FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Tesic [2017] FCAFC 93

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| Appeal from: | *Tesic v Minister for Immigration and Border Protection*  [2016] FCA 1465  |
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| File number: |  |
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| Judges: | **REEVES, ROBERTSON AND RANGIAH JJ** |
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| Date of judgment: | 7 June 2017 |
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| Catchwords: | **ADMINISTRATIVE LAW** – judicial review under s 39B of the *Judiciary Act 1903* (Cth) of the Minister’s decision not to revoke, pursuant to s 501CA(4) of the *Migration Act 1958* (Cth), cancellation of the respondent’s visa – whether the primary judge erred in finding jurisdictional error on the part of the Minister – where the Minister stated he was mindful of the “principle” that persons who commit serious crimes “should expect to forfeit the privilege of remaining in Australia” – whether no evidence that the respondent continued to traffick drugs following his cessation of their use – whether the respondent’s “correct criminal record” a mandatory relevant consideration – whether the primary judge erred in admitting into evidence affidavits, which were not before the Minister, denying that the respondent continued to traffick drugs following his cessation of their use – whether possibility that “correct criminal record” may have affected the Minister’s decision – whether denial of procedural fairness where respondent was told that either a delegate or the Minister would make the decision but not later told it was to be the Minister**MIGRATION** – appeal – orders of primary judge allowing an application for judicial review under s 39B of the *Judiciary Act 1903* (Cth) of the Minister’s decision not to revoke, pursuant to s 501CA(4) of the *Migration Act 1958* (Cth), cancellation of the respondent’s visa – whether the primary judge erred in finding jurisdictional error on the part of the Minister – where the Minister stated he was mindful of the “principle” that persons who commit serious crimes “should expect to forfeit the privilege of remaining in Australia” – whether no evidence that the respondent continued to traffick drugs following his cessation of their use – whether the respondent’s “correct criminal record” a mandatory relevant consideration – whether the primary judge erred in admitting into evidence affidavits which were not before the Minister denying that the respondent continued to traffick drugs following his cessation of their use – whether possibility that “correct criminal record” may have affected the Minister’s decision– whether denial of procedural fairness where the respondent was told that either a delegate or the Minister would make the decision but not later told it was to be the Minister  |
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| Legislation: | *Migration Act 1958* (Cth) ss 501, 501(3A), 501CA(4)  |
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| Cases cited: | *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321*Aksu v Minister for Immigration and Multicultural Affairs* [2001] FCA 514; 65 ALD 667*Andary v Minister for Immigration and Multicultural* Affairs [2001] FCA 1544*AZAFQ v Minister for Immigration and Border Protection* [2016] FCAFC 105; 243 FCR 451*Lu v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 543*Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; 141 FCR 346 *McCormack v Deputy Commissioner of Taxation Large Business and International* [2001] FCA 1700; 114 FCR 574*Mahon v Air New Zealand* [1984] AC 808; UKPC 29*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1*Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323*Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 327 ALR 8*Ruatita v Minister for Immigration and Citizenship* [2013] FCA 542; 212 FCR 362*Szelagowicz v Stocker* [1994] FCA 323; 35 ALD 16*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 *Tanioria v Minister for Immigration and Border Protection* [2016] FCAFC 43 *Waterford v Commonwealth* [1987] HCA 25; 163 CLR 54  |
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| Date of hearing: | 31 May 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 71 |
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| Counsel for the Appellant: | Ms K Stern SC and Ms A Wheatley |
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| Solicitor for the Appellant: | Clayton Utz |
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| Counsel for the Respondent: | Mr L Boccabella and Mr WJ Markwell |
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| Solicitor for the Respondent: | AJ Torbey & Associates |

ORDERS

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|  | QUD 941 of 2016 |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONAppellant |
| AND: | DUSKO TESICRespondent |

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| JUDGES: | REEVES, ROBERTSON AND RANGIAH JJ |
| DATE OF ORDER: | 7 JUNE 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the primary judge on 7 December 2016 be set aside.
3. In lieu of those orders the following orders be made:
	* 1. the application, as amended, for judicial review of the decision of the respondent Minister made on 18 March 2016 be dismissed;
		2. the applicant pay the respondent’s costs, as agreed or taxed.
4. The respondent pay the appellant’s costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. This appeal is from the orders of a judge of this Court (the **primary judge**), made on 7 December 2016, quashing the decision of the Minister for Immigration and Border Protection (the **Minister**) and restraining the Minister from giving effect to that decision. The orders also required the Minister to reconsider, according to law, the applicant’s application for review (sic).
2. The decision of the Minister was not to revoke the decision to cancel Mr Tesic’s Class BF Transitional (Permanent) visa. In short, that visa was cancelled on 2 March 2015 under s 501(3A) of the *Migration Act 1958* (Cth) and s 501CA(4) of the *Migration Act* provided that the Minister may revoke such a cancellation decision in certain circumstances.

