HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No S126 of 2023**

BETWEEN: **KATHERINE ANNE VICTORIA PEARSON**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

and

MINISTER FOR HOME AFFAIRS
Second Defendant

and

ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEAL

2. This appeal raises the following issues:

   (a) whether the *Migration Amendment (Aggregate Sentences) Act 2023* (**Aggregate Sentences Act**) applies to validate the decision of the Administrative Appeals **Tribunal** affirming a decision of the second defendant not to revoke the cancellation of the Plaintiff's TY Special Category (Temporary) visa under s 501(3A) of the ***Migration Act*** *1958* (Cth); and

   (b) whether items 4(3), 4(4) and 4(5)(b)(i) of Part 2 to Schedule 1 of the Aggregate Sentences Act are invalid in their application to the plaintiff because they usurp or interfere with the judicial power of the Commonwealth by having the effect of reversing or dissolving orders made by a Ch III court.

PART III NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

3. The plaintiff filed a notice under s 78B of the *Judiciary Act 1903* (Cth) on 8 December 2023 (**SCB 39**).

PART IV FACTS

4. On 25 June 2012, the plaintiff first arrived in Australia and was granted a Class TY Subclass 444 Special Category (Temporary) visa (**SCB 56 [6]**).

5. On 28 February 2019, the plaintiff was convicted of eight counts of supplying a prohibited drug, one charge of knowingly dealing with the proceeds of crime, and one charge of knowingly participating in a criminal group. She was sentenced for those offences to an aggregate sentence of imprisonment of 4 years and 3 months with a non-parole period of 2 years, pursuant to s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**SCB 57 [7]**).

6. The facts set out in **AS [6]-[7]** are not found in the special case. The first and second defendants (**the defendants**) otherwise agree with the procedural history set out at **AS [9]-[23]**, save that the date on which the plaintiff lodged the application for revocation under s 501CA is agreed in the special case as 22 August 2019 (**SCB 57 [9]**), not 19 August 2019 (**AS [10]**), and her date of detention following the

passage of the Aggregate Sentences Act is agreed in the special case as 6 September 2023 (**SCB 59 [23]**) rather than 11 September 2023 (**AS [22]**).

PART V ARGUMENT

7. The plaintiff argues that the Aggregate Sentences Act does not apply to her for two reasons, one relating to the construction of the Act (which concerns only the Tribunal's decision), and one relating to validity (which concerns the cancellation decision, the non-revocation decision and the Tribunal's decision).

8. For the following reasons those arguments should be rejected.

Construction of the Aggregate Sentences Act

9. The plaintiff contends that the Aggregate Sentences Act does not validate the Tribunal's decision because, she says, the Tribunal exercised a power under the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), rather than the Migration Act, citing *Brian Lawlor Automotive*,[1] *Madafferi*[2] and *Powell*.[3] Item 4 only validates "things done" "under" the Migration Act (**PS [25]**).

10. The argument pressed by the plaintiff is precisely the argument recently rejected by the Full Court in ***JZQQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 370.

11. The plaintiff's argument misfires because it focuses narrowly on the source of the Tribunal's power, as understood in *Madafferi* and *Powell*, rather than the actual words used in the validating provisions of the Aggregate Sentences Act. Item 4 of the Aggregate Sentences Act validates "a thing done, or purportedly done … under a law, or provision of a law", including the Migration Act. Item 2 defines "do a thing" to include:[4]

    (a) make a decision (however described); and

    (b) exercise a power, perform a function, comply with an obligation or discharge a duty; and

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1 *Brian Lawlor Automotive Pty Ltd v Collector of Customs* (1979) 24 ALR 307.

2 ***Madafferi*** *v Minister for Immigration & Multicultural Affairs* (2002) 118 FCR 326 at [68] (French, O'Loughlin and Whitlam JJ).

3 ***Powell*** *v Administrative Appeals Tribunal* (1998) 89 FCR 1 at 12 (French J).

4 "Purport to do a thing" is defined in Item 2 to have a corresponding meaning.

(c) do anything else.

12. The question is whether there is a sufficient connection between something done by the Tribunal (falling within a term non-exhaustively defined in Item 2) and the Migration Act, such that the thing can be described as being done "under" the Migration Act. That essentially turns upon whether the relevant thing was required or authorised under that enactment.[5] Thus, it is necessary to identify the particular "thing done" by the Tribunal and the relevant legislation that authorised or required that "thing".

13. The relevant "thing done" by the Tribunal was the affirming of the non-revocation decision on 15 September 2020: **SCB 57-58 [13] and 183**. In the non-exhaustive language of item 2 that is aptly characterised as the "perform[ance]" of the Tribunal's review "function". In more granular terms, it might also be said to involve the making of a "decision", the "exercise" of "power[s]" and the doing of other things ("anything else") in the performance of that function. Either way, that analysis points to the fact that particular attention is required to the provisions which gave the Tribunal jurisdiction to conduct that review (as opposed to the provisions which conferred power on the Tribunal to make the particular orders it did).

