FEDERAL COURT OF AUSTRALIA

Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCAFC 121

Moore, Emmett and Gyles JJ

16 May, 1 July 2005

Immigration — Visas — Cancellation — Two visas — Transitional permanent visa — Absorbed person visa — Decision by Minister to cancel transitional permanent visa — Whether appellant held transitional permanent visa — Whether appellant held absorbed person visa — Whether Minister's decision vitiated by jurisdictional error — Failure to take into account a relevant consideration — Migration Act 1958 (Cth), ss 34(2), 501, 501F(3).

The appellant was born in Sweden and brought to Australia as a newborn baby. He was entirely brought up in Australia and did not know his foreign relatives or the Swedish language. As an adult he committed criminal offences and was sentenced to imprisonment. The respondent Minister purported to cancel a transitional permanent visa said to be held by the appellant because his substantial criminal record resulted in a failure to pass the character test set out in s 501 of the *Migration Act 1958* (Cth) (the Act).

The appellant maintained that he did not hold a transitional permanent visa but rather an absorbed person visa by virtue of s 34(2) of the Act. It was contended that the Minister's failure to identify the correct visa was a jurisdictional error that vitiated her decision. In the alternative, it was submitted that the appellant held both visas and the Minister's failure to advert to the existence of the absorbed person visa was a failure to take into account a relevant consideration.

The Minister argued that the correct and only visa was properly identified, but if the appellant did hold two visas, the cancellation of one would cancel the other by virtue of s 501F(3) of the Act. It was further contended that the Minister's failure to advert to the fact that the appellant also had an absorbed person visa did not vitiate her decision because the characteristics of each permanent visa were the same.

Held per Moore and Gyles JJ: (1) Section 34(2) of the Act operates to grant the appellant an absorbed person visa. [11]

(2) Whether or not the appellant held a transitional permanent visa, the fact that he undoubtedly held an absorbed person visa vitiates the Minister's decision pursuant to s 501 of the Act. A decision to cancel one class of visa cannot be translated into a decision to cancel another class of visa. [15], [16]

(3) If both visas were held it was jurisdictional error for the Minister not to identify and consider the fact that the appellant held an absorbed person visa that would be directly affected by s 501F(3) of the Act. [17]

Akpata v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 389, distinguished.

Per Emmett J: The appellant was the holder of a transitional permanent visa. The Minister's failure to advert to the fact that the appellant also had an absorbed person visa does not vitiate that exercise of power under s 501(2) because the characteristics of each visa are the same. [45], [46]

Appeal against decision of Hartnett FM, [2005] FMCA 305, allowed.

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Akpata v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 389.

Akpata v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 65.

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1.

Ayan v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 126 FCR 152.

Hoffman v Chief of Army (2004) 137 FCR 520.

Immigration and Multicultural and Indigenous Affairs, Minister for v Schwart [2003] FCAFC 229.

Johnson v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 136 FCR 494.

Lu v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 141 FCR 346.

R v Wallis (1949) 78 CLR 529.

Roberts v Minister for Immigration and Multicultural Affairs (2004) 39 AAR 370.

Saraswati v The Queen (1991) 172 CLR 1.

Shaw v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 142 FCR 402.

Appeal

L de Ferrari, for the appellant.

S Donaghue, for the respondent.

Cur adv vult

1 July 2005

Moore and Gyles JJ.

1 This is yet another disturbing application of s 501 of the *Migration Act 1958* (Cth) (the Act). The appellant was born on 31 December 1973 in Sweden. His parents had permanently migrated to Australia from Sweden in 1966. His mother went back to Sweden in 1973 for a holiday with her first child, a daughter. She stayed in Sweden for the birth of the appellant rather than coming back to her home and husband in Australia because of the difficulty of travelling whilst pregnant. She returned to Australia on 27 January 1974, accompanied by the appellant. The appellant has not left Australia since 27 January 1974. He has never learnt the Swedish language and only speaks English. The appellant's

mother and father separated when he was about five years old and there was little contact between the appellant and his father thereafter. His mother, father and sister have all continued to live in Australia. There has been little contact between the appellant and his mother's family in Sweden. He does not even know the names of his cousins, where they live or what they do. The appellant has been entirely brought up in Australia. It was only happenchance that he was not born here. He is only an "alien" by the barest of threads. However, if the decision under challenge here stands he will be deported to Sweden and permanently banished from Australia. That result causes us a similar sense of disquiet to that expressed by Spender J in *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 402, particularly at [2]-[5] and Sackville and Allsop JJ in *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152 at [1] and [64]-[79] respectively. It suggests that administration of this aspect of the Act may have lost its way.

