[2023] HCATrans 183

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Perth

No P2 of 2023

B e t w e e n -

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Applicant

and

JOSEPH LEON McQUEEN

Respondent

GAGELER CJ
GORDON J
EDELMAN J
STEWARD J
GLEESON J
JAGOT J
BEECH-JONES J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON THURSDAY, 14 DECEMBER 2023, AT 10.00 AM

MR P.D. HERZFELD, SC: Your Honours, I appear with **MS N.A. WOOTTON** for the applicant. (instructed by Australian Government Solicitor)

MS L.G. DE FERRARI, SC: May it please the Court, I appear with **MR J.D. DONNELLY** for the respondent. (instructed by Zarifi Lawyers)

GAGELER CJ: Thank you, Ms De Ferrari. Yes, Mr Herzfeld.

MR HERZFELD: Thank you, your Honour. A point of general importance raised by this matter is whether, if the Minister reads only a departmental synthesis or summary of representations made by a person under section 501CA(4) of the *Migration Act* rather than the actual documents submitted by the person, that is of itself a jurisdictional error regardless of the material, accuracy, or completeness of the departmental brief. That raises an issue of more general significance concerning ministerial decision-making throughout the Commonwealth.

It is because of the general importance of those issues that we do not seek to disturb the costs orders below and we have agreed to pay the respondent's costs in this Court in any event. Our simple and, in our submission, orthodox point is that for the Minister to rely on a departmental summary is not itself an error. There is error if and only if the departmental summary is inaccurate or incomplete in such a way as to cause the Minister to commit some recognised species of jurisdictional error.

May we structure our oral submissions in this way. First, we will identify the passages in the Full Court's reasons which reveal error. Secondly, we will show your Honours how the Full Court's conclusion is inconsistent with authority concerning ministerial decision-making generally. Thirdly, we will explain why there is nothing about section 501CA which puts it into a special position. Fourthly, we will say something brief about the departmental summary in this case.

May we start with the Full Court's reasons, which begin at application book page 312. If your Honours turn within the application book to page 328 and your Honours look at paragraph 43 of the Full Court's reasons, their Honours said that:

> we consider the primary judge was correct to approach this matter on the basis that the Minister was required personally to consider Mr McQueen's representations to him, and could not rely only on a summary produced to him by his officers in the Departmental brief.

If your Honours then turn to page 338, in paragraph 82, four lines down:

> The satisfaction about whether a person's representations provide "another reason" to revoke the visa cancellation must be the Minister's *personal* satisfaction about those representations –

That is not in issue, but then:

> formed by having directly considered those representations, not another person's summary of them.

And then on the same page, in paragraph 84, six lines in:

> Summaries provide a useful focus, but they do not relieve the repository of the power from the obligation to directly consider the representations made.

And "directly" there is evidently being used in the same way as higher up the page, in contradistinction to consideration of a summary. Your Honours will notice that there is no reference in these passages to the accuracy or completeness of the summary. So, the Full Court's view was not the orthodox one that reliance on a summary could lead to error if the summary was materially incomplete or inaccurate. I will come back to explain with a bit more precision what I mean by "materially incomplete or inaccurate".

That was not the Full Court's view. The Full Court's view was that reliance on a summary was itself an error, regardless of its completeness or accuracy, and that this was the Full Court's view is evidenced by the respondent's submissions to your Honours. Would your Honours please take up the respondent's written submissions in this Court.

GAGELER CJ: Are you trying to extract a concession?

MR HERZFELD: No. I am just trying to make clear that both parties before your Honours accept that the Full Court's reasoning is as I have described it, and - - -

GAGELER CJ: You can just tell us the paragraph numbers.

MR HERZFELD: Paragraph 3 of the resondent's submissions in this Court. The reason that I have taken your Honours through that and made clear that it is the common position between the parties is that one of the matters raised with us during the hearing of the special leave application on 11 August was whether the Full Court's reasons are indeed to be understood in the way that I have described them or whether they were to be understood as simply embracing what we say is the orthodox position.

Both we and the respondent are both agreed in the view that the Full Court's reasons state the much more uncompromising position that I have shown your Honours. The question for your Honours is whether that more uncompromising position is correct, or not. So, that is the first topic we wished to address orally. May we then turn to the key appellate authorities on the question, and would your Honours begin with *Peko-Wallsend* - - -

EDELMAN J: Just before you do, can I just understand where the submissions are going? You said that one of the reasons for error is that there was no reference to the accuracy or the completeness of the summary. Does that mean that if a summary is provided that is inaccurate or incomplete, there would not have been proper consideration?

MR HERZFELD: I said I would come back and explain with a bit more precision – that is a shorthand. If the summary is inaccurate or incomplete in such a way as to mean that something the Minister is required to consider, the Minister does not consider, and that that could have made a realistic difference to the outcome, then there will be an error by the Minister. It will just be a classic error of not considering something the Minister was required to do which could have been material. The reason for that error will have been the incompleteness of the summary, but the incompleteness of the summary is not, itself, a new species of jurisdictional error.

EDELMAN J: So, if that is right and that is the appropriate test, would the correct order upon allowing the appeal be to remit the matter?

MR HERZFELD: Well, it has not suggested to your Honour by the respondent that anything that we say in our submission as to why this summary was sufficiently complete is wrong. So, in our submission, the correct order would be to allow the appeal and dismiss the challenge. But if your Honours were not persuaded that what we say about the completeness of the summary is correct, then it would be open to remit the matter to the Full Court to consider that question. As your Honours would appreciate, from a Commonwealth perspective it is the point of principle which is the more important thing than this particular case. Of course, the respondent's perspective on that may be different.

May we turn to the authorities. Would your Honours turn to *Peko-Wallsend* 162 CLR 24, which is volume 2 of the joint book of authorities, tab 5, page 10. Within that decision, would your Honours turn to the reasons of Chief Justice Gibbs, firstly, commencing at page 30 of the CLR print. Your Honours will see in the last paragraph on the page the passage beginning:

> Of course the Minister cannot be expected to read for himself . . . It would not be unreasonable for him to rely on a summary . . . No complaint could be made if the . . . summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider –

then the consequence will have been the failure to take into account that material fact. Then there is a similar passage in the reasons of Justice Brennan, at pages 65 to 66 of the CLR print, under the heading, "The Department and the Minister's Knowledge." Your Honours will see there a longer passage, which is very much to the same effect:

> to undertake an analysis, evaluation and précis –

is part of the Department's function:

> the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department.

Then, over the page:

> Reliance on the departmental appreciation is not tantamount to an impermissible delegation –

because:

> A Minister may retain his power to make a decision –

But, if the Department fails to draw facts to the Minister's attention, and the Minister's decision depends on that, that can be a recognised species of error. That is, in our submission, the orthodox submission. That position can be seen tracked through a number of authorities, including to recent authority of this Court.

Would your Honours then take up *Tickner v Chapman* 57 FCR 451, which is volume 3 of the authorities, tab 13. If your Honours turn through to page 464 of the FCR print, in the reasons of Chief Justice Black, there is a discussion by his Honour from around letter D, but the part to which we draw attention is between letters F and G:

> I would not rule out the possibility of some representations being quite capable of effective summary, yet there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it.

At page 477, in the reasons of Justice Burchett, at the top of the page his Honour refers to what Chief Justice Gibbs has said in *Peko-Wallsend*. Then on page 497, in the reasons of her Honour Justice Kiefel, at around letter D to letter E, there is again an explanation entirely consistent with what appears in the reasons of the Chief Justice in *Peko-Wallsend*. We would simply draw attention to what your Honour Justice Jagot said about this decision in an authority mentioned in footnote 7 of our written submissions, namely, that it permits reliance on summaries.

Moving then more specifically to the *Migration Act* context in the same volume of authorities at tab 7, there is the decision in *Carrascalao* 252 FCR 352. The Full Court there was dealing with cancellation of a visa under section 501(3), so a different provision concerning character cancellation, but nonetheless a character cancellation provision. If your Honours turn in the reasons to paragraph 61, their Honours accepted that:

> despite the personal nature of the power, the Minister was entitled to obtain assistance –

including the preparation of summaries. Then there were qualifications. The first qualification, consistently with *Peko-Wallsend*, was that a materially deficient summary:

> may give rise to an inference that the decision-making process was not properly conducted –

That is a different way in which it may demonstrate error. It is a broader statement but nonetheless consistent with the proposition that it is not the summary, per se, that is the problem, it is what it may lead to in terms of an ordinary jurisdictional error.