14. Pursuant to s 25(1)(a) of the AAT Act, an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. Section 25(4) provides that the Tribunal has power to review any decision in respect of which application is made to it under any enactment. But those provisions alone are insufficient to confer jurisdiction on the Tribunal: there must also be a relevant enactment that permits applications to be made to the Tribunal. In this case, that was s 500(1)(ba) of the Migration Act, which provided that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under s 501CA(4) not to revoke a decision to cancel a visa.

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[5] See, by way of analogy, *Griffith University v Tang* (2005) 221 CLR 99 at [78], [89] (Gummow, Callinan and Heydon JJ). The further requirement or criterion in *Tang* (ie that the "decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense…must derive from the enactment") was discerned by reference to the words "of an administrative character" and the particular context of a statute conferring a right of judicial review: see at [79], [80], [90]. Those considerations are not applicable here.

15. The Full Court in *JZQQ* correctly held that s 500(1)(ba) of the Migration Act confers jurisdiction on the Tribunal,[6] and that s 43(1) of the AAT Act then prescribes the type of review required by providing: "*For the purposes of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision*". Section 43(1) goes on to specify that the Tribunal shall make a decision in writing affirming, varying or setting aside the decision. In other words, section 43 describes the powers that the Tribunal may exercise and the decisions it may make, but it is s 500(1)(ba) that gives the Tribunal the authority to determine the application for review.

16. As the Full Court also noted,[7] amendments to s 500 of the Migration Act since *Powell*, which impose requirements on the Tribunal in relation to the conduct of the review (including being subject to the requirements and directions provided for in s 500(6D)(a), (6F)(d), (6FA), (6G), (6H), (6J), (6K) and (6L), direct – in very significant respects – how the review function performed by the Tribunal is exercised. In that sense the Migration Act governs and controls the exercise of the Tribunal's review function. The Tribunal is also, in the conduct of the review, subject to Ministerial directions made under s 499 of the Act.[8]

17. Those features of the statutory architecture indicate that the review function performed by the Tribunal, and/or the decision made by the Tribunal in performing that review function, are sufficiently connected to the Migration Act so as to be performed or made "under" that enactment. The deeming provision in item 4(3) thus operates on those things.

18. The Full Court in *JZQQ* (correctly) recognised that those propositions cohere with the authorities in this Court that establish that "it is the *original decision* to which one must look to understand the jurisdictional foundation" of the AAT's decision (at [91], emphasis in original). In *Frugtniet*, this Court observed that that the Tribunal, in exercising powers of review under the AAT Act, "*exercises the same power or powers*

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6 *JZQQ* (2023) 300 FCR 370 at [94] (Katzmann, SC Derrington and Kennett JJ). See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [388] (Crennan J). Alternatively, it is sufficient that the the AAT Act and the Migration Act operate in tandem to confer jurisdiction on the Tribunal: see para [24] below.

7 *JZQQ* (2023) 300 FCR 370 at [93]-[94] (Katzmann, SC Derrington and Kennett JJ).

8 ***Williams*** *v Minister for Immigration and Border Protection* (2014) 226 FCR 112 at [72]; ***Uelese*** *v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [19] (French CJ, Kiefel, Bell and Keane JJ).

as the primary decision-maker, subject to the same constraints" and that the "*primary decision, and the statutory question it answers, marks the boundaries of the AAT's review*".[9] *Frugtniet* is consistent with Kiefel J's observations in *Shi v Migration Agents Registration Authority,*[10] that "*the Tribunal should consider itself as though it were performing the function of that administrator in accordance with the law as it applied to that person*".

19. Once it is accepted that the Tribunal was exercising jurisdiction conferred and shaped by the Migration Act, it becomes apparent that one of the "things done" by the Tribunal was the performance of a function, namely the exercise of that jurisdiction. That exercise of jurisdiction is, by force of item 4, taken to be valid for all purposes. The Full Court's reasoning in *JZQQ* is consistent in this respect with *Williams*.[11] There, the question was whether a direction made pursuant to s 499 of the Migration Act – which empowered the Minister to issue directions to persons or bodies having "functions or powers under [the Migration Act]" – applied to the Tribunal when reviewing a decision to cancel a visa under s 501(2) of the Migration Act. Mortimer J, while accepting that the source of the Tribunal's power is "at least in part" s 43 of the AAT Act, observed that the Tribunal's jurisdiction "arises from s 25(4) which in terms relevantly depends on s 500 and the function there conferred". Her Honour held that, by reason of the operation of s 500, the Tribunal, in the exercise of its review function, is "*performing a function*" under the Migration Act within the meaning of s 499, rejecting an analogy with *Madafferi* and *Powell*. Consistently with her Honour's reasoning, the Tribunal here was "*exercising a function*" under the Migration Act, and the Aggregate Sentences Act validates its decision.

