

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

MINISTER FOR IMMIGRATION AND BORDER
PROTECTION

APPELLANT

AND

LIKUMBO MAKASA

RESPONDENT

Minister for Immigration and Border Protection v Makasa
[2021] HCA 1
Date of Hearing: 12 November 2020
Date of Order: 12 November 2020
Date of Publication of Reasons: 3 February 2021
S103/2020

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G T Johnson SC with N D J Swan for the appellant (instructed by Sparke Helmore Lawyers)

A Ahmad with J D Donnelly for the respondent (instructed by Morning Star Legal & Migration Pty Ltd)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Immigration and Border Protection v Makasa

Immigration – Visas – Visa cancellation – Character test – Substantial criminal record – Where delegate of Minister for Immigration and Border Protection ("Minister") cancelled respondent's visa on character grounds under s 501(2) of *Migration Act 1958* (Cth) – Where Administrative Appeals Tribunal ("AAT") made decision under s 43(1)(c)(i) of *Administrative Appeals Tribunal Act 1975* (Cth) to set aside delegate's decision and substitute a decision not to cancel visa – Where Minister purported to re-exercise discretion to cancel visa – Whether Minister can re-exercise discretion on same factual basis in circumstances where AAT earlier decided not to cancel visa.

Words and phrases – "Administrative Appeals Tribunal", "character test", "different factual basis", "finality to the administrative decision-making process", "from time to time as occasion requires", "general power", "ministerial override", "nature of merits review", "powers of AAT", "reasonable suspicion", "re-exercise of a power", "special power", "substantial criminal record", "visa cancellation".

Acts Interpretation Act 1901 (Cth), ss 2, 33(1).

Administrative Appeals Tribunal Act 1975 (Cth), s 43.

Migration Act 1958 (Cth), ss 501, 501A.

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ.
The question in this appeal is whether the Minister for Immigration and Border Protection ("the Minister") can re-exercise the power conferred by s 501(2) of the *Migration Act 1958* (Cth) ("the Act") to cancel a visa after the Administrative Appeals Tribunal ("the AAT") has made a decision under s 43(1)(c)(i) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") setting aside a prior decision of a delegate of the Minister to cancel the visa and substituting a decision that the visa should not be cancelled. The answer turns on the construction of s 501(2) of the Act read in the context of the Act and the AAT Act and in light of the prescriptions of ss 2 and 33(1) of the *Acts Interpretation Act 1901* (Cth) ("the AI Act") that, "subject to a contrary intention", "[w]here an Act confers a power ... then the power may be exercised ... from time to time as occasion requires".

2 The Full Court of the Federal Court, by majority, answered the question in the negative in the decision under appeal¹ for reasons given contemporaneously in *Minister for Home Affairs v Brown*².

3 The negative answer is correct, although not precisely for the reasons given in *Brown*. Convinced of that result, we made orders at the conclusion of the hearing, dismissing the appeal with costs. These are our reasons.

The Act and the AAT Act

4 Section 501(1) of the Act provides that "[t]he Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Section 501(2) provides:

"The Minister may cancel a visa that has been granted to a person if:

- (a) the Minister reasonably suspects that the person does not pass the character test; and
- (b) the person does not satisfy the Minister that the person passes the character test."

1 *Makasa v Minister for Immigration and Border Protection* (2020) 376 ALR 191.

2 (2020) 275 FCR 188.

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5 The "character test" is elaborated in s 501(6). To the extent relevant, that sub-section provides:

"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

...

(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; ...

Otherwise, the person passes the *character test*."

6 The definition of "substantial criminal record" in s 501(7), to the extent relevant, is as follows:

"For the purposes of the character test, a person has a *substantial criminal record* if:

...

(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; ..."

7 Each of the powers conferred by s 501(1) and by s 501(2) can be delegated by the Minister under s 496 of the Act. Where a delegate of the Minister exercises the power conferred by s 501(1) to refuse to grant a visa to a person, or exercises the power conferred by s 501(2) to cancel a visa that has been granted to a person, s 500(1)(b) of the Act allows the person to apply to the AAT for review of the decision of the delegate. Subject to the need for the AAT, no less than the delegate, to comply with directions about the exercise of the powers conferred by s 501(1) and s 501(2) given by the Minister under s 499, and subject to procedural

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modifications effected by s 500(6A)-(6L) of the Act, the powers of the AAT in the conduct of the ensuing review are those authorised to be exercised by the AAT Act.