2 On 12 August 2004 the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) purported to cancel a transitional (permanent) visa said to be held by the appellant. Pursuant to s 501(2) of the Act, the Minister reasonably suspected that the appellant did not pass the character test and decided that the appellant had not satisfied her that he passed that test. The Minister then decided to exercise her discretion to cancel the visa, giving reasons for that decision. Section 501(2) is as follows:

> 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.

3 There is no challenge to the Minister's conclusion as to the character test in view of the criminal convictions of the appellant. The essence of the appellant's case is that he did not hold a transitional (permanent) visa but rather was the holder of an absorbed person visa. It is the appellant's argument that failure to identify the correct visa was a jurisdictional error. In the alternative it was put that the appellant was the holder of each of those visas. It is contended for the Minister that the correct and only visa was properly identified but if there were two visas held the cancellation of one would cancel the other by virtue of s 501F(3). Section 501F, so far as is relevant, is as follows:

> (1) This section applies if the Minister makes a decision under section 501, 501A or 501B to refuse to grant a visa to a person or to cancel a visa that has been granted to a person.
>
> …
>
> (3) If:
>
> (a) the person holds another visa; and
>
> (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;
>
> the Minister is taken to have decided to cancel that other visa.

The appellant contests the application of s 501F but also submits that, if that section has that effect, then the failure by the Minister to advert to the fact that an absorbed person visa was held and would be cancelled by virtue of the decision made would itself vitiate that decision, as the Minister would have failed to consider a relevant consideration.

4 The learned Federal Magistrate held that the appellant did hold the transitional (permanent) visa that was cancelled by the Minister, the onus of establishing that he did not falling upon him. For that reason, and taking into account the effect of s 501F(3), no finding was made as to whether the appellant was the holder of an absorbed person visa. The Federal Magistrate also expressed the opinion that, even if the Minister was in error in identifying the relevant visa, the considerations relevant to a decision to cancel the visa that was cancelled would be no different from the considerations relevant to the cancellation of an absorbed person visa and, therefore, the Minister took all relevant considerations into account in reaching the decision in question.

5 There has been a long and complicated series of changes to the Act and the *Migration Regulations 1994* (Cth) (the Regulations) since the entry of the appellant into Australia in January 1974. Those changes have been traced in detail in the submissions of the parties. It is not necessary to trace all of that history for the purpose of these reasons.

6 The first question is whether or not the appellant held an absorbed person visa. That visa did not exist until 1994. Section 7 of the *Migration Reform Act 1992* (Cth) (No 184 of 1992) introduced the following section under the heading "Lawful non-citizens":

> 14 (1) A non-citizen in the migration zone who holds a visa is a lawful non-citizen.
>
> …
>
> (3) A non-citizen in the migration zone who:
>
> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and
>
> (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 November 1993; and
>
> (d) immediately before 1 November 1993, was not a person to whom section 20 of this Act as in force then applied;
>
> is a lawful non-citizen.

7 Subsequently, the *Migration Legislation Amendment Act 1994* (Cth) (No 60 of 1994) omitted subs (3) of s 14 and enacted the following section under the heading "Absorbed person visas":

> 26AB(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.
>
> (2) A non-citizen in the migration zone who:
>
> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and
>
> (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
>
> (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;
>
> is taken to have been granted an absorbed person visa on 1 September 1994.
>
> (3) Subdivisions AA, AB, AC (other than section 26ZK), AE and AH do not apply in relation to absorbed person visas.

That section was renumbered s 34 and the section in parenthesis in subs (3) was changed from s 26ZK to s 68 to arrive at the form in which the Act now stands in this respect.

