HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 26 Apr 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:	S126/2023
File Title:	Pearson v. Commonwealth of Australia & Ors
Registry:	Sydney
Document filed:	Form 27A - Plaintiff's submissions
Filing party:	Plaintiff
Date filed:	26 Apr 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

SYDNEY REGISTRY

BETWEEN:

KATHERINE ANNE VICTORIA PEARSON
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

PLAINTIFF'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues in these proceedings are as follows:

   (a) whether the Aggregate Sentences Act applies to validate the decision of the Administrative Appeals Tribunal (the **Tribunal**) under s 43 of the *Administrative Appeals Tribunal Act* (Cth) (the **Tribunal Act**) by 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* (Cth) (**Migration Act**); and

   (b) whether items 4(3), 4(4) and 4(5)(b)(i) of Part 2 to Schedule 1 of the *Migration Amendment (Aggregate Sentences) Act 2023 (Cth)* (**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.

3. The second of those issues may, but not necessarily, require this Court to consider whether to re-open the decision in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***).

Part III: Notice of constitutional matter

4. The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Reports of the judgments below

5. These proceedings are in the original jurisdiction of the Court.

Part V: Facts

Background

6. The Plaintiff, a 43-year-old New Zealand national, has lived in Australia since she was 23. The Plaintiff has developed significant ties to the Australian community since her arrival on 20 September 2003. The Plaintiff's criminal history spans from 2016 to 2019, with almost all her offending being related to possession or supply of drugs.

7. The Plaintiff has described herself as a high functioning drug user, having a history of drug use from the age of 18, and is tertiary educated and experienced as a graphic designer.
8. On 28 February 2019, the Plaintiff was sentenced to an aggregate term of imprisonment of four years and three months upon her conviction of 8 counts of supplying a prohibited drug, 1 count of knowingly dealing with proceeds of crime, and 1 count of knowingly participating in a criminal group (SCB 57 [7]).

Visa Cancellation and the Administrative Continuum

9. On 17 July 2019, the Plaintiff's visa was purportedly cancelled by a delegate of the Second Defendant under s 501(3A) of the Migration Act (the **cancellation decision**). The delegate was not satisfied that the Plaintiff passed the character test because her aggregate sentence was "a term of imprisonment of 12 months or more": s 501(7)(c) of the Migration Act.
10. On 19 August 2019, the Plaintiff made an application for revocation of the cancellation decision. On 23 June 2020, another delegate of the Second Defendant was not satisfied that there was "another reason" to revoke the cancellation decision under s 501CA(4)(b)(ii) of the Migration Act (the **non-revocation decision**). The non-revocation decision was also purportedly made on the basis that the Plaintiff's aggregate sentence meant that she failed the "character test" in s 501(7).
11. On 2 July 2020, the Plaintiff applied to the Third Defendant (the **Tribunal**) for merits review of the non-revocation. On 15 September 2020, the Tribunal purported to affirm the non-revocation decision, again on the basis that the Plaintiff failed the "character test" because of her aggregate sentence.

Judicial Review Proceedings

12. On 22 July 2021, the Federal Court of Australia (Markovic J) dismissed the Plaintiff's application for judicial review of the Tribunal's decision.[1]
13. On 1 March 2022, the Full Court of the Federal Court (Perry, Downes and McElwaine JJ) dismissed the Plaintiff's appeal.[2]

[1] *Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 825.
[2] *Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 22.

14. On 10 October 2022, following the Plaintiff being served with a notice of intended removal from Australia five days earlier, the Plaintiff made a second application for judicial review in the Federal Court.[3]

15. Adopting the argument advanced in ***Tapiki*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 605 and then reserved before the Full Court, the Plaintiff challenged the Tribunal decision on the basis that an aggregate sentence was not "a term of imprisonment of 12 months or more".

16. On that premise, consistently with *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[4] the Tribunal lacked jurisdiction to affirm the non-revocation decision.