At paragraph (b), their Honours identified that a "summary may not be appropriate" in some cases, depending on the nature of the representations. Their Honours then applied that reasoning, as your Honours will see, over at paragraph 138. This was not merely a dictum, it was applied in part of the reasoning dispositive to the case, at paragraph 138. Their Honours rejected the attempt by Mr Carrascalao to:

> discharged his onus of establishing that the Minister's claim that he had considered this aspect of the material –

The aspect described earlier, and the details not important:

> was mere lip service.

That was because:

> Subject to the qualifications . . . the Minister was entitled to have regard to the Department's summary . . . Mr Carrascalao did not contend that any aspect of that summary was inaccurate, incomplete, or did not convey the force of the argument –

Those propositions have been referred to by this Court recently in *Davis*.

STEWARD J: Just before you leave that case. You have accepted that the Minister relied upon the summary here and the reasons for decision. There is a more nuanced observation in paragraph 138, where the court said:

> The Minister needed to turn his mind to whether or not he needed to refer to the attachment –

Is it the case that it is accepted that the Minister did not turn his mind to considering the attachments here, or did?

MR HERZFELD: There is no specific finding about that. The primary judge's finding, which was upheld by the Full Court, was that the Minister did not consider the underlying material.

STEWARD J: But did he turn his mind to consideration?

MR HERZFELD: I do not think that is the subject of any finding because it was not the subject of any attack. I will be corrected if I am wrong about that. There was not – I will come back to that if what I have said is not correct, your Honour.

STEWARD J: Thank you for that.

MR HERZFELD: As your Honour will have appreciated, we, from the way in which we articulate the correct principle, would not accept that that additional proposition at paragraph 138 is a necessary element.

If your Honours then turn to the reasons of this Court in *Davis* (2023) 97 ALJR 214, which is in the same volume of the authorities, at tab 8. If your Honours turn to paragraph [25] within the reasons of Chief Justice Kiefel and your Honours Chief Justice Gageler and Justice Gleeson, your Honours will see in paragraph [25] an approving quote of the passage from Justice Brennan's reasons in *Peko-Wallsend*, to which I have directed your Honours' attention. In the reasons of your Honour Justice Gordon, at paragraph [91], the same passage is

approved. Then in the reasons of your Honour Justice Jagot at paragraph [295], again the same passage is approved.

Your Honours will see that footnote 282 is to the passage in *Peko-Wallsend* from the reasons of Justice Brennan. We have also drawn attention in our written submissions to the fact that the reasons in *Peko-Wallsend* have been applied in what it describes as the leading case in the United Kingdom, which is the *National Association of Health Stores Case*. We have given your Honours the references in our written submissions and the case is in the bundle at tab 12, but I will not take your Honours to it.

So, those authorities all support the general proposition that there is no error in a Minister relying on a document which summarises all those aspects of representations or submissions the Minister is required to consider and contains no error or omission which could realistically have made a difference to the outcome, and that more precise formulation – which I had already essayed in answer to a question from your Honour Justice Edelman – is what we mean by a materially accurate and complete summary.

Now, if that is right, the only question then is whether there is something special about section 501CA(4) which takes it out of the ordinary position, and that is the third topic that we would address orally. The first point that we would make is that the Full Court's uncompromising conclusion concerning section 501CA(4) is that it is inconsistent with what this Court said about that provision in *Plaintiff M1* 96 ALJR 497. Would your Honours turn to that in tab 11 of this volume. If your Honours turn in the joint reasons of four members of the Court to paragraph [23], your Honours will see that:

> It is, however, improbable that Parliament intended for that broad discretionary power –

That is the power in 501CA(4):

> to be restricted or confined by requiring the decision-maker to treat every statement within representations made by a former visa holder as a mandatory relevant consideration.

If it is the case that the Minister may permissibly not consider certain statements within representations, it must logically follow that if those statements are omitted from a summary, there is no failure by the Minister to consider a mandatory relevant consideration because those representations were never something the Minister was required to consider in the first place.

Your Honours will also see in that paragraph, implicitly, the acceptance of the view that it is not every statement within representations that is a mandatory consideration, but instead the mandatory consideration is the representations as a whole. That is how it is put. Your Honours will see in footnote 40 there is a reference to a Full Court decision at the end, *Buadromo*. What was held in *Buadromo* is that the representations as a whole are mandatory relevant considerations but not each statement within them.

STEWARD J: That comes from Justice Robertson's decision in *Goundar*.

MR HERZFELD: Yes. And if it is the case that the mandatory consideration is the representations as a whole, that is rather to point to the substance of the representations rather than their form. That is significant because many aspects of what the Full Court picked up on here in some of its reasons were the form of the particular representations. Staying with *Plaintiff M1*, your Honours will see at paragraph [25] that the "requisite level of engagement", of course, had to:

> occur within the bounds of rationality and reasonableness. What is necessary . . . will necessarily depend on the nature, form and content of the representations. The requisite level of engagement . . . will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.

So, again, if the Minister does not act unreasonably by not considering, for example, a lengthy, unclear and apparently-irrelevant representation, it must logically follow that the Minister does not act unreasonably by relying on a summary which omits that representation.

The Full Court's uncompromising conclusion is also inconsistent with the requirement that for an error to be a jurisdictional error it has to be material in the sense that it could realistically have led to a different outcome. On the Full Court's view, if the Minister's decision is made by reading a summary of representations, no matter how materially accurate or complete, it will be a jurisdictional error. It is just irrelevant, on the Full Court's view, whether some omitted material could realistically have made a difference to the outcome.

GLEESON J: How did the Full Court engage with *Plaintiff M1*?

MR HERZFELD: I think the answer I would give is that it did not, really. To be clear, it was mentioned, but it did not, on our submission, engage

with the points about *M1* that I have just made, and also did not engage with the inconsistency of its view with the materiality requirement that I have just mentioned.

More generally, to adopt the kind of language in *M1*, it is improbable that the Parliament intended a Minister to be required to read highly-repetitious documents restating, in perhaps identical words, the same content. It must have been intended that the Minister could rely on the Department to synthesise such representations into a brief that says, the former visa holder has repeatedly said X, Y, Z. It cannot have been thought that the Minister themselves would have to read each version of the visa holder saying those things.

Likewise, it is improbable that the Parliament intended that there would be error if, instead of reading a difficult-to-read handwritten document, the Minister relies on a summary or transcription of that handwritten document.

STEWARD J: Mr Herzfeld, the Full Court said that the Minister was not under an obligation to read every document. What is your understanding of what the Full Court required the Minister to do?

MR HERZFELD: Well, it is rather difficult to understand the meaning of that statement, because the Full Court held that the Minister had to consider the actual representations.

STEWARD J: The words they use are "directly consider".

MR HERZFELD: And their Honours were using that in contradistinction to reading a summary. And if that is the case, then it is difficult to see how the Minister could possibly avoid reading every document. Now, we accept that everything that I have put so far, other than *Plaintiff M1*, is about a general position. It would, of course, be possible for Parliament to say the Minister must read each of the pieces of paper submitted by the visa holder.

If the legislation said that, or was construed to say that, it would be a different case, but nothing in section 501CA either says that or should be construed to require that implicitly. Really, that is what the resondent's position must ultimately boil down to – that section 501CA(4) is to be construed uniquely as a provision which requires the Minister to read the actual documents submitted by the person. I say "uniquely" because your Honours have not been provided with any authority in which a provision was held to operate in that way.

Would your Honours take up the text of 501CA(4), which is in volume 1 of the bundle of authorities, at page 23. The first point to notice

about subsection (4) is it does not actually impose, expressly, an obligation on the Minister to consider the representations at all. What it says is that:

> The Minister may revoke the decision if:
>
> (a) the person makes representations . . . and
>
> (b) the Minister is satisfied –

of certain things. Now, we accept that implicit in that is that the Minister must consider the representations. But the fact that it does not even say that the Minister must consider them makes it all the more unlikely that this provision should require the Minister to read the actual documents submitted by the former visa holder. Certainly, the provision does not say that. As I said, it does not say anything about consideration at all.