20. The plaintiff submits that item 4 of the Aggregate Sentence is "very different" to s 499, because "orthodoxy dictates" a strict approach should be taken to the construction of validating statutes (**AS [32]**). However, the plaintiff has not identified any textual basis on which she could resist the conclusion that the Tribunal is performing a function or doing something else under the Migration Act when it is undertaking its review function conferred by s 500(1)(ba) of the Migration Act.

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9 ***Frugtniet*** *v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [14]-[15] (Kiefel CJ, Keane and Nettle JJ), [51] (Bell, Gageler, Gordon and Edelman JJ).

10 (2008) 235 CLR 286.

11 *Williams* (2014) 226 FCR 112 at [72] (Mortimer J).

21. Moreover, as the Full Court noted, even if the decision-making power of the Tribunal is found only in s 43 of the AAT Act, that does not exempt the Tribunal's decision from the validation provisions, because, at the very least, the Tribunal "*did something else*" under the Migration Act within the meaning of item 2(c) of Sch 1 in undertaking a review of a decision of a delegate of the Minister pursuant to an application made to the Tribunal under s 500(1).[12] Another way of expressing the Full Court's point in this regard is that the very broad wording of "doing anything else" in item 4 confirms that the validation provision is not intended to hinge upon fine distinctions based on the technical source of power to make particular consequential orders. Rather, where, as here, the substance of "anything" done can be described as "under the Migration Act", item 4 operates to validate it.

22. The plaintiff's reliance on *Madafferi*, which applied the decision of French J in *Powell*, does not alter the above analysis. As the Full Court in *JZQQ* noted at [92], this point was not dealt with in *Madafferi*. There the Court was concerned with a different issue (the scope of the Minister's power under then s 501A of the Migration Act to set aside a Tribunal decision), which in turn depended on whether the Tribunal had made a decision of a certain kind. The Court observed at [67]-[68] that the Tribunal's powers on review of a decision made under s 501 of the Migration Act were derived from s 43 of the AAT Act (citing *Powell*) and that the Tribunal "*does not exercise afresh the power conferred by the enactment under which the decision was made*". The Full Court in *JZQQ* accepted that it was "unarguable" that the power to affirm is sourced in the AAT Act (at [92]), but nonetheless held that it is the Migration Act which confers jurisdiction (at [94]). The Court in *Madafferi* had no cause to consider the question of jurisdiction as opposed to power.

23. *Powell* concerned legislation in different terms. It concerned the application of (then) s 475(1)(c) of the Migration Act, which referred to "decisions made under this Act", and not to "functions" or other "things done". Again, the basis of French J's conclusion was that the Tribunal's "power" was conferred by s 43(1) of the AAT Act, but his Honour did not consider the source of the Tribunal's jurisdiction. In any event, as Hayne and Heydon JJ observed in this very context in *Shi v Migration Agents Registration Authority*,[13] reference to decided cases "*must not be permitted to distract*

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12 *JZQQ* (2023) 300 FCR 370 at [95] (Katzmann, SC Derrington and Kennett JJ).

13 (2008) 235 CLR 286 at [92].

attention from the language of the applicable statute or statutes", notably here item 4 of the Aggregate Sentences Act, as amplified by the definition in item 2.

24. Moreover, and in any event, the plaintiff's argument sets up a false dichotomy between a decision "under" the AAT Act, and the Tribunal making a decision, or performing a function, "under" the Migration Act. Even if one takes the view that s 500(1)(ba) of the Migration Act is not the critical provision which confers jurisdiction on the Tribunal, it certainly does so in tandem with the AAT Act. As French CJ, Kiefel, Bell and Keane JJ observed in *Uelese*:[14]

> Section 500(1)(b) of the Act and s 25(4) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") together provide that applications may be made to the Tribunal for review of a decision of a delegate of the Minister to cancel a visa under s 501 of the Act. The appellant made an application to the Tribunal for review of the delegate's decision.

25. It cannot be disputed that s 500 of the Migration Act is an integral part of the statutory scheme by which that Act, together with the AAT Act, operate to confer jurisdiction on the Tribunal. Once that is recognised, it is plain that the Tribunal, in performing the function conferred (at least in part) by the Migration Act, was "doing a thing" under that Act, within the extended definition of that term in item 2.