17. On 22 December 2022, the Full Court (constituted by Allsop CJ, Rangiah and SC Derrington JJ) published its reasons for allowing the Plaintiff's application on the aggregate sentence ground (***Pearson***).[5]

18. The Plaintiff was released from immigration detention on 22 December 2022. On 24 January 2023, the Full Court made orders extending time, granting leave to amend the originating application, as to costs, and centrally to this proceeding:[6]

> 3. Th[at] writs of certiorari be issued directed to:
>
> (a) the [Minister] quashing the decision of a delegate of the [Minister] dated 17 July 2019 under s 501(3A) to cancel the Applicant's Class TY Subclass 444 Special Category (Temporary) visa (the [c]ancellation decision); and
>
> (b) the Third Respondent quashing the Tribunal Decision.
>
> 4. Declare that the Cancellation Decision, the Non-Revocation Decision and the Tribunal Decision are affected by jurisdictional error and invalid by reason of the fact that the relevant decision-makers erred in being satisfied that the Applicant's aggregate sentence of imprisonment imposed by the District Court of New South Wales on 28 February 2019 resulted in her having a substantial criminal record for the purposes of s 501(6)(a) of the Act by reason of s 501(7)(c) of the Act.

19. On 11 August 2023, the Second Defendant's application for special leave to appeal against *Pearson* was dismissed.

---

[3] *Pearson v Minister for Home Affairs* (2022) 295 FCR 177, [12].
[4] [2022] 289 FCR 256.
[5] *Pearson v Minister for Home Affairs* (2022) 295 FCR 177.
[6] SCB 213.

20. On 22 August 2023, the Second Defendant discontinued his application for special leave to appeal against *Tapiki*.[7]

The Aggregate Sentences Act and re-detention of the Plaintiff

21. On 17 February 2023, the Aggregate Sentences Act commenced (by operation of s 2, having received royal assent on 16 February 2023).
22. On 11 September 2023, the Plaintiff was again detained in immigration detention. She remains there.
23. On 10 October 2023, the Plaintiff filed an application for a constitutional or other writ in the original jurisdiction of this Court. On 7 March 2024, Jagot J referred the questions of law stated in the Special Case (filed on 13 February 2024) for consideration by the Full Court.

Part VI: Argument

24. The Aggregate Sentences Act does not apply to the Plaintiff for the two reasons set out at [2] above. The first question stated for the Full Court's consideration concerns only the Tribunal's decision. The second question addresses the cancellation decision, the non-revocation decision and the Tribunal's decision.

A. The Tribunal's decision was "under" Tribunal Act

25. The Aggregate Sentences Act does not apply to the Plaintiff, as its scope is expressly limited to decisions made, or actions taken, "under" the Migration Act. But the Tribunal decision here was made "under" the Tribunal Act, not the Migration Act. The contrary conclusion expressed by the Full Court in *JZQQ*[8] is, with respect, wrong.
26. Item 4(1) of Part 2 to Sch 2 to the Aggregate Sentences Act in terms provides (emphasis added):

> **4 Validation of things done before commencement**
>
> (1) This item applies if a thing done, or purportedly done, before commencement **under a law, or provision of a law, covered by subitem (2)** would, apart from this item, be wholly or partly invalid only because a sentence, taken into account in doing, or purporting to do, the thing, was imposed in respect of 2 or more offences.

[7] *Minister for Home Affairs & Anor v Pearson & Anor* [2023] HCATrans 105.
[8] *JZQQ* [94]-[95].

27. By item 4(2), the Migration Act is merely one of a number of "laws, or provisions of laws" to which item 4(1) is directed:

> (2) The laws and provisions are as follows;
>
> (a) the *Migration Act 1958;*
>
> (b) any legislative instrument made under that Act;
>
> (c) clauses 51 and 53 of Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*;
>
> (d) clauses 51 and 53 of Schedule 1A to the *Fisheries Management Act 1991*;
>
> (e) clauses 51 and 53 of Schedule 2 to the *Torres Strait Fisheries Act 1984.*
>
> Note: The things referred to in subitem (1) include (for example) the following:
>
> (a) deciding under section 501, 501A, 501B or 501BA of the *Migration Act 1958* to refuse to grant a visa to a person or to cancel a visa granted to a person;
>
> (b) accessing information under Division 2 of Part 4A of that Act, or disclosing information under Division 3 of that Part.
>
> (c) giving a notice under subsection 501L(1) of that Act;
>
> (d) divulging or communicating information as mentioned in subparagraph 503A(1)(a)(ii) or (b)(ii) of that Act.

