Federal Court of Australia

Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 174

|  |  |
| --- | --- |
| Appeal from: | *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1313 |
|  |  |
| File number: | NSD 1301 of 2020 |
|  |  |
| Judgment of: | **YATES, GRIFFITHS AND MOSHINSKY JJ** |
|  |  |
| Date of judgment: | 27 September 2021 |
|  |  |
| Catchwords: | **MIGRATION –** appeal from a decision of a single Judge of the Federal Court of Australia dismissing the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal – where Administrative Appeals Tribunal upheld a decision of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs under s 501CA(4) of the *Migration Act 1958* (Cth) to refuse to revoke the cancellation of the appellant’s visa – meaning of the words “given the notice” in reg 2.52(2)(b) of the *Migration Regulations 1994* (Cth) – whether invitation given to appellant under s 501CA(3)(b) of the *Act* inconsistent with the requirement of reg 2.52(2)(b) - whether reg 2.55 or reg 5.02 applied to the giving of the invitation – whether the appellant was in immigration detention at the time the invitation was given – whether the invitation was invalid in light of *Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 338 ALR 351 and *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196 – whether the appellant had “made” his representations to the Minister within 28 days  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 189(1), 476A, 501CA*Federal Court Rules 2011* (Cth) r 36.05*Migration Regulations 1994* (Cth) regs 1.09, 2.25(2)(b), 2.52(2)(b), 2.55(2)(b), 2.55(3)(c), 2.55(7)(a), 5.02*Periodic Detention of Prisoners Act 1981* (NSW) s 4 |
|  |  |
| Cases cited: | *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2; 262 CLR 333*Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 338 ALR 351*Stewart v Minister for Immigration, Citizenship, Migrant* *Services and Multicultural Affairs* [2020] FCAFC 196 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Administrative and Constitutional Law, Human Rights |
|  |  |
| Number of paragraphs: | 64 |
|  |  |
| Date of hearing: | 3 May 2021, 20 August 2021  |
|  |  |
| Counsel for Appellant: | Mr G Foster |
|  |  |
| Solicitor for Appellant: | Zali Burrows Lawyers |
|  |  |
| Counsel for First Respondent: | Mr C Lenehan SCMr G Johnson |
|  |  |
| Solicitor for First Respondent: | Sparke Helmore |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1301 of 2020 |
|   |
| BETWEEN: | ANDREW ALEXANDER SILLARSAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL SERVICESFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| order made by: | YATES, GRIFFITHS AND MOSHINSKY JJ |
| DATE OF ORDER: | 27 SEPTEMBER 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 1 made in NSD 628 of 2020 on 15 September 2020 be set aside.
3. The second respondent’s decision dated 29 April 2020 be quashed.
4. The coming into effect of Order 3 be delayed until:
	1. the expiry of the period within which to seek special leave to appeal to the High Court of Australia from these orders;
	2. (if an application for special leave to appeal is made) the determination of the application for special leave to appeal filed by the first respondent; or
	3. (in the event that special leave to appeal is granted) the determination by the High Court of Australia of the appeal.
5. Unless the appellant or first respondent take steps in accordance with Order 6, the first respondent pay two-thirds of the appellant’s costs of the appeal, as agreed or taxed.
6. Within one week hereof, if the appellant or the first respondent opposes Order 5:
	1. the opposing party has leave to file and serve written submissions, not exceeding two pages in length, as to why a different costs order should be made;
	2. the other party has leave to file and serve any written submissions in reply, not exceeding two pages in length, within five business days after any submissions are filed in accordance with Order 6(a); and
	3. the issue of costs will otherwise be determined on the papers.

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

REASONS FOR JUDGMENT

THE COURT:

1. This proceeding initially came before the Full Court as an application, pursuant to r 36.05 of the *Federal Court Rules 2011* (Cth), for an extension of time within which to file a notice of appeal from a judgment which dismissed the appellant’s application for judicial review of a decision of the second respondent, the Administrative Appeals **Tribunal**. The application for judicial review was brought pursuant to s 476A of the *Migration* ***Act*** *1958* (Cth). The subject of that review was the Tribunal’s decision to affirm a decision of a delegate of the first respondent, the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs, under s 501CA(4) of the *Act*, to refuse to revoke the cancellation of the appellant’s visa.
2. The draft notice of appeal accompanying the application contained two grounds. The first ground was that the notice of cancellation of the appellant’s visa was invalid or that the appellant had not been served with a valid cancellation notice. The issue raised by this ground was whether the invitation in the notice—informing the appellant as to the period in which he had to make representations about the revocation of his visa cancellation (s 501CA(3)(b))—was consonant with reg 2.52 of the *Migration* ***Regulations*** *1994* (Cth). This was not raised as a ground of review in the judicial review proceeding. As a consequence, the appellant required leave to raise this ground in the event that time was extended to allow him to bring an appeal. In submissions filed on 28 April 2021, the Minister advised that he did not oppose the application to extend time or the granting of leave to rely on the proposed first ground of appeal.
3. The appellant’s application was listed to be heard with proceeding NSD 1185 of 2020, ***EPL20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* on 3 May 2021. When both proceedings were called on for hearing on 3 May 2021, the Full Court raised a question touching on the validity of the invitation in the notice of cancellation not covered by the appellant’s proposed first ground of appeal. The question raised by the Full Court concerned the effect of the High Court’s decision in *Minister for Immigration and Border Protection v* ***EFX17*** [2021] HCA 9; 338 ALR 351 considered in light of ***Stewart*** *v Minister for Immigration, Citizenship, Migrant* *Services and Multicultural Affairs* [2020] FCAFC 196. This question also touched on the validity of the invitation in the notice of cancellation given in *EPL20*.
4. As none of the parties in the two proceedings before the Full Court had raised this question, and as its resolution could be dispositive of each proceeding, the hearing was adjourned to a date to be advised to enable the parties to consider their positions and to file supplementary submissions addressing that question.
5. Given the Minister’s stated position with respect to the appellant’s application for an extension of time, and on leave being granted to rely on his proposed first ground of appeal, an order was made extending time for the appellant to file a notice of appeal, substantially in the form of the draft notice of appeal accompanying his application for an extension of time, but amended so as to raise, in relation to the validity of the invitation in the notice of cancellation, the particular question raised by the Full Court on 3 May 2020.
6. On 19 August 2021, the applicant filed an “amended notice of appeal”. This document was filed out of time and added a further ground of appeal not covered by the grant of leave made on 3 May 2021. Nevertheless, the Full Court entertained submissions in respect of all grounds raised in that document at the resumed hearing of both proceedings on 20 August 2021. The Full Court also granted leave to the appellant to rely on an affidavit he had made to support his additional (fourth) ground of appeal.

## Background matters summarised

1. The primary judge summarised the appellant’s circumstances as follows:

2 Andrew Sillars is 33 years old. He has lived nearly all his life in Australia, having arrived at the tender age of five months. He never took out Australian citizenship. That means that he may only reside lawfully in Australia if he holds a valid visa. In 1994 he was granted a Class BF Transitional (Permanent) visa.

3 Mr Sillars has a long criminal history. This made him vulnerable to a decision by the Minister to cancel his visa on character grounds. In 2014 the Minister considered whether to do so but decided against it, warning Mr Sillars that cancellation might be reconsidered if he were to commit further offences or otherwise breached the character test. Mr Sillars continued to offend and his visa was cancelled. But the Minister acceded to a request from Mr Sillars to revoke the cancellation decision, at the same time putting him on notice that his case could be reconsidered if he were to reoffend. Mr Sillars reoffended and, on 6 September 2018, he was sentenced to a term of 12 months imprisonment, with a non-parole period of eight months, backdated to 12 August 2018. Consequently, his visa was cancelled again. Mr Sillars made representations to the Minister seeking to have the decision revoked. This time a delegate of the Minister decided not to revoke the decision and Mr Sillars applied to the Administrative Appeals Tribunal for a review of the delegate’s decision. The Tribunal affirmed the delegate’s decision. Mr Sillars now applies to this Court to have the Tribunal’s decision set aside and his application remitted to the Tribunal for determination according to law.

1. The notice of cancellation with which this appeal is concerned is dated 7 November 2018. It was addressed to the appellant and dispatched by registered mail to the Metropolitan Remand and Reception Centre in Silverwater, New South Wales. This was the appellant’s last residential address known to the Minister. The notice of cancellation contained an invitation to the appellant to make representations to the Minister about revoking the cancellation decision. It informed the appellant that his representations must be made in accordance with instructions outlined in the notice under two headings— “How to make representations about revocation of the decision to cancel your visa” and “Timeframe to make representations about revocation”. The following instructions were given under the latter heading:

**Time-frame to make representations about revocation**

Any representations made in relation to the revocation of a mandatory cancellation decision must be made within the prescribed timeframe. The combined effect of s501CA(3)(b) and s501CA(4)(a) of the Act and Regulation 2.52 of the Regulations is that any representations **MUST** be made within 28 days after you are taken to have received this notice.