8 Section 43(1) of the AAT Act provides:

"For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- (a) affirming the decision under review;
- (b) varying the decision under review; or
- (c) setting aside the decision under review and:
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

9 Section 43(6) provides:

"A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes ... be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."

10 Section 501A of the Act then confers powers by which the Minister is permitted to override a decision made by a delegate or by the AAT on review. The Minister can override a decision not to exercise the power conferred by s 501(1) to refuse to grant a visa and instead decide to refuse to grant the visa. Equally, the Minister can override a decision not to exercise the power conferred by s 501(2) to cancel a visa and instead decide to cancel the visa.

11 Section 501A(1) is the gateway to s 501A. Section 501A(1) states:

"This section applies if:

- (a) a delegate of the Minister; or

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(b) the Administrative Appeals Tribunal;

makes a decision (the *original decision*):

(c) not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person; or

(d) not to exercise the power conferred by subsection 501(2) to cancel a visa that has been granted to a person;

whether or not the person satisfies the delegate or Tribunal that the person passes the character test and whether or not the delegate or Tribunal reasonably suspects that the person does not pass the character test."

12 Application of s 501A through the operation of s 501A(1) triggers the potential for the Minister to exercise one or other of two specific powers. Each can be described as a "non-compellable and non-delegable power"³ in that each is permitted by s 501A(5) to be exercised only by the Minister personally and in that s 501A(6) makes clear that the Minister need not consider exercising either of them. However, the incidents of each are slightly different.

13 The first of the two powers is that conferred by s 501A(2). Section 501A(2) is expressed to enable the Minister to set aside the original decision and refuse to grant a visa or cancel a visa if "the Minister reasonably suspects that the person does not pass the character test" and "the person does not satisfy the Minister that the person passes the character test" and "the Minister is satisfied that the refusal or cancellation is in the national interest".

14 The second of the two powers is that conferred by s 501A(3). Section 501A(3) is expressed to enable the Minister to set aside the original decision and refuse to grant a visa or cancel a visa if "the Minister reasonably suspects that the person does not pass the character test" and "the Minister is satisfied that the refusal or cancellation is in the national interest".

15 Exercise by the Minister of the power conferred by s 501A(3) is excused by s 501A(4) from compliance with procedural fairness, but triggers application of s 501C through the operation of s 501C(1). Section 501C(3) obliges the Minister to notify the person whose visa has been refused or cancelled under s 501A(3) and

3 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 665 [90].

to invite the person to make representations. Section 501C(4) then empowers the Minister, following receipt of any such representations, to revoke the decision to refuse or to cancel if, but only if, "the person satisfies the Minister that the person passes the character test". Section 501C(5) requires the power conferred by s 501C(4) to be exercised only by the Minister personally. Section 501C(8) compels the Minister to cause notice of a decision to revoke or not to revoke to be laid before each House of the Parliament.

Facts

16 Mr Makasa is a citizen of Zambia. He entered Australia on a student visa in 2001. He was granted a permanent residence visa in 2004.

17 In 2009, Mr Makasa was convicted in the District Court of New South Wales of four offences all of which related to events concerning a single complainant occurring over a period of two days in 2006. One was an offence of aggravated sexual assault, which was later set aside on appeal to the Court of Criminal Appeal. The other three were offences of sexual intercourse with a person aged between 14 and 16 years of age, for which he was sentenced to three concurrent terms of imprisonment each of two years with a non-parole period of 12 months.

18 Suspecting that Mr Makasa failed to pass the character test by reason of the sentences imposed in respect of the 2009 convictions, a delegate of the Minister in 2011 exercised the discretion conferred by s 501(2) of the Act to cancel his permanent residence visa. Mr Makasa appealed to the AAT. Eventually, in 2013, the AAT re-exercised the power conferred by s 501(2) of the Act to make a decision under s 43(1)(c)(i) of the AAT Act setting aside the decision of the delegate and substituting a decision that his visa should not be cancelled.