May we then go through each of the six features mentioned by the Full Court and explain why none of them reveal that 501CA should be construed in anything but the orthodox way. I will give your Honours the references to each of the paragraphs in the Full Court's reasons where these six features may be found. So, first, at paragraph 80, the Full Court referred to the fact that that the purpose of a representation in the context of section 501CA is to persuade, and the "odds are already stacked against the individual". Now, both of those points could be made equally about section 501(3), which was considered in *Carrascalao*.

Further, all representations or submissions to a Minister are intended to persuade, and to say that "the odds are already stacked against the individual" rather sounds like a policy judgment about the merit of mandatory visa cancellation for the commission of certain crimes, but even accepting for the sake of argument that that is so, it is no reason the Minister should be deprived of the assistance ordinarily to be expected by a Minister of analysis and summary by the Minister's Department. That was the first point the Full Court relied on.

The second point was that the Full Court referred a number of times to the fact that the Minister could delegate the power under section 501CA(4). That was said at paragraphs 82, 84 and 106 of the Full Court's reasons. The same was so in *Peko-Wallsend*. Conversely, the irrelevance of the fact that the Minister could delegate the ultimate decision-making power is evidenced by the fact that *Peko-Wallsend* was applied in both *Tickner* and *Carrascalao* where there was no power of delegation.

There is no reason to suppose that Parliament intended the Minister to be denied the ability to rely on a departmental synthesis or summary of

representations simply because the Minister wished to retain the ultimate decision-making power. Indeed, there is good reason for the Minister to retain personal responsibility for the most complex or controversial cases of revocation of mandatory cancellations. On the one hand, it may involve refusing to allow a person with significant ties to Australia to remain here. On the other, it involves deciding whether to release into the community persons who, by definition, have been convicted of serious crimes.

Both decisions either way have weighty consequences for the individual and their family, but also the broader community. The fact that the Minister wishes to retain ultimate decision-making control does not entail any reason to depart from the usual ability of a Minister to rely on a materially accurate and complete departmental summary.

The third point the Full Court made was to seek to distinguish *Peko-Wallsend* and *Tickner* based on specific features of the regimes at issue. That was at paragraphs 88 and 93 to 95. But, with respect to the Full Court, it is entirely opaque how the features that the Full Court relied upon are relevant for present purposes, and so much is evidenced by the application of *Peko-Wallsend* in *Carrascalao*, which is a similar context to the present one.

The fourth point the Full Court made at paragraph 89 is that personal decision-making by the Minister, rather than by a delegate, has the consequence that merits review is unavailable. Again, that is just unconnected to the question of whether the Minister may rely on a materially accurate and complete summary of representations. Further, the absence of merits review is not unique to a decision under 501CA(4) made personally by the Minister. It would apply to a personal decision under 501(1), (2) and (3) as well – that latter provision being the subject of *Carrascalao*.

Fifthly, the Full Court referred at paragraph 90 to the fact that the decision affects the person's liberty and ability to remain in Australia. The same is, of course, so about a decision to cancel a visa under section 501(3), as in *Carrascalao*. But more fundamentally, the question of whether a statue permits a Minister to rely on a departmental summary is not one of interpreting a statute which interferes with liberty and then choosing a construction which does so the least. The degree of interference with liberty is the same whether or not reliance on a summary is permitted. So, to rely on the background presence of an effect on liberty to influence the answer to the present question really involves an unfocused and inapposite invocation of the principle of legality.

The sixth and final point the Full Court relied upon was to raise the question at paragraph 126 of whether, if we are correct, that would mean

that a delegate of the Minister could rely on a summary prepared by a more junior officer. At the level of basic principle, the answer is that for a delegate to rely on such a summary would not, itself, be an error. Take, for example, the case where the Minster delegates all decisions of a particular kind to a very senior officer, such as the Secretary of the Department. There is no reason to think that the Secretary could not have the assistance of departmental officers in summarising voluminous material for them. Now, the example the Full Court gave at paragraph 126 of a very junior departmental officer having another junior officer summarise representations for them is simply not likely to arise in practice, so it is not a helpful example to test the correctness of the principle.

For all of those reasons, it is necessary to approach this question by reference to what we have described by reference to authority as the orthodox approach. That is, for the Full Court's ultimate order to be sustained, it would be necessary to identify some aspect of the representations here that was not replicated in the Department's summary where that aspect was something the Minister was required to consider, and which, if the Minister had considered it, could realistically have made a difference to the outcome. The Full Court did not attempt that task, and neither does the respondent before your Honours.

As for the Full Court, would your Honours turn back to the application book at page 345. At page 345, paragraph 107, from here, the Full Court mentioned a series of matters which it said gave a different impression than the departmental summary in this case. As your Honours can see at paragraph 107, it did not do so in order to answer the question that we have submitted is the necessary one: is the thing missed something the Minister was required to consider, could it realistically have made a difference? The reason it did so, as it said at paragraph 107, was really just to evidence what the Full Court saw as the significance of the Minister considering representations personally through the documents submitted, and thus to bolster the conclusion of construction to which the Full Court had come.

The Full Court does not, in these passages, go through the analysis which, in our submission, is required. Nonetheless, we, in our written submissions to your Honours at paragraph 42, have gone through each of the matters the Full Court picked up, and we have explained why each of those matters were either things that were in fact included in the departmental submissions – often with direct quotes or using the words from the underlying documents – or they were not matters the Minister was required to consider, or they were matters which could not realistically have made a difference to the outcome.

Significantly, the respondent does not contest any of our submissions on this point. The respondent's written submissions in response at paragraph 20 is to say that our analysis at paragraph 42 is just "a distraction", and that is because the respondent embraces the absolute position taken by the Full Court. In the absence of any challenge before your Honours to the submission we make at paragraph 42, your Honours should proceed on the basis that the contradicting party does not suggest that this summary is materially accurate or incomplete in the way that we say is the required one. In any event, given the absence of contest about what we say in paragraph 42 of our written submissions, I do not propose to address each of those matters further orally.

I should make one correction, though. In footnote 25 of our written submissions, the first paragraph reference there says "paragraph [35]" but the paragraph reference should in fact be 25, rather than 35. We do need, however, to deal with one final point. It is said by the respondent that the primary judge made a factual finding which is fatal to our success. Would your Honours go to the primary judge's reasons at page 298 of the application book. Your Honours will see, in the middle of paragraph 85, in the fourth line:

> It was not possible to discern the full sense and content of the representations made without regard to the documents in which the representations were expressed.

The primary judge did not elaborate on this statement, but on its terms, what the primary judge said will be so for every summary. If we are right, in point of principle, it is necessary to go further than that finding, which I should say is, of course, not a factual finding in the sense of a finding of primary fact about whether the light was red or green at the time of the accident, it is just a characterisation of the document. In any event, in point of principle, it is necessary to go beyond that. It is necessary to find something that was not included which the Minister was required to consider and which, if the Minister had considered it, could have realistically made a difference. That statement in paragraph 85 about the summary does not go anywhere near doing so.

GAGELER CJ: That sentence is quoted by the Full Court in paragraph 91 in a context that appears not to be related to the particular facts. I am not sure; it seems to me to be perhaps a statement of law as translated by the Full Court.

MR HERZFELD: What your Honour says about the position of its quotation is correct, because their Honours, in their Honours' reasoning – because of their Honours' reasoning, did not have to get to any question about the accuracy or completeness of the summary. In any event, even if

that was taken as the Full Court's endorsement of the primary judge's statement, it does not do anything more than describe, of its nature, a summary. It does not get to the critical question which has to be answered, if we are right, as a matter of principle.

BEECH-JONES J: Mr Herzfeld, is that part of the – is that effectively the same as the latter part of the Full Court's reasons, which is broadly to the effect of, there is a persuasive tone or aspect of the submissions that is lost by the departmental summary, and that is, according to their Honours, the essence of the problem?

