FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
REGISTRY: MELBOURNE

File number:	**MLG35OF 2022**
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Filed on:	
Court Location:	
Court Date:	
Court Time:	

NOVAK DJOKOVIC
Applicant

MINISTER FOR HOME AFFAIRS
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

PART I INTRODUCTION

1. The applicant seeks judicial review of a decision of a delegate of the respondent to cancel the applicant's visa under s 116 of the *Migration Act 1958* (Cth) (**the Act**).

2. The Court has jurisdiction to determine this matter under s 476(1) of the Act even though this decision was made by a delegate. While delegates' decisions are usually excluded from this Court's jurisdiction by s 476(2)(a) as a "primary decision", it appears to be common ground that the delegate's decision in this case is not such a primary decision. That is because it was made while the applicant was in immigration clearance at the airport. Such a decision is outside the scope of review by the Administrative Appeals Tribunal under Part 5 (see s 338(3)(b)) and Part 7.

3. This proceeding has been brought on for hearing very expeditiously. Interactions with the Court during mentions have usefully identified that a matter of primary interest to the Court is the procedure that was followed in this case.

4. Because a determination is required expeditiously, and in light of those interactions, we think it convenient to go to straight to these procedural grounds, being Grounds 3A and 3B of the Applicant's proposed Amended Originating Application (**AOA**).

PART II GROUND 3A

5. Ground 3A is put in two ways.

A. First formulation

6. The applicant contends that none of the events in s 124(1) of the Act had occurred by 7.42am when the delegate made his decision, and so there was no power to make that decision at that time. There is no dispute about s 124(1)(b) and (c), and the Court's focus should be on s 124(1)(a) only.

7. The respondent's position is that s 124(1)(a) means only that the person has given a response, not a "completed" response as the applicant contends: **AS [121]**. The applicant's position reads words into the statute that are not there. And it may well arm a visa holder with a procedural filibuster, stymying the operation of what is a statutory power (s 116) integral to the Commonwealth's sovereign right to determine who can stay or remain in Australia. That is not a sensible construction.

8. The perverse outcome referred to at **AS [121]** (a non-citizen had said *something* but not *everything* they wanted to) is avoided entirely by recognising, as we do recognise, that a cancellation decision can be judicially reviewed for its alleged unreasonableness, potentially (as here) as to its **timing**. That presumption of reasonableness which attends the discretion to cancel is the statutory check and balance. By contrast, there is no such check and balance on a person who repeatedly seeks further time to respond to an invitation at interview (whatever the reason for that may be). That interpretation would instead permit the ongoing presence in Australia of a person where the delegate considers there appears to be a ground for cancelling their visa. That interpretation cannot be correct.

9. Here, there is no doubt that the applicant gave his response at interview. He had nothing more to say as at 6.14am.[1] Section 124(1)(a) had occurred, and there was, therefore, power to proceed to cancel.

10. This ground should be rejected.

B. Second formulation

11. The applicant alleges that not giving the applicant until 8.30am to speak to his advisers again denied him procedural fairness. **AS [128]** concedes, correctly, that the High Court's decision in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 is distinguishable in that, there, the person was given no notice of the change in procedure

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[1] Transcript of interview, T-20:31-33.

at all. That is not this case and *WZARH* does not control the outcome here. What controls the outcome is basic principle: has the applicant demonstrated practical injustice in the delegate giving him less time than previously stated?

12. He has not, for these reasons.

13. What must be shown to demonstrate practical injustice will vary with the nature of the alleged denial of procedural fairness. Here, the allegation is that the delegate resiled from a representation. In such a case, what Gageler and Gordon JJ described in *WZARH* applies:[2]

> There are cases in which conduct on the part of an administrator in the course of a hearing can be demonstrated to have misled a person into refraining from taking up an opportunity to be heard that was available to that person in accordance with an applicable procedure which was otherwise fair. To demonstrate that the person would have taken some step if that conduct had not occurred is, in such a case, part of establishing that the person has in fact been denied a reasonable opportunity to be heard.

14. In *WACO v Minister for Immigration and Multicultural and Indigenous Affairs*, which was cited by Gageler and Gordon JJ, the Full Court explained the "critical" feature in the High Court's decision in *Lam* as being that "the appellant never said that he relied upon that representation" by the decision-maker.[3] The leading treatise in this field likewise says that evidence would usually be called for to support a finding of reliance in "cases where unfairness is said to have resulted from conduct or representations (or the breach of those representations)".[4]

15. Here, there is no evidence from the applicant's lawyers about what they would or could have done between 7.42am and 8.30am, whom he had contacted previously.[5] Further, the applicant had had a long opportunity to provide information to the respondent over the course of the evening. He had just gotten off a plane, that is true, but he was flying from Spain (a time zone where it was the afternoon to evening).

