

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**MELBOURNE**  
**SEPTEMBER 2024**

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## **BIF23 v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS (M44/2024)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCAFC 201

Date of judgment: 19 December 2023

Special leave granted: 9 May 2024

The appellant is a Cambodian citizen who arrived in Australia in 2002 with his mother when he was aged twelve on a child permanent visa. In October 2021, as an adult he was convicted of several offences including theft and intentionally causing injury and affray, resulting in a prison term of 18 months to be served at a correctional centre. On 1 November 2021, a delegate of the respondent (“the Minister”) notified the appellant by email to the correctional centre that he was being considered for visa cancellation due to his criminal record under section 501 of the *Migration Act 1958* (Cth) (“the Migration Act”), and requested the appellant to complete a questionnaire relating to his immigration status. The correctional centre responded with the appellant’s completed questionnaire under cover of an email stating that “the [appellant] was very confused by these questions”.

On 24 November 2021, the appellant’s visa was mandatorily cancelled by a delegate of the Minister pursuant to s 501(3A) of the Migration Act, and a s 501CA(3) Notice (“the Notice”) was given to the appellant through the correctional centre on 1 December 2021. Section 501CA(3) of the Migration Act requires the Minister to give the person a written notice that sets out the original decision, provide particulars of the relevant information, and invite the person to make representations to the Minister about revocation of the original decision within a certain timeframe.

At that time, it is submitted that the appellant was receiving treatment in a secure psychiatric facility, was under a disability, and lacked decision-making capacity within the meaning of the *Guardianship and Administration Act 2019* (Vic) (“the Guardianship Act”), including in relation to his visa cancellation.

In December 2021, the Victorian Institute of Forensic Mental Health (“Forensicare”) urgently applied for a guardianship order from the Victorian Civil and Administrative Tribunal (“VCAT”) in order to make decisions on the appellant’s behalf with respect to legal and personal matters, including his visa cancellation. In January 2022, VCAT made orders under s 30 of the Guardianship Act appointing the Public Advocate as the appellant’s guardian, by which point the time limit had expired for the appellant to make representations about non-revocation. Between July and September 2022, the appellant’s legal representatives asserted that he had not received effective notice of the cancellation of his visa in accordance with s 501CA(3) of the Migration Act. Relevantly, the Minister took the view it could not issue a new Notice to the appellant. In September 2022, the appellant was released from the correctional centre and placed in immigration detention.

The appellant applied to the Federal Circuit and Family Court of Australia (Division 2) for judicial review of the Minister’s decision to give the Notice. The application was dismissed by Judge Mansini (after the appellant had first been released from detention with his visa restored following the decision in *Pearson v Minister for Home Affairs* [2022] FCAFC 203, and later placed back into

detention pursuant to the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth)). The appellant appealed to the Full Court of the Federal Court of Australia, which dismissed the appeal.

The appellant remains in immigration detention.

The parties agree that the main issue concerns the practicability of giving the Notice and the appellant's mental capacity – that is, whether it was “practicable” within the meaning of s 501CA(3) of the Migration Act for a Minister's delegate to give the appellant the Notice in circumstances where the appellant lacked decision-making capacity and had no guardian appointed. Alternatively, whether the Minister is able to issue a further Notice now that it is known that the appellant lacked mental capacity for the purpose of his visa revocation.

The appellant submits that while the window of time for a person who has received notice of a visa cancellation to make representations about non-revocation is a narrow one, Parliament intended that such a person would have a real and meaningful opportunity to persuade the Minister to revoke the cancellation, whether on the basis that the person passes the character test, or on the basis of other discretionary matters. The appellant submits that the purpose of s 501CA(3) is to be construed against a background of common law notions of justice and fairness. The appellant contends that the Minister had actual or constructive knowledge of the appellant's incapacity and that it was unreasonable for the Minister to give the Notice when he did. The Minister disagrees and submits that he did not know about the appellant's psychiatric condition or legal incapacity at the time the Notice was given. In fact, Forensicare only applied to VCAT for a guardianship order after the Notice was given.

The grounds of appeal are:

- The Full Court erred in failing to find it was not “practicable” within the meaning of s 501CA(3) of the Migration Act for the Minister's delegate to give the appellant notice under that subsection on 1 December 2021 in circumstances where, at that time, as the Federal Circuit and Family Court of Australia found, the appellant lacked decision-making capacity.
- Alternatively, the Full Court erred in failing to find that a further notice could be issued to the appellant, after a guardian was appointed for him on 11 January 2022 under the Guardianship Act and, further, that it would be legally unreasonable for the Minister not to do so in circumstances where the appellant is now able to make representations about the revocation of the cancellation of his visa by his guardian.

