HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 25 Jul 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M44/2024
File Title:	BIF23 v. Minister for Immigration, Citizenship and Multicultu
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	25 Jul 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BIF23
Appellant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

SUBMISSIONS OF THE RESPONDENT

I. CERTIFICATION

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

II. CONCISE STATEMENT OF THE ISSUES

2. The Respondent (**Minister**) accepts the issues are those set out in Appellant's submissions (**AS**) [2]. In summary, the Minister's argument is as follows.

3. **Ground 1**: The requirement "as soon as practicable" in s 501CA(3) of the *Migration Act 1958* (Cth) is concerned only with the feasibility of the Minister performing the physical act of giving notice and an invitation to the Appellant.

   3.1. The Appellant's argument is contrary to the ordinary meaning of "practicable", and cannot stand with the reasoning in *Minister for Immigration v **EFX17*** (2021) 271 CLR 112: if "give" and "invite" in s 501CA(3) connote only the performance of a physical act (not the consequences for the recipient), then it is not tenable to interpret "practicable" differently.

   3.2. Further, on ordinary principle, a lack of legal capacity could only affect the validity of representations made by the person whose visa is cancelled, not the prior issuing of the notice of visa cancellation by the Minister.

4. **Ground 2:** Notice of visa cancellation under s 501CA(3) can only be given once. The detailed timelines in the Act for making representations, and removing a person from Australia as soon as reasonably practicable, evince an intention to exclude the operation of s 33(1) of the *Acts Interpretation Act 1901* (Cth) (**AI Act**).

III. SECTION 78B NOTICES

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

IV. STATEMENT OF MATERIAL FACTS

6. The Minister accepts the facts set out in AS [6]-[17], but emphasises two matters.

7. ***Minister did not know of incapacity:*** First, the Minister did not know about the Appellant's psychiatric condition or his legal incapacity at the time notice was given.

8. At first instance, the Appellant contended that the Minister had "actual or constructive knowledge" of the Appellant's incapacity, such that it was unreasonable for the Minister to give the notice and invitation when it did (**PJ [90]**; CAB 35-6). The primary judge rejected that argument (**PJ [99]-[103]**; CAB 37-8). Before the Full Court, the Appellant contended that the information before the Minister should have put the Minister on inquiry as to the question of the Appellant's capacity (**J [122]**; CAB 78). The Full Court rejected that argument too, finding there "there was no information available to the Minister which pointed to the conclusion that the appellant was under an incapacity or which put the delegate on inquiry as to the appellant's capacity to make representations about revocation" (**J [132], CAB 81**). In this Court, the Appellant now accepts that the Minister did not know that the Appellant lacked capacity when notice and invitation was physically given to him on 1 December 2021 (AS [60]).

9. Thus, while it may be accepted that the Appellant was residing in the psychiatric unit of the Ravenhall Correction Centre at the time the s 501CA(3) duty was performed (AS [10]), that fact only emerged later. Similarly, the Minister did not know at the time that the Appellant lacked legal decision-making capacity at and around the time that the notice and invitation was issued (cf AS [10]). Forensicare applied for a guardianship order on 23 December 2021, after the notice was given (cf AS [11]).

10. ***Practical capacity to make representations is more nuanced:*** Second, while it may be accepted that the Appellant was under a legal incapacity at the time he was given notice and invitation by the Minister, the question of whether it was possible, as a matter of fact, for representations to be made on the Appellant's behalf is more nuanced than simply stating that he "lacked legal decision-making capacity at and

around [that] time" (cf AS [10]). The Appellant was able to consent on 1 December 2021 for Forensicare to contact Victoria Legal Aid (**VLA**), and VLA referred to the Appellant to Refugee Legal on 3 December 2021, well before the deadline expired.[1] That is not to doubt that the Appellant lacked formal legal capacity, but rather to indicate that in practice it might have been possible for representations to have been made on the Appellant's behalf: see further [24]-[25] below.

V. ARGUMENT

Ground 1: "Practicable" does <u>not</u> take account of recipient's capacity

11. Ground 1 contends that it was not "practicable" for the Minister to give the notice and invitation to the Appellant on 1 December 2021. That argument should be rejected.