If you make representations about revocation of the visa cancellation decision but the representations are received outside the prescribed timeframe of 28 days, the Minister or his/her delegate is not able to consider the representations because they would not have been made in accordance with the invitation, as required by s501CA(4)(a) of the Act.

Lodging the Revocation Request Form

**If you decide to make representations to the Minister to revoke the mandatory cancellation of your visa, it is essential that you complete and lodge the Revocation Request Form within 28 days after you are taken to have received this notice as this timeframe cannot be extended.**

**If, following lodgement of the Revocation Request Form within the 28 day period, you wish to provide additional information, you may do so. Provided the additional information is received before a decision whether or not to revoke the cancellation is made, the additional information will also be taken into consideration in making the revocation decision.**

As this notice was sent by mail from a place in Australia to an address in Australia, you are taken to have received it seven (7) working days after the date of this notice. A working day does not include weekends or public holidays in the Australian state or territory to where this notice was posted.

(Emphasis in original.)

1. The notice of cancellation included a Revocation Request Form and a Personal Circumstances Form. The appellant’s evidence is that he received the notice of cancellation on 18 November 2018. The appellant says that he completed, signed, and dated the Revocation Request Form, and that he partly completed and signed the Personal Circumstances Form. However, most of the Personal Circumstances Form was left blank by him to be completed by his girlfriend, his mother, or his aunt. He says that, by 20 November 2018 (within two days of his receipt of the notice of cancellation), he left the Revocation Request Form and the partly completed Personal Circumstances Form with prison officers to be collected by his girlfriend and to be forwarded, presumably by her, to the Department. The appellant says that he placed the documents on a tray through a little window, near his cell, where forms were collected. The appellant’s understanding is that, at some stage—he does not say when—his mother and aunt completed the documents and sent them to the Department.
2. We observe that the Revocation Request Form (said to have been fully completed by the appellant) is dated 17 November 2018 (one day before the appellant says he was given the notice of cancellation). The Personal Circumstances Form (said to have been partly completed by the appellant) is dated 21 December 2018. These forms, fully completed, seem to have been sent to the Department by email on 27 December 2018 at 2.52 pm, with the following message:

Dear

We are unfortunately submitting this application late as my son is currently in prison and had passed this onto [sic] someone to complete further details and it did not get attended to. We have only received this letter on 18 December and have done all we can to get it completed and gather all the information needed to attach. Please consider this visa cancellation revocation as Andrew and our family deserve at least the right to be heard. Thank you

1. On the assumption that s 501CA(3) was complied with, and that the appellant was given notice on 18 November 2018, the time for making representations about revocation of the cancellation decision expired on 17 December 2018, well before the sending of this email.
2. On 11 February 2020, a delegate of the Minister decided not to revoke the cancellation decision. No point was raised about the appellant’s representations being made out of time.
3. The appellant then applied to the Tribunal to review the decision not to revoke the cancellation decision. Four days before the hearing of that review, the Minister raised a “procedural issue” with the Tribunal, namely that, because the appellant’s representations had been made outside the prescribed period, the Tribunal had no power to revoke the cancellation decision. The Tribunal upheld that contention.

## Ground 1

1. Section 501CA(3) of the *Act* provides:

As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

1. Regulation 2.52 applies to representations made to the Minister under s 501CA(3)(b). Regulation2.52(2)(b) provides:

The representations must be made:

(a) …; and

(b) for a representation under paragraph 501CA(3)(b) of the Act--within 28 days after the person is given the notice and the particulars of relevant information under paragraph 501CA(3)(a) of the Act.

