HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B43 of 2020

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

and

EFX17
Respondent

RESPONDENT'S SUBMISSIONS

PART I. Certification

1. These submissions are in a form suitable for publication on the internet.

PART II. Issues

2. The Notice of Appeal raises the issues that the appellant (**Minister**) identifies in his written submissions (**AS**) at [3]-[6], but the respondent would formulate them as follows:

(a) In order to discharge the obligations in s 501CA(3) of the *Migration Act 1958* (Cth) (**Act**), is the Minister required to consider the characteristics and circumstances of the former visa-holder that may affect their capacity to receive, understand and make representations in response to the written notice, particulars and invitation referred to in that subsection (**capacity matters**)?[1]

(b) Does compliance with s 501CA(3) of the Act also require the former visa-holder to comprehend the notice, particulars and invitation given to him (there being no challenge to the finding of the majority in the court below that the respondent did not understand the material he was given (CAB 207-09 [134]-[137]; 217 [165]))?

(c) If the answer to the question in (a) is "yes" but the answer to the question in (b) is "no", was it open to the court below to conclude in the present case that the Minister failed to consider the capacity matters that were relevant to the respondent?

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[1] This was the respondent's contention below (CAB 173-74 [13]-[15]; 225-26 [197]). The matters in AS [3] are examples of capacity matters which are relevant to the respondent.

This issue entails an anterior question: Was it necessary for the Minister to have been personally aware of the relevant capacity matters, or was constructive knowledge, or knowledge that was reasonably obtainable, sufficient?

(d) Independently of the issues in (a) to (c), can the steps in s 501CA(3) of the Act be performed by a person, including an officer of a State correctional facility, if the Minister has not delegated that person authority under s 496(1) with respect to that subsection?

3. The respondent raises a further separate issue on the Notice of Contention filed on 24 July 2020 (CAB 265), namely:

(a) Did the "invitation" given to the respondent meet the requirement in s 501CA(3)(b) to specify the period ascertained in accordance with the regulations for making representations to the Minister, in circumstances where it:

(i) purported to date the period, incorrectly, by reference to transmission by email; and

(ii) contained no other point of reference from which the respondent could ascertain the period for response?

PART III. Section 78B notice

4. The respondent considers that it is not necessary to give any notice in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV. Material facts

5. The respondent does not contest the facts set out in AS [10]-[20] but seeks to supplement them as follows.

6. The respondent's native language is Hazaragi. The respondent is illiterate in that language (CAB 207 [134]; 221 [183]); and he has, at best, very limited capacity to speak, read or write in English (CAB 207 [134]; 216 [165]; 224 [190]). The respondent also has a schizophrenic illness (CAB 207 [134]; 216 [165]; 224 [190]), which was at least in part attributable to traumatic events affecting him and his family at the hands of Taliban soldiers in Afghanistan (CAB 207 [134]).

7. The documents to which the Minister refers in AS [14] (reproduced at CAB 8-94) (**Decision Bundle**) comprised 86 pages written entirely in English. Justice Greenwood identified the contents of Decision Bundle in his Honour's reasons for judgment (CAB 170 [3]).

8. The covering letter to the Decision Bundle stated that (CAB 10-11):

   (a) any representations the respondent wished to make about revocation had to be made "within 28 days after you are *taken to have received* this notice" (emphasis added); and

   (b) "[a]s this notice was transmitted to you by email, you are taken to have received it at the end of the day it was transmitted".

9. The respondent did not receive the notice by email.

10. The case notes to which the Minister refers in AS [16] contain the only available evidence of what the respondent was told when the Decision Bundle was handed to him. There was no evidence that an interpreter was used. The full record that the Queensland Corrective Services (**QCS**) officer made of what the respondent was told regarding revocation is set out in the reasons for judgment of Greenwood J (CAB 200 [111]). According to that note, the officer advised the respondent that: "He can request a revocation of the cancellation *by writing to [the Australian Border Force (**ABF**)]* within 28 days" (emphasis added). This advice was incomplete and inaccurate.

11. There was no evidence that the respondent received the assistance he requested from another prisoner, to which the Minister refers in AS [16] (CAB 201-02 [114]). The respondent also requested assistance from the Prisoners' Legal Service (**PLS**) (CAB 200-01 [112]). Although a QCS officer was said to be organising a phone call with, or visit from, PLS to discuss requesting revocation of his visa cancellation (CAB 200 [111]), that did not occur (CAB 201-02 [114]).

12. The conversation between the respondent and an ABF officer to which the Minister refers in AS [17] took place with the assistance of an interpreter in the respondent's native language (Respondent's Further Material (**RFM**) 15 [25]).