12. ***Text of s 501CA(3)***: The starting point is the statutory text, while at the same time regard is had to context and purpose[2] (cf AS [23]). At the time, s 501CA(3) provided that, "[a]s soon as practicable after" after making a decision to cancel the person's visa under s 501(3A), the Minister must give a person, "in the way that the Minister considers appropriate in the circumstances"[3] (a) a written notice that sets out the cancellation decision and particulars of the relevant information; and (b) invite a person to make representations.

13. For the following reasons, the words "[a]s soon as practicable" require the Minister to give notice as soon as <u>feasible</u>,[4] assessed from the perspective of those administering the Act. That is not affected by whether the recipient has legal capacity.

14. <u>*Feasibility of "giving" notice (EFX17)*</u>: First, the question "feasibility of what?" (AS [33]) is answered by s 501CA(3) itself: it is the feasibility of giving notice. And *EFX17* holds that "give" and "invite" in s 501CA(3) connote only the performance

---

1 Affidavit Natalie Young 12 October 2022 [2]-[4]: Respondent's Book of Further Materials (**RBFM**) 23, 27-28.

2 See eg *SZTAL v Minister for Immigration* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 at [86] (Gordon, Edelman, Steward and Gleeson JJ).

3 These words have since been omitted, and the new s 501CA(3A) now provides that the s 501CA(3) notice "must be given in the prescribed way": *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth), Sch 1 items 29-30.

4 See eg ***M38/2002*** *v Minister for Immigration* (2003) 131 FCR 146 at [65] (the Court); ***Uebergang*** *v Australian Wheat Board* (1980) 145 CLR 266 at 305-6 (Stephen and Mason JJ).

of a physical act, not the consequences of that performance (such as the recipient's capacity to understand the notice).[5] It cannot be supposed that "practicable" takes account of a recipient's legal capacity when the words "give" and "invite" do not: the Appellant's argument impermissibly seeks to dissect s 501CA(3) into separate words and phrases that are amalgamated into some artificial composite meaning.[6]

15. *"Practicability" assessed from officer's viewpoint:* Further, on its ordinary meaning, what is "practicable" is assessed from the viewpoint of the persons administering the scheme (here, those giving notice):[7] (**J [50]-[51]**, CAB 60). Thus, to shift perspective to the capacity of the person receiving the notice (as the Appellant's argument seeks to do) is contrary to the ordinary meaning of s 501CA(3).

16. Here, "[a]s soon as practicable" accommodates the sorts of practical difficulties that the Minister might have in providing notice to a person who is not typically in the Minister's custody or control. Those practical considerations were evident in this case: despite the Minister providing the notice to Ravenhall Correctional Facility on 24 November 2021, notice was not provided to the Appellant until 1 December 2021.[8]

17. Nothing in *EFX17* suggests that the timing of the s 501CA(3) notice is informed by free-standing notions of reasonableness (cf AS [28]). The reference in *EFX17* to notice being given in a reasonable way[9] derives from the requirement in s 501CA(3)(a) at the time, now repealed, that the way (ie method) of giving notice is one that the Minister "considers appropriate".[10] That does not bear on what is "practicable".[11]

18. The Appellant's arguments do not provide any reason to reject this textual analysis.

---

5 *EFX17* (2021) 271 CLR 112 at [23].

6 *Westpac Securities Admin Ltd v ASIC* (2021) 270 CLR 118 at [54] (Gordon J).

7 *M38/2002* (2003) 131 FCR 146 at [65] (the Court); *Uebergang* (1980) 145 CLR 266 at 305-6 (Stephen and Mason JJ); *Stubbings v The King* [2023] NSWCCA 69 at [49], [51] (Gleeson JA, Davies and Wilson JJ agreeing).

8 See email exchange between the Department and the prison on 1 December 2021; RBFM 9-10, 17-19.

9 *EFX17* (2021) 271 CLR 112 at [29].

10 See *EFX17 v Minister for Immigration* (2019) 273 FCR 508 (***EFX17 (FFC)***) at [235]-[236] (Logan J, dissenting), approved in *EFX17* (2021) 271 CLR 112 at [21]. The phrase "in the manner the Minister considers appropriate" has since been deleted: see fn 3 above.