1. Regulation 2.55 provides for how a document is to be “given” to a person, including a document relating to the cancellation of a visa under the *Act*. One of the prescribed means by which a document is “given” is by dating the document, and then dispatching it within three (3) working days of its date, by prepaid post (or other prepaid means), to the person’s last residential address, business address, or post box address known to the Minister: reg 2.55(3)(c). If given by this means, and if the document is dispatched from a place in Australia to an address in Australia (which was the case here), the person is “taken to have received the document” within seven (7) working days after the date of the document: reg 2.55(7)(a).
2. The appellant draws attention to the following words in reg 2.52(2)(b): “within 28 days after the person is *given the notice* …” (emphasis added). He contrasts these words with the following words in reg 2.55(7)(a): “*taken to have received* the document …” (emphasis added). His argument is that “given the notice”, in reg 2.52(2)(b), is not the same as “taken to have received the document” in reg 2.55(7)(a). He submits that the two phrases are not interchangeable; they mean different things. He submits that, although reg 2.55(7)(a) states when a document is “received” it does not state when a document is “given”.
3. The appellant then draws attention to the instruction given in the underlined paragraph in the notice of cancellation (quoted at [8] above)—the Revocation Request Form must be completed and lodged “within 28 days after you are taken to have received this notice …”.
4. The appellant’s short point is that this instruction is inconsistent with reg 2.52. According to the appellant, this means that the notice of cancellation is “invalid” or “ineffective for the purposes of determining the period when the [a]ppellant was required to make representations”. Thus, he submits, the Minister failed to comply with s 501CA(3)(b) of the *Act*.
5. We do not accept that submission. Section 501CA(3)(b) requires an invitation to make representations to be given within the period and in the manner ascertained in accordance with the *Regulations*. Regulation 2.55 is directed to the means of giving notice. Regulation 2.25 is directed to specifying time limits for the purposes of s 501CA(3)(b). If the means of giving notice is that mandated by reg 2.55(3)(c) then, by dint of reg 2.55(7)(a), the notice is deemed to have been received seven (7) working days after its date. Obviously enough, the object of this provision is to crystallise the date on which a person receives a particular document for the purpose of determining time limits.
6. We accept the Minister’s submission that, read with reg 2.52(2)(b), the effect of the deeming provision in reg 2.55(7)(a) is that a person is taken to have been “given the notice” on the date that it is taken to have been received. We accept that there is no other sensible way of reading those provisions together, which, within the context of the legislative scheme, provide the prescribed “period” and “manner” to which s 501CA(3)(b) refers.
7. For these reasons, the particular instruction to which the appellant refers in this ground of appeal is not inconsistent with reg 2.52. The notice of cancellation is not “invalid” or “ineffective” for the reason the appellant advances. Ground 1 is not established.

## Ground 2

1. As formulated in the notice of appeal, Ground 2 appears to be a reflection of Ground 1. However, as advanced in submissions, and as answered by the Minister, the appellant’s contention is that the primary judge erred in concluding that reg 2.55 applied to the notice of cancellation. The appellant’s submission is that, when the cancellation decision was made, he was in immigration detention. This meant that the notice of cancellation could not be given to him under reg 2.55, given the terms of reg 2.55(2):

However, this regulation does not apply in relation to:

(a) …; or

(b) a person who is in immigration detention.

Note: See regulation 5.02.

1. According to the appellant, the notice of cancellation had to be been given by the method of service required under reg 5.02, which relevantly provides:

For the purposes of the Act and these Regulations, a document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf.

...

1. The primary judge noted that the appellant’s contention turns on the definition of “immigration detention” in s 5 of the *Act*, which applies equally to the same expression in the *Regulations*— for relevant purposes, reg 2.55(2)(b). This definition includes “being held by, or on behalf of, an officer ... in a prison or remand centre of the Commonwealth, a State or a Territory”. The primary judge accepted that the term “officer”, in that definition, included, at the relevant time, employees of State and Territory correctional services or prison departments or their equivalent. But the mere fact that a State prison can be a place of immigration detention did not mean that the appellant was “in immigration detention” in November 2018.
2. The primary judge noted that there is a distinction between immigration detention and criminal detention, which is recognised in the *Regulations*. She reasoned that a person is not in immigration detention if he or she is in criminal detention and that, as the appellant was in criminal detention at the relevant time, he was not in immigration detention.
3. In this connection, the primary judge accepted the Minister’s submission that:

39 … a non-citizen only enters immigration detention as a result of an executive act taken pursuant to s 189 of the Migration Act. As long as the non-citizen is being detained in a prison serving a sentence, there is no reason for such action to be taken. Presumably the purpose of the extended definition of “immigration detention” in s 5 is to enable places other than detention centres established under the Act to be used when, for one reason or another, a detention centre is unavailable or inaccessible, such as where there is no room in the nearest detention centre or there has been a fire there or the only access is by air and it is too late to take a flight or the flights are fully booked.