13. Neither the individual who emailed the Decision Bundle to the Brisbane Correctional Centre, nor the QCS officer who handed the Decision Bundle to the respondent, held a delegation from the Minister under s 496 of the Act in relation to s 501CA(3) (CAB 211 [144]-[145]; 220 [177]).

PART V. The respondent's argument

Construction of s 501CA(3) (grounds 1 and 2)

14. Section 501CA is the central provision in this appeal. Consistently with well settled principles of statutory construction, it is necessary to construe the provision in the context of the Act, having regard to particular provisions.[2]

15. The Act provides for visas permitting non-citizens to enter or remain in Australia, and is intended to be the only source of the right of a non-citizen to so enter or remain: s 4(2). The lawfulness of a non-citizen's presence in the migration zone is contingent upon the person holding a visa: ss 13 and 14. Section 15 of the Act provides that "if a visa is cancelled its former holder, if in the migration zone, becomes, on the cancellation, an unlawful non-citizen unless, immediately after the cancellation, the former holder holds another visa that is in effect".

16. Section 501 of the Act makes provision for the Minister, relevantly, to cancel a person's visa on character grounds. Other grounds on which the Minister can cancel a person's visa are set out in Division 3 of Part 2 of the Act.

17. Section 501(3A) of the Act provides that the Minister *must* cancel the visa of a person who:

(a) does not pass the character test because the person has a "substantial criminal record" (on the basis of having been sentenced to death, imprisonment for life or imprisonment for a term of 12 months or more) or has been convicted of a sexually based offence involving a child; and

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

18. As Gageler and Gordon JJ observed in *Falzon v Minister for Immigration and Border Protection*, the subsection "imposes an obligation on the Minister to cancel a visa whenever its terms are met".[3] Consistently with ss 14 and 15 of the Act, the cancellation operates to render the former visa-holder liable to detention under s 189 of the Act, and

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2 See *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29, [13]-[14] (Kiefel CJ, Nettle and Gordon JJ) and the cases there cited.

3 (2018) 262 CLR 333 (***Falzon***), 353 [72].

for removal from Australia as soon as reasonably practicable under s 196(1) in accordance with s 198, unless the Minister revokes the original decision to cancel.[4]

19. By contrast with s 501(1) and (2) of the Act, the rules of natural justice do not apply to an exercise of power under s 501(3) and (3A). Section 501(5) provides in this respect:

> The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

20. Subdivision AB of Division 3 of Part 2 of the Act prescribes a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications". Subdivision AB would thus apply in a case where the Minister is proposing to exercise the power in s 501(1); and, but for s 501(5), it would also apply to the exercise of the power in s 501(3)(a) (both of which relate to the refusal of visas). The Subdivision does not, however, apply to the *cancellation* of visas, on character grounds or otherwise.

21. True it is that s 501(5) applies only to the exercise of the power in one or other of s 501(3) and s 501(3A) (AS [40]); but it does not follow that the subsection is of no relevance to the present exercise of construction. To the contrary, in circumstances where ss 501(3A) and 501CA constitute an "integrated statutory scheme" (CAB 193 [87] (Greenwood J)), the operation of s 501(5) is central to the statutory context in which s 501CA falls for consideration. By reason of s 501(5), the rules of natural justice do not condition the exercise of power in s 501(3)(b) and s 501(3A).[5] There is thus no obligation to notify a visa-holder before their visa is cancelled under those provisions, including for the purpose of giving them an opportunity to be heard against a proposed cancellation.

22. Section 501CA applies "if the Minister makes a decision (the ***original decision***) under s 501(3A) … to cancel a visa that has been granted to a person": s 501CA(1). One of the conditions of s 501(3A) is that the visa holder is, at the time of the Minister's decision to cancel his or her visa, serving a full-time custodial sentence. As Greenwood J observed (CAB 191 [79]), s 501CA "seeks to come to the aid of a former

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4 See *Falzon* (2018) 262 CLR 333, 339 [12] (Kiefel CJ, Bell, Keane and Edelman JJ); 353-5 [75]-[79] (Gageler and Gordon JJ); 360 [96] (Nettle J).

5 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *SZBEL v Minister for Immigration and Citizenship* (2006) 228 CLR 152, 160-61 [26] (the Court).

visa holder who finds himself or herself serving a term of imprisonment" that meets the description of one or more of s 501(7)(a) to (c). Section 501CA(3) and (4) provide:

> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
> (ii) particulars of the relevant information; and
>
> (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
>
> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.