11 The query in ***BDS20*** *v Minister for Immigration* (2021) 285 FCR 43 at [118] whether it is "practicable" to give notice to a person who is incapable of receiving it in any meaningful way is obiter dicta, and extreme situations cannot control the meaning of s 501CA: **J [54]**; CAB 61.

19. ***Legal incapacity does not affect whether notification is practicable:*** The Appellant argues that notification is not "practicable" if the recipient lacks legal capacity, and argues there is a clear distinction between a person facing practical challenges (where notification is practicable) and legal incapacity (where it is not) (AS [35], [41]).

20. As a preliminary point, this argument sits very uneasily with the result in *EFX17*. That case establishes that a notice is "given" under s 501CA even if the person does not speak English and cannot understand the notice.[12] If "practicability" is concerned with affording a person with a meaningful opportunity to respond to the notice, as the Appellant contends, then no proper distinction can be drawn between a person who cannot as a practical matter respond to a s 501CA(3) notice within time because of a lack of language skills or literacy, and a person who cannot respond in time because of a mental illness. In each case, the person lacks the <u>practical</u> capacity to respond: (**J [47]**, CAB 59; cf AS [41]).

21. <u>*Lack of legal capacity does not attach to prior notification:*</u> Crucially, the Appellant's argument on this point misunderstands the effect of legal incapacity, which is to deprive legal effect to an act <u>of the person</u> under the incapacity.[13] Thus in ***Soondur*** *v Minister for Immigration*,[14] the fact that a person lacked legal capacity meant that a visa application had not been "made", in the context of a prohibition against making more than one visa application.[15]

22. Here, the application of this ordinary principle would mean that a person did not have capacity to make representations under s 501CA(4) unless and until a legal guardian was appointed: the person's legal incapacity would <u>not</u> attach to the prior notification. But that result does not favour the Appellant. It seems to be common ground that the Regulations prescribe by when submissions must be made (28 days after the person is given the notice and information),[16] and that this period cannot be extended to take

---

12 Indeed, the person in *EFX17* had a schizophrenic condition, albeit under reasonable control: *EFX17 (FFC)* (2019) 273 FCR 508 at [134] (Greenwood J).

13 See eg *Burnett v Browne (No 2)* [2021] FCA 373 at [3](b) (O'Callaghan J), quoting *Vishniakov v Lay* (2019) 58 VR 375 at [30] (Derham AsJ): The law requires that a person must have the necessary mental capacity if they are to do a legally effective act or make a legally effective decision for themselves.

14 (2002) 122 FCR 578.

15 *Soondur* (2002) 122 FCR 578 at [35], [38] (Gray J, Goldberg J agreeing), analysed in **J [57]-[61]**; CAB 62-64.

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

account of the fact that the recipient lacks legal capacity and a legal guardian must be appointed.

23. *Legal incapacity does not automatically render an act void:* In any event, the principle that a lack of legal capacity deprives an act of legal effect is not absolute. For one thing, there is no single standard of sanity, and legal capacity is assessed on an issue by issue basis.[17] Further, a lack of legal capacity in some contexts only prevents an act from being relied on against the person with the legal disability; it does not render the act a legal nullity for all purposes[18] (cf AS [43]).

24. More fundamentally, the application of this principle is subject to statutory context. For example, there are cases indicating that a minor child can bring legal proceedings to challenge a refusal, without the formal appointment of a litigation representative.[19] Taken together, these matters mean that it is not as simple as saying that a lack of legal capacity necessarily means that a person cannot validly make representations.

25. Here, the context indicates that the validity of representations does not depend on whether the person providing the representations had legal capacity. In the context of s 501CA, representations must be made within a specified period to enable a visa cancellation to be reconsidered (s 501CA(4)(a)). If representations had in fact been made by or on behalf of the Appellant within time,[20] there would be every reason to treat those representations as having been "made" (to allow reconsideration), despite any lack of legal capacity. The fact of the representations having been made within time would be a benefit which the Appellant is entitled to keep.

---

17 *Gibbons v Wright* (1954) 91 CLR 423 at 437 (Dixon CJ, Kitto and Taylor JJ); *Hanna v Raoul* [2018] NSWCA 201 at [47]-[51] (Beazley P, Macfarlan and White JJA agreeing).