## The legislation

1. The relevant statutory provisions were as follows:

**501 Refusal or cancellation of visa on character grounds**

…

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

…

**501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**

(1) This section applies if the Minister makes a decision (the *original decision*) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

(2) For the purposes of this section, *relevant information* is information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

(b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

(3) 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.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

(5) If the Minister revokes the original decision, the original decision is taken not to have been made.

…

## The Minister’s reasons for decision

1. The reasons of the Minister were as follows.
2. The Minister recorded, at [9], that he was not satisfied Mr Tesic passed the character test (as defined by s 501), with the result that s 501CA(4)(b)(i) of the *Migration Act* was not met. That is not in issue. Mr Tesic was convicted in the Supreme Court of Queensland of Trafficking in Dangerous Drugs, for which he was sentenced to 7 years imprisonment.
3. The Minister then turned to consider, in light of Mr Tesic’s representations, whether he was satisfied that there was another reason why the original mandatory visa cancellation decision should be revoked: see s 501CA(4)(b)(ii). The Minister recorded, at [12], that the reasons Mr Tesic had articulated why the original decision should be revoked included: revocation is in the best interests of his minor god-daughter and niece; he is fully rehabilitated from drug use and has only a “minimal or remote” chance of re-offending; the expectation of the Australian community would support revocation of cancellation; he has positive employment prospects in Australia; he is engaged to an Australian citizen, and she, other family members and friends would suffer hardship in the event of his removal from Australia; and he would suffer hardship if he cannot remain in Australia.
4. At [31], under the heading “Protecting the Australian Community, the Minister said as follows:

In coming to my decision about whether or not there is another reason why the original decision should be revoked I have had regard to the consideration of the protection of the Australian community, noting in particular Mr TESIC’s claim that he is fully rehabilitated from drug use, he has only a “*minor or remote*” chance of re-offending, and the (sic) he does not present an unacceptable risk. I considered the Government’s commitment to protecting the Australian community from harm as a result of criminal activity by non-citizens. I also took into consideration that remaining in Australia is a privilege that Australia confers on non-citizens in the expectation they are law-abiding.

1. At [33], the Minister said in his statement of reasons: “When he was apprehended for trafficking in dangerous drugs, Mr TESIC was on conditional liberty, having being granted bail following his apprehension, on 19 September 2009, in possession of cocaine, methylamphetamine and MDMA.” At [43], the Minister noted that Mr Tesic “continued to traffick drugs, following his cessation of their use, until he was apprehended by police.” At [49], the Minister said: “Mr TESIC continued to traffick drugs when he had ceased personal use, and while he was on bail for drug possession offences.”
2. In his conclusion, the Minister said, at [55]:

On the other hand, in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the serious nature of the crime committed by Mr TESIC, that of trafficking in dangerous drugs, and his relatively frequent antecedent offending which includes offences of violence. I am also mindful of the principle that persons who commit serious crimes should expect to forfeit the privilege of remaining in Australia.

## The application before the primary judge

1. The application to this Court for judicial review of the Minister’s decision contained the following grounds, as amended.
2. The respondent did not properly apply s 501CA and s 501CA(4) of the Migration Act 1958;
3. The respondent’s decision was unreasonable;
4. The respondent took into account irrelevant considerations;
5. The respondent failed to take relevant considerations into account;
6. There was insufficient evidence or no evidence to support various findings made by the respondent;
7. [not pressed];
8. The respondent failed to properly exercise his discretion under s 501CA and s 501CA(4) of the Migration Act 1958;
9. The respondent’s decision involved an error of law;
10. [not pressed];
11. The respondent in making the decision did not comply with the rules of natural justice and/or the applicant was denied procedural fairness.

