FEDERAL COURT OF AUSTRALIA

Burgess v Assistant Minister for Home Affairs [2019] FCAFC 152

|  |  |
| --- | --- |
| Appeal from: | *Burgess v Assistant Minister for Home Affairs* [2019] FCA 34  |
|  |  |
| File number: |  |
|  |  |
| Judge: | **KERR, WHITE AND CHARLESWORTH JJ** |
|  |  |
| Date of judgment: | 30 August 2019 |
|  |  |
| Catchwords: | **MIGRATION** – visa cancelled under s 501(3) of the *Migration Act 1958* (Cth) – rules of natural justice inapplicable – whether Assistant Minister proceeded on an incorrect understanding that he was bound not to accord natural justice – whether Assistant Minister misunderstood the effect of an alternate cancellation power – whether any such error affected the exercise of the power under s 501(3) – whether it was open to the Assistant Minister to be satisfied that cancellation of the visa was in the national interest – whether the national interest criterion can only be fulfilled in circumstances warranting an urgent decision  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 48B, 195A, 198AB, 417, 474, 476, 476A, 501, 501A, 501BA*Judiciary Act 1903* (Cth) s 44  |
|  |  |
| Cases cited: | *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456*Burgess v Assistant Minister for Home Affairs* [2019] FCA 34*Burgess v Minister for Immigration and Border Protection* (2018) 259 FCR 197*Byrne v Marles* [2008] VSCA 78; 19 VR 612*Craig v South Australia* [1995] HCA 58; 184 CLR 163 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1*Ibrahim v Minister for Home Affairs* [2018] FCA 1592*Ibrahim v Minister for Home Affairs* [2019] FCAFC 89*Ibrahim v Minister for Immigration and Border Protection (No 2)* (2017) 256 FCR 50*Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326*Maxwell v Minister for Immigration and Border Protection* (2016) 249 FCR 275*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158*Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1*Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Nguyen v Minister for Home Affairs* [2019] FCAFC 128*Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 |
|  |  |
| Date of hearing: | 10 May 2019 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 125 |
|  |  |
| Counsel for the Appellant: | Mr S Ower SC with Mr SA McDonald |
|  |  |
| Solicitor for the Appellant: | MSM Legal |
|  |  |
| Counsel for the Respondents: | Mr G Johnson SC with Mr DF O’Leary |
|  |  |
| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

|  |  |
| --- | --- |
|  | SAD 32 of 2019 |
|   |
| BETWEEN: | PAUL WILLIAM BURGESSAppellant |
| AND: | ASSISTANT MINISTER FOR HOME AFFAIRSFirst RespondentCOMMONWEALTH OF AUSTRALIASecond Respondent |

|  |  |
| --- | --- |
| JUDGES: | KERR, WHITE AND CHARLESWORTH JJ |
| DATE OF ORDER: | 30 AUGUST 2019 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay the first respondent’s costs of the appeal, to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

KERR J:

1. I have had the very considerable benefit of reading the reasons of White and Charlesworth JJ in draft. I am grateful to their Honours for their careful statement of the facts and their analysis of the legal principles relevant to the four grounds advanced by the Appellant in this appeal. Subject to the limited reservations I express below, I adopt their Honours’ reasons as my own. In the circumstances it is unnecessary for me to repeat where I agree: it is sufficient that I note where I concur and explain the circumstances and reasons where I differ.
2. I concur with their Honours, for the reasons they have given, in rejecting Grounds 3 and 4.
3. I also agree with their Honours’ rejection of Ground 2. However, in my view the Assistant Minister’s reasons, read fairly, reveal that he proceeded on a mistaken basis that if he were to exercise the power under s 501(2) of the Act to cancel the Appellant’s visa, natural justice required that the Appellant be given a notice period of 28 days.
4. Because I nonetheless reach the same ultimate conclusion regarding the disposition of Ground 2, I will be concise in stating why I differ in that respect.
5. The departmental submission that provided advice to the Assistant Minister regarding his legal options as relevant to that issue was in the following terms:

4 You may decide to undertake a consideration of cancellation of Mr BURGESS’ reinstated visa under s501(2), with natural justice. Under this provision the person is provided with a Notice of Intention to Consider Cancellation and is given 28 days in which to respond to the notice. This gives the person an opportunity to provide the Department with information pertaining to their circumstances and to respond to any adverse information, before a decision is made.

1. The Assistant Minister adopted, without any amendments, the draft reasons attached to that departmental submission.
2. The Assistant Minister’s reasons, as explain his decision relevant to that issue, were as follows:

I note that I could have instead elected to consider Mr BURGESS’ visa cancellation under s501(2) of the Act, with natural justice, and that under that provision the person is provided with a Notice of Intention to Consider Cancellation and given 28 days in which to respond to the notice. Under that process the person is afforded an opportunity to provide the Department with information pertaining to their circumstances and to respond to any adverse information, before a decision is made.