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## **COMMONWEALTH OF AUSTRALIA v SANOFI (FORMERLY SANOFI-AVENTIS) & ORS (S169/2023)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCAFC 97

Date of judgment: 26 June 2023

Special leave granted: 18 December 2023

In Australia at the times relevant to this litigation, clopidogrel (a medication which inhibits the formation of blood clots and is usually prescribed to those who have suffered, or are at risk of suffering, a heart attack or stroke) was supplied in tablet form under the brand names ‘Plavix’ and ‘Iscover’ by the respondents (“Sanofi”). Both have been listed on the Pharmaceutical Benefits Scheme (“PBS”) since 1999. The usual effect of being listed on the PBS is that a pharmacist who sells the drug receives a substantial subsidy from the Commonwealth. The listing on the PBS of a generic version of a drug results in a variety of reductions in the extent of that subsidy, including an automatic 12.5% reduction in the listed price of the drug.

By interlocutory application filed in 2013, the Commonwealth sought to recover from Sanofi the loss it claims to have suffered on the non-triggering of price reductions for clopidogrel after Sanofi successfully prevented the entry of a generic version of clopidogrel into the Australian market (“the market”). This had occurred in September 2007 when Sanofi had obtained an interlocutory injunction restraining Apotex Pty Ltd (“Apotex”) from launching into the market its generic form of clopidogrel. Sanofi obtained this interim relief on the basis of a patent later found on appeal in 2009 to be wholly invalid. At the time Sanofi had obtained the interlocutory injunction in 2007, it proffered an undertaking to the primary Court that it would compensate any person adversely affected by the grant of the injunction (whether they were parties or not to that proceeding). It was noted in the making of that order that Apotex undertook not to seek PBS listing of its generic form.

The Commonwealth contended that it was entitled to recover from Sanofi a range of price reductions that would have occurred in the pricing of clopidogrel starting on 1 April 2008, being the date on which Apotex would have launched its generic competitor if the interlocutory injunction had not been granted. In essence, the Commonwealth sought to recover the harm done to the PBS by Sanofi’s thwarting of the entry of a generic competitor into the market.

Central to the outcome was the approach taken to the assessment of whether the Commonwealth had proven that, if not for the injunction, Apotex would have sought PBS listing of its generic brand. The primary judge, Gyles J, found that the Commonwealth’s case had an “evidentiary deficiency” which could not be made good without calling Dr Sherman (CEO and Chairman of Apotex’s parent company) to give direct evidence of whether Apotex would have launched even if the interlocutory injunction had not been granted. The Full Court of the Federal Court upheld that conclusion on appeal.

The primary judge also held that, even accepting that Apotex would have launched, the Commonwealth would still not be entitled to damages. While the loss claimed by the Commonwealth would not have occurred if the interlocutory injunction had not been granted, Gyles J did not accept that the claimed loss flowed directly from it. His Honour found that the loss claimed flowed directly from the undertaking not

to seek PBS listing, which Apotex had proffered at the time the interlocutory injunction was granted to Sanofi. While his Honour accepted that the undertaking not to list would not have been proffered if the interlocutory injunction had not been granted, nevertheless, he concluded that its existence as an intermediate step between the interlocutory injunction and the loss claimed meant that the loss could not be said to flow directly from the interlocutory injunction. On appeal, the Full Court found it did not need to resolve this issue since the Commonwealth had failed on the threshold evidentiary challenge. However, the Full Court concluded that it did not agree with the primary judge that the Commonwealth's loss did not flow directly from the Sanofi undertaking.

The Commonwealth has filed a notice of a constitutional matter. No Attorney-General has intervened in the proceeding.

The grounds of appeal are:

- The Full Court erred in failing to hold that:
  - (a) the Commonwealth's evidential burden was to establish a prima facie case that its loss flowed directly from the interlocutory injunction and that, once that was established, an evidential burden shifted to the respondents to establish their contention that Apotex would not have sought listing on the PBS even if not enjoined; and
  - (b) the Commonwealth discharged its evidential burden but the respondents did not.
- The Full Court erred in failing to find, by inference from the evidence, that in the absence of the interlocutory injunction, it was likely that Dr Sherman would have reconfirmed the plan to seek PBS listing.