## The reasons of the primary judge

1. The reasons of the primary judge, insofar as relevant to the present appeal, were as follows.
2. First, at [37], the primary judge allowed Mr Tesic to rely on an affidavit sworn by him and dated 22 October 2016 and an affidavit of Mr William John Markwell, his lawyer and migration agent, dated 25 October 2016. Her Honour held that this material was relevant to the unreasonableness ground of review, the ground that there was insufficient evidence or no evidence to support a finding made by the Minister and to the ground of review that the Minister failed to take relevant considerations into account: see her Honour’s reasons at [34]. The issue was said to be the Minister’s conclusion that Mr Tesic trafficked in drugs after he had stopped personal use: see the Minister’s statement of reasons set out at [8] above.
3. At [80] of the judgment, the primary judge concluded that the Minister’s failure to take into account the correct time from when Mr Tesic ceased drug trafficking amounted to jurisdictional error. At [82], the primary judge said it was not in dispute that the accurate history of Mr Tesic’s criminal activity, including when he ceased drug trafficking, was a relevant consideration for the Minister. At [88], the primary judge held that Mr Tesic should not be denied relief as the failure of the Minister to take into account the correct time from when Mr Tesic ceased drug trafficking may possibly have affected the outcome adversely to his interests. At [89], the primary judge appears to have held that the Minister had failed to take relevant considerations into account in this respect.
4. In relation to the issue raised by the Minister’s use of the term “privilege” (see the passages from the Minister’s statement of reasons set out at [7] and [9] above), the primary judge held, at [52], that *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 and *AZAFQ v Minister for Immigration and Border Protection* [2016] FCAFC 105; 243 FCR 451 were to be distinguished “as to whether the Minister had properly exercised his powers pursuant to s 501CA of the Migration Act, and in doing so had regard to irrelevant considerations.” Her Honour referred to the Minister’s statements in this respect at [31] and [55] of his statement of reasons and, at [55] of her reasons for judgment, said she did not accept that the statements of the Minister in respect of “privilege” in this case could properly be confined to rhetoric expounding the relevant considerations concerning Mr Tesic’s criminal history and the importance of protecting the Australian community. Her Honour held, at [56], that the fact that the Minister took into consideration that remaining in Australia is a privilege that Australia confers on non-citizens indicated that the decision-making process was distorted. At [57], the primary judge contrasted the statement of reasons in the present case with the statements of reasons in *Stretton* and in *AZAFQ* and said: “Unlike in these cases, the Minister in the statement of reasons in Mr Tesic’s case referred to the “privilege” as a principle of law referable to the exercise of the power, rather than a general policy statement.” The primary judge upheld, in this respect, the grounds that the Minister did not properly apply s 501CA(4), that the Minister took into account irrelevant considerations, that the Minister failed to properly exercise his discretion under s 501CA(4) and that the Minister’s decision involved an error of law.
5. At [23], the primary judge identified the claim of denial of procedural fairness, at that time raised by ground 10 of the application for judicial review and now the subject of the respondent’s notice of contention. The basis of the claim was that Mr Tesic said he was not aware that the Minister was personally to make the decision on whether to revoke the cancellation of the visa. A delegate would be bound by a Ministerial Direction, but the Minister would not. The primary judge considered that ground of review at [38]-[43] and concluded that it had no merit. The primary judge reasoned that Mr Tesic was informed that potentially the Minister might make the decision and in that light he was invited to submit anything he thought appropriate. This was clear from the letter dated 2 March 2015 from the Department to Mr Tesic. That letter stated that either a delegate or the Minister may make the decision.

## The grounds of appeal and the notice of contention

1. The grounds in the Minister’s notice of appeal were as follows:
2. The [primary judge] erred in finding (Judgment at [57]) that the reference by the Minister to ‘principle’ in the Minister’s Statement of Reasons was referable to a principle of law. Her Honour should have found that the references to the “privilege of remaining in Australia” were an “unremarkable synonymous phrase for the statutory rights held under the Migration Act” as was held by the Chief Justice in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [26].
3. The [primary judge] erred (Judgement at [52] to [58]) in concluding that the references to the “privilege of remaining in Australia” in the Minister’s Statement of Reasons disclosed jurisdictional error. In so finding, her Honour erred in considering these references in isolation and without having regard to the Minister’s Statement of Reasons as a whole and without an eye keenly attuned to detecting error (contrary to the guidance in *AZAFQ v Minister for Immigration and Border Protection* [2016] FCAFC 105 at [47]-[48]). Her Honour should have found that there was no jurisdictional error.
4. The [primary judge] erred (Judgment at [63]) in relying upon her Honour’s interpretation of the cases of *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 and *Ruatita v Minister for Immigration and Citizenship* (2013) 212 FCR 362 without giving the parties the opportunity to make submissions as to either of these cases, neither of which were referred to in written or oral submissions, or during the course of the hearing. In the circumstances, this was a denial of procedural fairness.

4. The [primary judge] erred (Judgment at [79] and [87]) in finding that the Minister failed to consider a relevant consideration namely an accurate history of Mr Tesic’s criminal activity. Her Honour should have held that:

a. The Minister was entitled, on the material before him, to conclude that Mr Tesic had continued to traffick in drugs until he was apprehended by police and whilst he was on bail for drug possession offences (Minister’s Statement of Reasons at [43] and [49]); and

b. In any event, that any error of fact as to such matters would not lead to jurisdictional error.

5. The [primary judge] erred in characterising an error as to the precise date of cessation of offending (even if such error were apparent) as a failure to have regard to a mandatory relevant consideration. Consistent with the Full Court’s decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505 at [71] and with the judgment of Sackville J in *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 at [54] the circumstances surrounding the offences do not amount to a mandatory relevant consideration.