MR HERZFELD: Well, their Honours, in terms, effectively say that from 107 onwards. Paragraph 91 is really just quoting the primary judge's unelaborated conclusion, which it must be true of every summary and so does not engage with the critical question which, in our submission, is necessary to answer as a matter of principle.

GLEESON J: Is it not directed to the ground of the appeal which is concerned with the process of the Minister reading and considering only the summary and then, reflected in the implicit criticism in paragraph 100, that complete reliance on a summary is an assessment of the worth of the representation by others?

MR HERZFELD: Yes. It is not entirely clear why that statement about these particular representations appears in paragraph 91. It may be, as the Chief Justice has suggested, that what their Honours were seeking to do was to say it is not possible to discern the full sense and content of any person's representations without regard to the documents in which the representations were expressed and thus to support their Honours' conclusion. In any event, that conclusion about the correct approach to 501CA(4) was wrong for the reasons that we have given.

Now, if that is correct, then your Honours should say so, because the point of the application for special leave is to correct the wrong turning which we submit has occurred in the Full Court's decision. There is then a subsidiary question about this particular matter and, in our submission, unless your Honours are persuaded that there is a controversy about the accuracy and completeness of the summary, using the shorthand that I have explained, your Honours should simply dispose of the appeal favourably to us. If your Honours are persuaded that there is a controversy which your Honours are not able or inclined to resolve, having regard to the competing submissions, then the suitable course would be to remit the matter to the Full Court to deal with the correct application of principle.

If your Honours would just excuse me for one moment. In answer to your Honour Justice Steward's question, there is not a clear finding about

whether the Minister did or did not turn his mind to whether to consider the representations. The closest is in the primary judge's reasons at paragraph 80, which your Honours will see at page 296 of the application book, where the primary judge found that the Minister effectively followed the decision-making path which the brief set out for the Minister.

That was part of the primary judge's reasoning to the conclusion that the Minister did not read the underlying attachments, but, of course, the summary which the Minister considered noted all of the attachments after each of the propositions in the summary, and so there is not a finding. It would be difficult to make a finding if the Minister did not even consider whether to look at the attachments, even though ultimately the finding is that the Minister decided not to consider the attachments. As I say, that, in our submission, is not an essential aspect of the point of principle.

Your Honours, those are our oral submissions.

GAGELER CJ: Ms De Ferrari.

MS DE FERRARI: Thank you, your Honours. May I start by picking up that point that was just made. Your Honours will appreciate that the matter has evolved substantially from how it was argued before the learned primary judge, where the Minister raised two different responses to our ground, which was basically a ground of failure to give proper consideration to the representations – one of the grounds; the other one was the fact of delegation. In respect of the question posed by your Honour Justice Steward, part of the answer is to be found at paragraphs 35 and 36 of the learned primary judge's decision. That is court book pages 278 and 279.

Your Honours will see that that is part of the way that litigation progresses, but his Honour addressed those matters in respect of the first ground that we were moving on at first instance, which was the alleged de facto delegation, which was then the subject of a notice of contention, but the Full Court did not decide, and it is not before your Honours. At paragraph 35 it sets out what else we relied upon below. Your Honours will see at paragraph 36 that his Honour said:

> Based on the evidence, I make findings in the above terms.

So, everything that is set out there, his Honour accepted and made a factual finding accordingly. And then, if your Honours go to paragraph 79, which is at 295, which is the paragraph that precedes the paragraph 80 that my learned friend just took you to, his Honour the primary judge set out what he found, as a matter of fact, were the features of the brief to the Minister in this case. Your Honours will see, in point (4):

It invited the Minister to form and record his decision on the Decision Page which contained no suggestion that the Minister was required to personally consider and understand the submissions received.

Then at paragraph 80 there is a finding:

I find that the Minister followed the instruction he was given.

So, all the instructions that are set out below are the subject of findings of fact by the primary judge about what the Minister did. If your Honours go to the actual brief to the Minister – your Honours have not been taken to this document, but it starts at application book page 8. This is the document that his Honour was making all those findings that I just took the Court to, and your Honours will see that it is a submission which contains the recommendations that become the decision – the record of the decision.

Then at page 9 there is what can be generally referred to as the brief to the Minister or the submission to the Minister. Your Honours would see it is quite specific in instructions – and I will not take your Honours a lot of them, but they were the subject of those findings by the primary judge – at the top of page 10:

> Please record your decision on, and sign, the Decision Page at **Attachment 1**. If you do not revoke the original decision, a draft Statement of Reasons is at **Attachment 3** –

When your Honours go through the rest of the brief, your Honours will see that, I think as my learned friend has said, yes, the attachments were included and are referred to in bold and underlined, but nowhere – nowhere is there any suggestion that the Minister should look at any of those, and the finding of fact is he did not.

GAGELER CJ: And your case is that he should have looked at every one of them, is it?

MS DE FERRARI: There are two questions. One is the statutory construction in this particular case and, yes, we say that the Act, properly construed, required personal consideration directly of the representations. Then there is the second issue, if we are wrong about that then, given the finding – and we do say it is a finding by the learned primary judge that the brief was deficient because it did not convey the full force and contents of the representations; I will take your Honours to it – that is consistent with the possibility of the brief not working, as was appreciated by the Full Court

of the Federal Court in *Tickner v Chapman* and as was appreciated by the Full Court again in *Carrascalao*.

Your Honour is correct. We do not shy away from the point that this is a statutory construction question first and foremost. In fact, I intend to spend some time on it because I do not think my learned friend – certainly does not give any prominence to it. But we do say it is statutory construction of the particular power in this particular Act, and you are not assisted by decisions that consider other statutes.

The second point is, in any event, we do say it is a finding of fact. And it was a finding of fact about this brief. So, if we are wrong about the general point of statutory construction, there is a finding of fact by the primary judge about the nature of this brief. His Honour read it carefully and thoroughly because he also – his Honour also had to make a finding about how long it would have taken the Minister to consider the brief, because that was part of our attack on both fronts: the fact of delegation and failure to give due consideration to the representations. So, his Honour read it, and he said it would take – I think he said – a couple of hours.

So, that is the finding that is based on his Honour's reading of that brief – as clearly the Full Court did as well, because otherwise they would not have made all those observations of paragraph 107 and following. They read it carefully, and they agreed this brief does not do it. That does not exclude the possibility that some other brief might do it – might convey the full force and content. But, as I already alluded, there are at least two decisions of the Full Federal Court that says, it is very risky. And even her Honour Justice Kiefel, as her Honour then was, in *Tickner v Chapman*, said, theoretically it is possible, but you might as well read them because they will not convey the full force in context.

I will come to those decisions in a moment. I just wanted to briefly also indicate that the actual decision is at page 21 of the application book, and that is a famous document which, for reasons unexplained, was taken as a photograph. So, that is the answer to, I think, the question that your Honour Justice Steward posed to me.

Your Honour Justice Gleeson asked a question about *Plaintiff M1* and the Full Court. The Full Court dealt with it at page 337, paragraph 77. It recorded the contention by the Minister – and I will come in due course to *Plaintiff M1* about why we say it actually supports our ground. So, there the contention is recorded and then on the next page, 338, it is in that context that what was said by this Court, at paragraph 24, is to be understood. Their Honours recognised that the exercise was a persuasive one, and to that extent the passage referred to does not assist.

Your Honours will know that in *Plaintiff M1* – I may as well come to that now. That is tab 11, in volume 3, your Honours.

GAGELER CJ: Can you give the Commonwealth Law Report reference, please?

MS DE FERRARI: There is no Commonwealth Law Report as yet. It is *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497.

GAGELER CJ: Thank you.

MS DE FERRARI: It has taken a bit of time to make it to the Commonwealth Law Reports, your Honour. Your Honours, if your Honours go to page 324 of the joint book of authorities - - -

GORDON J: Would you just mind telling us what page and paragraph of the reports? Some of us are working electronically.

MS DE FERRARI: I am sorry, your Honour?

GORDON J: Could we just have the page of the report?

MS DE FERRARI: Page of the report is page 508. It is a section that deals with 501CA(4), which starts at paragraph [21]. But it is really – and it goes on to page 510 of this reported version of the decision – it includes, relevantly for today, all the way to paragraph [30]. We say that the decision is really to be understood in three parts, what your Honour said there.