1. Section 189(1) of the *Act* provides:

If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

1. Section 5 of the *Act* defines “detain” to mean:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

1. The primary judge noted a contention by the appellant that he was in immigration detention from the time the cancellation decision was made because that decision transformed him from a lawful to an unlawful citizen—in other words, a change of status was all that was required.
2. The primary judge rejected that contention based on *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2; 262 CLR 333 in which the plurality said (at [59]):

Criminal detention cannot be “converted” into immigration detention. A person is imprisoned by order of the court which authorises his or her detention by the State following conviction for an offence against the laws of the State. A person so detained cannot be said to be detained by an officer acting under s 189 of the *Migration Act*.

1. Alternatively, the appellant contended that action had been taken to detain him under s 189(1) of the *Act* when a prison officer gave the appellant the notice of cancellation on 18 November 2018. The appellant also relied on an email sent to “Sentence Admin”, the Secretary of the Parole Board, and the Department of Justice advising that the appellant’s visa had been cancelled, that written notification had been sent to him by registered post, and that it was important that, on its arrival, this notification be handed to the appellant as soon as possible.
2. The primary judge rejected this contention, stating that neither event constituted taking the appellant into immigration detention, or amounted to keeping or causing him to be kept in immigration detention.
3. Relatedly, the primary judge noted that the email, on which the appellant relied, was inconsistent with his contention because it expressly referred to making arrangements to take the appellant into immigration detention following his release from criminal custody. The primary judge found that the appellant was not taken into immigration detention until 10 June 2019.
4. Quite apart from these findings, the primary judge noted that, on his own evidence, the appellant had been given the notice of cancellation by 18 November 2018. That being so, the 28-day period, in which to make representations about revocation of the cancellation decision, commenced to run from that date, assuming reg 5.02 applied.
5. In this appeal, the appellant calls in aid reg 1.09, which provides:

For the purposes of these Regulations, a person is in criminal detention if he or she is:

(a) serving a term of imprisonment (including periodic detention) following conviction for an offence; or

(b) in prison on remand;

but not if he or she is:

(c) subject to a community service order; or

(d) on parole after serving part of a term of imprisonment; or

(e) on bail awaiting trial.

1. The appellant also calls in aid the *Periodic Detention of Prisoners Act 1981 (No 18)* (NSW), specifically the definition of “detention period” in s 4 thereof. The significance of this legislation seems to be that, according to the appellant, it is possible for a person to be in periodic detention, and thus in criminal detention, while also being at liberty which, somehow, renders the person amenable to being in immigration detention. The appellant contends, therefore, that a person can be in both immigration detention and criminal detention at the same time.
2. The reasoning behind this submission is difficult to follow. But it need not be pursued. First, the legislation in question was repealed in 2000. Secondly, this ground of appeal is met by the fact that we do not see error in the primary judge’s finding that the appellant was not taken into immigration detention until 10 June 2019. The appellant’s submissions on appeal do not engage with this finding. They also do not engage with the reasons why the primary judge found that, at the time he was given the notice of cancellation, the appellant was *not* in immigration detention.
3. Furthermore, as the primary judge explained, and as the Minister submits, the appellant’s contention that he was in immigration detention at the time he was given the notice of cancellation does not avail him because, even if reg 5.02 applied at that time, by his own admission he was served with the cancellation notice (it was given to him) on 18 November 2018.
4. The appellant submits that there is no evidence as to who gave him the notice of cancellation. He submits that the act of “an unidentified person” giving him the notice of cancellation cannot amount to “service” within the meaning of the *Regulations*. This submission cannot be accepted. Regulation 5.02 requires no more than the giving of the document to the person concerned or to another person authorised by him or her to receive documents on his or her behalf. Unquestionably, the appellant was given the notice of cancellation. Therefore, even on the basis that reg 5.02 applied, the appellant’s representations, when made, were outside the 28-day time period stipulated by reg 2.52(2)(b).
5. For these reasons, Ground 2 is not established.

## Ground 3

1. This ground of appeal concerns the question raised by the Full Court, namely the validity of the invitation given by the Minister pursuant to s 501CA(3)(b) of the *Act* having regard to *EFX17* and *Stewart*. It is directed to the following paragraph in the instructions quoted above:

If you make representations about revocation of the visa cancellation decision *but the representations are received outside the prescribed timeframe of 28 days*, the Minister or his/her delegate is not able to consider the representations *because they would not have been made in accordance with the invitation, as required by section 501CA(4)(a) of the Act.*

(Emphasis added.)