6. The [primary judge] erred (Judgment at [37]) by allowing Mr Tesic to rely on further evidence in the form of an Affidavit of himself and Mr Markwell as:

(a) Such material was not relevant to a consideration of whether or not the Minister committed jurisdictional error as it only sought to contest the merits of the decision, which would not constitute a jurisdictional error; and

(b) Such material was not relevant to a consideration of whether or not the Minister committed jurisdictional error as, at best it would only establish *‘negligence, inadvertence or* *incompetence on the part of the agent’ (SZSXT v Minister Immigration and Border Protection* (2014) 222 FCR 73 at [52]), which would not constitute a jurisdictional error.

1. The ground in Mr Tesic’s notice of contention was as follows:
2. The appellant in making the decision did not comply with the rules of natural justice and/or the applicant was denied procedural fairness.

## The submissions of the parties

1. In relation to the “privilege” of remaining in Australia grounds, grounds 1 and 2, the Minister submitted that in *Stretton* and in *AZAFQ*, the Full Court had considered language directly analogous to that used by the Minister in the present case. The Minister submitted that in *Stretton* the Court did not suggest that the inclusion of reference to such “privilege” grounded any jurisdictional error. In *AZAFQ*, the Minister submitted, similar language was used but it was held that there was no legal unreasonableness. In the present case, the Minister submitted, contrary to the reasoning of the primary judge, as with *Stretton* and *AZAFQ*, there was no jurisdictional error in the Minister including reference to the “privilege” of remaining in Australia in his statement of reasons. The language used was plainly referring to the framework for decision-making as set out in the preamble to Direction No. 65. Read in context, the Minister submitted, he was saying no more than that, as a matter of policy, those who were granted visas were expected to be law-abiding and the rights conferred thereby may be removed if serious crimes are committed. There was no basis, the Minister submitted, for the conclusion of the primary judge that the decision-making process was “distorted” by reason of the reference to “privilege”.
2. Further, the Minister submitted, the primary judge erred in finding that the Minister applied the “privilege” as a “principle of law referable to the exercise of power, rather than a general policy statement”. The Minister submitted the statement of reasons read as a whole did not support that construction.
3. The Minister submitted that to the extent that the primary judge found that the policy framework reflected in the use of the term “privilege” was an irrelevant consideration, the primary judge erred. The Minister submitted the unconfined nature of the discretion to be exercised under s 501CA(4) was one which did not lend itself to stated mandatory relevant or irrelevant considerations. The scope, object and purpose of the *Migration Act* did not support a conclusion that the Minister was precluded from considering as a policy framework for his decision that visa holders should be expected to be law-abiding and that those who commit serious crimes should expect that their visas may be cancelled. The Minister submitted that this was consistent with the analysis of the then Direction in *Tanioria v Minister for Immigration and Border Protection* [2016] FCAFC 43 at [19]. The Minister submitted that the analysis was inconsistent with any contention that the principles could not lawfully be considered.
4. The respondent submitted in this respect that the use of the word “privilege” by the Minister was found in the section marked “CONCLUSION” to the statement of reasons. There was in law no “principle” of the kind the Minister was referring to. The words themselves had a particular force, being that this so-called “principle” meant a person “should expect to forfeit” the ability to remain in Australia. It was submitted that the so-called “principle” had a tendency to lead to a prescription or skewed decision or a presumption towards making an unfavourable decision to an affected person. It was submitted that the word “principle” had a driving force inconsistent with the unfettered nature of the discretion in s 501CA(4). It appeared that this “principle” had developed a momentum to make it a driving force, something which it could not have at law. The respondent submitted that the primary judge was correct at [56] in stating that the “principle” coloured the Minister’s reasoning process.
5. In relation to the grounds relating to the further evidence and the respondent’s criminal history, grounds 3 to 6, the Minister submitted that he referred to and relied upon an accurate statement of the respondent’s criminal record and of his sentences. Before the Minister, the respondent did not in any way suggest that he should not be regarded as having offended as set out in the charge (ie to 11 March 2010) nor did he challenge his representative’s submission that the trafficking continued after the drug usage ceased. Any inaccuracy arose only from material not before the Minister.
6. The Minister submitted that the primary judge erred in relying upon *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; 141 FCR 346 and *Ruatita v Minister for Immigration and Citizenship* [2013] FCA 542; 212 FCR 364. The Minister submitted the primary judge erred in finding that such factual material was a mandatory relevant consideration and in admitting the fresh evidence as relevant to the grounds of review. The Minister submitted that this case fell directly within the authority of the majority in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505. Nor could it be said, the Minister submitted, that there was no evidence to support the Minister’s description of the offence of which the respondent was convicted (having pleaded guilty) at [33] and [43] of the statement of reasons. The Minister submitted that any error of the respondent’s migration agent in his submission to the Minister was not such as to constitute jurisdictional error.
7. The respondent submitted in this respect that the primary judge made a finding that the fact that he, Mr Tesic, continued to traffick dangerous drugs when he had ceased personal use did not exist and referred to [83] and [84] of the judgment. This error, the respondent submitted, could be characterised as a jurisdictional error on three separate grounds, that is, unreasonable (in the sense of no intelligible basis for the finding of a material fact), failing to take a relevant consideration into account and absence of evidence of a material fact. The respondent submitted that what was involved was the misdescription of the sentences actually imposed on the respondent, referring to *Lu* at [54] and to the same judgment at [55]-[56]. The respondent also submitted that having an accurate account of the visa holder’s conduct is a relevant consideration and taking erroneous factual matters into account is an irrelevant consideration. The respondent submitted the preferable approach was to regard the provision of incorrect information about a matter the Minister regards as material as meaning that the Minister’s discretion has miscarried. The respondent also submitted that the character provisions make an accurate finding about the conduct of the visa holder a relevant consideration. If the Minister does not have an accurate finding of material fact on the visa holder’s conduct before him or her, then it is a failure to take into account a relevant consideration. The evaluation of that conduct once accurately found as a material fact is a matter for the Minister’s lawful discretion. The respondent submitted that the relevance of the further affidavits filed at first instance was interwoven into these issues. Clearly, it was submitted, those affidavits were relevant to enable the Court to properly assess the arguments of both parties.
8. In relation to his notice of contention, the respondent submitted that essentially he was kept in the dark about whether it was the Minister or a delegate who would make the decision. It could be seen from the nature of the submissions made that they were based on the assumption that the decision would be made by a delegate bound by Ministerial Direction No. 65. Requiring the Department to notify a visa holder that it would be the Minister making the decision would not be an onerous exercise. Such an approach would let the visa holder know the parameters of the case he or she has to meet.