First, there is paragraph [21], then paragraphs [22] to [27] inclusive deal more broadly about the approach to representations, and then paragraphs [28] to [30] deal with the approach to representations when the issue of the representation is one that goes or might go to a non-refoulement obligation, which was the only issue before the court in that case, obviously.

In terms of the broader matters about how representations are to be approached in this context, the plurality said at paragraph [24], that:

> Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations.

That is a "no doubt" proposition. It is for that reason that the Full Court and the primary judge considered that *Plaintiff M1* did not assist – no, I take that back. I do not think *Plaintiff M1* was decided by the time of the primary judge's decision. I think his Honour only had *Viane*.

GAGELER CJ: I am just trying to understand how you are using this. You are saying that there is something special about section 501?

MS DE FERRARI: I will say there is something special, yes, when I come to such construction. But all I need to say is why in this case there is this obligation. It does not mean that the obligation does not exist in any other cases. My learned friend said we have never put before the Court an authority that says, in this particular statutory context, there is an obligation to read the representations. That authority is the Full Court decision in this case.

But my learned friend has not put before your Honours, and the authority says there is never an obligation to read the actual representations. None of the cases from this Court's decision in *Peko-Wallsend*, all the way through to *Carrascalao* – none of them say that, in part because they only address the issues that were presented in those cases. It is a novel point, and it is probably for that reason that, when the matter was just before two of your Honours, we did not try and say that there was no question of special importance. We understand why it is a novel issue.

Just one final point, if I may, in response to your Honour Justice Gleeson's question about *Plaintiff M1*. We also say that, again, in the Full Court's reasons for decision at page 344 of the application book, paragraph 103, the same point is made, we say, by reference to this Court's decision in *Viane*. That is why we say we rely on both what this Court said in *Viane* and what the Court said in *Plaintiff M1*. I think that is the consideration that the court below gave to *Plaintiff M1*, your Honours. Your Honours will appreciate that the Full Court's reasons are basically all responsive to the Minister's submissions, rather than the submissions, necessarily, that we were making.

May I now turn to the outline of oral submissions and follow that, your Honours. First, the obvious difference between the parties is this, we say: the Minister's approach – when one looks at it in terms of statutory construction, which we say is where the analysis must start – must boil down to an irrebuttable presumption as a matter of statutory construction that the Minister can always proceed by relying upon a departmental brief. That must be the Minister's approach. In every statutory context, there is that, unless, as my learned friend has said, there are words in a statute that expressly say, even if the Minister is considering the question personally, the Minister must read every document by which a representation is made to the Minister.

The subsidiary proposition advanced by my learned friend that there is an orthodox approach which is unavailable to save the Minister's decision only if the brief somehow fails to bring to the Minister's attention a

mandatory relevant consideration or a necessary fact, as perhaps was more the case on the facts of *Peko-Wallsend*. That subsidiary proposition does not diminish what my learned friend is asking your Honours to find. That is, as a matter of statutory construction, every time there is a power that speaks about the Minister, whether delegable or non-delegable, there is an irrebuttable presumption that the Minister can always proceed on a summary unless it has a *Peko-Wallsend*-type of defect. We say it to that effect in our written outline of submissions at paragraph 36.

Now, the important words that appear in a number of the authorities relevant to this case, in our submissions, are the words "assist" or "assistance" and the words "consider" or "consideration". Now, they are liable to distract and cause error if they are not considered in the statutory context and in a precise way in which any of the judges that use them deploy them, having regard to the issues that were before their Honours.

We say that the Minister does not engage in the question of statutory construction, which is the first question, and rather relies on this orthodox approach that the Minister has presented to your Honours said to be able to be derived by dicta, and in every case it is dicta, by dicta from various cases. To the extent – and my learned friend did it today as well, and I am here on proposition 4 – that the Minister engages with statutory construction, it is this compare and distinguish, or not distinguish, from other provisions which are different.

It comes back to one of the two keywords that I highlighted, the word "assist". The next proposition we make is that, in general terms, it must be permissible for a person who has had vested upon them by Parliament a statutory task to get some assistance in execution of that task. But the question which we say was ultimately at the heart of this Court's decision recently in *Davis*, the question must be: did that assistance cross the line and turn into the performance of something that in fact the statute required the decision-maker to do? That is how we frame the issue in this case, your Honours.

Can I turn to then the statutory construction in respect of this particular provision, and I am on proposition 6. Would the Court please go to the legislation, which is behind tab 3, volume 1 of the joint book of authorities. We say that the whole scheme must be considered. Now, the whole scheme, starting from section 476, which is at pages 8 and 9, and in particular subsection (2)(c), operates to exclude review by what used to be the Federal Circuit Court, and your Honours will see in paragraph (c):

made personally by the Minister under section 501 –

Section 501(3A) would be included, and there is obviously, of course, a mention to section 501CA. Then if your Honours turn to the next page, your Honours will find section 500. It is a complicated process by which the Act makes it clear that merits review is excluded, but it follows these provisions.

Section 500 now deals with the only form of merits review, which is now, under the Act, by the Administrative Appeals Tribunal. The relevant provisions there, your Honours, are in subsection (1)(b) and (ba), and your Honours will see that if the decision in this case had been made by the delegate, there would have been merits review. Then subsections (3) and (4), (4)(b) in particular, make it clear that the two-way process which includes a mandatory decision of 501(3A) and 501CA for possible revocation, that process is excluded because if the person is not entitled to seek review of the decision under 501(3A), then you do not get merits review at all of that decision.

So, the point is this. What that does, it makes clear that 501(3A) – and that is on page 17, if your Honours go to that – that decision, which could be by the Minister personally or delegated, is not amenable to merits review. So, the only point in time in this scheme where an applicant who was a lawful non-citizen – had a visa – where the person might get merits review is if a delegate makes a decision on whether the status quo should be re-established. That is an important feature of this scheme, your Honours.

While I am on page 17, your Honours should also note subsection (1) and subsection (3). That was the power that was considered by the Full Court in *Carrascalao* and we say that is quite different, because in this case there is a decision under subsection (3A) where it is mandatory, without merits review even if made by the delegate, and there is no consideration of anything, including no consideration of national interest – all that there is, is consideration of criminal record.

In this case, then, the only substantive engagement with the issues comes at section 501CA. In the *Carrascalao* situation, by contrast, the real engagement happens under 501(3), and I do not think it has been included here, but I will turn it up, the power to consider revocation which is in section 501C only deals with whether there was an error in terms of not satisfying the character provisions. So, this process, 501(3A) and 501CA, postpones all considerations of the individual's case. Section 501(3) and 501C frontloads it to the Minister under the national interest consideration. That is why we say, amongst other matters, this is very different from the scheme considered in *Carrascalao*.

That is proposition 6. I do wish to note, however, the matter in the second-last bullet point, which is another important difference. This is

worked out by looking at subsection 501 itself. If the Minister makes a decision under 501(3), there is an obligation on the Minister to report to Parliament. There is no such obligation if the Minister, under 501CA, decides to make the decision personally instead of leaving it to the delegate.

Where it all comes to, your Honours, is that there is absolutely nothing special here about the Minister exercising this power. The only difference is that if the Minister exercises the power, the individual does not get a right to merits review. That is the only difference, and it is only in respect of this power in the whole of the *Migration Act* where it can be exercised by both the Minister and the delegate, and it is only in respect of this power that this is the only difference. Did your Honours want me to go to the authorities next?

GAGELER CJ: We will take a morning adjournment, so if this is a convenient time - - -

MS DE FERRARI: It is, your Honour.

GAGELER CJ: We would take it now. Thank you.

AT 11.13 AM SHORT ADJOURNMENT

UPON RESUMING AT 11.26 AM:

MS DE FERRARI: Your Honours, I am on paragraph 7 of the outline. I want to take them slightly out of order. I have already dealt with *Plaintiff M1*. I just wanted to briefly touch on this Court's decision in *Viane*. That is at tab 6, volume 2 of the authorities, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398.