19 In 2017, Mr Makasa was convicted in the Local Court of New South Wales of two further offences. One was of failing to comply with a reporting obligation, by failing to advise police in a timely way that he had downloaded a social media application which he used to communicate with his daughter, for which he was fined \$300. The other was of driving under the influence of alcohol, for which he was disqualified from driving for 12 months and fined \$1,200.

20 The 2017 convictions again brought Mr Makasa to the attention of the Minister. Being satisfied that Mr Makasa failed to pass the character test solely by reason of the sentences imposed in respect of the 2009 convictions, but taking the 2017 convictions into account in the exercise of discretion, the Minister personally

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purported to again exercise the power conferred by s 501(2) of the Act to cancel his permanent residence visa.

21 Mr Makasa applied to the Federal Court for judicial review of the Minister's decision. Burley J dismissed the application at first instance. The Full Court, by majority (Allsop CJ, Kenny and Banks-Smith JJ and Besanko J, Bromwich J dissenting), allowed Mr Makasa's appeal, set aside the dismissal, and substituted an order that the decision be quashed. From that decision the Minister, by special leave, appealed.

The Full Court decision

22 The reasoning of the Full Court can only be understood against the background of the reasoning in *Brown*, which was heard and decided contemporaneously by a Full Court constituted by the same five members. There too, a delegate of the Minister had exercised the power conferred by s 501(2) of the Act to cancel a visa on the basis of the visa holder having been sentenced to a term of imprisonment which amounted to a substantial criminal record and which therefore amounted, without more, to a failure to pass the character test. There too, the AAT on appeal had re-exercised the discretion conferred by s 501(2) of the Act resulting in a decision under s 43(1)(c)(i) of the AAT Act which set aside the decision of the delegate and substituted a decision that the visa should not be cancelled. Taking account of subsequent events not suggested to amount or contribute to a further failure to pass the character test, there too the Minister had purported to re-exercise the discretion conferred by s 501(2) of the Act to again cancel the visa.

23 At first instance in *Brown*⁴, Colvin J took the view that, once exercised in respect of facts constituting a failure to pass the character test to decide not to cancel a visa, the power conferred by s 501(2) of the Act cannot be re-exercised in respect of the same failure to pass the character test to decide to cancel the visa. On appeal in *Brown*, Allsop CJ, Kenny and Banks-Smith JJ took a more limited view. Their view was that the power conferred by s 501(2) of the Act becomes incapable of being re-exercised to cancel a visa in respect of a failure to pass the character test only upon the making by the AAT of a decision under s 43(1)(c)(i) of the AAT Act setting aside a decision made by a delegate and substituting a decision that the visa should not be cancelled.

4 *Brown v Minister for Home Affairs* [2018] FCA 1722.

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24 Thus, Colvin J and Allsop CJ, Kenny and Banks-Smith JJ all took the view in *Brown* that the statutory scheme evinced an intention contrary to the unconstrained application to s 501(2) of the Act of s 33(1) of the AI Act. The main difference between them was as to the point at which the power conferred by s 501(2) of the Act becomes incapable of being re-exercised. Unlike Colvin J⁵, Allsop CJ, Kenny and Banks-Smith JJ⁶ interpreted the earlier decision of the Full Court in *Parker v Minister for Immigration and Border Protection*⁷ as having decided that the Minister can re-exercise the discretion conferred by s 501(2) of the Act to cancel a visa based on the same failure to pass the character test as had founded an earlier exercise of discretion by a delegate not to cancel the visa. Applying the standard for overruling prior decisions of the Full Court that has been adopted as a matter of policy in the Federal Court⁸, their Honours were not prepared to hold that *Parker* was "plainly wrong"⁹.

25 The remaining members of the Full Court in *Brown*, Besanko J and Bromwich J, each took the view that a decision not to cancel a visa, whether made by a delegate or made by the AAT on review of a decision of a delegate, does not amount to an exercise of the power conferred by s 501(2) of the Act at all. Having not previously been exercised by the making of a decision not to cancel a visa, the power conferred by s 501(2) of the Act remains available to be exercised by the Minister or a delegate to cancel the visa based on the same failure to pass the character test quite independently of any application of s 33(1) of the AI Act.