28. There is a well-established body of case law that supports the conclusion that decisions made by the Tribunal in merits review proceedings are made "under" the Tribunal Act, rather than "under" the statute governing the original decision.

29. This conclusion is grounded in cases as far back as as *Brian Lawlor Automotive Pty Ltd v Collector of Customs* (1979) 24 ALR 307. In *Brian Lawler*, Brennan J (as his Honour then was) said that "the only decision which takes effect under the enactment" is the initial decision, and not the Tribunal's decision on review, even where deciding to affirm the initial decision.[9]

30. Further supporting this view, French J (as his Honour then was) said in *Powell v The Administrative Appeals Tribunal and Anor*:[10]

> When the Tribunal affirms a decision, in my opinion, it exercises a power conferred by section 43(1)(a) of the AAT Act. It does not re-exercise the power originally conferred by the statute under which the reviewed decision was made.

---

[9] *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167, 175–6 (Brennan J), approved in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [100] (Hayne and Heydon JJ).

[10] (1998) 89 FCR 1, 12 (French J, emphasis added).

> … Therefore, for the purposes of this discussion, it is pertinent that the decisions of the Tribunal affirming the decisions of the Minister's delegate were not decisions made under the Migration Act or the regulations pertaining to visas.

31. French J's observations were subsequently endorsed by the Full Court of the Federal Court in *Madafferi v Minister for Immigration and Multicultural Affairs*, which stated: "the source of the AAT's power is section 43 of the AAT Act. It does not exercise afresh the power conferred by the statute under which the original decision was made."[11] These remarks align with this Court's characterisation of Tribunal decisions as being made "under" s 43 of the Tribunal Act.[12]

32. Moreover, to the extent that Mortimer J (as her Honour then was) articulated what might be said to be a different view in *Williams v Minister for Immigration and Border Protection*,[13] it is important to note that her Honour's comments were specifically contingent upon the statutory context in which the term "under" appeared in s 499(1) of the Migration Act. This case is very different, particularly because the issue of interpretation arises within a validating statute. Orthodoxy dictates that courts exercise caution not to extend their validating effects beyond the decisions expressly identified within the statute.[14] This is in keeping with the general juridical approach to interpreting deeming provisions.[15]

33. The Plaintiff otherwise relies upon the submissions advanced in the Appellant's Submissions dated 24 April 2024 in *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs*[16] at [24] – [26] in relation to this question.

B. The Aggregate Sentences Act interferes with, or usurps, Ch III judicial power

34. In *Tapiki*,[17] the Full Court of the Federal Court concluded that the decision in *AEU*[18] foreclosed Tapiki's argument that the impugned provisions of the Aggregate Sentences Act, in its application to Tapiki, usurped or interfered with judicial power under Ch III.[19] The Plaintiff submits to the contrary. Unlike the legislation in *AEU*, which attached new

---

[11] (2002) 118 FCR 326, [68] (the Court).
[12] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [100] (Hayne and Heydon JJ); *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [51] (the Court).
[13] (2014) 226 FCR 112, [12], [43], [60]–[65] (Mortimer J).
[14] *Martinez v Minister for Immigration & Citizenship & Anor* (2009) 177 FCR 337, [29] (Rares J).
[15] *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, 696 (Griffith CJ); *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288, [51] (Gageler J). See also *Commissioner of Taxation v Comber* (1986) 10 FCR 88, 96 (Fisher J).
[16] B15/2024.
[17] *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 167 (***Tapiki***).
[18] *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***).
[19] *AEU* [35] (French CJ, Crennan and Kiefel JJ).

legal consequences to an historical fact upon which the Federal Court has previously adjudicated, the Aggregate Sentences Act purports to reverse the earlier judicial orders by giving legal effect to a *decision* that the Federal Court has quashed and declared to be invalid; in other words, to breathe life into that which a Ch III court has quashed and declared null.