23. Considered together, s 501CA(3) and (4) of the Act operate so as to:

(a) afford a former visa-holder (as soon as practicable after the Minister makes the "original decision") the first, and only, opportunity to be heard as to why the cancellation of his or her visa should be revoked, thus conferring what Logan J described as "a natural justice purpose" (CAB 234 [219]); and

(b) empower the Minister to exercise a discretion in relation to the non-citizen's visa status, and to do so having regard to matters other than the former visa-holder's criminal history and custodial status. By contrast to the narrow and objectively ascertainable criteria that mandate cancellation under s 501(3A), the discretion to revoke is broad: the Minister can revoke the cancellation if he is satisfied that there is "another reason" why the cancellation decision should be revoked.[6]

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[6] See eg *GBV18 v Minister for Home Affairs* [2020] FCAFC 17, [31]-[32] (Flick, Griffiths and Moshinsky JJ); *Minister for Home Affairs v Omar* (2019) 272 FCR 589, 603 [34(g)]- 607 [37] (Allsop, Bromberg, Robertson, Griffiths and Perry JJ). For an indication of reasons that, from the perspective of the Minister, would constitute "another reason", see Part C of Direction No 65 (CAB 61ff).

24. Importantly, however, the Act conditions both of those opportunities. The opportunity afforded to the former visa-holder is to make representations about revocation "within the period and in the manner ascertained in accordance with the regulations". Relevantly for present purposes, reg 2.52 of the *Migration Regulations 1994* (Cth) (**Regulations**) fixes an absolute 28-day timeframe, as well as formal requirements for making those representations. In turn, the power conferred on the Minister is only enlivened if the former visa-holder "makes representations in accordance with the invitation".[7]

25. These contextual features of s 501CA(3) are shared with s 501C (which deals with cancellation in the national interest pursuant to s 501(3)) but otherwise are unique in the Act. There are other provisions that use similar language,[8] but those provisions generally form part of a code of procedural provisions about the subject matter of the relevant decision, or follow a discretionary decision which permits consideration of the visa-holder's broader circumstances. Section 501CA(3) is the only provision that operates almost exclusively upon persons in criminal custody.

The nature of the invitation in s 501CA(3)

26. In the context of the particular statutory framework here in issue, the respondent contends that the invitation to which s 501CA(3)(b) refers entails a requirement that the former visa-holder have a meaningful opportunity to respond. That construction reflects the "natural justice purpose" of s 501CA(3) and the role of the invitation in s 501CA(3)(b). It is consistent with the purpose of the provision as described in the Explanatory Memorandum for the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth).[9] It is also consistent with the ordinary meaning of "invite", the object of which is a response from the recipient.[10] Handing over a bundle of documents that follows a set template, and is incomprehensible to the recipient, does not afford the recipient an opportunity to "make representations" in any real sense (cf AS [56]).

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7 *S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32, [36] (Nettle, Gordon and Edelman JJ).

8 See ss 57(2), 120(3), 133F(3), 359A(1), 424A(1) and 473DE(2) of the Act.

9 Explanatory Memorandum for the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Cth), [92]. Regard may be had to the Explanatory Memorandum consistently with s 15AB(1) of the *Acts Interpretation Act 1901* (Cth).

10 William R Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (Oxford University Press, 5th ed, 2002), p 1419.

27. Other invitation requirements in the Act have been construed in a similar manner. In *Minister for Immigration and Citizenship v Li*,[11] a majority of this Court (Hayne, Kiefel and Bell JJ) held that the obligation in s 360(1) of the Act to "invite" an applicant to give evidence and present arguments before the Tribunal "requires that the invitation be meaningful, in the sense that it must provide the [recipient] with a real chance to present his or her case".[12] The corresponding requirement in s 425(1) has been said to require an invitation that is "real and meaningful" and not a "hollow shell" or "empty gesture".[13]

28. In that statutory context, whether an invitation is real and meaningful has been judged by reference to the recipient's capacity to respond to it. It has been held that an invitation is not meaningful if, for example, the recipient is incapable of understanding what happens at the hearing or conveying representations to the Tribunal by reason of their mental condition or an inadequate interpreter.[14] Similarly, in *Li*, Hayne, Kiefel and Bell JJ cited with approval a passage from *Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[15] in which Hely J said that to "invite" a person to a hearing they are unable to attend would be an "empty gesture".[16] Although their Honours in *Li* referred to the Tribunal's knowledge of the applicant's incapacity,[17] the respondent contends that this should not be read as limiting the circumstances in which an invitation may not be meaningful, in light of their Honours' recognition of the fundamental requirement that the applicant have a "real chance to present his or her case".[18]