26 In the decision under appeal, each member of the Full Court adopted and applied the reasoning that member had set out in *Brown*. On the hearing of the appeal to this Court, the Minister urged adoption of the approach of Besanko and Bromwich JJ.

27 As will become apparent, the approach of Besanko and Bromwich JJ must be rejected. The approach of Colvin J is to be preferred to the approach of

5 [2018] FCA 1722 at [61]-[77].

6 (2020) 275 FCR 188 at 193 [16], 209-211 [68]-[77].

7 (2016) 247 FCR 500.

8 eg *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560-561 [26]-[31].

9 (2020) 275 FCR 188 at 193 [16].

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Allsop CJ, Kenny and Banks-Smith JJ. To the extent that *Parker* contains reasoning to the contrary, that reasoning is not to be followed.

Legislative history

28 Together relevantly with ss 499, 501A and 501C, s 501 was inserted into the Act in substantially its current form by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) ("the Amending Act").

29 Before the Amending Act, s 501 had made compendious provision to the effect that "[t]he Minister may refuse to grant a visa to a person, or may cancel a visa that has been granted to a person" if the Minister "having regard to ... the person's past criminal conduct ... or ... the person's general conduct ... is satisfied that the person is not of good character". Section 500 had allowed a person who had been refused a visa or whose visa had been cancelled by a decision under s 501 to apply to the AAT for review of the decision.

30 The second reading speech for the Bill for the Amending Act¹⁰ referred to one of the purposes of the Amending Act as being to improve decision-making in routine cases by, amongst other things, introducing a new "character test", placing the onus on visa applicants and visa holders to satisfy decision-makers that they pass the character test, "establish[ing] clear benchmarks for criminal behaviour that would automatically lead to a non-citizen failing the character test", and allowing the Minister to give binding directions to decision-makers.

31 The Explanatory Memorandum for the Bill for the Amending Act explained¹¹:

"Section 501 currently provides for a two stage process for refusal to grant or cancellation of a visa. The first stage involves a decision-maker making a finding of fact as to whether a person is 'not of good character'. The second stage is a discretion to grant or not to cancel a visa, despite a finding that a person is not of good character."

10 Australia, Senate, *Parliamentary Debates* (Hansard), 11 November 1998 at 59-60.

11 Australia, Senate, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*, Explanatory Memorandum at 12.

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The Explanatory Memorandum went on to explain that s 501 in the form to be substituted would retain "a staged decision-making process", albeit that s 501(1) and s 501(2) would "place the burden of proof as to whether the character test is passed, on the visa applicant and visa holder, respectively".

32 The Explanatory Memorandum explained the difference between the structure of s 501(1) and the structure of s 501(2) in relation to the placement of the burden of proof at the first of the two stages of the decision-making process as follows¹²:

"The exercise of the discretion that the Minister may cancel a visa in new subsection 501(2), would remove a benefit that has been given to a person (that is, they are already a visa holder), hence the requirement that there be a reasonable suspicion that the person does not meet the character test before that person is then obliged to satisfy the Minister that he or she satisfies the character test. New subsection 501(1) relates to the power to refuse an application by a person seeking a benefit, that is, the grant of a visa. As a result, there is an absence of any preliminary requirement that there be a reasonable suspicion that the visa applicant does not satisfy the character test before that person is obliged to satisfy the Minister that they do satisfy the character test."

33 The second reading speech for the Bill for the Amending Act referred to another of the purposes of the Amending Act as being to enable the Minister "in exceptional or emergency circumstances" to act "personally" and "decisively" on matters of visa cancellation and refusal¹³. Specifically addressing the justification for the powers to be conferred on the Minister under s 501A to override decisions of the AAT, the second reading speech referred to the AAT having made "a number of character decisions that are clearly at odds with community standards and expectations". The second reading speech stated that "[i]t is essential that the Minister, acting personally, have the power to intervene or set aside such decisions in the national interest"¹⁴.

12 Australia, Senate, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*, Explanatory Memorandum at 12.

13 Australia, Senate, *Parliamentary Debates* (Hansard), 11 November 1998 at 59.

14 Australia, Senate, *Parliamentary Debates* (Hansard), 11 November 1998 at 60-61.

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Construction of s 501(2) of the Act

34 Bearing centrally on the construction of s 501(2) of the Act is recognition that s 501(2) confers a single power that is exercised by the Minister or a delegate in the first instance, and that is re-exercised by the AAT under s 43(1) of the AAT Act on review, according to a two-stage decision-making process.