## Analysis

1. In relation to the use of the word “privilege”, grounds 1 and 2, it is appropriate to begin by considering the terms of Direction No. 65. We note that the validity of that Direction was not challenged in this proceeding.
2. That Direction first refers to a privilege at cl 6.3(1) and, more specifically, at cl 6.3(3). Those parts read as follows:

**6.3 Principles**

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia’s law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

…

(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

1. Part C identifies the considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of the non-citizen’s visa (see cl 5 – Contents – Part C) and states at cl 13.1 under the heading “Protection of the Australian Community” that when considering protection of the Australian community:

[d]ecision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.

1. In our opinion, the Minister was referring at [31] of his statement of reasons to cl 6.3(1). Similarly, at [55] of his statement of reasons, the Minister was referring to the principle in the same way as the Determination, at cl 6.3(3), sets out “Principles”.
2. There are, in our opinion, two issues. The first is what is the meaning of the relevant passages in the Minister’s statement of reasons, when read consistently with *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259. The second issue, if reached, is whether that meaning gives rise to a jurisdictional error on the part of the Minister.
3. Properly read in context, the references to “privilege” in [31] and [55] of the Minister’s statement of reasons are not to be construed as suggesting that the Minister was referring to legal principles but to considerations of government policy. Direction No. 65 provides the relevant context. We do not read the Minister’s statement of reasons as meaning that a non-citizen has no rights (but only privileges). We therefore do not accept the factual basis for the submission that the decision-making process was distorted. Further and consequentially, we do not accept that there was a misunderstanding of the “privilege” as a principle of law which coloured the Minister’s reasoning process.
4. The respondent focused on the word “principle”. We do not accept the respondent’s submission that the Minister used the word “principle” to mean a rule of law that mandated or created a presumption that a person who committed serious crimes would not have his or her cancellation decision revoked, so as to distort or impermissibly fetter the Minister’s discretion. In our opinion, in saying that he was mindful of the principle that persons who commit serious crimes should expect to forfeit the privilege of remaining in Australia, the Minister was taking into account a policy to that effect.
5. In our opinion, the primary judge erred in distinguishing *Stretton* and *AZAFQ* and in concluding that the Minister had used the word “privilege” inconsistently with the statutory rights that non-citizens have in respect of visas. The primary judge also erred, at [56] insofar as her Honour concluded that the Minister, in stating that he was mindful of the “principle” that persons who commit serious crimes should expect to forfeit the privilege of remaining in Australia, took into account an irrelevant consideration.
6. We refer to two decisions relied on by the respondent, *Aksu v Minister for Immigration and Multicultural Affairs* [2001] FCA 514; 65 ALD 667 and *Andary v Minister for Immigration and Multicultural* Affairs [2001] FCA 1544, and to one decision relied on by the Minister, *Tanioria* at [19].
7. *Aksu* concerned the power in s 501 of the *Migration Act* to cancel a visa if the Minister reasonably suspected the person did not pass the character test and the person did not satisfy the Minister that he or she did pass the character test. It was said by Dowsett J at [10] that s 501 conferred an unfettered discretion and: “In the absence of express provisions to the contrary, the Minister cannot fetter his exercise of that discretion. He may, however formulate a policy to guide that exercise.” At [21], Dowsett J identified as a matter of concern the use of categories (primary and other considerations) and the prescription that: “… no individual considerations can be more important than a primary consideration, but … a primary consideration cannot be conclusive in itself in deciding whether to exercise the discretion to refuse or to cancel a visa.” At [24] and [34], his Honour said:

It is one thing to say that some factors should generally be treated as more important than others.… It is quite another thing to say that a particular consideration must always be treated as at least equally important as another consideration without regard to the facts of the case. Section 501 prescribes failure to satisfy the character test as a condition precedent to the exercise of the discretion to refuse or cancel. It does not create any presumption as to the way in which that discretion should be exercised. The unfettered nature of the discretion inevitably implies that in particular circumstances any one factor may, at least theoretically, outweigh any other possibly relevant factor.

… It is an inescapable conclusion of his adoption of [the briefing paper] that he proceeded in accordance with it. This must inevitably have included acceptance of the allegedly “binding” nature of the Direction. It follows that he has inappropriately fettered his discretion by assuming that each primary consideration bore at least as much weight as each other consideration, regardless of the facts of the case. In my view this fettering of the discretion constituted an error of law for the purposes of s 476(1)(e) of the Act.

1. As may be seen, *Aksu* confirms established principle, including that the Minister may formulate a policy to guide that exercise, and in the application of principle held that the Minister had fettered his discretion “regardless of the facts of the case”. If it had been necessary to decide, we would not have accepted that in the present case Direction No. 65 had that effect.
2. In *Andary*, in contrast, the official who prepared the briefing paper (upon which the Minister acted), did not advise him that Direction No. 17 was binding upon him. Nevertheless, Dowsett J concluded, at [42], that the Minister had not merely chosen to place more weight upon the primary considerations than upon the other matters having regard to the facts of the case. Rather, the Minister accorded pre-eminence to the primary considerations and denied the possibility that the other matters, particular to the circumstances of the applicant, were entitled to greater importance than a primary consideration in the exercise of an unfettered discretion under s 501. The Minister adopted this course because he applied the policy contained in Direction No. 17 which directed such an approach to the exercise of the discretion.
3. If it had been necessary to decide, we would not have accepted that in the present case that course was taken by the Minister. We would not have accepted the submission that the use of the word “principle” established that the Minister had fettered the width of his statutory discretion or that the Minister made his decision not to revoke the cancellation of the respondent’s visa without regard to the circumstances of the present respondent. We refer to the recent discussion of these principles in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 327 ALR 8 at [52]-[54] per French CJ, Bell, Keane and Gordon JJ and at [68]-[72] per Gageler J.
4. We should note that we get no present assistance from the decision of the Full Court in *Tanioria* at [19]. Although it was there submitted that cl 6.3(2) of the then Direction was *ultra vires* the *Migration Act*, the question raised in the present appeal was not raised in *Tanioria*.
5. In relation to the grounds of appeal concerning the respondent’s criminal history and further evidence, grounds 3 to 6, it is essential to start with the material which was before the Minister. Otherwise the jurisdiction of the Court to hear and determine the judicial review application in respect of the Minister’s decision risks sliding into impermissible merits review.
6. The relevant finding by the Minister, at [43] of his statement of reasons, was that the respondent continued to traffick drugs, following his cessation of their use. Similarly, at [49], the Minister found that Mr Tesic continued to traffick dangerous drugs when he had ceased personal use, and while he was on bail for drug possession offences.
7. The material before the Minister included what was said by the sentencing judge of the Supreme Court of Queensland on 19 November 2012. It was there stated that the count of trafficking in dangerous drugs related to the period from 18 September 2009 to 11 March 2010. The respondent had pleaded guilty to that charge, amongst others. The judge of the Supreme Court also said that Mr Tesic was put on bail after 19 September 2009 “but continued your trafficking activities.”
8. Further, the respondent’s migration agent/lawyer provided a substantial number of statutory declarations, including one by the respondent, and that migration agent/lawyer made a comprehensive submission on the respondent’s behalf.
9. It does not appear that any of that material took issue with what had been said on this topic by the sentencing judge. We refer in particular to the respondent’s statutory declaration dated 18 March 2015 at [38]-[43].
10. Indeed, the migration agent/lawyer said**:**

It does seem, that the Applicant did continue trafficking for a short while after Larissa’s ultimatum, but he was from all appearances starting to wind this down.