8 A visa to remain in Australia may be to remain indefinitely — known as a permanent visa — or during a specified period or until a specified event happens or while the holder has a specified status - known as a temporary visa. An absorbed person visa is permanent. Classes of visas are dealt with by s 31 of the Act:

> (1) There are to be prescribed classes of visas.
> (2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A and 38.
> (3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37 or 37A but not by section 33, 34, 35 or 38).
> (4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.
> (5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

"Prescribed" means prescribed by the regulations.

9 Regulation 2.01 of the Regulations was as follows:

> For the purposes of s 31 of the Act, the prescribed classes of visas are:
> …
> (b) the following classes:
> (i) transitional (permanent); and
> (ii) transitional (temporary).

10 Regulation 4 of the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth) (the Reform Regulations) included the following:

> Entry permits in force before 1 September 1994 to continue in effect
> (1) Subject to regulation 5, if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a permanent entry permit, that entry permit continues in effect on and after 1 September 1994 as a transitional (permanent) visa that permits the holder to remain indefinitely in Australia.
> (2) If, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a temporary entry permit, that entry permit continues in effect on and after 1 September 1994 as a transitional (temporary) visa that:
> (a) permits the holder to remain in Australia; and
> (b) is subject to the conditions (if any) to which the entry permit was subject; and
> (c) has a visa period ending on the day on which the entry permit would have stopped being in force.

11 It is accepted by the Minister that the appellant had ceased to be an immigrant by absorption into the Australian community before 2 April 1984. It is accepted that on the face of it the appellant satisfies all the criteria in s 34(2). However, it is submitted by the Minister that the criteria for an absorbed person visa should be viewed, when considering the scope of reg 4, as intended to apply to a limited class of immigrants, namely those who became absorbed persons prior to 1984 although they had been illegal immigrants and the appellant is not such a person. The Minister's argument obtains some support from consideration of the legislative history and extrinsic material to which

reference was made. However, the ordinary meaning of the provision is clear. It is not ambiguous or obscure and does not lead to a result that is manifestly absurd or is unreasonable. Thus, s 15AB of the *Acts Interpretation Act 1901* (Cth) does not permit the use of extrinsic material to arrive at the construction contended for. The statute operates according to its terms and the appellant must be taken to have been granted an absorbed person visa on 1 September 1994.

12 In January 1974 the appellant was granted a permanent entry permit in accordance with s 6(2) of the Act as it then stood and entered Australia pursuant to it. It is contended for the Minister that that entry permit continued to be held by the appellant until 1 September 1994 when it was converted into a transitional (permanent) visa by virtue of the Reform Regulations. It is contended for the appellant that, as the Act stood in 1974, the entry permit was just that and no more. Once a person entered Australia lawfully pursuant to a permanent entry permit with no conditions attached, that person could not be removed from Australia for not holding any form of permit or authority. This conclusion was even clearer once the person became absorbed and so ceased to be an immigrant. It was therefore submitted that the appellant did not "hold" an entry permit. It was submitted for the Minister that the entry permit was never revoked or otherwise affected and, in effect, once a holder always a holder. It was also sought to be shown that there was practical utility, at least for some, in being classed as continuing to be the holder of an entry permit over the years.

13 The question as to whether, leaving aside the issue of the absorbed person visa, the appellant was entitled to a transitional (permanent) visa is a question of some nicety depending upon whether the appellant, immediately before 1 September 1994 was in Australia as the *holder of* a permanent entry permit. The difficulty arises because, as the Act stood in 1974 when the appellant entered Australia, the requirement for a permit existed only at the point of entry. No provision of the Act imposed any requirement of an ongoing kind that an immigrant must hold a permit. Once there was lawful entry pursuant to a permanent entry permit, the immigrant was entitled to remain in Australia indefinitely by virtue of that fact. We cannot see that this conclusion is assisted in the case of a person who became absorbed and thus was no longer an immigrant. It is an odd use of language to suggest that a person such as the appellant was the *holder of* an entry permit in 1994. The Minister's construction requires that the provision be construed as applying to all persons who entered Australia *pursuant to* a permanent entry permit. On the other hand, the notion of holding a permit, rather like a certificate, seems to have crept into the statutory scheme so that everybody is regarded as either a permit holder or a visa holder. Furthermore, in many situations it would be beneficial to the alien to be regarded as the holder of a permit. We will examine the position on the hypothesis that the appellant would have been granted a transitional (permanent) visa on 1 September 1994 leaving aside the absorbed person visa.