16. There is no denial of procedural fairness in making the decision earlier.

PART III GROUND 3B

17. We accept that the delegate's decision can be reviewed for unreasonableness, and that the timing of the decision could in an appropriate case render the decision unreasonable.

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2 (2015) 256 CLR 326 at [59]

3 (2003) 131 FCR 511 at 524-525 [57].

4 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) at 486 [7.380].

5 Affidavit of Natalie Bannister sworn 6 January 2021 at [7(d)].

18. But that is not the case here.

19. Here, the applicant had already had a long opportunity to put representations to the delegate. A decision was made over an hour after the conclusion of the brought-forward interview, but no additional information was forthcoming in that period either. The applicant had previously contacted his lawyers, and there is no evidence that his lawyers would or could have done anything in that intervening period, and no evidence that anything would or could have been said in that intervening period that could not have been given to the delegate already.

20. Many decisions under the Act have heavy consequences for a person. This Court is entirely familiar with decisions that impact upon persons who claim that their own and their family's lives are at stake. Nonetheless, the "test for unreasonableness is necessarily stringent" and "the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion".[6] There is "an area within which the decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness",[7] and the court does not determine for itself how the power should have been exercised,[8] or interfere "just because the court would have exercised the discretion in a different way".[9] The Court could well think that it would not have made the decision at the time the delegate did, but that is not to the point.

21. This ground too should be rejected.

PART IV GROUND 1A

22. There is no dispute that a valid NOICC under s 119 of the Act is a jurisdictional precondition to the exercise of power under s 116: **AS [29]**.

23. But this NOICC was valid, not invalid. **AS [25]** seizes upon the undoubted typo in the last sentence of Attachment A to the NOICC. That unfortunate typo in misquoting the provision in one spot is unfortunate but immaterial.

24. Item 8 of the NOICC accurately identified s 116(1)(e)(i). The language of s116(1)(e)(i) was on the next page. Attachment A accurately quoted (albeit without quotation marks) s 116(1)(e)(i) in the second last paragraph, and the first sentence of the last paragraph in Attachment A accurately expressed the delegate's state of satisfaction by reference to the language of s 116(1)(e)(i).

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6 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [11], 564 [52], 570 [70], 586 [135].
7 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541at 577 [97].
8 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541at 567 [58].
9 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 574 [86].

25. This submission that the typo in the statement of the ground meant that particulars of why the ground existed had not been supplied consistently with s 119 should be rejected.

26. This ground plainly fails.

PART V GROUND 1B

27. Ground 1B is similar but different to, and weaker than, Ground 1A. The delegate made the same typo in Annexure B, being the record of decision as opposed to the NOICC. But the Court well knows that "[t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error".[10] That is what the applicant is doing here.

28. It is plain that the delegate formed the state of mind required by s 116(1)(e). Under item 6 in Part B, the delegate ticked s 116(1)(e). In the second last paragraph of Annexure B, the delegate quoted s 116(1)(e)(i) (albeit without quotation marks). And the whole gist of Annexure B is about s 116(1)(e)(i). The ground is comfortably disposed of by not departing from the High Court's instruction as to the proper approach to reading reasons for decision.

29. This ground plainly fails.

PART VI GROUND 1C

30. Ground 1C contains three separate sub-grounds (see **AS [35]**) and we therefore address them separately.

A. First sub-ground

31. The applicant challenges the statement in the delegate's record of decision that "[p]revious infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia".

No factual error

32. There is no factual error here let alone jurisdictional error.

33. **AS [39]-[40]** build up to the AIR form at **AS [41]-[43]**. But page 3 of that form says, at the top of the right hand column, "A previous infection is not a contraindication to immunisation against that same disease". That aligns with the delegate's record of decision.

34. **AS [44]-[45]** then pivots to what the applicant calls the ATAGI Exemption Guidance. But that says:

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[10] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

> … **people with laboratory confirmation of past infection can start their vaccination course**, or complete the second dose, if they have already had a first dose prior to being infected by SARS-CoV-2 **as soon as they have recovered from the symptomatic infection.** …

35. The evidence is that the applicant has recovered.

36. Further, the ATAGI Exemption Guidance has to be read with the AIR form, because it says it was "prepared to support completion of" that form. That form, as we said above, is clear.

