

# FEDERAL COURT OF AUSTRALIA

## Pearson v Minister for Home Affairs [2022] FCAFC 203

File number: NSD 854 of 2022

Judgment of: **ALLSOP CJ, RANGIAH AND SARAH C  
DERRINGTON JJ**

Date of judgment: 22 December 2022

Catchwords: **MIGRATION** – application for review of decision of Administrative Appeals Tribunal to affirm decision of delegate of Minister for Home Affairs to mandatorily cancel visa on character grounds – where invitation did not crystallise the time period to make representations for revocation – where representations nevertheless made within 28 days and were considered – whether invitation a nullity – whether Minister’s failure to comply with condition precedent to exercise of power material

**MIGRATION** – visa mandatorily cancelled pursuant to s 501(3A) of *Migration Act 1958* (Cth) on basis of aggregate sentence of 4 years and 3 months – whether aggregate sentence “a term of imprisonment of 12 months or more” within s 501(7)(c)

**ESTOPPEL** – *Anshun* estoppel – where applicant previously sought judicial review of same decision and appealed to Full Court – whether applicant “should” have raised new grounds in previous application – where applicant could lose right ever to reside in Australia – whether “special circumstances”

Legislation: *Acts Interpretation Act 1901* (Cth) ss 2(2), 23(b)  
*Migration Act 1958* (Cth) ss 441A, 441G, 501(3A), 501(6), 501(7), 501(7A), 501(12), 501CA(3), 501CA(4)  
*Migration Regulations 1994* (Cth) rr 2.52(2)(b), 2.52(4)  
*Crimes Sentencing Procedure Act 1999* (NSW) s 53A

Cases cited: *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 114  
*BC v Minister for Immigration and Multicultural and Indigenous Affairs* [2001] FCA 1669; 67 ALD 60  
*Champerslife Pty Ltd v Manojlovski* [2010] NSWCA 33; 75

NSWLR 245

*Clayton v Bant* [2020] HCA 44; 272 CLR 1

*EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173; 288 FCR 158

*EXT20 v Minister for Home Affairs* [2022] FCAFC 72

*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123

*JM v R* [2014] NSWCCA 297; 246 A Crim R 528

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* [2022] FCAFC 28; 289 FCR 72

*Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 271 CLR 112

*Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; 238 CLR 627

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; 273 CLR 21

*Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423

*New South Wales v Kable* [2013] HCA 26; 252 CLR 118

*Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 825

*Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 22

*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589

*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355

*Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174; 288 FCR 180

*Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578

*Tapiki v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 391

*Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 ; 259 CLR 212

*Vaughan v The Queen* [2020] NSWCCA 3

*XJLR v Minister for Immigration, Citizenship, Migrant Service and Multicultural Affairs* [2022] FCAFC 6; 289 FCR 256

Division: General Division

Registry: New South Wales

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 58

Date of last submissions: 2 December 2022

Date of hearing: 25 November 2022

Counsel for the Applicant: Mr P Knowles SC

Counsel for the First Respondent: Mr C Lenehan SC and Mr J Wherrett

Solicitor for the First Respondent: Australian Government Solicitor

## ORDERS

NSD 854 of 2022

**BETWEEN:**           **KATE PEARSON**  
Applicant

**AND:**               **MINISTER FOR HOME AFFAIRS**  
First Respondent

**SECRETARY, DEPARTMENT OF HOME AFFAIRS**  
Second Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**  
Third Respondent

**ORDER MADE BY:** **ALLSOP CJ, RANGIAH AND SARAH C DERRINGTON JJ**

**DATE OF ORDER:** **22 DECEMBER 2022**

### **THE COURT ORDERS THAT:**

1. Within 7 days, the parties provide the Full Court with proposed short minutes of order, including as to costs, reflecting the substance of these reasons.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### THE COURT:

#### Introduction

1 Ms Pearson’s application for judicial review raises two questions of some importance to the construction and application of the *Migration Act 1958* (Cth) in circumstances where a person’s visa has been mandatorily cancelled under s 501(3A) of the *Migration Act* because the person has been sentenced to a term of imprisonment of 12 months or more. The first is whether the notice given to Ms Pearson of the cancellation of her visa was invalid because it failed to comply with the requirements of s 501CA(3)(b) of the *Migration Act* and reg 2.52(2)(b) of the *Migration Regulations 1994* (Cth). The second is whether, for the purposes of s 501 of the *Migration Act*, an aggregate sentence of imprisonment, under a provision such as s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), is a single sentence to a term of imprisonment or a sentence to “2 or more” terms of imprisonment, or is neither.

