HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **KATHERINE ANNE VICTORIA PEARSON**
Plaintiff

COMMONWEALTH OF AUSTRALIA
First Defendant
MINISTER FOR HOME AFFAIRS
Second Defendant
ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

PLAINTIFF'S REPLY

Part I: Certification

1. The plaintiff certifies that this reply is in a form suitable for publication on the internet.

Part II: Reply

2. Construction of the Aggregate Sentences Act: The defendants contend that the plaintiff's argument misfires because it does not focus on the actual words used in the validating provisions of the *Aggregate Sentences Act* (DS[11]). But Item 4(1) of Sch 1 of the *Aggregate Sentences Act* only has application to impugned "laws and provisions" reflected in Item 4(2).

3. Item 4(2) of Sch 1 makes no reference to the *Administrative Appeals Tribunal Act* 1975 (Cth) (the **Tribunal Act**). Reference is made to the *Migration Act* 1958 (Cth) (the **Migration Act**). Critically, a decision under s 43(1) of the *Tribunal Act* is *not* a "thing done" under the *Migration Act*.

4. Although not itself a source of jurisdiction, it is s 43 of the *Tribunal Act* that confers power on the Tribunal to determine matters in respect of which it has jurisdiction.[1] Hence,

[1] *Department of Social Security v Hodgson* (1992) 37 FCR 32, 569–572.

a decision made by the Tribunal under s 43(1) is not a decision under the *Migration Act*.[2] Nor is it a thing done under the *Migration Act*. It follows that Item 4(1) does not have a field of operation in relation to the plaintiff's case.

5. The defendants contend that the question is whether there is a "sufficient connection" between something done by the Tribunal and the *Migration Act* (DS[12], [17]). No authority is cited in support of that contention, which does not conform to the statutory text.

6. The defendants must pay particular attention to the provisions which gave the Tribunal jurisdiction to conduct that review, and *not* the provisions which conferred the power on the Tribunal that it exercised in making its decision (DS[13]). There is no question that the Tribunal accrued jurisdiction to determine the plaintiff's application for review, but the "thing done" done by the Tribunal for the purposes of s 43(1) of the *Tribunal Act* was to make a decision "affirming the decision under review". That was an exercise of power under the *Tribunal Act*, not the *Migration Act*; ie, a "thing done" under the *Tribunal Act*, not a "thing done" under the *Migration Act*. No question of jurisdiction arises (*contra*, DS[14]-[15], [18]-[19], [25]).

7. The defendants submit that s 500(1)(ba) of the *Migration Act* gives the Tribunal the power to determine the application for review (DS[15]). Section 500(1)(ba) of the *Migration Act* does no more than vest the Tribunal with jurisdiction to review the impugned departmental decision. The Tribunal's power to "determine the application" is by making "a decision in writing" under s 43(1) of the *Tribunal Act*.

8. Citing the Full Court's decision in *JZQQ*,[3] the defendants contend that various subsections of s 500 govern and control the exercise of the Tribunal's review function (DS[16]). So much can be accepted. However, none of that makes the non-revocation decision of the Tribunal a decision or a "thing done" under the *Migration Act* for reasons already given.

9. The defendants also highlight the fact that the Tribunal is "subject to Ministerial directions made under s 499 of the Act" (DS[16]). Section 499 of the *Migration Act*

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[2] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [34].
[3] *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 370 at [93]-[94].

merely imposes mandatory considerations for the Tribunal to consider when making decisions. It does not speak to the character of a decision made under s 43(1) of the *Tribunal Act*, or somehow convert such a decision into a decision under the *Migration Act* (*contra*, DS[17], [19]).

10. Reliance on the reasoning of this Court in *Frugtniet*, where it was said that the Tribunal exercises the same power or powers as the primary decision-maker, subject to the same constraints and that the primary decision, is misconceived: DS[18].

11. *Frugtniet* cannot be considered in a vacuum and must be considered in the broader context of established jurisprudence. The Tribunal's powers are not precisely co-extensive with that of the delegate. For example, the Tribunal exercises its decision-making power to advance the statutory objectives in s 2A of the *Tribunal Act*. A delegate of the Minister does not. Moreover, unlike a delegate, the Tribunal must make the correct or preferable decision.[4] Finally, unlike the Tribunal, the delegate does not have an analogous power under s 43(1) of the *Tribunal Act* and is not exercising such a power.

12. The defendants' basic proposition is that the Tribunal here was "exercising a function" under the *Migration Act* (DS[19]). However, the non-revocation decision made by the Tribunal was the exercise of power under s 43(1) of the *Tribunal Act*, not a decision under the *Migration Act* (*contra*, DS[20]).

13. The Tribunal's act of reviewing a delegate's decision under s 501CA(4) of the *Migration Act* is governed by its own statutory framework. Thus, the validation provisions of the *Aggregate Sentences Act* cannot override the distinct legal basis provided by the *Tribunal Act*, and the Tribunal's procedural authority remains independent of the *Migration Act*, making the application of Item 2 of Sch 1 inapplicable to its review actions (*contra*, DS[21]). The jurisdiction conferred by the *Migration Act* was a jurisdiction to exercise powers, and do things, under the *Tribunal Act*, not to exercise powers, or do things, under the *Migration Act*.

14. The defendants argue that the Tribunal, in performing the function conferred (at least in part) by the *Migration Act*, was "doing a thing" under that Act: DS[25]. Even if that were

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[4] *Australian Postal Corp v Hughes* (2009) 111 ALD 579 at 281; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 24 ALR 577 at 589; *Rand v Comcare* [2014] FCA 584, [26].

accepted, on 24 January 2024, the Full Court quashed the Tribunal's decision.[5]

15. When the Full Court issued writs of *certiorari*, the Tribunal's decision was declared *void ab initio*, meaning it was treated as if it "never existed". In this legal context, there was no "thing done" for the purposes of Item 4 of the *Aggregate Sentences Act*. To suggest otherwise is to undermine the exercise of Commonwealth judicial power and infringe upon Ch III of the *Constitution*.

16. Contrary to the submissions of the defendants, the necessary consequence would not be the validation of the cancellation and non-revocation decisions (*contra*, DS[26]-[27]). Those decisions were quashed by the Full Court on 24 January 2023.

17. 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 (DS[28]). The Memorandum can only be of limited assistance: a memorandum does not displace the legislative text, no matter how "clear or emphatic" the language of the memorandum.[6]

18. Validity of the Aggregate Sentences Act: The plaintiff adopts the submissions (paras [2]-[15]) of the appellant in reply in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (P10/2024).

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[5] *Pearson v Minister for Home Affairs (No 2)* [2023] FCAFC 4, [3].
[6] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31].