29. There are, it is true, differences in text and context as between s 501CA(3) and ss 360(1) and 425(1) (cf AS [55]). Nevertheless, the respondent contends that the purpose of providing an opportunity to the recipient to make representations to the Minister about

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11 (2012) 249 CLR 332.
12 (2012) 249 CLR 332, 362 [61].
13 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 (***SCAR***), 560 [33] (Gray, Cooper and Selway JJ); *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 64 ALD 395 (***Mazhar***), 402 [31] (Goldberg J).
14 See, eg, *SCAR* (2003) 128 FCR 553, 562 [40]-[41] (Gray, Cooper and Selway JJ); *Mazhar* (2000) 64 ALD 395, 402 [31] (Goldberg J); *Singh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 1 (***Singh***), 6 [27]-[28] (Tamberlin, Mansfield and Emmett JJ); *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365, 391 [102] (French J).
15 (2003) 128 FCR 359.
16 (2003) 128 FCR 359, 366 [36]; cited in *Li* (2012) 249 CLR 332, 362 [61] (Hayne, Kiefel and Bell JJ).
17 (2012) 249 CLR 332, 362 [61].
18 In *SCAR*, the Full Court of the Federal Court has held that there may be a failure to "invite" under s 425(1) whether or not the Tribunal is aware of the recipient's inhibition: (2003) 128 FCR 553, 561 [37] (Gray, Cooper and Selway JJ).

revoking a cancellation decision is analogous to the purpose of the invitations in ss 360(1) and 425(1). As a matter of context, the fact that s 501CA(3) is not part of a broader review process, and only arises when the Minister makes a decision, without notice, that changes the former visa-holder's immigration status from lawful to unlawful, reinforces the importance of the opportunity conferred on the former visa-holder being a meaningful one.

30. It may also be accepted that s 501CA(3)(b) "applies indifferently across a range of persons whose visa has been cancelled, admitting of an infinite variety of literacy and comprehension capacities" (CAB 240 [245] (Logan J)) (cf AS [54]). However, s 501CA(3)(b) cannot provide an opportunity that operates "indifferently" between individuals with different capacities unless appropriate adjustments are made for those differences. It is the objective of indifferent operation – providing a fair opportunity to individuals with different capacities – that requires those adjustments to be made.[19]

31. The Minister relies by way of answer on *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*[20] (***WACB***) (AS [42], [54]; see also AS [37]-[39]). There are, however, real distinctions between s 501CA(3) and the provision the Court considered in that case, namely, s 430D(2). The latter provision required only that the Tribunal "give ... a copy of the statement prepared under subsection (1)". It was apparent from that language that the statement had to be in writing and physically delivered.[21] Subsection (1) and associated provisions specifically identified what the statement was to contain and how it was to be delivered, which the Court described, having regard to their particular history and context, as a "code".[22] Section 430D(2) also:

(a) did not include any requirement for the Minister to consider the appropriate way of giving the notice in the circumstances;

(b) was not accompanied by a requirement to "invite" a response from the person to whom it was provided; and

(c) was not the statutory source of the recipient's only opportunity to be heard in relation to the subject matter of the decision being notified.

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19 See *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212, 215 [7]-[10] (Allsop CJ, Robertson J agreeing (at 230 [74])); 224 [44]-[45] (Flick J).
20 (2004) 79 ALJR 94.
21 (2004) 79 ALJR 94, 100 [27].
22 (2004) 79 ALJR 94, 97 [15].

32. For these reasons, the respondent contends that the requirement to "invite" in s 501CA(3)(b) should be construed as requiring a meaningful invitation to the recipient, in the sense that it is capable of being understood by the recipient and responded to in the required manner.

The requirement to "give" notice and particulars "in the way the Minister considers appropriate in the circumstances"

33. The requirements in s 501CA(3)(a) must be construed in the context of s 501CA(3)(b) and the broader statutory context set out above.[23] The purpose of the information to which s 501CA(3)(a) refers is to facilitate the opportunity afforded to the former visa-holder through the invitation in s 501CA(3)(b). The requirement to give that information is delineated by reference to "the way the Minister considers appropriate in the circumstances".

34. Whether or not it is accepted that s 501CA(3) entails a minimum standard as to the comprehensibility of the notice and particulars in s 501CA(3)(a) (as to which see below), the language of the provision requires the Minister at least to consider what is the appropriate "way" of giving the notice and particulars, in "the circumstances".

35. The Minister makes no positive submission as to what "the circumstances" means. In its context in the language of s 501CA(3)(a), and in light of the purpose of the notice and particulars described in [33], "the circumstances" is properly understood as those which inform the appropriate "way" of giving the notice and particulars. So understood, the question that the Minister must ask is whether a way of giving the notice and particulars (including their form and substance) is appropriate to facilitate that opportunity.