2 Ms Pearson sought leave to raise the second question as a new ground in her Second Further Amended Originating Application for review of a migration decision (SFAOA) annexed to her outline of submissions filed on 15 November 2022. The Minister opposed the grant of leave relying, ultimately rather weakly, on the principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 (*Anshun estoppel*). As is discussed below, the principle was not engaged in the present case and leave should be granted to Ms Pearson to rely on the SFAOA.

3 For the reasons that follow, the first question raised in the SFAOA should be answered “No”, and the second that it is neither a single sentence to a term of imprisonment nor a sentence to two or more terms of imprisonment. Consequently, Ms Pearson’s first and second grounds of appeal (which reflect the first question) must be dismissed. Ground three (which reflects the second question) must be upheld.

#### Background

4 On 17 July 2019, Ms Pearson was notified that a delegate of the **Minister** for the **Department** of Home Affairs had cancelled her class TY subclass 444 Special Category (Temporary) **visa** under s 501(3A) of the *Migration Act* because she had been sentenced to a term of imprisonment of 12 months or more (**Cancellation decision**). Ms Pearson was informed of that decision by letter dated 17 July 2019 and was invited to make

representations to the Minister about revoking the decision to cancel her visa. The letter informed Ms Pearson that the representations:

must be made in accordance with the instructions outlined below, under the headings ‘How to make representations about revocation of the original decision’ and ‘Timeframe to make representations about revocation’.

5 The letter made four claims relevant to the period in which she was required to make her representations:

- any representations “*must be made within 28 days* after you are given this notice”.
- the “Required Information” (which was defined to include the information specified in reg 2.52(4)) “***MUST be received by the Department within 28 days*** after you are taken to have received this notice”.
- “As this notice was sent by mail from a place in Australia to an address in Australia, you are taken to have received it seven (7) working days after the date of this notice”.
- “If the Required Information is received outside the prescribed timeframe of 28 days, the Minister or his/her delegate is not able to consider your representations because they would not have been made in accordance with the invitation (as set out in this notice), as required by s 501CA(4)(a) of the Act”.

(Emphasis added)

6 Ms Pearson was also informed that once the Required Information had been received by the Department within the 28-day period, she was at liberty to provide any additional information which would be considered if received before the revocation decision was made. Ms Pearson was deemed to have received the invitation to make representations on 26 July 2019.

7 By email on 22 August 2019 at 4:18:27 pm (being sent by Ms Pearson and received by the Department within 28 days of receipt of the invitation by Ms Pearson) Ms Pearson’s legal representatives made representations on her behalf to support her request for revocation of the Cancellation decision.

8 The Department acknowledged receipt of Ms Pearson’s representations by email on 23 August 2019 which also said the Department “will consider them in due course”.

9 Further information was provided to the Department by Ms Pearson’s legal representatives on 15 October 2019, 20 November 2019, 22 November 2019, and 25 November 2019.

- 10 By letter dated 30 March 2020, the Department invited Ms Pearson to comment on information it had received relating to the sentencing remarks of the District Court of NSW on 28 February 2019 and a media article dated 13 September 2017. A “procedural fairness” notice, as this letter was, is not “a representation under paragraph 501CA(3)(b)” and so the time period prescribed by reg 2.52(2)(b) was of no application to that request.
- 11 On 24 June 2020, Ms Pearson was notified that the Minister’s delegate had decided not to revoke the Cancellation decision (**Non-Revocation Decision**).
- 12 Ms Pearson sought review of the Non-Revocation Decision by the Administrative Appeals **Tribunal** which, on 15 September 2020, affirmed the decision. On 22 July 2021, a judge of the Court dismissed an application for judicial review of the Tribunal’s decision (*Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 825). That decision was upheld by the Full Court on 1 March 2022 (*Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 22). These proceedings were commenced on 10 October 2022 subsequent to Ms Pearson’s being served with a notice of intended removal from Australia five days earlier.