1. In effect, this paragraph of the invitation informed the appellant that, in order for him to make representations, his representations had to be received by the Minister within a 28-day time period.
2. The instructions also stated:

As this notice was sent by mail from a place in Australia to an address in Australia, you are taken to have received it seven (7) working days after the date of this notice. A working day does not include weekends or public holidays in the Australian state or territory to where this notice was posted.

1. This paragraph informed the appellant of the date from which the 28-day period commenced to run.
2. Read together, these paragraphs of the invitation purported to crystallise the period for making representations for the purposes of s 501CA(3)(b) of the *Act*. However, they did not do so.
3. In *Stewart*, the Full Court held (at [43]) that, in reg 2.52(2)(b) of the *Regulations*, the requirement that the representations responding to the invitation referred to in s 501CA(3)(b) be “made” within the 28-day period does not mean “received” but “dispatched”. At [50] – [51], the Full Court explained:

50 Here, ss 501CA(3)(b) and 501CA(4)(a) and reg 2.52 are concerned with affording a person who is currently in prison a real opportunity, within a specified period, to make representations to the Minister as to why the cancellation should be revoked. The statutory context contemplated and intended that the prisoner would have a limited capacity to communicate with the Minister. That was because of the effect of the deprivation of the person’s liberty and consequent limitations on their ability to arrange for, or ensure, delivery of any representations that they might make. Rather, the legislative expressions “makes” and “made” in s 501CA and reg 2.52 focus on the act of the prisoner, not the position of the Minister as the intended recipient of the representations. It can readily be inferred that, in such a context, the statutory language contemplated and intended that the prisoner only do all that was reasonably in their power to “make” the representations within the prescribed period of 28 days after being given the notice of revocation.

51 The prisoner, in a case like the applicant’s, could not use any email or facsimile facilities at the prison to send his representations because the prison authorities either did not have those facilities or would not make them available to him. All he could do was to give the representations he had already written to the prison authorities and entrust to them the task of communicating them to the Minister as and when they saw fit. He had no control whatsoever over the timing of when the prison authorities might choose to send his representations to the Minister.

1. In the present case, by in effect stating that the appellant’s representations had to be received by the Minister within the 28-day time period, the invitation incorrectly fixed the time under reg 2.52(2)(b). This meant that the invitation was not one under s 501CA(3)(b) to make representations “within the period … ascertained in accordance with the regulations”: *EFX17* at [41] – [42].
2. The Minister submits that the Full Court’s analysis in *Stewart* was plainly wrong and should not be followed. His submissions mirror those advanced in *EPL20*. For the reasons we have given *in EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173 at [38], we reject that submission. We consider that we should apply *Stewart*.
3. As an alternative submission, the Minister contends that, even if *Stewart* is not wrong, and the invitation contained the error we have identified, it does not follow that the invitation was invalid. According to the Minister, one must first consider the extent and consequences of the invitation’s departure from the statutory requirement: *Minister for Immigration and Citizenship v* ***SZIZO*** [2009] HCA 37; 238 CLR 627 at [35] – [36].
4. In this connection, the Minister relies on the process that the appellant adopted for making representations about the revocation of the cancellation decision—a matter to which we will return when considering Ground 4 below. For present purposes, we do not see this case as analogous with *SZIZO*. As *EFX17* demonstrates, the failure to invite representations “within the period … ascertained in accordance with the regulations”, for the purposes of s 501CA(3)(b) of the *Act*, is not a failure in mere procedure. To apply the reasoning in *EFX17* (at [41]) it can hardly be supposed that Parliament intended that a person whose visa had been cancelled would not be given the information that would reveal the date by which representations must be made if the person is to avoid the strict consequences of failing to make representations.
5. For these reasons, Ground 3 should be upheld.

