HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S103/2020
File Title:	Minister for Immigration and Border Protection v. Makasa
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	18 Sep 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

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

2. The decision under review involved the fresh exercise, in October 2017, of the power in s 501(2) of the *Migration Act 1958* (Cth) (**Act**) by the Appellant (**Minister**), on account of all the facts then known to the Minister – including new facts and circumstances which had arisen since the Tribunal's 2013 decision.[1] The more recent PCA offence, in particular, was material to the Minister's assessment of risk including as to sexual offending and his exercise of discretion. This was not, contrary to **RS [15]**, **[56]**, merely a "*change of mind*" by the Minister. Also, the Minister did not "*set aside*" or "*render nugatory*" (cf. **RS [15]**) the past Tribunal's decision and his decision operated only from its own date. Similarly, the Minister's decision fell outside the field of operation of s 501A of the Act, which permits the Minister, personally, in the national interest, to "*set aside*" a decision of a delegate or Tribunal and substitute his own decision – including on exactly the same facts[2] (it being a "*personal 'override' power*"[3]).

3. A valid visa is essential to a non-citizen's ability to lawfully enter and/or remain in Australia.[4] Following the Tribunal's decision, the Respondent's retention of his visa (and any right to remain as a non-citizen in Australia) was subject to the Act, including the operation of cancellation powers such as (relevantly) s 501(2).[5] Contrary to **RS [73]**, the

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[1] The Respondent concedes that there were new facts and circumstances at the time of the Minister's 2017 decision (Respondent's Submissions (**RS**) [40]).
[2] See *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [37], [50]-[51] (Griffiths and Perry JJ); [67], [70] (Mortimer J).
[3] *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [67] (Mortimer J)
[4] Cf. ss 4, 13, 14, 15 and 29 of the Act.
[5] See eg. *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2; (2018) 262 CLR 333 at [9]-[13] (Kiefel CJ, Bell, Keane and Edelman JJ).

"*administrative continuum*" did not end with the Tribunal's decision. That decision, an exercise of power under s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), had effect as a decision of the delegate (s 43(6)).[6] It set aside the prior delegate's decision and ended the Tribunal's merits review, but it was not "*final*" (contrary, for example, to **RS [69]** and **[74]**) as regards the future consequences of Respondent's failure to meet the character test, particularly in the presence of new facts, and it did not "*complete the executive's role in relation to the considerations going to the exercise of s 501(2)*" (contrary to **RS [30]**), or decide factual issues in the course of reaching the decision in any final or binding way for the purposes of future decision-making. There is nothing in the text of the Act, or the AAT Act, to support the submission (cf. **RS [52]**) that the effect of the Tribunal's decision was that it is "*taken*" or "*deemed*" to have the extended operation and effect contended for by the Respondent.

4. Nor was the power under s 501(2) to cancel "*spent*" or "*exhausted*" by the delegate's 2011 cancellation decision (set aside by the Tribunal).[7] It goes nowhere, with respect, to say that s 501(2) was once "*engage[d] with*" or "*utilized*", or to speak of any "*imprimatur of executive power*" (cf. **RS [12]-[13]**). Contrary to **RS [17]**, the mere formation of the state of satisfaction in s 501(2)(a) and (b), while it is a step that is a precondition for the exercise of the power to cancel in that section,[8] is not itself the "*exercise*" of that power, much less any bar to its future exercise.

5. Also, to say that the Tribunal's decision was within the power of s 43(1)(c) of the AAT Act does not mean that it was an exercise of the power to cancel under s 501(2). Nor was release of the Respondent from detention relevant to this case.[9] Further, none of the matters in **RS [28]-[31]** assist the Respondent. The Respondent points to no provision of the AAT Act (or of the Act) which has the effect that the Tribunal's decision was an exercise of the power to cancel under 501(2).

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[6] The Respondent does not grapple with the effect of s 43(6), which is contrary to the way in which the plurality sought to distinguish the Tribunal decision from one of the delegate to exercise the power under s 501(2).

[7] See Appellant's Submissions (**AS**) [21]-[30].