37. Second, the ATAGI Exemption Guidance has to be read with the later December document, which the applicant refers to as the ATAGI Vaccination Advice. It says on (internal) page 3, in terms, "Past infection with SARS-CoV-2 is not a contraindication to vaccination". That is entirely consistent with the impugned sentence in the delegate's record of decision.

38. The applicant relies on (internal) page 4, which says "COVID-19 vaccination in people who have had PCR-confirmed SARS-CoV-2 infection **can be deferred** for a maximum of six months after the **acute illness**, as a temporary exemption due to acute major medical illness" (emphasis added). But any such exemption has ceased: see above at paragraph 34.

39. Further, the statement about deferral does not say that such a person has, contrary to the delegate's statement, "a contraindication to vaccination". It says the person can defer the vaccination. That is different, which is no doubt why the document uses different language for different concepts.

40. Further still, there is no suggestion that the applicant had "acute major medical illness" in December 2021. All he has said is that he tested positive for COVID-19. That is not the same. Thus the ATAGI Vaccination Advice uses different terms, such as mere "past infection" and also "symptomatic infection".

41. The "radical" and "fundamental" error for which the applicant contends (**AS [49]**) is thus not made out.

No jurisdictional error

42. In any event, the impugned statement in the record of decision concerns the existence or not of a ground of cancellation. Whether or not such a ground exists is a matter of the delegate's state of satisfaction: a subjective jurisdictional fact, not an objective jurisdictional fact.

43. This does not mean the delegate's state of satisfaction is unreviewable. But what it does mean is that "the scope for review where the condition on which a power is exercised is

the state of mind of the repository of power — such as 'satisfaction' — is more limited than where the condition is an objective fact".[11]

44. The applicant seeks to show illogicality or unreasonableness: those are matters that **can** vitiate a state of satisfaction. But the Court will well appreciate how difficult it is to demonstrate illogicality or unreasonableness.

    44.1. As to illogicality, it is a "high bar".[12] As Robertson J explained in *Minister for Immigration and Citizenship v SZRKT*, "it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions".[13]

    44.2. As to unreasonableness, the "test for unreasonableness is necessarily stringent" and "the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion".[14] There is "an area within which the decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness",[15] and the court does not determine for itself how the power should have been exercised,[16] or interfere "just because the court would have exercised the discretion in a different way".[17]

45. For the reasons given above, there is not even mere factual error in the delegate's record of decision. But if there were any imperfection in it here (which is denied), any such imperfection falls well short of what must be shown to demonstrate illogicality or unreasonableness.

46. That is especially so in the specific context of this case. It is common ground that the applicant is unvaccinated. And there is no challenge to what the delegate said about "[u]nvaccinated persons creat[ing] a greater health risk of contracting COVID-19 and spreading COVID-19 to others" thus further "burden[ing] the Australian health system". Given that common ground and that finding, illogicality and unreasonableness in the delegate's formation of their state of satisfaction cannot be demonstrated. As Banks-Smith J and Wheelahan J have both stated about s 116(1)(e), "the words "or may

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11 *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120 at [17] (Banks-Smith J); *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90 at [20] (Wheelahan J).

12 *Rodchompoo v Minister for Immigration and Border Protection* [2018] FCA 965 at [108] (McKerracher J).

13 (2013) 212 FCR 99 at 137 [148].

14 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [11], 564 [52], 570 [70], 586 [135].

15 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541at 577 [97].

16 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541at 567 [58].

17 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 574 [86].

be" and "or might be" lowered the threshold for satisfaction as to risk".[18] The delegate's conclusion that this was satisfied was plainly open to them.

47. This sub-ground fails.

B. Second sub-ground

48. The second aspect of ground 1C is an allegation that the delegate failed to consider a representation made by the applicant as to why the delegate should not be satisfied of s 116(1)(e)(i).

49. Paragraphs 31 to 33 of the AOA states:

> Among the reasons given by the Applicant as to why grounds for cancellation do not exist, or why the Visa should not be cancelled, was that he had been granted a medical exemption via a process involving two independent medical panels, being: (i) a first independent expert medical review panel; and (ii) a further independent Medical Exemptions Review Panel of the Victorian State Government, in which process the Applicant's identity was anonymised (**Medical Exemption Process**).
>
> The exemption document resulting from the Medical Exemption Process (Bannister Affidavit, Annexure F) recorded that the conditions of exemption were consistent with recommendations of ATAGI.
>
> In the premises, the Applicant represented that his compliance with ATAGI Principles was a reason why grounds for cancellation did not exist, or why his Visa should not be cancelled.