### **Section 501CA of the Migration Act**

- 13 Section 501CA(3) requires the Minister, as soon as practicable after making a decision to cancel under s 501(3A), to:
- (a) give the person, in the way that the Minister considers appropriate in the circumstances:
    - (i) a written notice that sets out the original decision; and
    - (ii) particulars of the relevant information; and
  - (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
- 14 Regulation 2.52(2) sets out the time period in which representations must be made:
- (2) The representations must be made:
    - (a) for a representation under paragraph 501C(3)(b) of the Act—within 7 days after the person is given the notice under subparagraph 501C(3)(a)(i) of the Act; and
    - (b) for a representation under paragraph 501CA(3)(b) of the Act—within 28 days after the person is given the notice and the particulars of relevant information under paragraph 501CA(3)(a) of the Act.

15 The Minister’s authority to revoke the original decision is contained in s 501CA(4), which provides:

- (4) The Minister may revoke the original decision if:
  - (a) the person makes representations in accordance with the invitation;  
and
  - (b) the Minister is satisfied:
    - (i) that the person passes the character test (as defined by section 501); or
    - (ii) that there is another reason why the original decision should be revoked.

16 Section 501CA(3) requires the Minister to do two things before reaching the requisite state of satisfaction to revoke, or not to revoke, the original decision – to give a written notice to the person concerned, and to invite the person to make representations within a period of time and in a manner ascertained in accordance with the *Migration Regulations*. The verbs “give” and “invite” bear their common or ordinary meanings of “to deliver or hand over” and “to request politely or formally”: *Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 271 CLR 112 at [23]. The High Court held that, “The verbs ‘give’ and ‘invite’ connote only the performance of an act rather than the consequences of that performance...”: at [23].

17 There was no dispute that the Minister gave Ms Pearson a written notice, nor that the Minister invited Ms Pearson to make representations. Equally, there was no dispute that the invitation did not invite her to make those representations “within the period” ascertained in accordance with the *Migration Regulations*.

### **The effect of the invitation**

18 Ms Pearson submitted that the invitation was invalid and ineffective because the period for representations was improperly crystallised. This was because the prescribed period was incorrectly identified as referable to when any representation was received by, or lodged with, the Department rather than by a period referable to when any representations were made or dispatched to the Minister. In *EFX17* the High Court held, at [42], that “an invitation to make representations ‘within the period... ascertained in accordance with the regulations’ must crystallise the period either expressly or by reference to correct objective facts from which the period can be ascertained on the face of the invitation...” The High Court said, at [41]:



It can hardly be supposed that Parliament intended that a person whose visa had been cancelled would not be given the information that would reveal the date by which representations must be made if the person is to avoid the strict consequences of failing to make representations.

19 In *EFX17*, the respondent was instructed that any representations must be made within the prescribed time period which was said to be “within 28 days after you are taken to have received this notice”. The instructions also said, “As this notice was transmitted to you by email, you are taken to have received it at the end of the day it was transmitted”. The email was transmitted to the Brisbane Correctional Centre on 3 January 2017 but the letter and its enclosures were handed to the respondent by a Corrective Services Officer the following day, 4 January 2017. If the letter and enclosures had complied with s 501CA(3), then the 28-day period would have started to run from 4 January 2017. The High Court held, at [40], that in the absence of any manner of ascertaining the 28-day period, and by incorrectly saying that the respondent was “taken to have received [the letter] at the end of the day it was transmitted [by email]” (which was 3 January 2017), the letter did not invite representations “within the period ... ascertained in accordance with the regulations”. The High Court gave as an example, an invitation to make representations within “28 days from the date that you were handed this document”: at [42].

20 As can be discerned from the High Court’s reasoning, the Court was concerned with circumstances where the person would be held to the strict consequences of failing to make representations because the correct period had not been accurately crystallised in the invitation and so the representations were made one day beyond the requisite 28-day period.

21 This was a similar feature of each of the Full Court decisions of this Court relied upon by Ms Pearson. In *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578, the Minister contended that the representations had been made outside the 28-day period. The Full Court held that the word “made” does not mean “received” but rather “dispatched” and so it was sufficient in that case for the prisoner to have given the representations to the prison authorities within the 28-day period to dispatch because the prisoner then does not know whether or not they have been received in time: at [47].

22 In *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173; 288 FCR 158, the representations were received by the Minister on 4 October 2019 which was one day outside the 28-day period. The Minister’s delegate did

not take any point about the timing of the representations but, on review to the Tribunal, the Tribunal held that it lacked jurisdiction because the applicant’s representations had to be received no later than 3 October 2019. The Full Court observed that the High Court in *EFX17* had accepted that an error by one day in crystallising the period for making representations was sufficient to invalidate the invitation without any consideration of the extent or consequences of departure: at [40]. The Full Court held that it should follow and apply *Stewart* and that there was no sound basis for distinguishing *Stewart* or *EFX17* in that context: at [41].