[8] *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [28] (Gleeson CJ, Gummow, Kirby, Hayne JJ); *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 120 at [43] (Gummow, Kirby, Hayne, Heydon, Crennan, Kiefel JJ).

[9] Cf. Final sentence of **RS [26]**.

6. Additionally, while the Minister contends (and Besanko J and Bromwich J found) that there had been no prior exercise of power under s 501(2), the Minister's argument is not dependent on that proposition. The Minister in **AS** has advanced multiple separate reasons why the plurality erred.[10] Similarly, whereas **RS [25]** describes s 501A as "*central*" to the Minister's submission that there was no prior exercise of the power to cancel under s 501(2), it is only one of the various arguments advanced. Still, no justification presents for the plurality treating a Tribunal decision differently from a delegate's decision not to cancel a visa under s 501(2) in terms of whether they prevent the future exercise of power under s 501 (see **Brown [16]-[17], [110]**).

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7. The Respondent accepts, at **RS [34]-[35]**, that *Parker* supports there being no "*contrary intention*" for the purpose of s 33(1) of the AIA – and that new facts going to the exercise of discretion may enable the power in s 501(2) to be exercised again. **RS** do not say that *Parker* is wrongly decided. It does not negate *Parker* to say (cf. **RS [38]**) that it did not answer whether s 501(2) could be exercised again on the "*same facts*" – because neither *Parker* nor this case concerned the "*same facts*".[11] Contrary to **RS [62]** and the plurality here, *Parker* is not distinguishable simply because it did not involve a Tribunal's decision, especially in the presence of s 43(6) of the AAT Act. The Respondent's reliance (cf. **RS [37]**) on *Watson*[12] is also misplaced, as it dealt with different issues. In *Watson*,
20 the visa had already been cancelled and the question was whether the cancellation could be revoked.

8. The availability here of the power to cancel under s 501(2), where there was a material change of facts going to the exercise of discretion, is not answered by **RS [44]-[50]**. The "*tension*" in **RS [44]** does not exist. As to **RS [44]-[48]**, even if it were to be inferred from s 501A that it would be necessary for there to be some change of facts following the Tribunal decision for the power in s 501(2) to be exercised by the Minister relying on the same failure to pass the character test (see **Brown [179], [206]** per Bromwich J), there was a material change of facts in this case – particularly the later PCA conviction

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[10] See also *Parker*, where Mortimer J found that a decision not to cancel *was* an exercise of power under s 501(2) – but nonetheless found that the power in s 501(2) remained available, referring, *inter alia*, to the "*uncontentious operation*" of s 33(1) of the *Acts Interpretation Act 1901* (Cth) (**AIA**).

[11] Indeed, **RS [40]** concedes that "*a new fact*" emerged in this case, "*as distinct from the mere effluxion of time*" – but says, incorrectly and without explanation, that this new fact was not one "*bearing upon the discretionary choice*".

[12] *Minister for Immigration and Multicultural Affairs v Watson* (2005) 145 FCR 542.

and what it was found to show, including as to current risk (through alcohol) of sexual offending. As to **RS [50]-[51]**, any perception that s 501(2) "*strikes a balance*" between different considerations is not contrary to the proposition that the power to cancel in s 501(2) can later be exercised, as here. Further, **RS [75]** and following misunderstands the Minister's reliance on s 43(6) of the AAT Act. The fact that the Tribunal's decision takes effect as one of the delegate aids the proposition that it could not (outside the reach of s 501A) restrict the future availability of s 501(2) any more than a decision of a delegate not to exercise that power to cancel. Contrary to **RS [78]**, the operation of s 501A of the Act and s 43(1) of the AAT Act did not "*exhaust*" the s 501(2) power.

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Notice of Contention

9. Contrary to **RS [83]-[97]**, the Minister's reliance on the 2017 PCA conviction was not legally unreasonable. There was evidence or material before the Minister of a link between alcohol and the Respondent's past offending, including sexual offending, and as to alcohol being a risk factor for him.[13] Further, the Minister did find such a link and saw alcohol as affecting the risk currently posed by the Respondent to the Australian community.[14] The Minister's reasoning and findings, and his ultimate exercise of power, were within the range of a legally reasonable exercise of s 501(2).[15] No further explanation or articulation was required. Bromwich J was correct to reject this argument

20 (**Makasa [33]-[41]**) as was the primary Judge ([38]-[45]). See also **AS [40]**.