35 The first stage of the decision-making process begins with the decision-maker forming a reasonable suspicion that the visa holder in question does not pass the character test. By operation of s 501(6), a person either passes the character test or does not. The person does not pass the character test in any one or more of the circumstances exhaustively enumerated in s 501(6). Otherwise, the person passes the character test.

36 Reasonable suspicion is a state of mind – "a state of conjecture or surmise" – that is based on "sufficient grounds reasonably to induce that state of mind"¹⁵. The necessary precondition to the decision-maker forming a reasonable suspicion that the visa holder does not pass the character test is therefore the existence of facts sufficient to induce a reasonable person to surmise that one or more of the circumstances exhaustively enumerated in s 501(6) has occurred.

37 The decision-maker having formed a reasonable suspicion that the visa holder does not pass the character test, the first stage of the decision-making process is completed by the decision-maker making a binary decision either to be satisfied by the visa holder that he or she passes the character test or not to be so satisfied and in consequence to maintain the reasonable suspicion.

38 Satisfaction too is a state of mind – an "actual persuasion of [the] occurrence or existence"¹⁶ of the thing in issue. Implicit in the statutory placing of the onus on the visa holder to satisfy the decision-maker that he or she passes the character test is a requirement of procedural fairness that the visa holder be given notice and an opportunity to make representations before the first stage of the decision-making process can be completed. Implicit in the statutory need for satisfaction or

15 *George v Rockett* (1990) 170 CLR 104 at 113, 115.

16 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

non-satisfaction is that the satisfaction or non-satisfaction is to be reasonably based on the totality of the facts then known to the decision-maker¹⁷.

39 If the outcome of the first stage of the decision-making process is that the decision-maker is satisfied by the visa holder that he or she passes the character test, the only decision open to the decision-maker is not to cancel the visa. The decision-making process necessarily ends with the making of that decision.

40 The second stage of the decision-making process is reached only if the outcome of the first stage is that the decision-maker, not being satisfied that the visa holder passes the character test, maintains a reasonable suspicion that the visa holder does not pass the character test by reason of the occurrence of one or more of the circumstances set out in s 501(6). The second stage then involves the decision-maker, reasonably¹⁸ and in compliance with applicable directions given under s 499, exercising a discretion the outcome of which is the making by the decision-maker of a further binary decision either to cancel the visa in the exercise of discretion or not to cancel the visa in the exercise of discretion.

41 Accordingly, exercise of the power in every case begins with the decision-maker forming a reasonable suspicion that a visa holder does not pass the character test and exercise of the power in every case ends with a decision either to cancel the visa or not to cancel the visa. The decision that constitutes the end point of the exercise of the power, if it be to cancel the visa, can only have come about because the decision-maker has not been satisfied by the visa holder that he or she passes the character test and has gone on to exercise discretion to cancel the visa. If the decision be not to cancel the visa, the decision can have come about either because the decision-maker has been satisfied by the visa holder that he or she passes the character test or because the decision-maker has gone on to exercise discretion not to cancel the visa.

42 Whether the decision is to cancel the visa or not to cancel the visa, the decision is therefore the end point of an exercise of the power conferred by s 501(2) of the Act. That is so of a decision to cancel or not to cancel reached by the Minister or a delegate in an initial exercise of the power. And it is so of a decision to cancel

17 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73]; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 447 [167].

18 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1.

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or not to cancel reached by the AAT on review in a re-exercise of the power under s 43(1)(c)(i) of the AAT Act.

43 The consequence is that, if the Minister or a delegate is to make a subsequent decision to cancel a visa under s 501(2) of the Act, superseding a decision of the Minister or a delegate in the first instance or of the AAT on review not to cancel the visa, that subsequent decision can only occur through a re-exercise of the power conferred by s 501(2) of the Act.