23 *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174; 288 FCR 180, which was heard concurrently with *EPL20*, also concerned circumstances in which the representations were received outside the 28-day time period (10 days later) and where no issue as to the timing of the representations was raised by the delegate. The Tribunal, however, accepted a submission by the Minister that the Tribunal had no power to revoke the cancellation decision because the representations had been made outside the prescribed period.

24 On their face, the decisions in *Stewart*, *EFX17*, *EPL20*, and *Sillars* are authority for the proposition that the failure of an invitation to crystallise the period in which representations must be made makes the invitation ineffectual. The reasoning of the Full Court in *Stewart* emphasised, at [50], that:

the legislative expressions “makes” and “made” in s 501CA and reg 2.52 *focus on the act of the prisoner, not the position of the Minister* as the intended recipient of the representations. It can readily be inferred that, in such a context, the statutory language contemplated and intended that the prisoner only do all that was reasonably necessary in their power to “make” the representations within the prescribed period of 28 days after being given the notice of revocation.

(Emphasis added)

25 Nevertheless, as was the case in *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423, there is a distinguishing feature in the present case, namely that Ms Pearson’s representations were incontrovertibly received by the Minister 27 days after the date on which she was deemed to have received the invitation. Further, subsequent to the Minister’s receipt of the representations, Ms Pearson sent four additional sets of representations, through her legal representative. She was also sent a request to comment or provide information on two matters that had been brought to the Minister’s attention. These “procedural fairness” notices are not “a representation under

paragraph 501CA(3)(b)” and so the time period prescribed by reg 2.52(2)(b) is of no application to these requests. There was no dispute that all of Ms Pearson’s representations were considered by the Minister.

26 The question which arises is whether the failure to crystallise the period within which representations are to be despatched invalidates the invitation for all purposes. The answer to this question is to be arrived at by proper construction of the statute, and through that process, “discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute”: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123 at [27] per Kiefel CJ, Gageler and Keane JJ.

27 As the plurality observed in *Hossain* at [28]:

The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. *They are not so delicate or refined in their operation that sight is lost of the fact that “[d]ecision-making is a function of the real world”.*

(Emphasis added)

28 How this translates to circumstances such as the present is that a statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance with a condition to be observed in the course of a decision-making process. A failure to observe such a condition is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition: *Hossain* at [29].

29 The broad test for determining whether an implied legislative condition is jurisdictional, such that it would deny legal force and effect to a subsequent decision is that set out by McHugh, Gummow, Kirby, and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [93], “whether it was a purpose of the legislation that an act done in breach of the provision should be invalid”.

30 As Gageler J explained in *New South Wales v Kable* [2013] HCA 26; 252 CLR 118 at [52], and as was adopted by the High Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; 273 CLR 21 at [20]:

[A] thing done in the purported but invalid exercise of a power conferred by law...remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a ‘nullity’ in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, money might be paid in the purported discharge of an invalid statutory obligation in circumstances which make that money irrecoverable, or the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of the power is valid.

31 Acceptance of the factual existence of the consequence of an unauthorised exercise of statutory power is implicit in the High Court’s analysis of the words “give” and “invite” in s 501CA(3)(b) as connoting only the *performance* of an act, *rather than the consequences* of that performance: *EFX17* at [23]. This invites attention to whether, properly construed, the statute incorporates a threshold of materiality and what that threshold is: *Hossain* at [29]-[30].

32 In *Hossain*, the High Court said, at [30]:

...the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which the decision was made.

33 Similarly, Edelman J (with whom Nettle J agreed, at [39]) observed in *Hossain* at [67], that “[a] close examination of legislation will usually have the effect that not every express or implied condition must be construed in a binary way ... Just as it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power, so too it is unlikely to be an intention that the legislature is taken to have that a decision be rendered invalid by an immaterial error”.