If your Honours turn to pages 405 and 406 of that report, paragraphs 12 and 13, there is a shorter summary of statutory context than what I have presented, but we do say that that is entirely consistent with what we have submitted to your Honours as the proper construction in full context of this provision. The next point, your Honour, is – I just wanted to briefly highlight the authorities that were considered at first instance and by the Full Court. If your Honours go to pages 262 and 263 of the application

book, this is the reasons for judgment of the learned primary judge, Justice Colvin.

STEWARD J: Sorry, Ms De Ferrari, just before you go there. The sentence at paragraph 15 of *Viane*, the last sentence:

> The breadth of the power conferred . . . renders it impossible, nor is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation.

Is your proposition an absolute rule?

MS DE FERRARI: No, it is not, your Honour.

STEWARD J: You accept that a summary that gave the full force and content of the representations would be validly relied upon?

MS DE FERRARI: Your Honour, we understand that in a sense that is directed to another issue and this might be – I know the other word that I said needs some attention to be paid on in this case, and that is what is meant by "consider". Consistently with *Plaintiff M1*, it is clear that in the context of this provision, it is hard to say that there are ever mandatory relevant considerations or irrelevant prohibited considerations. The question always then depends about the level of engagement – that is *Plaintiff M1* – with particular considerations would depend on each case.

But the statutory question is – and my learned friend has said the word "consider" is not used in the statute but it must be implicit – if the Minister decides to make the decision personally, how does the Minister have to deal with the actual documents, the actual manner and way in which the representations are presented? And the Full Court has said, and the learned judge has said, consistent with *Plaintiff M1*, you should read them. That is the first step in actual consideration.

That does not mean that you need to give the same amount of detailed consideration to every word that you would read. A quick reading of a particular submission will indicate that that is something that has already been put and you already read it. For example, it might say, as I have said before and I want to say it again, or a quick reading of the submission because, ultimately, it is going to be only for the Minister to decide what is going to go in the basket of what might give rise to another reason. A quick reading of it might say, even if all of that was correct, I would not be prepared to give it any weight, and so you skip through it pretty quickly.

STEWARD J: Can I ask, does a "quick reading" mean reading every word on every page?

MS DE FERRARI: Well, your Honour, I do not think many people read every word on every page, but it does mean read the document in a way that is commensurate with a duty to actually consider the fact that someone is making representation at the only stage in which they can make them to seek to persuade you. So, if there are, for example, obvious things like a blank page with just a word on it saying "surprise" – I mean, you would probably perceive it, you perceive that word, but you would just skip through the otherwise white page.

Again, it all comes down to what is, on its proper construction, the decision-maker personally required to do to discharge the duty – which my learned friend accepts is implied in the statute – to actually consider those representations. The statute does not say, consider a summary. The statute does not use the word "consider" at all. The only thing the statute uses is representations.

BEECH-JONES J: Ms De Ferrari, do you accept that it is a foundation of the Full Court's reasons, whether it is a quick read or a close read, the starting point is the Minister must read the representations and material put by the person whose visa is to be cancelled?

MS DE FERRARI: Yes, and that was how his Honour Justice Colvin approached it as well.

BEECH-JONES J: I understand. Thank you.

MS DE FERRARI: We set out the relevant paragraphs where his Honour did it. Yes, we do not shy away from that. The converse is – and your Honours would have seen the brief of how it goes to the Minister. If a brief comes to the Minister with 500 pages or 1,000 pages of submissions, the Minister can say, I am not going to read this, and decide that the delegate is going to do it. It is not a big imposition on the Minister if they have made the procedural decision that they do want to consider that they actually read them. Have I answered the question that your Honour Justice Steward puts to me?

I was going through the cases before the learned primary judge, and your Honours would see on pages 262 and 263 that his Honour considered *Bushell*, the obvious famous dictum in that case; his Honour considered *Carrascalao*; his Honour considered *Peko-Wallsend*, *Viane*, and *Tickner v Chapman*. As I said before, his Honour did not consider this Court's decision in *Plaintiff M1*, because that case was decided in May of that year, and the decision predates it. It was March 2022.

If your Honours then go to the Full Court, which is 312 and 313, your Honours will see the same cases were considered: *Carrascalao*, *Peko-Wallsend*, *Viane*, *Plaintiff M1* in this case, and *Tickner v Chapman*. There is no consideration given by the Full Court of this Court's decision in *Davis* – again, for the obvious reasons that it postdates the judgment. We say that both the primary judge's and the Full Court's consideration of those decisions is correct. They started from the point that they dealt with different statute, and they considered what issue was decided in that case, and what was otherwise said as dicta.

I wanted to spend now some time on this Court's decision in *Peko-Wallsend* (1986) 162 CLR 24. That case is at tab 5, in volume 2. Your Honours, the brief and perhaps slightly unusual facts are set out in the headnote, the last paragraph on page 24 of that report, continuing to the top of page 25, just before the reporter noted what was held in that case. Your Honours will be very familiar that the learned Chief Justice Gibbs and Justices Mason and Dawson decided on one particular way, and Justices Brennan and Deane on a slightly different point.

At page 27 of that report, your Honours will see the submissions as they were put by Mr Bennett QC. And, as your Honours have seen from our submission – and also made clear in the more recent decision of the Court of Appeal (England and Wales), which I will come to – the submission was actually being put of, in effect, a split *Carltona* principle. It is in that context and in the context of there having been a report as required under the Act, the previous decision of this Court saying that the report did not need to consider detriment, and so the only time when detriment could be considered would be by the Minister, and the fact that after the report submissions had been made by the *Peko-Wallsend* interest, directly to the Minister about detriment in a way that had not been made clear at the time that the matter was before the reporter. It is because of those facts and because of the question – two questions, really.

One was: was that detriment, given that only the Minister could consider it, but not the reporter? Was that a mandatory relevant consideration? And there is obviously the very learned and much relied-upon judgment of his Honour Justice Mason. That is one question. The other question was: does it make any difference that that matter has been known to the Department – or assumed to have been known by the Department, because the Department received that representation on detriment, but had not made it to the Minister? That is the split *Carltona* principle. Mr Bennett QC was saying it is not an error because the decision on the facts that were relevant could be done at the delegate level.

Against that second question, this decision is all about procedural fairness – and it is to say, procedural fairness to both sides. That is, no, as a matter of procedural fairness, because those submissions had been made on detriment, the Minister had to consider them given that there were mandatory relevant considerations, and as a matter of procedural fairness, however – and Justice Deane in particular was very strong on that – if it goes back to the Minister and those are to be considered because they go to detriment a mandatory consideration, the Aboriginal parties should have a say about those representations as well.

This decision is all predicated upon what is fair, having regard to what information is in the possession of the Department but not in the possession of the Minister. It is fairness that is construed against the Minister, because the Minister is imputed with constructive knowledge that what is in the possession of the Department is also in the possession of the Minister. This is what this case is about.

It is in that context that if I go to page 30 of that report – the reasons of his Honour Chief Justice Gibbs – and in the split *Carltona* principle issue that his Honour said the dictum that my learned friend took you to about not being expected to read every page. It is because the issue was being put you cannot be expected to read every page. You should allow for a split decision-making by the delegates as to what facts go before the Minister or not. That is what it is responding to.

If your Honours then go to the reasons of his Honour Justice Mason, the points that I have sought to make become even clearer. At page 37 of that report, your Honours will see from the middle of the page, "During argument", that whole paragraph, and then the next paragraph, "This submission". Then on the next page, at page 38, there is a reference in the fourth line to the *Carltona* decision. Then, in the middle of the page, his Honour rejects that *Carltona* is applicable:

> However, there is nothing in the nature, scope and purpose –

et cetera. That is a rejection of *Carltona*, split or unsplit, being available. That then leads to the conclusion, which starts on the last line of page 38, that:

> These matters combine to compel the conclusion that the Minister's function under s. 11 is to be exercised by him personally unless he delegates it –

That is how the particular factual issue has been raised. Then, if your Honours go to page 43 of that report. From the first full paragraph, his Honour sets out how this problem, in a sense, that detriment has to be

considered by the Minister personally, and cannot have been addressed by the report, arises in this situation. Your Honours will see there is consideration of the previous decision in *Meneling Station*, and your Honours would note, at the middle of the page, that his Honour Justice Mason dissented in the previous result.