14 Section 82(2) of the Act provides:

> A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.

It is clear enough that the policy reflected by s 82(2) is that a person should not hold two substantive visas at the one time. That would be anomalous. However, the situation here does not fit neatly within the terms of s 82(2) as, if there were two visas, then each was created at the same time, one directly by virtue of the

statute and the other by virtue of the Reform Regulations. It was pointed out for the appellant that there was no equivalent of s 501F(3) in force when the reforms came into force in 1994. In those circumstances, the inference that the Act and Reform Regulations were intended to work as a package and would not be construed as resulting in two visas being granted at the same time to the same appellant is suggested to be overwhelming. It is submitted that the specific statutory visa based upon s 34, would take precedence and that the mere fact that the appellant continued to hold an entry permit (if that were the case) would not transform the permit by operation of the Reform Regulations into a further visa (*R v Wallis* (1949) 78 CLR 529 at 550; *Saraswati v The Queen* (1991) 172 CLR 1 at 24). It is contended for the Minister that, as there is no substantive difference between the characteristics of each visa, there is no inconsistency between them and no need for a choice to be made. There is force in both points of view.

15 In our opinion, once it is concluded that the appellant meets the criteria for holding an absorbed person visa by virtue of s 34, there is no basis upon which that conclusion can be avoided by according some form of primacy to a visa arising from the Reform Regulations. Whether or not the appellant held a transitional (permanent) visa or not, in our opinion, the fact that he undoubtedly held an absorbed person visa vitiates the Minister's decision pursuant to s 501. We therefore do not need to decide whether both were held.

16 If no transitional (permanent) visa was held, then it is clear enough that the decision was affected by jurisdictional error. Cancelling a non-existent visa is not the valid exercise of any statutory power. It was sought on behalf of the Minister to suggest that there was no harm done because the same considerations would apply if the Minister had been considering cancellation of an absorbed person visa and the same result would inevitably have been arrived at. It is submitted that this argument was not put below. In any event it is unsound. A decision to cancel one class of visa cannot be translated into a decision to cancel another class of visa. (*Minister for Immigration and Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229; *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 494 at [28]-[31].)

17 We can see no escape from the proposition that if both visas existed the cancellation of one pursuant to s 501 resulted in cancellation of the other by the operation of s 501F(3). However, in our opinion, if both visas are held it was jurisdictional error for the Minister not to identify and consider the fact that the appellant held an absorbed person visa that would be directly affected by s 501F(3). Leave should be granted to the appellant to amend the notice of appeal to directly raise that issue. It was an issue before the Federal Magistrates Court. Thus, it cannot be suggested that the case below would have been conducted differently. It has not affected the conduct of the appeal in any material way. It is the other side of the coin to the Minister's argument that the characteristics of the visas are the same and that the decision should not be set aside for that reason.

18 It is true that the characteristics of each visa are the same — the right to indefinitely stay in Australia but not to re-enter. It does not follow that, when it comes to cancellation, the difference between the categories of visa can be ignored. Put another way, when considering whether to make a decision that will result in cancellation of an absorbed person visa it is essential to take into

account the nature of that visa. Even if there is overlap between the categories so far as this appellant and others are concerned, it is not suggested that the class of persons holding each category of visa is coextensive. They plainly are not. Each category has a different history and field of operation.

19 The absorbed person visa is applicable to a very special class of person arising out of unusual circumstances. To be eligible, a person has to have been absorbed into the Australian community prior to 2 April 1984. Upon absorption, such a person ceased to be subject to deportation pursuant to s 13 of the Act as it then stood. Such power as there was pursuant to s 14 to deport could be subject to confirmation by an independent Commissioner after review of the facts. Subject to that, the person had the right to remain indefinitely in Australia. The 1984 changes introduced by the *Migration Amendment Act 1983* (Cth) (No 112 of 1983), which substitute the description of "non-citizen" for "immigrant", had the effect that a permanent resident of Australia for 10 years could not be deported for criminal activity. That remained largely the position until the 1994 amendments and remains broadly reflected in Div 9 of Pt 2 of the Act post 1994. Section 201 expressly deals with the deportation of non-citizens in Australia for less than 10 years who are convicted of crimes. Those provisions reflect the policy which should govern that topic and are consistent with not retrospectively disadvantaging persons such as the appellant.