34 In the present case, although the Minister did not comply with the condition precedent in that there was a failure to crystallise the period within which Ms Pearson’s representations were to be despatched, that failure was not material. It was argued, albeit faintly, that the failure was material in that Ms Pearson may have had more time to make more fulsome representations in her first response to the invitation. That proposition cannot be accepted on the facts. Ms Pearson’s representations *were* made within the relevant time period and, together with her subsequent representations made over the ensuing three months, were taken into account by the Minister’s delegate in making his decision almost 12 months after the

Cancellation decision. There is no suggestion in the delegate’s reasons that the timing of the receipt of the more detailed representations impacted in any way on the weight accorded to those representations. The factual and legal consequences generated by the admittedly invalid invitation are that Ms Pearson made representations in accordance with that invitation, as required by s 501CA(4)(a) of the *Migration Act*, enabling the Minister to reach the requisite satisfaction, or not, pursuant to s 501CA(4)(b).

35 Had Ms Pearson’s representations been made beyond the period incorrectly specified in the invitation, the Minister could not have refused to consider the representations on the basis that they were late because the exercise of power in s 501CA(4) would have miscarried. It would miscarry “because there is a *refusal* to exercise the power...on the misconceived basis that there the person affected had been given an invitation to make representations that was ‘in accordance with’ the Act, when they had not”: *EXT20 v Minister for Home Affairs* [2022] FCAFC 72 at [102] (emphasis original).

36 In such circumstances, the factual and legal consequences generated by the failure to specify the correct time limit means that the invitation is invalid to the extent that it purports to prescribe a time period, in which case time ceases to run until the Minister considers the representations, but the invitation is otherwise valid to the extent that it is a document that invites representations. That is because the power conferred by s 501CA(4), either to revoke a visa cancellation, or not, is preconditioned on the Minister’s satisfaction that there is a reason why the original decision should be revoked, after representations have been made. This is not to depart from the decisions of the Full Court in *Stewart*, *EPL20* or *Sillars* in which the recipients of the invalid notice did not make representations within the prescribed period. Those cases were concerned with different substrata of facts.

37 In this regard, the matter is not dissimilar to *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; 238 CLR 627 where the Refugee Review Tribunal (**RRT**) failed to comply with the requirements of ss 441A and 441G of the *Migration Act*. The RRT sent notice of the hearing to the first applicant only, instructing him to inform the other applicants of the hearing. All of the applicants attended the hearing and had the opportunity to participate in the hearing. The High Court said, at [35], that the “admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from *any* of the procedural steps leading up to the hearing”,(emphasis added).

38 Similarly, it cannot be supposed that the legislature intended that a person who has made representations which have been considered by the Minister, whether the cancellation decision is revoked or not, should be required to remain in immigration limbo whilst the process commences again when there could not be a materially different outcome: *Montgomery*, at [101]. Were it otherwise, the protective mechanism that Parliament has provided for in s 501CA(4) would be significantly diminished.

39 For these reasons, grounds one and two cannot succeed.

### **The effect of an aggregate sentence**

40 The proposed new ground of review is concerned with whether Ms Pearson's sentence to an aggregate maximum term of imprisonment of 4 years and 3 months in respect of 10 offences engages s 501(3A) of the *Migration Act* because of the operation of the character test, particularly as provided for in s 501(7)(c). Ms Pearson submits that, notwithstanding the lateness of the SFAOA, the issue that arises is one of law only and the Minister cannot be taken by surprise since the same issue is presently reserved before another Full Court: NSD 296 of 2022 on appeal from *Tapiki v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 391. Relevantly, the character test is as follows:

#### *Character test*

- (6) For the purposes of this section, a person does not pass the ***character test*** if:
  - (a) the person has a substantial criminal record (as defined by subsection (7)); or
  - (aa) the person has been convicted of an offence that was committed:
    - (i) while the person was in immigration detention; or
    - (ii) during an escape by the person from immigration detention; or
    - (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
  - (ab) the person has been convicted of an offence against section 197A; or
  - (b) the Minister reasonably suspects:
    - (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
    - (ii) that the group, organisation or person has been or is involved in criminal conduct; or

- (ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
- (i) an offence under one or more of sections 233A to 234A (people smuggling);
  - (ii) an offence of trafficking in persons;
  - (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;
- whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or
- (c) having regard to either or both of the following:
- (i) the person's past and present criminal conduct;
  - (ii) the person's past and present general conduct;
- the person is not of good character; or
- (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
- (i) engage in criminal conduct in Australia; or
  - (ii) harass, molest, intimidate or stalk another person in Australia; or
  - (iii) vilify a segment of the Australian community; or
  - (iv) incite discord in the Australian community or in a segment of that community; or
  - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or
- (e) a court in Australia or a foreign country has:
- (i) convicted the person of one or more sexually based offences involving a child; or
  - (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or
- (f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
- (i) the crime of genocide;
  - (ii) a crime against humanity;
  - (iii) a war crime;
  - (iv) a crime involving torture or slavery;

- (v) a crime that is otherwise of serious international concern; or
- (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
- (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the *character test*.