GAGELER CJ: Ms De Ferrari, just so I understand what we are getting out of this, is it to explain the passages upon which the applicant relies as being a product of the particular legislative scheme and particular issues raised in that case? Is that what we are doing?

MS DE FERRARI: Yes, your Honour, and in particular, the way that the Minister put the split decision-making point.

GAGELER CJ: And you also - - -

MS DE FERRARI: What is being said by both Chief Justice Gibbs and by Justice Brennan in particular, including by reference to the dictum in *Bushell*, is putting it all against the Minister in terms of procedural fairness. No, this does not work, and we will not allow you to raise that issue in any event, Justice Mason says, because you did not raise it below. I am trying to elucidate why, in fact, this is a decision where those dictums really say – well, they are dicta, and to sort of say, that does not exclude it in other contexts, this is possible, but this does not work in this situation, this is not the issue in this case.

GAGELER CJ: So, part of your point is that they are dicta, they are not the ratio of the case?

MS DE FERRARI: They certainly are dicta, your Honour, yes.

GAGELER CJ: Okay.

MS DE FERRARI: In fact, our submission is that they are dicta in every case, including in this latest decision of this Court in *Davis.*

GAGELER CJ: Yes.

MS DE FERRARI: I will be brief. Your Honours will see at page 44 of the report, 116 of the authorities book, the last paragraph:

> The second question, which lies at the heart of this appeal –

And I stress, at the heart of this appeal. Then the consideration goes on to page 46 of the report. I stress the last paragraph on page 46, which again is

a kind of thin wedge argument that was made in that case by the Minister, that the appellant:

> submitted that there are great practical difficulties –

required in considering every submission. Then his Honour gives the obvious answer, you can delegate. Briefly, if I can go to his Honour Justice Brennan, starting from page 65 of the report, towards point 7, there is the heading, "(v) The Department and the Minister's Knowledge." That is the paragraph that has been repeated many times. If your Honours go to the next page, 66 – and we rely on what his Honour says there:

> Reliance on departmental appreciation is not tantamount to an impermissible delegation –

That is the issue that was being raised in that case. And at about line 9:

> The Parliament can be taken to intend that the Minister will retain control . . . while being assisted –

And I stress that word "assisted". Their question is one of assistance, not of taking over the function. What is the function will depend – what is the function that cannot be split delegated in a Carltonic way, or in any other way, will depend on a particular statute. Then there is the dictum from *Bushell*.

We set out the other paragraphs from the reasons of his Honour Justice Deane and Justice Dawson; Justice Dawson agreed with Justice Mason. Justice Deane was very strong in particular. He was not part of this Court's decision in *Meneling*, but it is fair to assume that he would not have decided and might have dissented the same way his Honour Justice Mason had done, but he was very strong that if it went back there would have to be natural justice both ways.

Now, that that is a proper characterisation of the decision, the dicta, having regard to the issues, was also the conclusion of the English and Welsh Court of Appeal. This is the decision that is behind tab 12, *R (on the application of National Association of Health Stores) v Department of Health*. The primary reasons given by Lord Justice Sedley – and if I can take your Honours to page 339 of the book, starting from paragraph 23, your Honours will note the heading, "What knowledge does the law impute to Ministers?" We are relying on paragraphs 23, 24, 26, 27 and 28, where it starts consideration of what the High Court's decision four years after *Bushell*.

All the paragraphs that follow – and your Honours will see at paragraph 32, the Lord Justice elucidates exactly what is to be taken by the dictum of Lord Diplock in *Bushell*, which is, as I have submitted, really a decision that goes against the Minister. You are going to be imputed with constructive knowledge in certain types of cases. It concludes on paragraph 33, which is on page 341:

> In my judgment *Bushell* is not authority for what Mr Cavanagh seeks to derive from it.

Mr Cavanagh's submission was an even more extreme version of the split *Carltona* principle that was advanced by Mr Bennett QC:

> It is a decision about due process – specifically, about what fairness requires where new material which emerges –

but it is not in the hands of the Department. To similar effect, your Honours, the reason of Lord Justice Keene, your Honours will see at paragraph 71, on page 351:

> I agree and wish to add only a few comments –

I refer to paragraph 71 and 74 of the Lord Justices' reasons, and then at the bottom of page 352, Justice Bennett – paragraph 77:

> I agree –

That is really a unanimous decision, on that view, of really what was the issue in *Peko-Wallsend* in terms of ministers being imputed with knowledge of what is in the hands of the Department. The next case is the Full Court's decision in *Tickner v Chapman* (1995) 57 FCR 451, and your Honours will also find it behind tab 13, in volume 3 of the joint book of authorities. If I can start with the reasons of His Honour Chief Justice Black. From page 455 of that report, your Honours will see from point F the scheme of the Act is summarised. I will not read it, but I rely on the reasoning of page 455, and then if your Honours go to the top of page 456:

> In the present case, O'Loughlin J held that an essential precondition to the exercise of the Minister's power had not been satisfied –

Why? Because the Minister had not personally considered the representations. We rely on this because, if we are right on our construction, that is the jurisdictional error. There is an error to satisfy an essential precondition to the exercise of the power. What was held in that case, obviously, was that the representation had to be considered by the Minister, and on the facts they were not considered, as your Honours will

see, still staying on the reasons of Chief Justice Black, from page 461, where at F his Honour says, "Whether the representations were considered". Again, the same point is made at G, so his Honour agrees with the learned primary judge:

> it is clear that the Minister's duty to consider under s 10(1)(c) is a provision compliance with which is a necessary step in the exercise of power –

Next page, at paragraph B:

> The Minister must personally consider the report and any representations attached to it.

Then there is the learned excursus in what does "consider" mean, which has obviously being picked up in a number of cases after that, including what her Honour Justice Kiefel said about that word. There is a reference in those contents to *Peko-Wallsend*, at point F, but I think, as I already submitted, "consider" is a word on which, of course, we rely on this learned learning, and on what other courts of have said, including *Carrascalao*, but it depends. At the fine level at which you have to delve, in terms of what will constitute consideration or not especially when it is a precondition on the exercises of power, depend on a statutory context. All we wish to say on this point is that the absolute proposition, is actually put by my learned friend, of an irrebuttable presumption that the Minister can always just satisfy "consider" by sole reference to the brief is incorrect.

Then briefly, at page 464 of that report, there is again dicta because in this case the facts establish that he just simply had not considered, and what had been done by his staff did not amount to consideration. One of his staff had read it, but then had discussions on the phone, and the evidence established they were quite inadequate. Your Honours would see from about point F:

> This does not mean that the Minister is denied the assistance of a staff member in the process of considering the representations.

No one doubts that the department can carry out an important role in organising materials, as his Honour Chief Justice Black said, by sorting out the representation in categories. His Honour then says:

> I would not rule out the possibility –

Hence we say it is dicta:

> of some representations being quite capable of effective summary –

For example, technical ones. But then, in this case, it was clear that there were some that could not possibly be the subject of summary, and that is at point G.

MS DE FERRARI: Then, at page 465, there was another issue in that case which was some representations were effectively made sealed that had only been considered by the reporter, who was a woman, because it dealt with secret women's business. There were two separate issues with two different types of representations, and your Honours will see that Chief Justice Black deals with that at page 465 at point G. That is, even that issue does not mean that the actual decision-maker must not consider it. His Honour Justice Burchett considered a way around that, a practical way around that - - -

GAGELER CJ: Ms De Ferrari, can you just summarise again what you are getting out of this analysis, for us?

MS DE FERRARI: That in fact what this case stands for is the proposition that the Minister, under this particular statutory scheme, had to personally read and personally engage with the representation, including the secret women's business. It was no answer that it was a man and the representation dealt with secret women's business and Justice Burchett said if that is the problem the way you get around that, because the power is non-delegable, you get a female Minister to be appointed to make the decision.

So, this case stands for the proposition and, in this statute, that had to be personally considered. There was some dicta that allowed for the possibility that some might be able to be summarised, but that is just dicta. The proposition, which we have made repeatedly, is that every statute has to be considered in its terms.

GAGELER CJ: And that is really the effect of all of your analyses of these cases.