50. This second sub-ground should be rejected. The delegate in terms considered the representation made by the applicant that he had a medical exemption issued by Tennis Australia. That exemption was before the delegate, and the delegate referred to it in his reasons, stating that the applicant "also provided a copy of a medical exemption issued by Tennis Australia". That so-called "exemption" stated that the "conditions of the exemption are consistent with the recommendations of the Australian Technical Advisory Group on Immunisation (ATAGI)". The delegate then stated that "[p]revious infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia". And as explained in relation to the first sub-ground, that is entirely consistent with both ATAGI documents upon which the applicant seeks to rely.

51. Alternatively, any failure to consider such representations is immaterial, because again, *mere* previous infection with COVID-19 is not a contraindication according to the ATAGI guidance, and that is only the basis upon which the applicant claims to be "exempt".

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[18] *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90 at [20] (Wheelahan J). See also *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120 at [17] (Banks-Smith J).

C. Third sub-ground

52. The third sub-ground proceeds on the alternative assumption that the delegate did not consider ATAGI guidance. Ground 1C does not arise, because the respondent does not contend that the delegate did not consider ATAGI's position. Rather, the clear inference arising from the delegate's reasons is that he did: because he stated that vaccination is not a contraindication to vaccination in Australia, and that is precisely what ATAGI says.

53. In any event, applicant did not present "highly probative evidence" of contraindication (cf **AS [61]**). The applicant presented a letter from Tennis Australia purporting to provide him with a "medical exemption". It does not refer anywhere to "contraindication". Nor does it give *any medical reason* why the applicant could not be vaccinated. It follows that any error as alleged is immaterial. Even if the delegate did not consider ATAGI, it would not have mattered because the applicant did not provide evidence consistently with ATAGI recommendations that he had a contraindication to vaccination.

PART VII GROUND 1D

54. Ground 1D complains that the record of decision states that a traveller **must** provide evidence of that medical contraindication provided by their medical practitioner whereas s 5(3)(b) of the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021* (Cth) (**Determination**) only says that a person must declare that they can do so.

55. There is no error in the record of decision, because the reference to a person having to provide that evidence should be understood, as **AS [70]** prophylactically and accurately recognises, in the context of s 5(7) which requires a person to produce the medical evidence upon request.

56. **AS [70]** says that the applicant could not have breached this because he wasn't asked for the medical evidence: he gave it before he was asked. That would defeat the Determination if a person could sneak around the provision by providing something first before being asked. The point is that a person must be able to provide something that meets the substantive requirement.

57. So that then takes us to **AS [71]-[74]**, which the applicant again prophylactically and accurately recognises must be the true killing ground here. Was it open to the delegate to find that that evidence did not show a medical contraindication? That takes us back to Ground 1C. That ground fails, and so the answer to our question is "yes".

58. This ground too must fail.

PART VIII GROUND 2A

59. Ground 2A alleges that the delegate failed to consider the representations made by the applicant and recorded at Part B Point 8 of the Decision Record (internal page 5). Whether the delegate considered them is a question of fact. It is implausible that the delegate recorded it there without considering them at all. And it is a significant thing so to find.[19]

60. Indeed, the delegate can be seen to have considered these matters under "Client circumstances in which the ground for cancellation arose (whether there were any extenuating circumstances beyond the visa holder's control that led to the grounds existing)". The applicant describes this as a "grossly inadequate summary" of the representations made; but that is not to the point. The question is were they considered?

61. In *Minister for Home Affairs v Omar*,[20] the Full Court approved at [36(c)] the following passage from the judgment of Kiefel J in *Tickner v Chapman*, addressing what is meant by the obligation to "consider":[21]

> To "consider" is a word having a definite meaning in the judicial context … It requires that the Minister have regard to what is said in the representations, to bring his [or her] mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the Minister is required to know what they say.

62. The answer must therefore be "yes", they were. They are expressly recorded at Part B Point 8 of the Decision Record. And they are repeated at Part B Point 9, in a way that demonstrates the delegate *must* have considered them and then attributed them the weight or persuasive quality he thought appropriate. That was the role of the delegate. It is not for this Court to second-guess the weight the delegate chose to assign to them.

63. What the applicant in truth asks this Court to do is to slide into impermissible merits review,[22] and make a finding that the applicant had in fact "done everything he had been asked to do in order to ensure his entry into Australia" (**AS [85]**), and that material given to him by the Department informed him that he had done everything (**AS [84]**). Even if the representations in fact made can be understood in this way, it does not mean the delegate was required to accept those representations.