10. Nor was there legal unreasonableness in the Minister's findings at [95], referring to the Respondent's aunt and extended family in Zambia. There was no finding that specific

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[13] See Dr Ashkar's Report dated 12 August 2013 at [11], [27], [32]-[33], [37], [43] (Respondent's Further Material filed on 28 August 2020 (**RM**) 328ff). See also the final paragraph of **RM 78** and fifth paragraph **RM 321** (Mother's evidence). See further the Tribunal's reasons at [68] (**RM 199**).

[14] At [43], the Minister found that the 2017 PCA conviction indicated that "*further rehabilitative progress with respect to alcohol is required*". At [45], the Minister referred to Dr Askhar's Report (August 2013), including his mention that the Respondent's offending occurred when he "*was consuming large amounts of alcohol to regulate stress*" and, at [46], to psychological factors and sexual recidivism. At [49], the Minister found that the Respondent had a "*low risk of sexual offending*" (as well as "*an ongoing likelihood of non-sexual offending*"), that specific past events had not produced "the deterrent effect considered by the AAT" and that the Respondent "*still requires further progress with respect to alcohol rehabilitation*". The Minister also referred to the "*very serious*" harm that could occur to the community if the Respondent re-offended. See also at [100]-[101]. At [103]-[104], the Minister saw the "*risk of further harm*" to be of "*such seriousness*" that it outweighed "*even the strong countervailing considerations*" outlined by him and concluded that the risk of harm posed by the Respondent was "*unacceptable*".

[15] *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [78] (Heydon J); [131], [135] (Crennan and Bell JJ); *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [11] (Kiefel CJ), [52] and [70] (Gageler J), [135] (Edelman J).

assistance would be given, and the balance of the paragraph accepts that the Respondent would face practical and financial hardship in adjusting to life in Zambia. The Minister had earlier noted at [92] that the Respondent had "*little contact with Zambia*" since coming to Australia.[16] Bromwich J, and the primary Judge, were correct to reject the argument as they did (at [44] and [47]-[48], respectively). The Minister's approach was not arbitrary or irrational, but a predictive finding that was not dependent upon any specific evidence that one or more relatives would in fact give assistance.

11. The Respondent also relies (**RS [98]-[102]**) on the reasoning of Besanko J (alone) that the Minister fell into jurisdictional error by failing to consider the Tribunal decision, which his Honour termed "*a relevant consideration of great importance*". However, the Minister did consider the Tribunal's decision in his reasons[17] and no further reference to it was required. See also **AS [39]-[40]**. The contention (cf. **RS [99]**) that the Minister failed to engage in an "*active intellectual process*" in relation to the Tribunal's decision is apt to invite merits review.[18] Also, to be a mandatory consideration, a consideration must be required to be taken into account by the text, subject, scope and purpose of the Act.[19] Given the nature of the power being exercised, neither the Tribunal's decision nor its reasons were such. The Minister properly made his own decision in the presence of further material facts. His statement of reasons should be "*read fairly and not in an unduly critical manner and in the light of the statutory obligation pursuant to which it was prepared*".[20] A comparison with, or analysis of, the Tribunal's decision, which is not itself part of the Minister's reasons for reaching his own decision, need not be included in that statement.[21] No jurisdictional error can be inferred from its absence.

Dated: 18 September 2020

Geoffrey Johnson SC

Nicholas Swan

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[16] This was the Respondent's evidence at **RM 82**.
[17] See eg. at [36] and [49].
[18] *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2010) 243 CLR 164 at [30]-[32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ).
[19] *Applicant S270 v Minister for Immigration and Border Protection* [2020] HCA 32 at [33] (Nettle, Gordon, Edelman JJ).
[20] See s 501G of the Act. See also *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; (2019) 93 ALJR 1091 at [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon JJ); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25] (French CJ, Bell, Keane, Gordon JJ).
[21] *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320 at [47]-[48].