HIGH COURT OF AUSTRALIA

4 December 2024

BIF23 BY HIS LITIGATION GUARDIAN THE PUBLIC ADVOCATE v MINISTER FOR IMMIGRATION, CITIZENSHIP & MULTICULTURAL AFFAIRS
[2024] HCA 44

Today, the High Court unanimously allowed an appeal from a decision of the Full Court of the Federal Court of Australia. The principal issue for determination was whether the Minister may validly give notice to a person of a decision to cancel a visa and invite that person to make representations about the revocation of that decision pursuant to s 501CA(3) of the *Migration Act 1958* (Cth) ("the Act") at a time when that person lacks legal capacity to do so.

The appellant is a citizen of Cambodia whose visa was mandatorily cancelled in 2021 pursuant to s 501(3A) of the Act. On 1 December 2021, the appellant was given notice of the cancellation of his visa and invited to make representations about the revocation of that cancellation decision ("the notification"). The notification explained that the representations had to be made within 28 days after the day the notification was given to him. The appellant acknowledged receipt of the notification on the same day. At that time, the appellant was receiving psychiatric care at the prison where he was serving a sentence. Neither the Minister nor the relevant Department were aware of this. On 23 December 2021, an urgent application for a guardianship order was made to the Victorian Civil and Administrative Tribunal ("VCAT") on the appellant's behalf. On 11 January 2022, VCAT appointed the Public Advocate to be the guardian of the appellant pursuant to s 30 of the *Guardianship and Administration Act 2019* (Vic). By that time, the 28-day period had expired. The guardian had, amongst other things, the power to start and defend legal proceedings on behalf of the appellant in relation to the cancellation of his visa. On 18 July 2022, a request was made by the appellant's legal representatives that the Department re-notify the decision to cancel the appellant's visa. The Department refused to do so on the basis that the notification given on 1 December 2021 was validly made pursuant to s 501CA(3) of the Act.

The primary judge dismissed the application for judicial review brought on the appellant's behalf in the Federal Circuit and Family Court of Australia (Division 2). The primary judge did not accept the appellant's contentions that: it was not "practicable" within the meaning of s 501CA(3) to deliver the notification to the appellant given his lack of legal capacity, or that the purported delivery of the notification constituted a denial of procedural fairness. On appeal, the Full Court of the Federal Court of Australia did not accept that it was not "practicable" within the meaning of s 501CA(3) to deliver the notification on 1 December 2021.

The High Court held that, on 1 December 2021, the appellant lacked the legal capacity to make the representations sought and also lacked the ability to empower a person to make decisions on his behalf such as by granting an enduring power of attorney, or by applying for a guardian to be appointed, for the purpose of making representations of his behalf. Consequently, at that date, the Minister had the duty in s 501CA(3) but the appellant's legal incapacity in the particular sense described meant that the Minister could not discharge that duty until the appellant obtained capacity or until a guardian was appointed for the appellant for the purposes of making representations.

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