18 For example, if litigation is commenced by a minor without a litigation guardian or equivalent and the proceedings terminate in the child's favour, the child may retain that benefit. But if the proceedings result in the rejection of some right, privilege or benefit claimed for the child, the child may not be held to that result (unless he or she does not seek to disturb that result as an adult): *SBAH of 2001 v Minister for Immigration* (2002) 126 FCR 552 at [1] (Madgwick J); see also *Fernando (by his litigation guardian) v Minister for Immigration (No 9)* [2009] FCA 833 at [16] (Siopis J) (judgment is voidable if no litigation guardian); *CDN16 v Minister for Immigration* [2021] FCA 699 at [178] (Kenny J).

19 See eg *SFTB v Minister for Immigration* (2003) 129 FCR 222 at [7], [10]-[11] (the Court), referring to *X v Minister for Immigration* (1999) 92 FCR 524 and *Odhiambo v Minister for Immigration* (2002) 122 FCR 29.

20 This is not a wholly theoretical possibility: see [10] above.

26. ***Context indicates certainty in application***: In addition, the legislative context supports a construction which promotes certainty in application and that does not depend upon the subjective capacity of a recipient to understand or respond to the notice (**J [55],** CAB 61-62). A person whose visa is cancelled must invoke the facility for revoking the cancellation within a certain period of time, in accordance with an invitation that must be given as soon as practicable after the cancellation decision. There is no discretion as to when an invitation may be given, or by when it may be responded to (**J [55](1),** CAB 61).[21] Further, the Minister is obliged under s 198(2B) of the Act to remove a person whose visa is cancelled under s 501(3A) and who does not make representations within the prescribed time period. The statutory scheme requires certainty in the giving of notices under s 501CA(3) (**J [55](2),** CAB 62).

27. *Notification postponed for uncertain period:* Two further matters suggests s 501CA(3) is concerned to promote certainty. The first is, as this Court recognised in *EFX17*, that the purpose of s 501CA(3) is to "ensure the government can move quickly to take action against noncitizens who pose a risk to the Australian community".[22] Even if the Minister knows that a person is under a legal incapacity, it may be a lengthy period before the incapacity is overcome (eg, by appointment of a guardian), a period over which the Minister has no control.[23] On the Appellant's argument, the Minister may be required to detain that person for an extended period, without giving that person notice of the fact of their visa cancellation or any opportunity to request revocation, until a guardian is appointed. That result is at odds with the need to act quickly.

28. *Regulations promote certainty of notification*: The second matter is that the regulations in force when s 501CA was enacted in 2014 provide a strong indication that the validity of a notice does not depend on the legal capacity of the recipient.[24] The Regulations contain a detailed prescriptive regime as to whom the Minister is

---

21 See *BDS20* (2021) 285 FCR 43 at [98] (Banks-Smith and Jackson JJ).

22 *EFX17* (2021) 271 CLR 112 at [28].

23 In this case, the period between cancellation and the guardianship order was about 6 weeks. But the guardianship order was prompted by the notice: ABFM 83. Without the notice, it is possible that the period would have been much longer (cf AS [54]).

24 The Appellant seems to accept that contemporaneous regulations can properly shed light on the statutory scheme: AS [19].

permitted to give documents relating to visa cancellation (under s 501(3A)) and revocation (under s 501CA).

28.1. Regulation 2.55(3) regulates the giving of documents to adults. It requires, if the Minister is to give documents by hand, that the document must be given "to the person personally" or to another person who is at the person's last residential or business address known to the Minister, who appears to live there, and who appears to be at least 16 years of age. (The Minister can elect not to give documents by hand, and provide documents by post or other prepaid means, or by transmitting the document by fax, email or other electronic means. These options will rarely be appropriate in the case of a recipient who is in criminal custody.) The Regulations do not permit the Minister to give documents to an adult's guardian.

28.2. Similarly, reg 2.55(3A) (which was added in 2008[25]) deals with minors. Again, the regulation requires, if the Minister is to give documents by hand, that the Minister must give the document by "handing it to the person personally" or by giving it to another person who is at the person's last residential or business address known to the Minister, who appears to live there, and who appears to be at least 16 years of age.