26. If the plaintiff's construction argument is correct, the necessary consequence would be that the cancellation decision and non-revocation decision are validated (as they are undoubtedly decisions made "under" the Migration Act), but the Tribunal's decision is not (**AS [24]**). It would follow that the Tribunal's task of review would remain unperformed and the plaintiff, and many others, would have a right to a fresh hearing in the Tribunal. However, when the Tribunal came to undertake that review, it would be compelled to apply the new s 5AB of the Migration Act (which prospectively changes the law such that an aggregate sentence is a "term of imprisonment" within s 501(7) of the Migration Act). Thus, the effect of the plaintiff's construction is that the Tribunal would be compelled to conduct a fresh review which would be an exercise in futility, as the Tribunal would be required by s 5AB to reach the same conclusion as to the character test as it had previously reached.

27. Of course, the legislature did not intend that absurd result. It cast the net in extremely wide terms, to include "performing a function" and "doing anything else" under the

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[14] (2015) 256 CLR 203 at [87] (French CJ, Kiefel, Bell and Keane JJ), see also Nettle J at [87].

Migration Act. It is no stretch of language to conclude that the Tribunal is performing a function when discharging its jurisdiction conferred by s 500(1)(ba) of the Migration Act, or that, at least, in so doing it is "doing anything else" under that Act.

28. If there remained any doubt about the matter, the Explanatory Memorandum to the Bill that became the Aggregate Sentences Act expressly states that item 4 is intended to apply to things done including a Tribunal's decision on a s 500 review.[15] That being so, this Court should avoid concluding that the "*legislature has plainly missed fire*".[16]

29. It follows that the decision of the Tribunal is a "thing done" under the Migration Act and it is validated by item 4 of the Aggregate Sentences Act.

Validity of the Aggregate Sentences Act

30. As to the second ground, the plaintiff relies on the submissions advanced by the appellant in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (P10/2024).

31. The defendants likewise adopt the respondent's submissions filed in that matter at paragraphs 7 to 38.

PART VI RELIEF

32. If the plaintiff succeeds on Ground 1, but not Ground 2, she is not entitled to be released (cf **AS [39], [40]**). There is no dispute that, as a matter of construction, the Aggregate Sentences Act applies to the cancellation decision and the non-revocation decision (**AS [24]**). Therefore, the only consequence of upholding Ground 1 is that the Tribunal's review function would remain, in law, unperformed. It would still be open to an officer to reasonably suspect that the plaintiff is an unlawful non-citizen under ss 189(1) and 196(1) of the Migration Act, on the basis that the Aggregate Sentences Act validates the cancellation decision and the non-revocation decision.

33. If the plaintiff is entirely successful on Ground 2, the defendants accept that, as the Aggregate Sentences Act would be invalid in its application to the cancellation

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15 Parliament of the Commonwealth of Australia, Senate, Explanatory Memorandum to the Migration Amendment (Aggregate Sentences) Bill 2023 at [24].

16 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 (McHugh JA), quoted with approval in *Commissioner of Taxation v Douglas* (2020) 282 FCR 204 at [91] (the Court).

decision, the non-revocation decision and the Tribunal decision, then she is entitled to be released (**AS [37]-[39]**).

PART VII ESTIMATE

34. The defendants estimate that they will require 4 hours to present oral argument if the matter is heard concurrently with *Tapiki* and *JZQQ*.

Dated 22 May 2024

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SYDNEY REGISTRY **No S126 of 2023**

BETWEEN: **KATHERINE ANNE VICTORIA PEARSON**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

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MINISTER FOR HOME AFFAIRS
Second Defendant

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ADMINISTRATIVE APPEALS TRIBUNAL
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ANNEXURE TO THE SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS

Pursuant to Practice Direction No. 1 of 2019, the First and Second Defendants set out below a list of constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1	*Commonwealth Constitution*	Current (Compilation 6, 29 July 1977 – present)	Ch III
Commonwealth statutory provisions			
2	*Acts Interpretation Act 1901* (Cth)	Current (Compilation 37, 12 August 2023 – present)	s 23
3	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation 46 (11 May 2018 to 31 December 2020)	ss 25, 43

4	*Migration Amendment (Aggregate Sentences) Act 2023* (Cth)	As enacted	Whole Act
5	*Migration Act 1958* (Cth)	Compilation 144 (17 April 2019 to 29 August 2019)	ss 189, 196, 499, 500, 501
	Migration Act 1958 (Cth)	Compilation 147 (5 December 2019 to 10 August 2020)	s 501CA
6	*Migration Act 1958* (Cth)	Current (Compilation 160, 29 March 2024 – present)	s 5AB
State and Territory statutory provisions			
7	*Crimes (Sentencing Procedure) Act 1999* (NSW)	As at 28 February 2019	s 53A