*Substantial criminal record*

- (7) For the purposes of the character test, a person has a *substantial criminal record* if:
- (a) the person has been sentenced to death; or
  - (b) the person has been sentenced to imprisonment for life; or
  - (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
  - (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
  - (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
  - (f) the person has:
    - (i) been found by a court to not be fit to plead, in relation to an offence; and
    - (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
    - (iii) as a result, the person has been detained in a facility or institution.

*Concurrent sentences*

- (7A) For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

...

- (12) ...

*sentence* includes any form of determination of the punishment for an offence.



(Emphasis in (7)(c) added)

41 **The significance of the proper construction of the character test** stems from the terms of s 501(3A) which *require* the Minister to cancel a visa held by a person if the Minister reasonably suspects that the person does not pass the test because of the person’s having a “substantial criminal record” (s 501(6)) because the person satisfies the conditions in one of ss 501(7)(a), (b), (c) or 501(6)(e). That is, the person has been sentenced to death, sentenced to imprisonment for life, sentenced to a term of imprisonment of 12 months or more, or convicted of a sexual offence involving a child. In all other circumstances where a person does not meet the character test because of s 501(6), the Minister retains a discretion to cancel the person’s visa (s 501(3)).

42 It is clear from the text of s 501 that mandatory cancellation of a person’s visa on character grounds is **reserved for the most serious offences** – those attracting the death penalty, life imprisonment, a term of imprisonment of 12 months or more, and sexual offences involving children. It is in that context the question of whether an aggregate sentence can be considered to be a term of imprisonment of 12 months or more is asked.

43 The Minister submitted that the definition of “sentence” in s 501(12) being punishment for “an offence” does not assist the construction of s 501(7)(c) because s 23(b) of the *Acts Interpretation Act 1901* (Cth) compels **the singular to include the plural**. The operation of s 23(b) is of course constrained by s 2(2) which makes the application of any provision of the *Acts Interpretation Act* to an Act or provision of an Act subject to a contrary intention. A close examination of the provisions relating to the character test reveals that Parliament has made a conscious choice about the use of the singular or the plural throughout ss 501(6) and (7) that manifests a contrary intention to that expressed in s 23(b). For example, s 501(6)(aa) speaks in terms of “an offence” committed while in immigration detention, during an escape from immigration detention, and after escape as being sufficient to fail the character test. Where multiple offences are relevant to be considered, Parliament has used the phrase “one or more”; s 501(6)(ba), (e), (f). In the context of s 501(7), it is apparent that Parliament has made a distinct choice about the nature of the sentence for an offence that was to be used as an objective proxy for a “substantial criminal record” that will lead to mandatory cancellation – that being an offence punishable by death, life imprisonment, or a term of 12 months.

44 Ms Pearson was sentenced pursuant to s 53A of the *Crimes (Sentencing Procedure) Act* to an aggregate maximum term of imprisonment of 4 years and 3 months in respect of 10 offences.

As is required by s 53A(2) of that Act, indicative sentences were recorded in respect of each offence, one of which was for a term of 18 months. The approach to aggregate sentencing utilising s 53A was explained by the NSW Court of Criminal Appeal in *JM v R* [2014] NSWCCA 297; 246 A Crim R 528 per RA Hulme J (Hoeben CJ at CL and Adamson J agreeing) at [39]:

[39] A number of propositions emerge from the above legislative provisions [ss 44(2C), 53A, 54A(2) and 54B] and the cases that have considered aggregate sentencing:

1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 in sentencing for multiple offences: *R v Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a “cascading or ‘stairway’ sentencing structure” when the principle of totality requires some accumulation of sentences: *R v Rae* [2013] NSWCCA 9 at [43]; *Truong v R*; *R v Le*; *Nguyen v R*; *R v Nguyen* [2013] NSWCCA 36 at [231]; *Behman v R* [2014] NSWCCA 239; *R v MJB* [2014] NSWCCA 195 at [55]–[57].
2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *R v Clarke* [2013] NSWCCA 260 at [50]–[52]. See also *Cullen v R* [2014] NSWCCA 162 at [25]–[40].
3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).

