to that proposition and is itself an indication that a decision of the Tribunal favourable to a review applicant will not have the effect that a person's visa will always remain on foot, as assumed by the
30 plurality. The plurality also refers (**Brown [113]**) to the potential for "*repeated decisions*" and "*for inconsistency*" between them. The concept of consistency (and

[25] See also *Minister for Immigration and Multicultural Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at [126]-[128] per Heydon and Crennan JJ, where their Honours observed that the discretion in s 501(2) is unfettered in its terms and that "*Parliament has left it to the Minister to decide the matters which are relevant to whether a person who fails the character test should be permitted to remain in Australia*".

inconsistency) in decision-making arises where the factual matrix underpinning those decisions is the same – like cases being treated alike (or consistently). At the core of the present case, and also *Brown* and *Parker*, is that significant new facts had emerged (further criminal offending) after the earlier delegate's and Tribunal's decision. The idea of "*consistency*" in decision-making in these circumstances is inapt, given that the factual matrix of the earlier decisions (ie. of the delegate and Tribunal) and the Minister's later decision, materially changed. In any event, consistency is not necessarily an overriding norm and will not prevent a different decision from being made where the statute, on its true construction, so permits.

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38. Furthermore, as Bromwich J explained (**Brown [208]**), the plurality's approach (of effectively limiting the further consideration of whether to cancel a visa effectively to the personal exercise of discretion by the Minister himself) is not desirable as a matter of public administration, as it may limit the availability of merits review in cases that would not ordinarily warrant the intervention of the Minister,[26] and dilute the time available to the Minister for cases that do warrant such escalation.

Alternative error found by Justice Besanko

20 39. Justice Besanko found what he considered to be an independent jurisdictional error in Makasa (**Makasa [11]-[12], [18], [21]**), although his Honour was the only member of the Full Court who so found (and he recognised that his was "*minority reasoning*" (**Makasa [11]**)). His Honour considered that the Minister had failed to treat the earlier Tribunal's decision as a "*relevant consideration of great importance*", which amounted to jurisdictional error (**Makasa [21]**). That was because, his Honour found, the Minister's reasons "*come close to articulating a line of reasoning...that abuse of alcohol is the common thread in the sexual offending and the drive under the influence offence. In other words, the recent drive under the influence offence indicates that the [Respondent] has a problem with alcohol which he does not have under control and*
30 *this makes it more likely he will reoffend by way of sexual offences*" and "*if the Minister took that view then, in light of the previous decision of the Tribunal, he*

[26] The Tribunal does not have jurisdiction to review a decision made by the Minister under s 501A.

needed to clearly articulate it an presumably an increased risk (to whatever degree) of reoffending. He has not done that..." (**Makasa [20]-[21]**).

40. No jurisdictional error of the nature found by Besanko J is made out. As Bromwich J found (**Makasa [40]**), the Minister found (at [49] of his reasons) that there was a low risk of the Respondent reoffending with a sexual offence, that in the past there had been a connection between the Respondent's criminal conduct and alcohol use, that the 2017 drink-driving offence indicated that the Respondent had not been rehabilitated in relation to alcohol, and there *was*, consequently, a low risk that he would reoffend with a crime of a sexual nature. The Minister thus did consider the effect of the Respondent's continued consumption of alcohol (especially by reference to the 2017 drink-driving conviction) and concluded that this contributed to a low, but continuing, risk of sexual re-offending. The Minister did not, contrary to Besanko J's findings, fail to consider the earlier Tribunal decision (having repeatedly referred to it – but, in effect, also having found that these later facts led to a different decision). Further, the Minister did, contrary to Besanko J's findings, "*articulate*" a link between the Respondent's consumption of alcohol and his risk of reoffending – as Bromwich J makes plain. The Minister's reasoning process was one that a reasonable person *could* have undertaken, in the factual circumstances of the case – and was thus not legally unreasonable, irrational or illogical. As Crennan and Bell JJ have explained, "*if probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion*".[27] The test for legal unreasonableness is "*necessarily stringent*",[28] and the Minister's decision was, in this case, within his area of "*decisional freedom*".[29]

Part VII: Orders sought by the Appellant

41. These are set out at **CAB** 92-93.

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[27] *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [131]; see also at [135] and at [78] per Heydon J.
[28] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [11] per Kiefel CJ.
[29] *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [28] per French CJ.

Part VIII: Appellant's oral presentation

42. The Appellant estimates that he will require 75 minutes for the presentation of his oral argument.

Dated: 30 July 2020

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

and

LIKUMBO MAKASA
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

The statutory provisions referred to in the appellant's submissions are as follows (all as at 18 October 2017):

1. *Acts Interpretations Act 1901* (Cth), s 33.
2. *Administrative Appeals Act 1975* (Cth), s 43.
3. *Migration Act 1958* (Cth), ss 4, 29, 501, 501A.