1. We would not assume that the respondent was unaware of the sentencing remarks of the judge of the Supreme Court. In any event, it is clear that those sentencing remarks were provided to the respondent by letter dated 29 June 2015, together with an invitation to comment on them.
2. In response by or on behalf of the respondent, we note first that a supplementary submission dated 22 July 2015 was before the Ministerand that material sought to correct a sentencing remark, but not this one. Also before the Minister was a later statutory declaration by the respondent which sought to provide an explanation of, or qualification to another of, the sentencing remarks of the judge, but not this one.
3. The Minister had before him material on which to base his findings. Those findings could not be suggested to be legally unreasonable on the material before the Minister. The findings by the Minister were not as to a jurisdictional fact. There was no relevant procedural error alleged. Evidence is not to be adduced on judicial review merely on the basis that it goes to a mandatory consideration, even assuming that the period over which the respondent trafficked in dangerous drugs was a mandatory consideration.
4. In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 McHugh, Gummow and Hayne JJ said, at [72]-[73] (omitting footnotes):

The considerations that are, or are not, relevant to the Tribunal’s task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider. …

This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations for the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts.

1. Put shortly, it is not permissible to conflate evidence with mandatory considerations.
2. In our opinion, in the present circumstances evidence was inadmissible before the primary judge to contradict the material on which the Minister made his findings of fact: see [8] above.
3. It is to be recalled that in *Waterford v Commonwealth* [1987] HCA 25; 163 CLR 54 Brennan J said at 77–78:

A finding by the A.A.T. on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the A.A.T. Act confers on a party to a proceeding before the A.A.T. a right of appeal to the Federal Court of Australia “from any decision of the Tribunal in that proceeding” but only “on a question of law”. The error of law which an appellant must rely on to succeed must arise on the facts as the A.A.T. has found them to be or it must vitiate the findings made or it must have led the A.A.T. to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact. Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact.

The position of the Minister as primary decision-maker on judicial review for jurisdictional error can be no more favourable to the admission of fresh evidence than the position in respect of the AAT on an appeal limited to a question of law. The Minister’s findings were not vitiated by an error of law.