36. That question cannot be answered without reference to the recipient, and the capacity matters applicable to the recipient. Considering whether the recipient is capable of receiving, understanding and making representations in response to the notice and particulars forms a necessary part of considering whether a way of giving them the notice and particulars facilitates a meaningful opportunity to respond. This conclusion does not involve varying, re-writing or reading words into s 501CA(3)(a) (cf AS [48],

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[23] The Explanatory Memorandum referred to in [26] above confirms this purpose.

[52]). It involves nothing more than construing the phrase "appropriate ... in the circumstances" in its context.

37. The Minister's focus on considerations relevant only to physical delivery (AS [48]) is unduly narrow and does not sufficiently promote the statutory purpose.[24] To the extent that the Minister relies to this end on the meaning of "give" adopted in *WACB*, the respondent has pointed out above that there are differences in the statutory language between s 501CA(3) and s 430D(2) that make such reliance contestable. Further to those features, subparagraphs (i) and (ii) of s 501CA(3)(a) include requirements of substance that are not defined (cf AS [36]). Subparagraph (i) does not specify any form for the "notice" or how it "sets out" the original decision. Subparagraph (ii) requires the Minister to give "the relevant information" (which is defined), and "particulars" of that information. The language of s 501CA(3)(a) thus accommodates a variety of possibilities as to the substance, form and method of giving the notice and particulars it requires. It incorporates decisions as to the form of the "notice", the manner in which it "sets out" the original decision, the substance of the "particulars" to be given and the method by which that is to be done.

38. The inherent features of an invitation, to which reference has been made above, also support a conclusion that the way of giving the notice and particulars to which s 501CA(3)(a) refers must be capable of being seen as appropriate to fulfilling the statutory function of facilitating the invitation in s 501CA(3)(b). A way of giving a notice and particulars such that their required subject matter is incomprehensible to the recipient undermines, in a fundamental respect, a meaningful invitation to make representations about revocation. Giving a notice and particulars in such a way is incapable of being seen as an appropriate way of giving the notice and particulars in the circumstances, and cannot form the basis of a "state of considered appropriateness" (cf CAB 206 [132] (Greenwood J)).

39. Although Greenwood J invoked the concept of an "irreducible minimum standard" in this context, what drove that invocation was the need to recognise, and, the respondent contends, accommodate, the limited opportunity conferred on an identifiable class of

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[24] Cf *Acts Interpretation Act 1901* (Cth), s 15AA; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199, 214-15 [27] (French CJ).

persons, who are in criminal custody, to make representations as to why the Minister should revoke the mandatory cancellation of their visas.

40. The decision of this Court in *WACB* does not require a contrary conclusion for the reasons outlined above (cf AS [37]-[39], [42]-[44]). Nor does the obligation in s 57(2)(b) (and similar provisions), which is concerned not with the applicant's understanding of the information itself, but with their understanding of its relevance (cf AS [49]).

41. References to reg 2.52(2)(b), reg 2.55 and s 198(2B)(c)(i) do not assist the Minister (cf AS [41], [45], [47]). Apart from the general difficulties associated with construing the Act by reference to regulations made pursuant to it,[25] reg 2.52(2)(b) says nothing about the manner in which the s 501CA(3)(a) notice and particulars are to be given. As to s 198(2B)(c)(i), it is not apparent that a minimum standard of comprehensibility would create such uncertainty as to undermine the removal process.

42. As to the Minister's submissions about the alleged uncertainty, administrative burden, cost and inconvenience associated with a requirement to consider the capacity matters (AS [51]-[53]), the burden of accounting for the former visa-holder's capacity is limited by their almost invariable confinement in domestic custody. It should not be supposed that substantial resources would be needed to consider and implement mechanisms for delivering information to such persons in a considered and meaningful way. For example, it was apparent from the evidence in this case that there was information-sharing between QCS and the Department in relation to visa-holders in custody (RFM 36-38). Any burden imposed on the Minister in that respect is no more than is commensurate with the significance of the cancellation decision and the importance of the opportunity presented by s 501CA for the former visa-holder.

43. As Greenwood J observed (CAB 207-8 [134]), and the Minister does not challenge, the respondent was simply not capable of comprehending the suite of documents that comprised the Decision Bundle. The way the Decision Bundle was given to the respondent was not capable of being seen as appropriate to fulfilling the statutory function of facilitating the limited opportunity that the Act provides him to make

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[25] See *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 244 (Mason CJ and Gaudron J); *Master Education Services Pty Limited v Ketchell* (2008) 236 CLR 101, 109-10 [19] (Gummow A-CJ, Kirby, Hayne, Crennan and Kiefel JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 264 [39] (Crennan, Gageler and Bell JJ).

representations to the Minister in accordance with the invitation. The respondent did not understand the documents, and did not understand what he was being "invited" to respond to. It follows that neither s 501CA(3)(a) nor (b) has been satisfied.