28.3. Regulation 2.55(4B) (also added in 2008[26]), read with reg 2.54, also provide for the Minister to give a document to a "carer of the minor", being an individual who is at 18 years of age, and who the Minister reasonably believes has day-to-day care and responsibility for the minor, or who works in or for an organisation that involves care and responsibility for the minor. However, the provision for giving a document to a minor's carer does not prevent the Minister giving the minor a copy of the document (reg 2.55(4C)).

29. By this scheme, the Regulations deal with the giving of documents to minors (a class of people without legal decision-making capacity). The Regulations provide a power

---

25 Regulation 2.55(3A) was inserted by the *Migration Amendment Regulations 2008 (No 8)* (Cth), Sch 3 item 5. The Explanatory Statement stated that new reg 2.55(3A) "will bring certainty as to who the Minister (or his or her delegate) must notify where the client is a minor". Regulation 2.55(3)-(3A) apply to documents other than "designated documents": a notice under s 501CA(3) is not a designated document: see definition in reg 2.54.

26 Regulation 2.55(4A) was added by the *Migration Amendment Regulations 2008 (No 8)* (Cth), Sch 3 item 8.

to the Minister to give a document to the "carer of the minor". And yet the Regulations nonetheless permit the giving of the document to that person and deem receipt of the notice when it is handed to the minor (reg 2.55(5)). Further, the Regulations do not provide any power for the Minister to give a document to an adult recipient's agent or guardian (unless that person is at the recipient's last residential address, etc).

30. Viewed in light of the Regulations in force when s 501CA was enacted, Parliament intended that the Minister could discharge his obligation to give a notice/invitation by giving it directly to a person who lacked legal capacity (cf AS [39]-[40]). Those Regulations demonstrate that the scheme of providing notice of visa cancellation does not incorporate common law principles of agency in any comprehensive way.

31. ***Perceived unfairness cannot overcome clear text***: A large part of the Appellant's argument is that the courts should avoid unfairness, and cannot permit an invitation under s 501CA(3) that would be "hollow" (AS [25], [59]). However, these matters cannot displace the statutory text and context, set out above. Considerations of fairness at the individual level are not of great assistance in construing a provision of general application, and the task of statutory construction is not mediated by broad evaluative judgments invoking justice and fairness[27] (**J [76]**, CAB 67; cf AS [25]). Certainly, an interpretation does not become "absurd" or "anomalous", so as to justify departure from the text, simply because that interpretation leads to what could be seen as harsh consequences in some situations.[28] Equally, while it is correct that the general purpose of s 501CA(3) is to give a person a real opportunity to make representations about revoking the cancellation of their visa, that general purpose cannot be substituted for an analysis of the text actually used[29] (**J [77]**, CAB 68).

32. The scheme created by Parliament is one where a non-citizen has a limited time period in which to seek revocation. Parliament has not conferred a discretion to extend that time period. In that context, the invocation of "fairness" dismisses the

---

27 See *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [28], [32] (French CJ, Crennan and Kiefel JJ), discussing the presumption against retrospectivity.

28 The courts should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament: see *ConnectEast v Federal Commissioner of Taxation* (2009) 175 FCR 110 at [41] (the Court); *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318 at [127] (Campbell JA, Beazley and Giles JJA agreeing); *Di Paolo v Salta Constructions Pty Ltd* [2015] VSCA 230 at [48] (Osborn and Kyrou JJA).

29 See eg *Walker v Members Equity Bank* (2022) 295 FCR 225 at [105] (Wigney J, with Lee and Abraham JJ agreeing).

importance Parliament has, by s 501CA(3)(b), attached to compliance with prescribed timeframes. One can readily imagine a circumstance in which a person falls into a coma immediately after being given a notice/invitation. That person may be effectively precluded from seeking revocation, a result which might be considered unfair. But that perceived unfairness simply reflects the legitimate policy choice of Parliament, having regard to competing considerations.

33. Further still, Parliament has conferred on the Minister powers by which harsh or unfair consequences may be ameliorated. For example, the Minister is empowered by s 195A of the Act to grant the person a visa while they are still in detention. The Appellant's appeal to notions of fairness pays insufficient regard to the scheme of interlocking provisions of which s 501CA forms but one part.