20 In summary, this special category applies only to those who, when it was introduced in 1994, had been absorbed into the Australian community for more than 10 years (and many for much longer) but who had not become Australian citizens in the meantime, most of whom could by then not have been deported for criminal activity. The characteristics of that group are distinct from those of the holders of other visas, including a transitional (permanent) visa, and the distinctions are vital for the purposes of considering the application of s 501.

21 That section does not deal with deportation for criminal conduct as such at all. That is the field of s 201. The original purpose of the section was to deal with refusal to grant a visa. The primary purpose of a visa is to permit lawful *entry into* Australia and will normally be applied for and granted or refused prior to entry into Australia. Classes of visa vary considerably as do the characteristics of visa applicants. The visa applicant will normally have no or little connection with Australia. It is not surprising that there would be a wide discretion to refuse entry to Australia on character grounds. Checking of the character of offshore applicants is difficult. If it transpires that a mistake was made in granting a visa because of inadequate information concerning character, it is not surprising that there would be a ready power of cancellation when further information comes to hand. However, the section is not confined to cancellation proximate to grant.

22 The width of the potential application of s 501 makes it necessary, at the very least, for there to be proper identification and consideration of the nature of a visa to be cancelled directly or by force of s 501F(3). Bearing in mind the existence of Div 9 of Pt 2, it is difficult to see any real role to be played by s 501 in the case of criminal conduct in Australia by persons long absorbed into the Australian community. It is of significance that the visa said to have been automatically cancelled by virtue of s 501F(3) in this case is a visa expressly conferred by the statute itself. It is in no way ancillary or incidental to the visa which was expressly cancelled. Nor is it to be classed as procedural or minor

compared with that visa. (*Minister for Immigration and Multicultural and Indigenous Affairs v Schwart*; *Roberts v Minister for Immigration and Multicultural Affairs* (2004) 39 AAR 370 at [39]-[49].)

23 It was submitted for the Minister that the decision of Finn J in *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 389, upheld in the relevant respect by the Full Court in *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65, is contrary to the proposition that the Minister was bound to consider the effect of his decision upon the absorbed person visa. We do not agree. That case concerned the refusal of a parental visa on character grounds leading to the automatic loss of a bridging visa as well. The principal complaint of the applicant was that he was not warned of that consequence and was so denied natural justice. That argument was rejected by Finn J and by the Full Court on the basis that it was not up to the Minister to warn of the consequences of an unfavourable finding where natural justice had otherwise been afforded. That argument is not relevant here. The second ground of challenge was that the minute signed by the Minister recording his decision made no reference to, and the Minister failed to have regard to, the consequences to the applicant and his family of the automatic cancellation of his bridging visa if the parent visa was refused under s 501(1), that being a relevant consideration. Finn J dealt with that topic very economically as follows (at [30]):

> This ground of challenge is simply misconceived. The terms of the character test apart, the Act does not expressly state the considerations which the Minister is bound to take into account in making his decision under s 501(1): *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41. In my view, the subject matter, scope and purpose of the Act do not lead to or necessitate any implication that the Minister was bound to take account of the impact on a visa applicant of those machinery provisions of the Act (such as s 501F) that were designed to effectuate the actual purpose of an adverse decision taken under s 501(1) (ie the removal of that person from Australia). In any event, one can reasonably infer that the Minister was aware of those machinery provisions and, given Mr Akpata's special leave application at the time of the Minister's decision, that he was a visa holder of another visa.