44 The determinative question therefore becomes whether, and if so when, the power conferred by s 501(2) of the Act, having once been exercised by the Minister or a delegate in the first instance or re-exercised by the AAT on review not to cancel a visa, can be re-exercised by the Minister or a delegate to cancel the visa. The answer turns on an examination of whether, and if so to what extent, there appears sufficiently for the purposes of s 2 of the AI Act an intention contrary to the application of the general prescription in s 33(1) of the AI Act that a statutory power "may be exercised ... from time to time as occasion requires".

45 Before turning to examine the extent to which the scheme of the Act and the AAT Act manifest an intention contrary to the application of s 33(1) of the AI Act, some aspects of the operation of s 33(1) of the AI Act ought to be noted. The section is enacted against the background of "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise"¹⁹. The section counters that doctrine not by itself conferring any power but by requiring that a provision conferring a power be interpreted as authorising the power it confers to be exercised and re-exercised from time to time. The section does not alter the incidents of the power spelt out in the terms of the provision conferring the power. The words "as occasion requires" acknowledge the need for the repository of the power to comply with the incidents of the power spelt out in the terms of the provision. They are not words of additional limitation.

46 That s 33(1) of the AI Act does not alter the incidents of the statutory power to which it applies significantly limits the potential scope of its application to s 501(2) of the Act. To the extent applicable, s 33(1) requires s 501(2) to be interpreted as authorising re-exercise of both stages of the two-stage decision-making process which s 501(2) entails. Merely to re-exercise the

19 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211, quoting *Halsbury's Laws of England*, 1st ed, vol 27 at 131.

discretion that arises at the second stage of that decision-making process would be inimical to s 33(1).

47 The final aspect of s 33(1) of the AI Act that ought to be noted is a matter of controversy. Controversy has arisen and remains unresolved in the Federal Court as to whether the re-exercise of a statutory power contemplated by s 33(1) extends to revocation of an exercise of the statutory power that has resulted in an alteration of legal rights²⁰. The controversy about revocation would, on one view, arise to be addressed were the question whether the power conferred by s 501(2) of the Act, having once been exercised to cancel a visa, can be re-exercised so as not to cancel the visa²¹. Given that the question is whether that power, having once been exercised not to cancel a visa, can be re-exercised to cancel the visa, the controversy about revocation can be put to one side.

48 Turning then to the scheme of the Act and the AAT Act, it is important at the outset to recognise that nothing in the legislative scheme indicates an intention to displace the application of s 33(1) of the AI Act to the power conferred by s 501(2) of the Act to the extent that subsequent events or further information not previously before the Minister or a delegate provide a different factual basis upon which to form a reasonable suspicion that a visa holder does not pass the character test. A new sentence of imprisonment amounting by operation of s 501(7)(c), or contributing by operation of s 501(7)(d), to the coming into existence of a new substantial criminal record within the meaning of s 501(6)(a) is an example. A new conviction providing a reasonable basis for making a revised assessment of the visa holder's "character" – his or her "enduring moral qualities"²² – under s 501(6)(c) is another example. Section 501(6)(c) was not argued to be engaged in this appeal.

49 To the extent that the scheme of the Act and the AAT Act exhibit an intention contrary to the application of s 33(1) of the AI Act to the power conferred by s 501(2) of the Act, absent subsequent events or further information providing a different factual basis for the formation of a reasonable suspicion that a visa

20 See *Minister for Indigenous Affairs v MJD Foundation Ltd* (2017) 250 FCR 31.

21 cf *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* (2005) 145 FCR 542 at 546-547 [18]-[24].

22 *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 at 408; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 529 [65].

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holder does not pass the character test, such an intention emerges by reference to two principal considerations. One is narrower in its ambit and arises from the generic operation of the AAT Act; the other is broader in its ambit and specific to the relationship between s 501(2) and s 501A of the Act.

50 Looking to the generic operation of the AAT Act, an intention not to allow further re-exercise of a power by a primary decision-maker after re-exercise of that power by the AAT under s 43(1)(b) or (c)(i) of the AAT Act on review of an earlier exercise of power by the primary decision-maker is inherent in the nature of the merits review function for which it is the design of s 43 of the AAT Act to make provision. The merits review function of the AAT is "to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review"²³. The function of the AAT, in other words, is "to do over again" that which was done by the primary decision-maker²⁴. The function would be reduced to a mockery were the subject-matter of the decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review.