34. The wording of s 501CA(3) is intractable: the assessment of whether and when it is practicable to give written notice and particulars and invite representations focusses only upon when it is practicable or feasible for the Minister (the sender) to physically make the communication; it does not require the Minister (much less the Court) to assess whether the recipient understands the notice and invitation or is capable of responding to it. The Appellant's argument goes beyond attributing legal meaning to the statutory text, and would introduce administrative difficulties in tension with the goal of s 501CA.[30]

35. ***"Practicability" is not a jurisdictional fact***: Finally, the question of the practicability of giving the things specified in s 501CA(3)(a) and (b) is not an objective jurisdictional fact; rather, it is an evaluative judgment to be made on the material known to the Minister[31] (**J [62]**, CAB 64). The question of whether a requirement is a jurisdictional fact is a matter of statutory construction.[32] The following matters demonstrate that what is "practicable" is not a jurisdictional fact.

36. *Evaluative exercise:* First, what is "practicable" is an evaluative matter, which tends against it being a jurisdictional fact (**J [67]**, CAB 65).[33] That is especially so if (as the

---

30 See *EFX17* (2021) 271 CLR 112 at [28].

31 See *BDS20* (2021) 285 FCR 43 at [79] (Banks-Smith and Jackson JJ).

32 See eg *Plaintiff M70/2011 v Minister for Immigration* (2011) 244 CLR 144 at [58] (French CJ).

33 See eg, on evaluative matters less likely to be jurisdictional facts, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466 (Black CJ), dissenting but approved on appeal: (1997) 187 CLR 297 at 303-4.

Appellant contends) "practicability" takes account of the recipient's legal capacity: an individual's capacity will in many instances be a complex matter requiring expert opinion. Of course, a court can conduct this exercise when entrusted with that role, but its evaluative nature tends against it being a jurisdictional fact in s 501CA(3).

37. *Practicability assessed from Minister's viewpoint:* Second, what is "practicable" is assessed from the perspective of those administering the scheme (see [15] above), which again tends against it being something that a court would determine for itself (**J [68]**, CAB 65).

38. There is no analogy with *Commonwealth v* ***AJL20***[34] and other cases concerning whether removal from Australia is "reasonably practicable" under s 198 of the Act (cf AS [66]).

38.1. There is a vital difference between "practicable" and "reasonably practicable", because reasonableness directs attention to a range of factors (including factors affecting the person being removed). For that reason, reasonableness and practicability sometimes operate in opposing senses.[35] So the position under s 198 is of little relevance to s 501CA(3).

38.2. In any event, it is doubtful whether the requirement in s 198 to remove as soon as reasonably practicable is a jurisdictional fact.[36] *AJL20* held only that there must be "objectively determinable criteria for detention", which means that the duration of detention cannot depend on "the unconstrained, and unascertainable, opinion of the Executive".[37] That is, *AJL20* only requires that the Minister have a rational basis for determining what is practicable, not that the Court decide the issue for itself (**J [75]**, CAB 67).[38]

---

34 (2021) 273 CLR 43.

35 *M38/2002* (2003) 131 FCR 146 at [66] (the Court).

36 See ***Beyazkilinc*** *v Manager, Baxter Immigration Reception and Processing Centre* (2006) 155 FCR 465 at [41]-[47] (Besanko J). Nothing in *AJL20* or ***NZYQ*** *v Minister for Immigration* (2023) 97 ALJR 1005 disturbs this reasoning in *Beyazkilinc*: *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [91]-[94] (Kennett J); see also *HBMH v Commonwealth (No 2)* [2024] FCA 8 at [73]-[76] (Feutrill J) (good reason to consider that *Beyazkilinc* is still correct); *AHF18 v Minister for Immigration (No 2)* [2024] FCA 660 at [8], [9](g) (Bromwich J) (*Beyazkilinc* correctly decided).

37 (2021) 273 CLR 43 at [30] (Kiefel CJ, Gageler, Keane and Steward JJ).

38 Similarly, in relation to s 198, see *Beyazkilinic* (2006) 155 FCR 465 at [44] (Besanko J).

38.3. Cases such as *NZYQ v Minister for Immigration*[39] and *ASF17 v The Commonwealth*[40] are not relevant here either. The question in those cases was whether there was a real prospect of removal becoming practicable in the reasonably foreseeable future, which is a constitutional fact[41] informing whether the continued detention of a person under the Act is valid under Ch III of the Constitution. By contrast, the term "practicable" in s 501CA(3) does not have any constitutional significance, and therefore *NZYQ* and *ASF17* do not inform the interpretation of s 501CA(3).