24 Lander J, who delivered the leading judgment in the Full Court, noticed the course of proceedings in this respect at trial but, so far as we can see, only dealt with the natural justice aspect of the argument. We would conclude that the other aspect of the argument was not repeated on appeal. We do not think that the single judge decision in *Akpata* achieves any greater authority by virtue of the decision in the Full Court. Even if it did, there are points of distinction. It is clear enough from the reasons recorded for the present decision that the Minister gave no consideration to the effect of it upon the absorbed person visa or even as to whether such a visa was held. That would not be the case in relation to a bridging visa. If the applicant is in the country and is pursuing a claim it will be known on all sides that a bridging visa ancillary to the application for the principal visa would be in existence. On the assumption upon which the argument proceeds, the appellant here held two substantive visas, neither ancillary to nor dependent upon the other. It is far from a commonplace situation which would be understood by all. Indeed, it is anomalous.

25 Jurisdictional error is established. The learned Federal Magistrate erred in not so finding. The question of relief arises. It is not academic. The appellant is in detention under risk of deportation. It is clear enough that the Minister was

prepared to cancel a permanent visa, notwithstanding the long connection of the appellant with Australia. That does not establish that the same decision will inevitably be come to when the Minister's attention is directed to the nature of the absorbed person visa that would also be cancelled. There is a heavy onus on those seeking to establish futility in a case such as this with such dire consequences for an appellant who has demonstrated jurisdictional error. (*Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 346 at [5] and [64].)

26 What is more, it is timely for there to be a review by the Minister of the proper approach to matters such as this. That would be very likely to yield a different result in this case. In our opinion, it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all of his relevant family in Australia by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.

27 The first issue requiring reconsideration is the use of s 501 in circumstances where the directly relevant substantive section (s 201) is not applicable. Section 501 should not be used to circumvent the limitations in s 201. Apart from anything else, to do so is to retrospectively disadvantage permanent visa holders who happen to be non-citizens. While it was not argued in these proceedings, it may be that the specific power conferred by s 201 to deport non-citizens who have committed crimes is the only source of power to deport (in a case such as the present) and not indirectly, the power conferred by s 501 to cancel a visa enlivening the power to remove under s 198: see *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1; *Hoffman v Chief of Army* (2004) 137 FCR 520 at [12]-[27].

28 The second issue requiring reconsideration is the failure of Ministerial Direction No 21 to draw attention sufficiently to the difference between applying the section to an application for a visa on the one hand and cancellation of a visa on the other, to the difference between cancellation proximate to the grant of a visa on the one hand and cancellation of a long standing visa on the other, to the difference between a temporary visa and a permanent visa and to the difference between persons absorbed into the Australian community and those who are not. This case, and others which have reached the Court, show clearly enough that officers of the Department of Immigration and Multicultural and Indigenous Affairs, and ministers advised by those officers, are purporting to apply notions of protection of, and expectations of, the Australian community, which might be quite appropriate in relation to some situations, to situations such as this where they are arguably inappropriate. There is no need to stress the importance of Direction No 21. It directly binds all but the Minister and is routinely used by Ministers to guide the exercise of the statutory ministerial discretion.

29 It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. The appellant has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be

citizens. The difference is the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant's parents and some contestable High Court decisions. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.

30 The third issue requiring reconsideration is the increasing tendency to utilise direct ministerial decision making. There will, no doubt, always be cases of particular political sensitivity which may require ministerial consideration. That cannot be true of the ordinary case of criminal conduct such as this.

31 All in all it cannot be concluded that setting aside the decision is futile. Leave should be granted to amend the notice of appeal. The appeal should be allowed; the judgment of the Federal Magistrates Court be set aside and in lieu thereof it be ordered that the decision of the respondent be set aside and that the appellant be forthwith released from detention; and the respondent be ordered to pay the appellant's costs of the proceedings in the Federal Magistrates Court and of this appeal.

Emmett J.

32 The appellant was born in Sweden on 31 December 1973. He arrived in Australia on 27 January 1974 and has never left Australia. The appellant's parents were born out of Australia but they have acquired Australian citizenship. The appellant's sister, having been born in Australia, is an Australian citizen. However, despite having lived all but the first four weeks of his life in Australia, the appellant is a non-citizen for the purposes of the *Migration Act 1958* (Cth) (the Act). Nevertheless, until 12 August 2004, the appellant was a lawful non-citizen for the purposes of the Act. That is because he was, until that day, the holder of either a transitional (permanent) visa or an absorbed person visa, or was the holder of both classes of visa.