Sanofi has filed a notice of contention with seven grounds on which it contends that the decision of the Full Court of the Federal Court ought to be upheld including:

- The Full Court of the Federal Court of Australia erred in failing to hold that the claimed loss of the appellant did not flow directly from the operation of the interlocutory injunction granted on 25 September 2007 against Apotex Pty Ltd and therefore that compensation for the Commonwealth's claimed loss is not recoverable pursuant to the undertakings as to damages given by the respondents in support of the Interlocutory Injunction.

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## **GARLAND v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS AND ANOR (P20/2023)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCAFC 144

Date of judgment: 25 August 2023

Date referred to Full Court: 8 August 2024

This application for special leave to appeal from the judgment and order of the Full Court of the Federal Court of Australia (“FCFCA”) has been referred to the Full Court of this Court to be heard as if on appeal.

The applicant is a New Zealand citizen who has lived in Australia since 1988 when he was 17 years old. He has lived a substantial portion of his life in Australia and has “extensive connections here”. In August 2016, he was sentenced to 5 years of imprisonment for “aggravated burglary with intent in dwelling” and “assault occasioning bodily harm”. Consequently, his visa was mandatorily cancelled under section 501(3A) of the *Migration Act 1958* (Cth) (“the Migration Act”). The applicant has been held in immigration detention since he completed his criminal sentence in August 2021.

The applicant sought the revocation of the decision to cancel his visa under s 501CA(4) of the Migration Act. In April 2022, a delegate for the first respondent (“the Minister”) refused to revoke the cancellation, finding that the applicant had failed the character test and that there was no other reason the original decision should be revoked. The Administrative Appeals Tribunal (“the Tribunal”) affirmed the Minister’s decision. The applicant applied for further judicial review of the Tribunal’s decision and in March 2023, the primary Judge (Justice Colvin) dismissed that application. The applicant appealed to the FCFCA, which dismissed the appeal.

The applicant seeks special leave to appeal the decision of the FCFCA. The applicant is unrepresented and is assisted by pro bono counsel who will present argument on his behalf at the hearing.

The special leave question that the applicant raises in his application concerns the approach to meeting the materiality threshold as confirmed by this Court in the decision of *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*<sup>1</sup>. Is an error made by the Tribunal in misconstruing a direction given by the Minister, where the Tribunal is bound to comply with that direction, sufficiently material to constitute jurisdictional error?

Section 501(3A) of the Migration Act requires the Minister to cancel a visa that has been granted to a person if the person does not pass the “character test”, and is “serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, State or Territory”. The applicant submits that at the time of the Tribunal’s decision, the relevant direction<sup>2</sup> set out principles within which decision-makers should approach their

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<sup>1</sup> *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12.

<sup>2</sup> Direction 90: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA dated 8 March 2021 (“the Direction”).

task under s 501(3A), which includes taking into account certain primary considerations, including protection of the Australian community from criminal and other serious conduct, and the expectations of the Australian community. Relevantly, the Direction states that crimes against “vulnerable members of the community” are “serious”. The question before the FCFCA was whether the Tribunal made a jurisdictional error by misconstruing the phrase “vulnerable members of the community” in the Direction in assessing the “seriousness” of the applicant’s offences against a “vulnerable” victim.

The applicant submits that the FCFCA observed “the appeal is extremely significant to the [applicant] because of the personal consequences for him of failing and being removed from the country”, and contends that this application raises a question of law of public importance concerning the materiality threshold for jurisdictional error given this Court’s decision in *LPDT*, in that there will be a perpetuation of erroneous application of that threshold when a decision-maker misconstrues a direction by the Minister.

The Minister rejects the applicant’s contentions and submits that no question of law that is of public importance has been raised to warrant a grant of special leave to appeal. The Minister submits that there has been no error in the decisions of the Tribunal and the FCFCA that impacts the ultimate decision to cancel the applicant’s visa.

The sole ground of appeal is that:

- The Full Court (of the Federal Court of Australia) erred in law in holding that an error made by the Tribunal, in misconstruing paragraph 8.4(2)(c) of the Direction, was not material to the Tribunal’s decision to affirm a decision of a delegate of the Minister refusing to revoke the cancellation of the applicant’s visa.