The respondent's onus of proof (ground 3)

44. This ground arises only if the Court upholds ground 2 of the appeal. If it is accepted that s 501CA(3) required the notice, particulars and invitation to be comprehensible to the recipient, it is not necessary to address the delegate's knowledge of the capacity matters; that requirement is not contingent upon what the Minister knew. This Court's decision in *Li* did not involve imposing such a precondition, for the reasons in [28] above; nor did *TTY167 v Republic of Nauru*[26] (cf CAB 240 [144] (Logan J)).

45. The Minister's submissions on this ground presuppose that his obligation to consider the respondent's capacity matters was limited to matters he actually knew. However, a statutory obligation to consider material may extend to material within the decision-maker's constructive knowledge.[27] The imputation of constructive knowledge to the Minister in the context of s 501CA(3) reflects that the process the provision contemplates follows a mandatory cancellation decision as to which the former visa-holder has no opportunity to be heard.

46. In the present case, the delegate who made the cancellation decision in relation to the respondent sought to rely upon QCS officers discharging the obligation under s 501CA(3). The QCS case notes (AS [16]; RFM 28-31) showed that those officers knew or had access to material telling them of the respondent's language and mental health difficulties. Having chosen to rely upon those officers to carry out the delegate's obligation under s 501CA(3), in effect as the delegate's agents, their knowledge should be attributed to the delegate.[28] In any event, having regard to the flow of communications between the delegate (and the Department) and QCS, the delegate could reasonably have obtained knowledge of, and should reasonably have known, the capacity matters known to the QCS officers.

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26 (2018) 362 ALR 246, 251 [29].

27 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (***Peko-Wallsend***) (1986) 162 CLR 24, 45 (Mason J), 66 (Brennan J), 70 (Deane J).

28 Cf *Peko-Wallsend* (1986) 162 CLR 24, 66 (Brennan J); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 658-59 (Mason J); *Smits v Roach* (2006) 227 CLR 423, 441-42 [47] (Gleeson CJ, Heydon and Crennan JJ).

47. There was other evidence from which it could be inferred that the delegate had at least constructive knowledge of the capacity matters relevant to the respondent. The respondent had a file with the Department of Immigration (eg CAB 8, 13), which the delegate accessed in the course of, or in relation to, making the cancellation decision under s 501(3A) (RFM 4-6). The delegate knew that the respondent held a Class XA Subclass 866 Protection Visa (being the visa that was cancelled) (RFM 4, 6). There was also evidence before the Full Court that the respondent's file contained documents, correspondence and audio recordings in relation to his protection visa application and visa cancellation (RFM 21).

48. In order to grant the respondent a protection visa, the Minister was required to be satisfied that the respondent was a non-citizen in respect of whom Australia had protection obligations because he was a refugee or, as a necessary and foreseeable consequence of him being removed from Australia, there was a real risk that he would suffer significant harm. Reaching the requisite state of satisfaction as to those matters would have entailed consideration of the respondent's background, and not least his nationality. It could reasonably be inferred that the respondent's file recorded such information. It was also relevant that an officer of the ABF, which forms part of the Department, who spoke with the respondent a short time after the bundle was handed to him did so using an interpreter (see [12] above).

49. This evidence formed a sufficient basis for the inference that Greenwood J drew at CAB 210 [139]. That inference was not mere speculation (cf AS [60]), having regard to that evidence and the availability to the delegate of the information known to QCS. There was also a sufficient evidential basis to infer that the delegate did not consider the respondent's capacity matters, apart from the mere fact of his location at the Brisbane Correctional Centre. The Decision Bundle had a template quality, as did the covering email by which they were sent to QCS (CAB 6-94). That email gave no instructions as to how the attached material was to be given to the respondent, other than that it was to be done "without delay" (CAB 6). A QCS officer handed the Decision Bundle to the respondent without the delegate's involvement (AS [15]). The documents were written only in English and were not explained in a way he could understand (AS [16]-[17]; [7] above). The respondent was not given the opportunities he requested to obtain that explanation ([11] above). The Minister put no evidence to the contrary before the courts below.