39. *Jurisdictional fact would cause inconvenience:* Third, to construe what is "practicable" as a jurisdictional fact would lead to considerable inconvenience and delay. On the Appellant's approach, a Minister may receive representations from a person within the prescribed time, go on to make a decision under s 501CA, and then that decision could be set aside if the person was later found by a court to lack the capacity to make the representations. There would be uncertainty as to whether a notification was effective until the court had undertaken a de novo review.[42]

40. The fact that the non-citizen will, in most cases, be in State criminal custody at the time of notification does not suggest that practicability is an objective jurisdictional fact. Indeed, the fact that the Minister will not have direct access to information about the recipient's mental health is not a reason for interpreting this requirement as a jurisdictional fact (cf AS [64]), but rather is reason for interpreting "practicable" as not involving any consideration of the recipient's legal capacity at all.

41. Finally, it is true that s 501CA(3) is not expressly conditioned to operate on the Minister's assessment of what is practicable (cf AS [68]). But that factor does not overcome the contrary indications set out above, especially when it is inherent in the term "practicable" that it is assessed from the perspective of the person on whom the duty is imposed: see [15] above.

42. *Ground 1 must fail if jurisdictional fact argument rejected:* The jurisdictional fact point seems to be essential to the Appellant's argument under ground 1 – even if

---

39 (2023) 97 ALJR 1005.

40 (2024) 98 ALJR 782.

41 See *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ).

42 See *Chattaway v Minister for Health* (2020) 136 SASR 347 at [34] (Stanley J, for the Full Court).

"practicability" took account of the recipient's legal capacity (but was not a jurisdictional fact), the Appellant no longer challenges the reasonableness of the Minister's decision to notify the Appellant.

Ground 2: There can be only one notification under s 501CA(3)

43. Ground 2 contends that there can be more than one notification under s 501CA(3). For the following reasons, the Court below was correct to conclude that the scheme of the Act precludes the possibility of the Minister issuing more than one notification.

44. ***AI Act s 33(1):*** Section 33(1) of the AI Act provides that a duty "must be performed from time to time as occasion requires"; however, this is subject to a contrary intention (s 2(2) of that Act). A contrary intention may appear not only in the provision creating the power but in the scheme of the Act as a whole.[43]

45. ***Scheme of Act requires a single notification****:* The text, context and purpose of the Act establishes that the obligation to give the invitation "arises at a single time, that is as soon as practicable after making the original cancellation decision" (**J [105]**).

46. The Act confers a limited opportunity to seek revocation of the mandatory cancellation of a person's visa under s 501(3A), which must be invoked within a prescribed period of time. Further, the consequence of cancellation is that the person would be liable to immigration detention, and that s 198(2B) makes specific provision for removing the person as soon as reasonably practicable if a person does not make representations under s 501CA(3) (**J [108]-[109]**).

47. Even apart from the ordinary meaning of "as soon as practicable", the legislative scheme strongly indicates that s 501CA(3) provides for a single notification, tethered to the single event of cancellation. Section 501CA(4) then provides that the Minister may revoke the original decision only if "the person makes representations in accordance with the invitation" (ie singular).[44] The Appellant's construction would extend the period of immigration detention to an uncertain extent and run counter to the goal of s 501CA, identified in *EFX17*, of moving quickly to take action against non-citizens who pose a risk to the Australian community (**J [113]**, CAB 76).[45]

---

43 *Pfeiffer v Stevens* (2001) 209 CLR 57 at [20] (Gleeson CJ and Hayne J), [56] (McHugh J).

44 *BDS20* (2021) 285 FCR 43 at [83] (Banks-Smith and Jackson JJ).

45 *EFX17 (HC)* (2021) 271 CLR 112 at [28].