There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form 1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

*SHR v R* [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [35]–[43]) to be in breach of the requirement in s 53A(2)(b) ...

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57;

194 CLR 610. *The criminality involved in each offence needs to be assessed individually*. To adopt an approach of making a “blanket assessment” by simply indicating the same sentence for a number of offences is erroneous: *R v Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]–[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]–[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]–[89]. It has been said that s 53A(2) is “clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges”: [*Khawaja v R*, [2014] NSWCCA 80] at [18].

5. The imposition of an *aggregate sentence is not to be used to minimise the offending conduct*, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]–[60].
6. One reason *why it is important to assess individually the indicative sentences is that* it assists in the application of the principle of totality. Another is that *it allows victims of crime and the public at large to understand the level of seriousness* with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].
7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].
8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]–[26].
9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed “Sentencing procedures for imprisonment”, and within Division 1 of that Part which is headed “Setting terms of imprisonment”.

(Emphasis added)

45 Importantly for present purposes, the Court of Criminal Appeal also explained that “The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence”: *JM* at [40]. This is consistent with the observations of the Court of

Criminal Appeal in *Vaughan v The Queen* [2020] NSWCCA 3 at [90] per Johnson J (Macfarlan JA and RA Hulme J agreeing), that “The only operative sentence imposed by the Court is the aggregate sentence under this statutory scheme ... The periods indicated by the sentencing Court have no practical operation at all”. Contrary to the Minister’s submissions, those observations tend to support the construction contended for by Ms Pearson. **The aggregate sentence of itself will say little to nothing about the seriousness of the individual offences for which indicative sentences have been given.** Further, in the case where a sentencing judge fails to provide indicative sentences for individual offences, an aggregate sentence of imprisonment is not invalidated (s 53A(5)). In such circumstances, **there could be no objective** means by which the Minister **could reach any reasonable suspicion**, on the basis of s 501(7)(c), as to whether a person’s visa ought to be mandatorily cancelled.

46 In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* [2022] FCAFC 28; 289 FCR 72 at [26], the Full Court said:

The natural and ordinary meaning of the unqualified expression, “sentenced to a term of imprisonment”, as it is used within the definition of a substantial criminal record in s 501(7)(c), describes an objective state of affairs. That unqualified expression contrasts, for example, with the qualified expression of the nature of the sentence on which s 501(3A)(b) operates.

47 Similarly, the unqualified expression can be contrasted with that in s 501(7)(d) – “sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more” – and with the explanation in respect of concurrent sentences in s 501(7A). Had Parliament intended that an aggregate sentence of 12 months or more should be subject to mandatory cancellation of a person’s visa, it would have been a straightforward matter to say so. That it did not do so is consistent with the apparent purpose of s 501(3A), namely that only the most serious offending subjects a person to mandatory cancellation of a visa. Self-evidently, an aggregate sentence may be arrived at after conviction of a series of lesser offences, none of which on their own could render a person liable to have his or her visa mandatorily cancelled.

48 **Ms Pearson was not sentenced** (for an offence) **to a term of imprisonment of 12 months or more.** Consequently, her visa was not amenable to mandatory cancellation under s 501(3A). Of course, nothing would have prevented the Minister from exercising his discretion pursuant to s 501(2) or (3) to cancel her visa should he have been satisfied of the matters in that subsection.

49 Ground three is upheld and leave to rely on it should be granted.

## *Anshun estoppel*

50 The Minister, quite rightly, observed that Ms Pearson has already unsuccessfully sought judicial review of the decision of the Tribunal, which application was dismissed at first instance and on appeal to the Full Court. In those circumstances, the Minister submitted that the principles of *Anshun estoppel* should preclude the applicant from raising the three grounds she now raises in this Court.

51 As was held by the High Court in *Clayton v Bant* [2020] HCA 44; 272 CLR 1 at [32] and [37], the question of whether a common law estoppel arises (encompassing both “claim estoppel” and *Anshun estoppel*) requires: first, identification of the actual rights, the existence or non-existence of which were or might have been asserted and finally determined in the earlier proceedings; and secondly, determination of whether there is “correspondence between those rights and the statutory right asserted [in the later proceedings]”. In *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 114 at [65], the Full Court said that so far as concerns “claim estoppel”, the question in judicial review proceedings of the present kind is whether:

- (a) the “cause of action” or “claim” (Clayton at [28]) should be viewed as a claim for relief for jurisdictional error in relation to the impugned decision, with the result that the doctrine would operate to prevent a second application even on a ground of judicial review which had not been advanced or determined; or
- (b) different grounds of jurisdictional error can be seen as separate causes of action.