33 Under s 501(2) of the Act, the Minister may cancel a visa that has been granted to a person 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. In her reasons for the decision of 12 August 2004, the Minister concluded that she reasonably suspected that the appellant does not pass the character test and that the appellant had not satisfied her that he passes the character test. Accordingly, the prerequisites for the exercise of the discretionary power conferred on the Minister by s 501(2) were satisfied.

The impugned decision

34 On 12 August 2004, the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister), made a decision purporting to cancel a transitional (permanent) visa held by the appellant. The appellant says that, whether or not he was the holder of a transitional (permanent) visa, he was, at 12 August 2004, the holder of an absorbed person visa. He says that, since the Minister did not turn her mind to the question of cancelling his absorbed person visa, the Minister's decision was infected by jurisdictional error. Because it was infected by jurisdictional error, it was not a decision under the Act and, accordingly, the prohibition on curial interference contained in s 474 of the Act would have no application. He says, therefore, that the decision should be quashed.

35 The appellant commenced a proceeding in the Federal Magistrates Court of Australia seeking relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) in

respect of the Minister's decision. On 16 March 2005, the Federal Magistrates Court ordered that the proceeding be dismissed with costs. By notice of appeal filed on 24 March 2005, the appellant appealed from the orders of the Federal Magistrates Court to the Federal Court of Australia.

The appellant's visas

36 Section 29(1) of the Act provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of:

- travel to and enter Australia; and
- remain in Australia.

37 Section 31 of the Act provides that there are to be prescribed classes of visas. As well as the prescribed classes, there are the classes provided for by specific provisions of the Act. Only s 34 is presently relevant. Under s 31(4), the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia or both.

38 Section 34(1) of the Act provides that there is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas. Under s 34(2), a non-citizen in Australia who:

- on 2 April 1984 was in Australia;
- before that date, had ceased to be an immigrant;
- on or after that date, has not left Australia; and
- immediately before 1 September 1994 was not a person to whom s 20 of the Act as then in force applied;

is taken to have been granted an absorbed person visa on 1 September 1994. The Minister accepts that those four prerequisites were satisfied in respect of the appellant.

39 Regulation 2.01 of the *Migration Regulations 1994* (Cth) (the Regulations) provides that, for the purposes of s 31, the prescribed classes of visas are such classes (other than those created by the Act) as are set out in Sch 1 to the Regulations and the following classes:

- Transitional (Permanent); and
- Transitional (Temporary).

40 Section 40(5) of the *Migration Reform Act 1992* (Cth) (as amended) (the Reform Act) provided, inter alia, that the Regulations may provide that, from 1 September 1994, permits in a class of *permits* provided for by regulations under the Act and held by specified persons immediately before that date are to continue in effect as *visas* in a specified class of visas that is provided for by, or by regulations under, the Act. Under s 40(6), the Regulations may provide that, from 1 September 1994, specified persons are to be taken to have been granted visas in a specified class of visas provided for by, or by Regulations under, the Act. Under s 42 of the Reform Act, the Governor-General was authorised to make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Reform Act.

41 The *Migration Reform (Transitional Provisions) Regulations 1994* (Cth) (the Reform Regulations) were made in 1994 under the Act and under the Reform Act. Regulation 4 of the Reform Regulations relevantly provides that if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a *permanent entry permit*, that entry permit continues in effect on and after 1 September 1994 as a transitional (permanent) visa. Regulation 3(1) of the Reform Regulations defined permanent entry permit as meaning an entry

permit the effect of which is not subject to a limit as to time. A transitional (permanent) visa permits the holder to remain indefinitely in Australia. Such a visa would not permit the holder to re-enter Australia.

42 When the appellant arrived in Australia on 27 January 1974, he was granted a permanent entry permit within the meaning of the Reform Regulations. It follows that, immediately before 1 September 1994, the appellant was in Australia as the holder of a permanent entry permit. By the operation of r 4(1) of the Reform Regulations, that entry permit continued in effect on and after that date as a transitional (permanent) visa.