1. In *Szelagowicz v Stocker* [1994] FCA 323; 35 ALD 16 at 22, in relation to the broader “no evidence” grounds in ss 5(1)(h) and 5(3)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the plurality said: “[Those grounds] do not permit evidence to be adduced to contradict either evidence or material which was before the decision-maker or an inference which was available to be drawn from that evidence or material.” See also *McCormack v Deputy Commissioner of Taxation Large Business & International* [2001] FCA 1700; 114 FCR 574 at [40]. This was not a “no evidence” case, as to which see *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 356.
2. In our opinion, the primary judge erred in admitting into evidence the affidavit of the respondent sworn 22 October 2016 and the affidavit of Mr William John Markwell sworn 25 October 2016.
3. In our opinion it was not open to the primary judge to admit fresh evidence, and then make findings of fact, which contradicted the Minister’s findings. The reasoning of the primary judge at [83] and [84] shows that her Honour was there directing herself to impermissible merits review.
4. The grounds of review based on this inadmissible material should not have been upheld by the primary judge.
5. As to the reliance by the primary judge on *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* and *Ruatita v Minister for Immigration and Citizenship*, we would not regard this reliance as founding a material denial of procedural fairness. Not having heard from the parties in relation to those authorities might explain an error but does not, in our opinion, constitute a material procedural error in itself. Any lack of procedural fairness is cured on the appeal. We reject ground 3 of the Minister’s grounds of appeal.
6. The primary judge said, at [35], that those cases, *Lu* and *Ruatita*, made it clear that failure on the part of the Minister to take into account an applicant’s correct criminal record or correct length of custodial sentences can amount to jurisdictional error.
7. The primary judge analysed *Lu* extensively at [64]-[75] of her reasons for judgment. The most important distinction for present purposes is made clear by the judgment at first instance in *Lu v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 543 at [25]-[27]: this distinction is that the error of fact had been made by the person who prepared the Issues Paper, that person having failed to appreciate the disconformity between what was contained in paragraphs 4 and 22 of that Issues Paper. The error was therefore contained within, and apparent from, the material before the Minister. There was no question of introducing evidence to contradict the material on which the Minister made his findings. In our opinion, it is a misreading of *Lu* to reason that it stands for the proposition that evidence can be introduced on judicial review to contradict a finding of fact by the primary decision-maker on the basis that that evidence is relevant to a mandatory relevant consideration.
8. We also note that in *Lu*, the misdescription was of the sentences actually imposed on the appellant in that case. Further, the Minister conceded in that case that the appellant’s criminal record, including the sentences imposed on him, was a consideration that the Minister was bound by s 501A to take into account. No concession to this effect was made in the present case: the reasons of the primary judge at [82] (stating that it was not in dispute that the accurate history of the respondent’s criminal activity, including when he ceased drug trafficking, was a relevant consideration for the Minister) need to be read with what is recorded at [86] of those reasons (that the Minister submitted that if there was an error in respect of when the respondent ceased drug trafficking, the error was potentially of fact not law). Also, in *Lu*, the submission on behalf of the Minister, which failed by majority, was that the errors could not have affected the exercise of the Minister’s discretion. Much of the reasoning in that case was directed to that question.
9. The primary judge analysed *Ruatita* at [76]-[78] of her reasons for judgment. In that case, the misleading statement was found in [19] of the statement of reasons and was that the applicant had spent more than four and a half years of the time he had been resident in Australia in criminal custody. First, it was noted by Flick J at [27] of the judgment that either on the approach advocated on behalf of the applicant or on the approach of counsel for the Minister the period of time so stated was erroneous. At [38], it was expressly noted that counsel for the Minister “correctly accepted that the statement as to the time served in custody was erroneous.” It was held, at [30], that the erroneous statement vitiated the decision of the Minister: “the erroneous statement exposes jurisdictional error such that the Minister’s decision should be quashed and set aside.” Again, there was no question of introducing evidence to contradict the material on which the Minister made his findings. Secondly, the error was as to the length of time the applicant had been in criminal custody. Thirdly, Flick J followed *Lu*. Fourthly, Flick J rejected the submission on behalf of the Minister that the statement as to the time which the applicant had served in custody was not “critical” to the Minister’s reasoning process.
10. Neither of these decisions supports the admissibility of evidence to contradict the material on which the Minister made his findings.
11. It is not necessary to go further to consider whether either of these decisions supports the reasoning of the primary judge that the time at which the present appellant ceased trafficking in drugs was a mandatory relevant consideration.
12. It may be recalled from [24] above that the respondent submitted that this error could be characterised as a jurisdictional error on three separate grounds: unreasonable (in the sense of no intelligible basis for the finding of a material fact), failing to take a relevant consideration into account and absence of evidence of a material fact. As to the first of these grounds, we reject the submission that the Minister had no intelligible basis for making the finding as to the date the respondent ceased drugs trafficking. As to the second of these grounds, we have already explained that invoking a mandatory relevant consideration does not permit the admissibility of evidence to contradict the material on which the Minister made his findings. As to the third of these grounds, we reject the submission that there was no evidence or other material before the Minister in respect of his findings.
13. We reject the Minister’s submission that these findings were in any event immaterial: in our opinion, but for those findings it was possible that the Minister could have concluded that the likelihood of the respondent re-offending was less than “low”, as the Minister concluded at [50] of his statement of reasons.
14. Turning to the respondent’s notice of contention, in our opinion it has no substance. As found by the primary judge, the letter of 2 March 2015 drew the respondent’s attention to Direction No. 65 and enclosed a copy of it. The letter went on to state that if the decision-maker was a delegate, the delegate must follow Direction No. 65, but if the Minister made a revocation decision personally, he or she was not required to give consideration to Direction No. 65 although it provided a broad indication of the types of issues that he or she may take into account. There is no suggestion that the present respondent asked whether it would be a delegate or the Minister personally making the decision.
15. The respondent, in oral submissions, sought to rely in this respect on the letter from the Department dated 29 June 2015 which gave a postal address at the Department. It was submitted that this led the respondent to think that a delegate would make the decision whether or not to revoke the cancellation of his visa. We reject that submission. It is not supported by a reading of the letter which refers in general terms to “the decision-maker” and is from the same area of the Department, the “National Character Consideration Centre”, as the letter dated 2 March 2015 which stated that either a delegate or the Minister personally might make the decision. There was no evidence showing the structure of decision-making as between the Department and the Minister.
16. In our opinion, in the present case there was no unfair change of procedure: compare *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326.
17. The respondent invokes *Mahon v Air New Zealand* [1984] AC 808; UKPC 29 at 821. The fuller passage in the advice of the Privy Council, delivered by Lord Diplock, is as follows, at 820-821:

The rules of natural justice that are germane to this appeal can, in their Lordships’ view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

1. As may be seen, the Privy Council was addressing itself to the risk of a finding being made, principally, in that case, the finding in paragraph 377 of the report under challenge that sections of evidence originated in a pre-determined plan of deception. The present appeal does not concern such risk. In our opinion, the dicta have nothing to do with the present case. The respondent also invoked *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152, but that authority concerned a failure on the part of the Tribunal to raise factual issues with the appellant. It also has nothing to do with the present case. The respondent’s contention fails.

## Conclusion

1. In our opinion, the appeal should be allowed with costs. The notice of contention fails. The orders should be:
	1. The appeal be allowed.
	2. The orders made by the primary judge on 7 December 2016 be set aside.
	3. In lieu of those orders, the application for judicial review be dismissed with costs.
	4. The respondent pay the appellant’s costs of the appeal, as agreed or as assessed.

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court. |

Associate:

Dated: 7 June 2017