52 The Full Court said, at [66]:

We consider that the latter is the better view. If, in a subsequent judicial review application concerning a decision previously the subject of an unsuccessful judicial review application, an applicant asserts that the decision-maker exceeded the jurisdiction conferred by the statute (*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 95 ALJR 441 at [29]) on a ground which, as a matter of substance, has not previously been determined, then the subsequent application is not barred by “claim” estoppel. As Heerey J stated in *Re Ruddock* at [48], referring to the decision of Merkel J in *Somanader* at [52], “the question whether there is identity between the earlier cause of action and the ones raised in the proceeding said to be the subject of the plea is to be determined by matters of substance rather than the form of the particular proceeding or the way in which it is pleaded”.

53 The question then becomes whether Ms Pearson’s grounds for judicial review of the decision which have already been the subject of judicial review *could* and *should* have been raised in

the first proceeding such that *Anshun* principles apply: *Champerslife Pty Ltd v Manojlovski* [2010] NSWCA 33; 75 NSWLR 245 at [3] per Allsop P; *AIO21* at [71].

54 It is within the statutory context that the question of unreasonableness for the purposes of *Anshun* estoppel falls to be considered. Consequently, whether an *Anshun* estoppel arises depends on the particular circumstances of the case: *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; 259 CLR 212 at [111] per Gordon J. In *BC v Minister for Immigration and Multicultural and Indigenous Affairs* [2001] FCA 1669; 67 ALD 60, Sackville J said, at [26]:

The authorities emphasise that the *Anshun* principle, since it shuts out a litigant from pursuing a cause of action, should be applied only after a “scrupulous examination of all the circumstances”: *Bryant v Commonwealth Bank* at FCR 296; ALR 138, citing *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590; *Ling v Commonwealth* (1996) 68 FCR 180 at 182; 139 ALR 159 at 160, per Wilcox J; *Gibbs v Kinna* at 29, per Kenny JA. Moreover, the *Anshun* principle is subject to the “special circumstances” exception. In *Bryant v Commonwealth Bank*, the Full Court seemed to accept (at FCR 296, 298-9; ALR 138, 140-1) that the exception:

... comprehend[s] situations where, for broad discretionary considerations related to notions of justice, [the principle] should not be applied with full rigour.

55 In the present circumstances such as those facing Ms Pearson where she is facing deportation and the possibility of being prevented from ever returning to Australia in the future, a conclusion that she *should* have raised the new grounds of judicial review in her previous application is not one that should be lightly drawn. There was, at some point, knowledge available as to the arguments raised and questions decided in *Stewart*, *EPL20*, *EFX17* and *Sillars* when Ms Pearson’s case was being argued. If the matter were not of the character this is: the loss of a right to reside (likely forever) in this country, of such human importance to Ms Pearson, it may be that “should” would encompass such oversight by pro bono counsel as there was. But the matter does have that character. The notions of vindication of justice derived from the interpretation of a complexly worded statute may make this, in the circumstances, a case within the “special circumstances” exception to the principle. In any event, there has been no investigation of the circumstances that might explain why the point was not raised. There has been no scrupulous examination of all the circumstances. In these circumstances the Minister has not discharged the onus, that was on him, of establishing the factual basis for the operation of the *Anshun* estoppel.

### **Disposition and orders**

56 For these reasons, **Ms Pearson's application succeeds on ground three**. Grounds one and two must be dismissed.

57 The Minister accepts that the Court has jurisdiction to make a declaration as to the delegate's decision notwithstanding the terms of s 476 of the *Migration Act*. That acceptance was based on *XJLR v Minister for Immigration, Citizenship, Migrant Service and Multicultural Affairs* [2022] FCAFC 6; 289 FCR 256 at [79]-[87] (Rares J) and [95]-[96] (Yates J), to which no challenge was made. In these circumstances, the first duty of the Court to satisfy itself of its jurisdiction is satisfied by following a decision of a Full Court not on its face doubtful and not said by the Minister through experienced counsel to be wrong.

58 As to orders, the parties should bring in short minutes as to orders, including as to costs in the light of the fact that both parties have had some success.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Rangiah and Sarah C Derrington.

Associate:

Dated: 22 December 2022