43 Thus, the appellant was, as at 12 August 2004, the holder of two substantive visas. That circumstance is somewhat anomalous, having regard to s 82(2) of the Act, which provides that a substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for that non-citizen comes into effect. In the present circumstances, s 82(2) did not operate because each of the two visas in question came into effect at the same moment, one by the operation of s 34 of the Act and the other by the operation of r 4(1) of the Reform Regulations.

44 If the only visa held by the appellant was a transitional (permanent) visa, there could be no valid complaint about the exercise of the discretionary power under s 501 by the Minister on 12 August 2004. In essence, however, the appellant says that either he had only an absorbed person visa, which the Minister did not purport to cancel, or the Minister's exercise of power was affected by error because, in cancelling the transitional (permanent) visa, she failed to advert to the fact that the appellant was also the holder of an absorbed person visa.

Reasoning

45 For the reasons briefly outlined, I consider that the appellant was the holder of a transitional (permanent) visa as at 12 August 2004. The Minister purported to cancel that visa. I do not consider that the failure, when deciding to do so, to advert to the fact that, as at 12 August 2004, there was also in effect, in respect of the appellant, an absorbed person visa, vitiates that exercise of power under s 501(2).

46 The characteristics of each visa are the same. That is to say, each carries the right to stay in Australia indefinitely, but not to re-enter Australia if the holder departs from Australia. It may be conceivable that, in relation to some non-citizens, considerations could arise in relation to the cancellation of an Absorbed Person Visa that are different from the considerations that would arise in relation to the cancellation of a transitional (permanent) visa. However, the appellant does not point to any no considerations that would need to be taken into account by the Minister in deciding whether or not to cancel his absorbed person visa that are different from those that would need to be taken into account in deciding whether or not to cancel his transitional (permanent) visa.

47 Section 501F of the Act tends to confirm that conclusion. Section 501F applies if the Minister makes a decision under s 501 to cancel a visa held by a person. Under s 501F(3), if such a person holds another visa and that other visa is neither a protection visa nor a visa specified in the Regulations for the purposes of s 501F(3), the Minister is taken to have decided to cancel that other visa. There is no discretion conferred as to whether or not to cancel such other visa. An absorbed person visa is not specified in the Regulations for the

purposes of s 501F(3). It follows that, upon cancellation of the appellant's transitional (permanent) visa of 12 August 2004, the Minister is taken to have decided to cancel the appellant's absorbed person visa.

48 The intent of s 501F(3) is, at least in part, to ensure that, subject to the exceptions referred to, where the Minister decides to cancel one visa, the Minister does not need to consider the cancellation of other visas. The clear policy behind s 501F is that, if the Minister concludes that a person is not fit to retain a particular visa that would permit the person to remain in Australia, that person is not to remain in Australia, simply because the person holds another visa. In the light of s 82(2) of the Act, it would ordinarily be the case that only one substantive visa is held. If the characteristics of another visa were different from those of a visa that the Minister purported to cancel, there may be some argument in support of a conclusion that the Minister should have regard to the consequences of the effect of s 501F. However, as I have said, in the present case, there is no difference in the substantive content of the two visas in question. There is no reason, therefore, for the Minister to have regard to the effect of s 501F.

49 I have had the advantage of reading the reasons of Moore and Gyles JJ for concluding that the appeal should be upheld. While I do not agree with that conclusion, I share the disquiet expressed by their Honours concerning the circumstances in which a man who has spent all of his life in Australia and who has no knowledge of the Swedish language will be removed to Sweden and banished from Australia because of what must be characterised as an accident of history and an oversight on the part of his parents. The material before the Court indicates that the appellant is a thoroughly unpleasant man having been convicted of serious and odious crimes. However, that is irrelevant to the question that has been raised concerning the validity of the Minister's decision.

50 I do not consider that there was any error on the part of the Minister in exercising the discretionary power conferred by s 501(2). The appeal should be dismissed with costs.

Orders accordingly

Solicitor for the appellant: Victoria Legal Aid.

Solicitor for the respondent: Australian Government Solicitor.

ALEXIS WALLACE