Delegation (ground 4)

50. The Minister's submissions on this ground focus on the abstract meaning of "task in connection with the cancellation", without accounting for the context supplied by s 496 (cf AS [65]). The respondent contends that ss 496 and 497 must be construed together, starting from the general principle that a statutory power must be exercised personally by the person on whom it is conferred.[29] Section 496 provides an exception to that general principle, by reference to the Minister's "powers under [the] Act". In the context of the general principle, "power" includes, at least, an authority conferred by statute to do an act that produces a change in another person's legal relations.[30] That is consistent with the ordinary meaning of the word and its use in legal theory.[31] There is no reason to construe it differently in s 496.

51. Leaving to one side the effect of s 497, taking the steps under s 501CA(3) would be the exercise of one of the Minister's "powers under this Act" in the sense described above. Those steps change the recipient's legal relations because, *first*, the Minister is empowered to revoke the s 501(3A) decision under s 501CA(4) only if the recipient makes representations "in accordance with the invitation" referred to in s 501CA(3)(b); and *second*, the recipient is not able to do this unless the Minister has given that invitation by taking the steps in s 501CA(3). The Minister's submission that s 501CA(3) involves nothing more than the performance of administrative or clerical tasks (AS [69]) wrongly assumes that the obligation under that provision is confined to physical delivery.

52. For the Minister's submissions about s 497 to be accepted, it would be necessary to accept that the section represents a carve-out from the meaning of s 496 described above. This would require construing the phrase "task in connection with the cancellation" as including exercises of substantive power that would otherwise fall within s 496 (cf AS [70]). The respondent contends that construction should not be adopted for the following reasons.

53. *First*, neither section states that s 496 is subject to s 497.

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29 *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460, 481 (Gibbs J, Barwick CJ, Stephen, Mason and Wilson JJ agreeing).

30 *Dainford Ltd v Smith* (1985) 155 CLR 342, 349.

31 See, eg, Wesley Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 (1) *Yale Law Journal* 13, 44.

54. *Second*, s 497 has a role that is auxiliary to s 496: it presupposes that the Minister has delegated the power to grant, refuse or cancel a visa in accordance with s 496; and it clarifies that that delegation does not imply that the delegate must personally perform every "task in connection with" the exercise of that power. That auxiliary function does not imply any modification to the power to delegate in s 496.

55. *Third*, s 497 is formulated in negative terms. It does not follow from the proposition that a delegation does not require the Minister to perform personally any task in connection with the exercise of the power, that someone other than the Minister is permitted to perform any such task.

56. *Fourth*, s 497 uses the word "task" in contrast to the word "power". "Power" is used in s 497 only in reference to a delegation made under s 496. This implies that the words were intended to have different meanings.[32]

57. *Fifth*, there are certain references to "administrative" and "clerical" tasks, both in the Act and in relevant extrinsic material, which suggest that the permission in s 497 was not intended to extend to exercises of substantive power with consequences for individual rights:

(a) The heading of s 497, which forms part of the Act,[33] refers to "certain administrative tasks".

(b) Section 497(3) discloses a concern that, but for that subsection, s 497 might have been read as implying that persons given powers other than those specifically identified in s 497(1) and (2) would be required personally to perform all "administrative and clerical tasks" connected with the exercise of those powers.

(c) The Explanatory Memorandum to the *Migration Legislation Amendment Bill 1989* (Cth), which inserted the statutory predecessor to s 497, explained it as providing that "the delegate, while required to make the decision, is not required to perform personally all other administrative tasks involved".[34]

58. *Sixth*, the predecessor to s 497(1) used the words "the delegation *shall not be taken to* require" (emphasis added). The emphasised words confirmed that the intention of the

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32 *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 25, 30 (Irvine CJ); *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151, 160 [53] (Lander J).

33 *Acts Interpretation Act 1901* (Cth), s 13(1).

34 Explanatory Memorandum to the *Migration Legislation Amendment Bill 1989* (Cth), [207].

provision was to clarify and thereby avoid undesired implications being drawn from certain delegations of power. That intention was confirmed in the context of the amendments of s 497(2), in the Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994* (Cth) which the Minister has extracted as AS [68] ("put beyond doubt"). The example in that extract is consistent with the construction the respondent has advanced above. The extract otherwise does not shed any light on the meaning of "task" in s 497 (cf AS [68]).

59. The respondent's construction, which was accepted by the majority in the Full Court, does not render s 497(2) otiose or superfluous (cf AS [64], [71]). The example given in the Explanatory Memorandum, which concerns officers other than the delegate gathering information and making recommendations to the delegate, is an example of a situation in which s 497 would apply. Although those kinds of tasks might have been captured by the *Carltona* principle (cf AS [65]), s 497 "put[s] [that] beyond doubt", as the Explanatory Memorandum says.