MS DE FERRARI: Correct, your Honour, and I am sorry I am taking that much time. The same applies to *Carrascalao*, your Honours, and I will not take you through it. I have already outlined how that scheme under 501(3) and 501C is quite different from the scheme we are concerned with in this case. As your Honour Justice Steward pointed out, even that paragraph that my learned friend relies upon has the carve-out about what your Honour has pointed to, but more than that, on the facts of that case there was no argument being made that the summary was deficient in conveying the full force of the argument.

That point, your Honour, is also what we say – that really deals with our propositions at paragraph 8 and 9 leading to the proposition at paragraph 10 that dicta in the courts that have accepted that reliance upon a summary is permissible is the highest that the authorities go in the Minister's favour. I have not dealt with this Court's decision in *Davis*, but what we say is the principle that emerges from that case very clearly is that you have to construe the statute and you have to construe what are the limits of the assistance that someone who has been vested with the precise statutory power might gain from others. That is the principle.

Finally, paragraph 11, I have already dealt with that, for the reasons that, in particular, become clear from the treatment of Chief Justice Black in *Tickner v Chapman*, but was also accepted by the primary judge in this case and by the Full Court. If you fail – if the Minister fails to deal with a statutory precondition to the exercise of the power then that in and of itself is jurisdictional error.

Now, paragraphs 12 and 13 go to the other issue, and that is the matter of statutory construction. This case is a little bit more like what was contemplated as possible in *Tickner v Chapman*. In some cases it might be possible. Then we say that – and we do say it is a finding of fact by the primary judge and a finding of fact – not disturbing the Full Court – never challenged. In this case, the summary was deficient for the reasons that their Honours found, it did not convey the full force and content of the representation. We say it is no answer to sort of say all the topics were addressed.

GAGELER CJ: Ms De Ferrari, can we take what the Full Court said from paragraph 107 onwards to be the particularisation of the deficiencies?

MS DE FERRARI: Absolutely correct, your Honour. That is exactly how it developed before the Full Court, and that is the answer to – my learned friend says we never attacked the proposition that it makes about there is not a failure to deal with a mandatory relevant consideration. That was never this case, your Honours. This was not the ground of review before the primary judge, and this was not how the appeal was argued and fought. So, we do not deal with that because that is really a completely tangential question. The approach has always been, including in the Full Court – we rely on all these dicta for an orthodox approach where there is jurisdictional error if and only if the brief is materially deficient because it has not identified a relevant consideration. We say that is not what this case is about.

That really leads me to the last point, your Honours, what is to be done if we are wrong about everything that we have said, and my learned friend gets leave to appeal and the appeal is allowed. The question of

whether there was a material failure in terms of mandatory relevant consideration was never addressed. We never had to address it, because that was never the case that we had to meet, in our submission.

BEECH-JONES J: But is that not saying that is not the case you ran?

MS DE FERRARI: It is not a case we ran at first instance, but not a case we had to meet in the Full Court.

BEECH-JONES J: I understand.

MS DE FERRARI: So, having regard to the way the only ground of the proposed appeal is put, we say that if we are wrong about everything else, then the appropriate course of conduct would be to remit the matter.

GAGELER CJ: But to hear what? What would be being heard on the remittal?

MS DE FERRARI: Well, if we are wrong, it must mean that the only possible jurisdictional error – so must be that we are wrong about what the duty to consider required in this case, it must be that we are wrong about the brief being deficient, it must be that we are wrong in the way we articulated the first error, which was this is a failure to properly engage with the representation as a whole, to consider them. It was a broader error. It was not an error about you failed to deal with this particular consideration.

So, what would be remitted would be whether that error is maintainable on the proper construction that your Honours would give to this question, having regard to how the representation was raised as a mandatory relevant one. It is not really mandatory, it is one that comes within *Plaintiff M1* and how the departmental brief analysed it. That would be what would be remitted.

GAGELER CJ: All right.

MS DE FERRARI: But your Honours would appreciate, we say that that is not the issue, and that is why, in a sense, at all times, the parties seem to have been talking about two different cases.

Unless I can be of further assistance, your Honour.

GAGELER CJ: Thank you, Ms De Ferrari. Mr Herzfeld.

MR HERZFELD: Yes, there are four matters in reply. The first is that attention was drawn to *Plaintiff M1* paragraph [24], which refers to understanding and reading the representations. We have addressed in

paragraph 39 of our written submissions why that reference cannot be understood to dictate a requirement to read the actual documents which are submitted by the former visa holder, so we would just draw attention to what we said about that in paragraph 39, the first point.

The second point concerns the English Court of Appeal decision. Ms De Ferrari took your Honours to passages of that decision concerning the imputation of knowledge to a Minister. That is not the relevant part of the decision and is not relevant to anything at issue in this case. The relevant parts of the reasons are from 60 to 64 in the leading reasons, which, in terms, deal with whether there was a failure to consider what needed to be considered in circumstances where what was relied upon was a summary. Those paragraphs pick up and apply, in terms, the reasons in *Peko-Wallsend*. Then, in the other sets of reasons, it is paragraph 73 and paragraphs 87 to 88. The passages in that decision to which your Honours have been taken are not the relevant passages.

The third reply point that we make is this: our position is that, in light of the longstanding statements to which your Honours have been taken, legislation can be taken to have been framed on the background of that ordinary position. We do not say, as it was asserted on a number of occasions, that it is an irrebuttable presumption. I made clear in-chief that it is something that can be dealt with by express language or a matter of the proper construction of the statute. That is, properly construed, the statute can require the Minister or any other decision-maker to actually read particular documents. But our point is that there is nothing in this scheme which suggests that that is the requirement here, in light of the orthodox position.

The final reply point is this: it was asserted by Ms De Ferrari near the close of her submissions that that finding of the primary judge on which they rely had never been challenged, and the case that we say is the one that needs to be run has never been run before. That is not correct. Regrettably, may we supply to your Honours a bundle of material, which I am going to take your Honours through briefly, to show that this issue has been live in the Full Court; this is not a new matter which is being raised in this Court by us.

GAGELER CJ: I am not sure I understood her submission quite that way. I understood her to be saying that there would remain something left to be determined that has not been determined.

MR HERZFELD: Well, I really must show your Honours how this issue was joined in exactly the way that we have said it should have been joined in the Full Court, because it has been suggested to your Honours that this

issue was not joined in the Full Court, and it was. Unless your Honours are not going to be assisted by - - -

GAGELER CJ: I am not sure that we would be assisted by this, Mr Herzfeld.

MR HERZFELD: All right.

BEECH-JONES J: Mr Herzfeld, can I ask you this, is this – the position as I understood it, was it was never the respondent's case that there was a material omission in their summary warranting a suggestion of a failure to take into account a consideration. You say that is the limit of the universe. You say that if that is the limit of the principle, there is nothing left to remit. Is that what, at least, you say?

MR HERZFELD: Yes, and we said in the Full Court, and late in oral argument in the Full Court there were a couple of examples given by the respondent which we addressed. Then the Full Court, in 107 and following, came up with a whole series of other matters that had not been raised by either party, but yes, your Honour has understood the position that we have said consistently that this was the principle and the respondent needed to demonstrate why there was a material omission or inaccuracy. The respondent has largely, in this Court and below, eschewed doing that at all. I will not trouble your Honours with the material, but that was where a slightly meandering journey was going to end up.

EDELMAN J: Ms De Ferrari said that there was a notice of contention in the Full Court that was not addressed.

MR HERZFELD: Yes.

EDELMAN J: What was that notice of contention?

MR HERZFELD: That was Ms De Ferrari's notice of contention arguing that there had in fact been a de facto delegation of the whole decision-making task by the Minister to the Department, and that in truth, the decision was made by the Department, not the Minister. That was not determined by the Full Court and has not been re-enlivened by the respondent before your Honours.

If, at some point, your Honours wish the bundle to be provided, it can be, but it will now not be.

GAGELER CJ: Thank you, Mr Herzfeld – you are finished, Mr Herzfeld?

MR HERZFELD: Yes. Thank you, your Honour.

GAGELER CJ: The Court will reserve its decision in this matter and will adjourn to Monday, 18 December at 9.30 am.

AT 12.10 PM THE MATTER WAS ADJOURNED