35. The Plaintiff relies upon the submissions advanced in the Appellant's Submissions dated 24 April 2024 in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs*[20] at [29] – [63].[21]

36. In this case, the analysis identified at [39] of the Appellant's Submissions in *Tapiki* need focus only on the cancellation decision and the non-revocation, each of which was undoubtedly a thing done "under" the Migration Act, unless the first question is answered in the affirmative. In the latter circumstance, the analysis must proceed on the basis that, as argued by the Minister in *Tapiki*[22] and *JZQQ*,[23] and as accepted by the Full Court in those cases, the Tribunal, in conducting a review of a decision not to revoke a visa cancellation pursuant to an application made under s 500(1), was engaged in "doing" one or more of the specific "things" instantiated in the Aggregated Sentences Act.

C. Conclusion to Argument

37. For these reasons, the relevant provisions of the Aggregate Sentences Act do not apply in relation to the Tribunal decision; and are invalid in their purported application to the cancellation decision and the non-revocation decision.

38. Alternatively, the relevant provisions of the Aggregate Sentences Act are invalid in their purported application to the cancellation decision, the non-revocation decision and the Tribunal decision.

39. If this Court accepts as much, at that time it will no longer be open to an officer of the First Defendant or the Second Defendant to reasonably suspect that the Plaintiff is an unlawful non-citizen (because she will continue to hold a visa by reason of the decision to cancel his visa being quashed by the Full Court of Federal Court in *Pearson*). Accordingly, this Court should also make an order for the Plaintiff's immediate release.

---

[20] P10/2024.
[21] It is necessary to adapt those submissions by replacing reference to *Tapiki 1* with reference to *Pearson* at Tapiki Appellant's Submissions [39], [40], [42] and [57].
[22] *Tapiki* [15] (the Court).
[23] *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 620, [95] (the Court).

Part VII: Orders Sought

40. The Plaintiff submits that the following answers should be given to the questions stated for the opinion of the Full Court:

(a) Items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Schedule 1 of the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth), as applied by item 3 therein, do not apply in relation to the Tribunal decision; and are invalid in their purported application to the cancellation decision and the non-revocation decision; or

In the alternative, items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Schedule 1 of the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth), as applied by item 3 therein, are invalid in their purported application to the cancellation decision, the non-revocation decision and the Tribunal decision.

(b) No.

(c) The Plaintiff should have the following relief:

(i) a declaration giving effect to the answer to the questions of law stated in the special case;

(ii) a writ of *habeas corpus*, or an order in the nature thereof, directed to the First and Second Defendants, commanding that the Plaintiff be released from immigration detention;

(iii) a writ of prohibition, alternatively an injunction, directed to the First and Second defendants, preventing or restraining them, their servants or agents, from taking any steps on the basis of the purported decision of the Second Defendant's delegate to cancel the plaintiff's class TY subclass 444 Special Category (Temporary) visa under s 501(3A) of the *Migration Act 1958*, declared invalid and quashed by the Full Court of the Federal Court of Australia;

(iv) an order that the defendants pay the Plaintiff's costs of, and incidental to, the proceedings.

(d) The First and Second Defendants.

Part VIII: Estimate

41. The Plaintiff estimates that she will require 30 minutes for the oral presentation of her argument.

DATED: 26 April 2024

DAVID HOOKE
(02) 9233 7711
E: hooke@jackshand.com.au

JASON DONNELLY
(02) 9221 1755
E: donnelly@lathamchambers.com.au

MGS CROWLEY
(08) 92200444
E: matthew.crowley@fulbrightmail.org

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **KATHERINE ANNE PEARSON**
Plaintiff

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in his submissions.

No.	Description	Version	Provisions
1.	*Commonwealth of Australia Constitution Act*	Compilation 6 (current)	Chapter III
2.	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation 46 (11 May 2018 to December 2020)	s 43
3.	*Migration Act 1958* (Cth)	Compilation 153 (17 February 2023 to 23 June 2023)	ss 500, 501, 501CA
4.	*Migration Amendment (Aggregate Sentences) Act 2023* (Cth)	As enacted	Entire Act