60. The consequence of the Minister's submission is that the steps under s 501CA(3), which generate a former visa-holder's only opportunity to be heard about a matter of paramount importance to them, could be taken by an individual whom the Minister has not considered or formally identified as an appropriate person to exercise that power. Whether or not the respondent's construction of s 501CA(3) is accepted, its language requires more than the application of an administrative formula. The Minister should be required to delegate that power in the ordinary way.

PART VI. Respondent's arguments on the notice of contention

61. Even if the Court accepts the Minister's submissions on his grounds of appeal, the respondent contends that the "invitation" the Minister gave him failed to specify "the period ... ascertained in accordance with the regulations", and therefore failed to comply with s 501CA(3)(b).

62. Regulation 2.52(2)(b) provided that representations under s 501CA(3)(b) had to be made "within 28 days after the person is given the notice and the particulars of relevant information under paragraph 501CA(3)(a) of the Act". It is not in dispute that, if the Decision Bundle constituted notice and particulars within the meaning of s 501CA(3)(a),

it was given to the respondent (by hand) on 4 January 2017 (AS [15]).[35] Accordingly, the 28-day period for making representations would have started to run on 4 January 2017.

63. The covering letter of the bundle specified the timeframe for responding in this way (CAB 10):

> Any representations made in relation to the revocation of a mandatory cancellation decision must be made within the prescribed timeframe. The combined effect of s501CA(3)(b) and s501CA(4)(a) of the Act and Regulation 2.52 of the Regulations is that any representations MUST be made within 28 days after you are taken to have received this notice.

64. The following page elaborated (CAB 11): "As this notice was transmitted to you by email, you are taken to have received it at the end of the day it was transmitted".

65. The latter statement was wrong in two respects: the Decision Bundle was not transmitted to the respondent by email; and he was not "taken to have received it" at the end of the day on which it was transmitted by email (3 January 2017), but on the following day. There was no other reference point in the 86 pages of the Decision Bundle by which the respondent could identify when he was "taken to have received" the notice, or to otherwise ascertain the period in which he had to respond:

(a) The covering letter was dated 3 January 2017 (CAB 8).

(b) The only other reference in the Decision Bundle to the relevant timeframe, 84 pages later (CAB 93), stated simply: "If you wish to seek revocation it is very important you do so within the stated timeframe (28 days)".

(c) The statutory provisions quoted in the covering letter did not assist.

66. The ambiguity was not cured by a QCS officer purportedly telling the respondent that he "can request a revocation of the cancellation by writing to ABF within 28 days" (as set out in [7] above). Assuming that the case notes accurately transcribe what was said to the respondent, no start or end point for the 28-day period was identified (bearing in mind that the period is within 28 days *after* the notice is given), and the representations were required to be given by mail, email or fax to addresses specified in the covering letter (CAB 11), none of which involved "writing to ABF".

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[35] If necessary, that would be confirmed by reg 2.55(6).

67. The requirement for the former visa-holder to be invited to make representations within the period ascertained in accordance with the regulations is a mandatory component of the invitation described in s 501CA(3)(b); and compliance is a condition on the Minister's power to consider revocation in s 501CA(4). The fact that the period cannot be extended confirms the importance of describing it accurately and clearly, as does the significance of the opportunity that s 501CA provides the former visa-holder. Having regard to those circumstances, s 501CA(3) should not be construed as authorising an "invitation" that does not specify the required period.[36]

68. Justice Rares relied on this defect as an alternative basis on which the invitation was invalid (CAB 222 [185]). The respondent contends that his Honour's reasoning, to which Greenwood J adverted (albeit without expressing a concluded view (CAB 210 [140]-[141])), was correct and should be upheld.

PART VII. Time for oral argument

69. The respondent estimates one hour for oral argument.

Dated 18 September 2020

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[36] Cf *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ); *SAAP v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 294, 321-22 [77] (McHugh J), 345-46 [173] (Kirby J), 354-55 [208] (Hayne J).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B43 of 2020

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

and

EFX17
Respondent

ANNEXURE

LIST OF STATUTES AND STATUTORY INSTRUMENTS

1. *Acts Interpretation Act 1901* (Cth), ss 13, 15AA, 15AB (compilation number 36, as at the date of hearing).
2. *Migration Act 1958* (Cth), ss 4, 13, 14, 15, 57, 120, 133F, 359A, 360, 424A, 425, 430D, 473DE, 496, 497, 501, 501CA (compilation number 133, as at 4 January 3017).
3. *Migration Regulations 1994* (Cth), regs 2.52, 2.55 (compilation number 182, as at 3 January 2017).