51 The object of s 43(6) of the AAT Act, in deeming a decision made by the AAT under s 43(1)(b) or (c)(i) in variation of or substitution for the decision under review to be a decision of the primary decision-maker, is to bring finality to the administrative decision-making process. Like any other legal fiction, the deeming effected by s 43(6) of the AAT Act cannot be taken to have a legal operation beyond that required to achieve the object of its enactment²⁵. Section 43(6) cannot be taken so far as to be read as requiring an exercise of power by the AAT to be treated as no more than an exercise of power by the primary decision-maker which

23 *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51].

24 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 315 [100], quoting *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502.

25 *Queensland v Congo* (2015) 256 CLR 239 at 302 [165], citing *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 at 314 [51].

the primary decision-maker is able by operation of s 33(1) of the AI Act simply to re-exercise.

52 Looking next to s 501A of the Act, however, there emerges a somewhat broader intention limiting the scope of the application of s 33(1) of the AI Act to the power conferred by s 501(2). Part of the purpose of s 501A is to confer specific powers on the Minister to revisit and reverse a decision not to cancel a visa in the exercise of the power conferred by s 501(2). That is so whether the decision not to cancel is made by a delegate or by the AAT. And it is so whether the reason for the decision not to cancel a visa is satisfaction by the delegate or the AAT that the visa holder passes the character test or an exercise of discretion by the delegate or the AAT not to cancel the visa. So much is spelt out in s 501A(1).

53 As powers of ministerial override, each of the specific powers conferred on the Minister by s 501A(2) and s 501A(3) can be exercised by the Minister without need for any change to the factual basis on which the delegate or the AAT formed a reasonable suspicion that the visa holder did not pass the character test in making the decision not to cancel a visa.

54 However, the circumstance that each of the specific powers conferred on the Minister by s 501A(2) and s 501A(3) can only be exercised by the Minister personally and can only be exercised if the Minister is satisfied that cancellation is in the national interest is sufficient to invoke the well-settled principle of construction that "when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power"²⁶. The further qualifications imposed by s 501C on an exercise of power under s 501A(3) reinforce the application of that interpretative principle.

55 Hence, s 501A of the Act must be read as manifesting a legislative intention to exclude re-exercise by the Minister or a delegate of the more general power conferred by s 501(2) of the Act, read in light of s 33(1) of the AI Act, to revisit and reverse a previous decision of a delegate not to cancel a visa made in the exercise of the power conferred by s 501(2) where there has been no change to the factual basis on which the previous decision-maker, be it the Minister or a delegate

26 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678, referring to *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

Kiefel CJ
Gageler J
Keane J
Gordon J
Edelman J

16.

or the AAT, formed a reasonable suspicion that the visa holder did not pass the character test in making the previous decision not to cancel a visa.

Result

56 The result, in short, is that a decision of a delegate or the AAT not to cancel a visa made in the exercise of the power conferred by s 501(2) of the Act on the basis of facts giving rise to a reasonable suspicion that a visa holder does not pass the character test is final, subject only to ministerial override in the exercise of the specific power conferred by s 501A.

57 The Minister or a delegate can re-exercise the power conferred by s 501(2) to cancel the visa if subsequent events or further information provide a different factual basis for the Minister or a delegate to form a reasonable suspicion that a visa holder does not pass the character test at the first stage of the requisite two-stage decision-making process. But neither the Minister nor the delegate can rely on subsequent events or further information simply to re-exercise the discretion to cancel the visa at the second stage of the decision-making process.

58 That result is in harmony with the holding of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Watson*²⁷ that s 33(1) of the AI Act does not operate on the power conferred by s 501(2) of the Act to extend to permit the Minister to respond to representations urging re-exercise of the power to revoke the cancellation of a visa by reference to considerations going to the exercise of discretion.

59 To the extent that the decision of the Full Court in *Parker* can be read to suggest that s 33(1) of the AI Act authorises re-exercise of the power conferred by s 501(2) of the Act to cancel a visa by reference to events subsequent to an earlier exercise of the power not to cancel the visa which bear only on the exercise of discretion, *Parker* must be taken to have been wrongly decided.