## Ground 4

1. On the assumption that the Minister’s invitation was in accordance with s 501CA(3)(b) (contrary to Ground 3), the appellant contends that he made representations about revocation of the cancellation decision within the time prescribed by reg 2.52(2)(b) of the *Regulations*.
2. The appellant submits that, in all material respects, his case is the same as in *Stewart* other than that, in *Stewart*, the documents were left in the hands of the prison authorities for forwarding to the Department while, in the present case, the appellant left them in the hands of the prison authorities to be collected by his girlfriend for forwarding to the Department. His case is that the day on which he left the forms for collection—he says on 20 November 2018—is the date on which he dispatched them to the Department and, therefore, the date on which he made his representations to the Minister.
3. We do not accept the appellant’s submission that his case is, in all material respects, the same as in *Stewart*. The distinction that the appellant makes between his case and *Stewart* is material.
4. In *Stewart*, the Full Court made the following findings (at [23] – [24]) which were of particular significance to its conclusion (at [55]) that the applicant, in that case, made his representations (within the meaning of reg 2.25(2)(b)) when he gave them to the prison officers to be sent to the Minister:

23 The applicant signed and dated his representations for the revocation of the cancellation decision on 10 June 2019, ten days before the deadline. The evidence is that on that day he asked NSW Corrective Services officers if they could fax or email his representations to the Department, but the prison did not have the requisite facilities. The representations were apparently posted by NSW Corrective Services because they were received by the Department by post on 25 June 2019, five days after the deadline and a full 15 days after they had been given by the applicant to NSW Corrective Services officers for posting. The return address recorded on the envelope was the Mid North Coast Corrective Centre but the date that it was posted is not apparent.

24 It is not known whether the Corrective Services officers delayed in posting the representations or whether the representations were delayed in the post. In either event, what is clear is that the applicant, being in prison, could practically have done no more to get his representations to the Department before 20 June 2019 than what he did. That was to ask Corrective Services officers on 10 June 2019 to email or fax them and on being advised that there were no facilities to do that, to ask them to post the representations. He was otherwise entirely at the mercy of Corrective Services and the postal service.

1. The facts of the present case stand in stark contrast. As we have noted, in the present case the appellant completed and signed the Revocation Request Form. However, he only partly completed the Personal Circumstances Form, which he nevertheless signed. His evident intention was that the Personal Circumstances Form would be completed, with the assistance of his girlfriend, his mother, and/or his aunt, and, once completed, *then* dispatched, with the Revocation Request Form, to the Department. Unlike in *Stewart*, the appellant did not leave the Revocation Request Form and the Personal Circumstances Form with the prison officers for dispatch, on his behalf, to the Department. Rather, he left the forms with the prison officers solely for the purpose of holding the forms for collection by his girlfriend who would, at some later time after collection, complete the Personal Circumstances Form (if need be, with assistance) and dispatch the fully completed forms to the Department. Those in whom the appellant entrusted the forms to be fully completed, and then dispatched, did not do so timeously.
2. For these reasons, Ground 4 is not established.

## Disposition

1. Ground 3 of the appeal succeeds. Therefore, the appeal should be allowed.
2. The appellant submits that, if the appeal is allowed, he should be immediately released from immigration detention on the basis that he has been in detention for some two years and the Minister has failed to comply with his obligations under s 501CA(3)(b) of the *Act* to give the required invitation “as soon as practicable after making the original decision”.
3. Notwithstanding his success in this appeal, we do not accept that it is appropriate that the appellant be released from immigration detention. Rather, Order 1 made by the Court on 15 September 2020 should be set aside and the decision of the Tribunal dated 29 April 2020 quashed.
4. The Minister submits that the coming into effect of the order quashing the Tribunal’s decision should be delayed pending the expiration of the period within which to seek special leave to appeal to the High Court; if an application for special leave is made, the determination of the application; or, if special leave to appeal is granted, the determination of that appeal. Conformably with the orders made in *EPL20*, we think that such an order is appropriate and should be made.
5. The Minister also submits that each party should bear their own costs of the appeal (the second respondent filed a submitting appearance). The appellant submits that he should have his costs.
6. It is clear that the parties have had mixed success. Our tentative view is that the Minister should pay two-thirds of the appellant’s costs of the appeal, reflecting the limited measure of the appellant’s success. We would not interfere with the costs order made below because, there, the appellant failed on every ground he raised. The only ground on which he succeeded on appeal was not one that was raised before the primary judge. Nevertheless, conformably with the orders made in *EPL20*, if either party seeks a different order as to costs, the parties will have liberty to file and serve brief written submissions within one week hereof as to why a different costs order should be made.

|  |
| --- |
| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Yates, Griffiths and Moshinsky. |

Associate:

Dated: 27 September 2021