HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M44/2024
File Title:	BIF23 v. Minister for Immigration, Citizenship and Multicultu
Registry:	Melbourne
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	03 Sep 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BIF23
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

This outline of oral submissions is in a form suitable for publication on the Internet.

Part II: Propositions to be advanced in oral argument

1. Three principles of interpretation bear on the questions of construction arising here:
   (a) *first*, the requirement that the Court adopt a purposive approach to the construction of s 501CA(3): **AS [21], [25]-[26]**; s 15AA of AI Act;
   (b) *second*, the principle of legality: *Saeed* at [15]; **AS [23], [40]**;
   (c) *third*, attribution of an intention to produce absurd etc. consequences to be avoided where the text not intractable: *Miller* at [37]; **AS [23]-[24]**.

Ground 1 / question 1: construction of "as soon as practicable"

2. When tested against these principles, the Minister's / Full Court's construction fails.
   (a) *Purpose*: the purpose of s 501CA(3) is to ensure that <u>every</u> person whose visa has been cancelled under s 501(3A) has a meaningful (albeit time-limited) opportunity to seek revocation of the cancellation: **AS [18]-[22], Reply [10]**; *BDS20* at [94]; *Stewart* at [41]-[42]; *Li* at [59]-[61]. The Minister's construction defeats that purpose, because it entails that a class of persons well-known to the law and recognised by the Act itself – persons lacking capacity to make decisions – are incapable of realising the supposed "opportunity" by their own action.
   (b) *Principle of legality*: application of this principle converges with the requirement of purposive interpretation: **AS [43]-[45], Reply [15]**. The Minister's reliance on *AEU v FWA* is also inapt: that was a case involving a failed submission about the supposed substantive unfairness of an Act; not about procedural fairness.
   (c) *Avoiding absurdity etc.*: the Minister's construction is also apt to require the Minister to engage in a farce and to produce absurd consequences: **AS [23]-[24]**.

3. The Minister seeks to answer by three submissions: (a) denying or diminishing the starkness of the problem; (b) that *EFX17* forecloses the argument; and (c) that, in any event, the statutory text is intractable. None of these submissions should be accepted.

4. Attempt to deny or diminish the problem: The Minister submits that legal incapacity does not "automatically" render representations void: *cf.* **RS [23]-[25]**. This does not withstand scrutiny:

   (a) Only the person whose visa is cancelled may "make" representations: **AS [38]-[39], Reply [5]**. And where a person lacks capacity to make a decision whether to make an application (or, here, a representation) under the Act, a purported application (or representation) will not be valid: *Soondur*; *Woolley* at [30], [97]-[104], [152]-[156], [185], [226], [254], [270]; **AS [48]-[52]**.

   (b) The analogy with curial proceedings is inapt; and the notion of a "voidable" representation misconceived. The scheme is binary: a valid representation has been made or not: s 501CA(4)(a); s 198(2A) and (2B); **Reply [7]-[8]**.

   (c) The making of a representation is apt to prolong a person's detention. Accordingly, it is not necessarily to a person's benefit. That illustrates why there is a meaningful decision to be made (by a person with capacity to make it).

5. *EFX17* does not foreclose the appellant's construction (*cf.* **RS [3.1], [20]**):

   (a) No argument was advanced in *EFX17* concerning the construction of "as soon as practicable" in s 501CA(3); nor was any such question decided: **AS [29]-[31]**.

   (b) *EFX17* concerned a recipient's "capacity" (in a loose sense) to understand the letter and enclosures that had been handed to him, and the intersection with the appropriate "way" a notice must be given under s 501CA(3): see *EFX17* (HC) at [22]-[25]; *EFX17* (FCAFC) at [134]; *EFX17* (FCCA) at [34(a)]; see also *Nguyen* at 320, 325. Paragraph 29 of *EFX17* (HC) is to be read accordingly.

   (c) Unsurprisingly, in light of the argument advanced, there was no finding about the respondent lacking capacity to make a decision or to exercise a right under the Act (as there is here: *PJ* [86]; CAB 55). And the evidence would not have supported any such finding: *cf. EFX17 (FCAFC)* at [109], [112].

6. Statutory text is not intractable (*cf.* **RS [31]-[34]**):

   (a) The ordinary meaning of "practicable" is to be read in its context and in light of the statutory purpose. Pertinently, the ordinary meaning includes what is able to be "put into practice successfully" and is "effective": *BDS20* at [53], *cf.* [79], [118]. See also *J* [37]; CAB 57. Understood in this way, it is open to construe

"as soon as practicable" as meaning as soon as performing the *action* (i.e., giving the notice/invitation) is capable of effectively achieving the actor's *purpose* (i.e., giving the person the requisite opportunity): **AS [32]-[37]**; *cf.* **RS [15]**.

Ground 1 / question 2: "as soon as practicable" is a jurisdictional fact

7. Multiple factors suggest that the question is one of jurisdictional fact.

   (a) Text: s 501CA(3) is not framed as depending on an opinion of the Minister (compare s 501CA(4)): **AS [68]**.

   (b) Purpose: it makes little sense to construe s 501CA(3) as depending on the Minister's assessment based on evidence before him/her, given that the Minister will rarely have knowledge of relevant evidence (as was the case here): **AS [64]-[65]**, and given that assessment of capacity is more suitable to a court or specialist tribunal than the Minister: **AS [40], [44]**.

   (c) A conclusion that practicability is not a pre-condition to the exercise of the power entrenches the unfairness flowing from the Minister's construction: **AS [69], [53]-[54], Reply [17]**.

Ground 2 / question 3: no contrary intention to the application of s 33(1) of the AI Act

8. If "practicable" has the meaning we submit, then it coheres with the statutory purpose to conclude that the duty is re-enlivened in accordance with s 33(1) of the AI Act when it is apparent, <u>after</u> the initial notice/invitation is given, that that notice/invitation was incapable of affording the person the reasonable opportunity the Act intends: **AS [77]**. The majority's analysis in *BDS20* is flawed, principally at [79]: the fact that the duty is tethered to an original decision does not mean that it might not become "practicable" (properly construed) to issue a notice/invitation again: **AS [78]-[79]**. There is also no "inconvenience": *cf. BDS20* majority at [55]; *cf.* Rares J correct analysis at [44].

Dated: 3 September 2024

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