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19 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [48]; see also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166 at [15].

20 (2019) 272 FCR 589.

21 (1995) 57 FCR 451 at 495.

22 See *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [30] (the Court, referring with approval to observations of Basten JA with whom Allsop P (as his Honour then was) agreed in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45]); *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [32] (the Court).

64. This is because there is no such thing as an assurance of entry by a non-citizen into Australia. Rather, there are criteria and conditions for entry, and reasons for refusal or cancellation of a visa. Section 116(1)(e)(i) is one of those reasons for cancellation, and reflects the power and responsibility of the Commonwealth to determine who is entitled to be in Australia. That power and responsibility are fundamental attributes of Australia's sovereignty.[23] And as for material given to the applicant by the Department, it had not represented to the applicant that his so-called "medical exemption" would be accepted. The email from the Department stated that the applicant's *responses* to his Australian Traveller Declaration indicated that he met the requirements for "quarantine free" travel into Australia. But that says nothing about the power of the Minister (or her delegate) to interrogate those responses, the evidence upon which they were based, and conclude that a cancellation power was enlivened under the Act upon his arrival into Australia.

65. We reiterate that this all simply invites impermissible merits review. They arguments are addressed only for the purpose of showing that *even if* this Court were to infer the delegate did not consider something they expressly recorded they *had* considered, it would not be material, because the content of those representations only need be stated to be rejected.

PART IX GROUND 2B

66. Ground 2B challenges that part of the delegate's record of decision under the heading: "Client circumstances in which the ground for cancellation arose (whether there were any extenuating circumstances beyond the visa holder's control that led to the grounds existing)".

67. The delegate found that the circumstances were not beyond the applicant's control, and therefore considered that this weighed significantly in favour of cancellation.

68. The applicant's ground of review is that this is illogical or irrational because "[t]he absence of extenuating circumstances" could only be neutral or irrelevant, not adverse.

69. This ground should be rejected.

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[23] *Robtelmes v Brenan* (1906) 4 CLR 395 at 400 (Griffiths CJ); *Pochi v Macphee* (1982) 151 CLR 101 at 106 (Gibbs J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [21] (Gleeson CJ); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [402] (Crennan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [479] (Keane J); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92] (Nettle J); *Commonwealth v AJL20* (2021) 95 ALJR 467 at [21] (Kiefel CJ, Gageler, Keane and Steward JJ).

70. *First*, the applicant's argument amounts to a contention that no reasonable person could regard the fact that the ground for cancellation arose due to matters within the visa holder's control as a fact favouring cancellation. The proposition need only be stated to be rejected.

71. *Second*, the argument appears to depend on a narrow reading of the heading in the record of decision. But the parenthetical reference to the presence of extenuating circumstances need not narrow the "[c]lient circumstances in which the ground for cancellation arose".

72. *Third,* principles derived from cases regarding criminal sentencing do not readily translate to administrative decision making (cf **AS [96]**). The weight to be placed on each factor is a matter for the decision maker.

73. The applicant falls far short of demonstrating illogicality.

PART X CONCLUSION

74. The application should be dismissed with costs.

75. If the Court is minded to grant relief, then the respondent submits that the only orders should be to quash the decision and costs. It is inappropriate to make any further orders, whether they be for immediate release or even remitter to the delegate for reconsideration according to law.

76. As the Court raised with the parties at a previous mention, if this Court were to make orders in the applicant's favour, it would then be for the respondent to administer the Act in accordance with law. That may involve the delegate deciding whether to make another cancellation decision, but there are also other powers in the Act, as the Court would be aware. Or, indeed, no power may be exercised. It is sufficient for the Court to quash the decision. From the time those orders are made, the respondent will act on the basis that the applicant's visa has not been cancelled.

77. If the Court makes an additional orders for immediate release of the applicant, notwithstanding the above, the respondent submits that the Court should make it expressly clear that that order does not purport to (nor could it) prevent the respondent or any officer of the Commonwealth from exercising any power to detain that might be available to him or her despite the quashing of the delegate's cancellation decision. An order for immediate release does not prevent re-detention if there is power to detain.[24] The express reservation

[24] *Commonwealth v AJL20* (2021) 95 ALJR 467 at [105] (Gordon and Gleeson JJ, in dissent but not on this issue). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [183] (Kiefel and Keane JJ, in dissent but not on this issue).

is not, then, strictly necessary, but it would assist to say so to avoid any doubt about the proposition in the previous sentence.

Date: 9 January 2022

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