48. These features of the Act evince a contrary intention for the purposes of s 33(1) of the *Acts Interpretation Act 1901* (Cth). The Full Court correctly held that this construction of s 501CA(3) was also consistent with cases considering notification requirements in the Act, which have held that the prescriptive timing regime in the Act displays a contrary intention, to displace s 33(1) (**J [114]-[117]**, CAB 77).[46]

49. ***Appellant's construction unworkable***: Section 33(1) of the AI Act does not alter the incidents of the power set out in the provision conferring power.[47] The incidents of power here impose a duty on the Minister to give notice and invitation "[a]s soon as practicable" after making the original decision. If that power were exercisable more than once, the Minister's duty would then be capable of crystallising at any point in time, and in perpetuity.[48] This runs counter to Parliament's manifest intention that an invitation be issued, and a representation received, with a finite period of time prescribed by the Regulations.

50. Further, there is no reason to consider that the (re-)exercise of the duty in s 501CA(3) would be limited only to circumstances where the notice could not have been acted on or the foundation for the exercise of power no longer exists (cf AS [78]). The notice invites the recipient to make representations "about revocation": s 501CA(3)(b). Those representations might range over topics including a person's risk of reoffending, the best interests of minor children, the person's ties to the community, and the extent of impediments upon removal. The timing of the notice might mean that a person is precluded from making representations (eg, about changed circumstances, such as the birth of a child in Australia or evolving country conditions in their home country). If the Minister were required to re-issue notice at any point where a different decision under s 501CA(4) might have been reached (so as to avoid injustice), the Minister must effectively entertain a series of never-ending appeals of its own decision.

51. ***Potential injustice cannot control the meaning of s 501CA(3)***: The rejection of the Appellant's ground 1 did not substantially weaken or undermine the conclusion of the majority in *BDS20*: (**J [118]**, CAB 77-8; cf AS [34]). Even if the outcome in a

---

46 See *Minister for Immigration v Manaf* (2009) 111 ALD 437 at [48] (Sundberg J).

47 *Minister for Immigration v* ***Makasa*** (2021) 270 CLR 430 at [45].

48 Cf *Kabourakis v Medical Practitioners Board of Victoria* (2006) 25 VAR 449 at [64]-[65] (Nettle JA, Warren CJ and Chernov JA agreeing), on why matters cannot be re-opened endlessly.

particular case might be "regrettable" (**J [118]**, CAB 77-8), the principled reason for requiring strict compliance with statutory timeframes is clear; a construction that would permit an application to be commenced in any event effectively renders such a timeframe otiose.[49] And, where harsh consequences may result in an individual case, Parliament has conferred upon the Minister powers by which those consequences may be ameliorated (such as s 195A of the Act).[50] To the extent that potential injustice is relevant to construction, it is not correct to say that the Appellant's arguments are the "only way" to avoid injustice (cf AS [80]). The dispensing provision in s 195A tends against there being any need to give "practicable" a non-textual meaning that would undermine the scheme of the Act.

VI. ESTIMATE OF ORAL ARGUMENT

52. The Minister estimates that 2 hours will be required for presentation of his oral argument.

Dated: 25 July 2024

GRAEME HILL
Owen Dixon Chambers West
T: 03 9225 6701
E: graeme.hill@vicbar.com.au

JONATHAN BARRINGTON
Owen Dixon Chambers West
T: 03 9225 7438
E: j.barrington@vicbar.com.au

.....

Katherine Whittemore
T: 03 9291 2384
E: katherine.whittemore@sparke.com.au

[49] Cf *Rail Corporation New South Wales v Brown* (2012) 82 NSWLR 318 at [42] (Bathurst CJ).

[50] *BDS20* (2021) 285 FCR 43 at [117] (Banks-Smith and Jackson JJ).

Annexure A

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Minister sets out below a list of the particular statutes referred to in the submissions.

No.	Statute	Version	Provision(s)
1.	*Migration Act 1958* (Cth)	As at 1 December 2021 (Compilation No. 152)	ss 195A, 198, 501(3A), 501CA
2.	*Acts Interpretation Act 1901* (Cth)	Current	ss 2, 33(1)
3.	*Migration Regulations 1994* (Cth)	As at 1 December 2021 (Compilation No. 225)	reg 2.55
4.	*Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth)	As enacted (23 June 2023)	Sch 1, Items 29-30
5.	*Migration Amendment Regulations 2008 (No. 8)* (Cth)	As enacted (28 November 2008)	Sch 3, Items 5 and 8