1. As a matter of ordinary English, the commencing words of the second sentence in [4] of the departmental submission (“Under this provision …”) cannot sensibly be understood as not extending to the period of 28 days as is explicitly stated to be the period of notice which is given.
2. The majority assume (at [99]), for the purposes of their decision that the Assistant Minister read and acted in accordance with the advice set out in the departmental submission. I share that assumption; it is consistent with the Assistant Minister’s reasons.
3. However, unlike the majority I am unpersuaded by the submission advanced on behalf of the Assistant Minister that the reference in the departmental submission to a 28 day period suggested no more than the existence of a policy or practice adopted by the Department of Home Affairs to facilitate the provision of natural justice.
4. Given the terms in which [4] is expressed, that is not the natural meaning of the advice provided to the Assistant Minister. The natural meaning of the advice he received was that under the provision contained in s 501(2) of the Act, 28 days’ notice had to be given. The majority accepts that, had the Assistant Minister acted on that premise, he would have proceeded on an incorrect statement of the law. I accept, for the reasons I have stated above, that the Assistant Minister did proceed on that incorrect premise.
5. However, it does not follow that Ground 2 should be upheld.
6. The majority’s reasoning with respect to Ground 3 (with which I respectfully concur) establishes that in the particular statutory scheme of the Act no preliminary decision evaluating the respective merits of cancellation of the Appellant’s visa pursuant to s 501(2) rather than 501(3) of the Act was required on the part of the Assistant Minister. Having regard to that conclusion, cases such as *Byrne v Marles* [2008] VSCA 78; 19 VR 612 which impose a requirement to be heard on a preliminary decision are to be distinguished.
7. The High Court’s statement in *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 179 has relevance not only to the conduct of a tribunal but also the decision-making of a Minister:

If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, **and the tribunal’s exercise or purported exercise of power is thereby affected**, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

(Emphasis added.)

1. It is important not to ignore the qualifying words emphasised above. The legal error made by the Assistant Minister constitutes jurisdictional error only if the Assistant Minister were required to undertake the evaluative task this Court unanimously has rejected he had a duty to undertake.
2. Given I have joined with the majority in concluding that a wrong understanding of the legal consequences of a decision made pursuant to s 501(2) of the Act, in circumstances in which the Assistant Minister instead pursued the course open to him pursuant to s 501(3), is not a jurisdictional error capable of vitiating a decision made on the latter footing the error asserted in Ground 2 which I accept was made does not amount to jurisdictional error.
3. Subject to Ground 1, I apprehend there to have been no jurisdictional error in the Assistant Minister’s decision-making that the primary judge failed to identify.
4. I accept that it is only in the clearest of circumstances that a Court will construe an Act on the basis that the Parliament intended to abrogate the right of a person to be heard before a decision adverse to their interest is taken. However, it is not in contest in these proceedings that s 501(3) read in conjunction with s 501(5) explicitly permitted the Assistant Minister, acting personally to exercise the power to cancel the Appellant’s visa without notice and without according even the most minimal right to make representations assuming the criteria for that exercise of power were otherwise satisfied.
5. In so far as the potentially unfair consequences of the Assistant Minister not giving the Appellant any opportunity to be heard (save as to matters in relation to which the Appellant could not succeed) the departmental submission had bluntly (and correctly) informed the Assistant Minister that, if he were to cancel the Appellant’s visa pursuant to s 501(3), whatever representations the Appellant might later put forward could not assist him. I infer he acted on that premise.
6. Subject to Ground 1, it cannot plausibly be suggested that the Assistant Minister proceeded under any misapprehension regarding the inexorable legal consequences of his decision.
7. The primary judge was not in error to have reasoned that the Assistant Minister “was entitled to go straight to s 501(3) of the Act” (at [38]).
8. I join White and Charlesworth JJ in dismissing Ground 2. Where we differ as to the outcome is only in respect of Ground 1.

## Ground 1

1. Ground 1 alleges that the primary judge erred by:

1.1 failing to find that the Assistant Minister formed the state of mind required by s 501(3) of the Act on the basis of an erroneous understanding that the effect of s 501(5) was that he was bound not to accord natural justice (or a hearing of any kind) to the appellant; and

1.2 Failing to hold that this was jurisdictional error.

1. The majority judgment cites the reasons of the primary judge and the submissions of the parties (at [76]-[80]) in terms I adopt.
2. Their Honours note that the primary judge declined to accept the now Appellant’s submissions having regard to his Honour’s reasoning in *Ibrahim v Minister for Home Affairs* [2018] FCA 1592 (***Ibrahim* at first instance**).
3. At [81], the majority record that following the reservation of judgment on this appeal a Full Court of this Court allowed an appeal from the decision in *Ibrahim* at first instance: *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89 (***Ibrahim***). Neither party to the appeal applied to reopen argument after that judgment was delivered. In those circumstances, I proceed on the basis that the authority of *Ibrahim* is not in issue.
4. On that premise, I respectfully adopt the analysis of White and Charlesworth JJ as led to their Honours’ conclusion at [85]. I share their Honours’ reasoning that what the Full Court said in *Ibrahim* at [62]-[63] is inconsistent with the submission advanced on behalf of the Assistant Minister that the primary judge had not erred in rejecting the Appellant’s contention that the asserted misunderstanding about s 501(3) of the Act could not constitute jurisdictional error.
5. The critical passage in *Ibrahim* is at [62]:

To our minds, the fact that the Assistant Minister had not been bound, by reason of s 501BA(3), to invite further submissions from the appellant, or even to consider whether to invite further submissions, is not decisive. Framing the issue in that way tends to focus attention on whether the Minister had failed to do a positive act required by the Act. The submission of the appellant involves a different claim, namely, that in forming the state of satisfaction contemplated by s 501BA(2), the Assistant Minister had been required to understand that he was not, by the terms of the Act, precluded from obtaining further submissions from the appellant. If the Assistant Minister had had that understanding of the effect of the Act, then (subject to issues of legal unreasonableness), a decision on his part not to seek further submissions or a failure to advert to that question at all would not have amounted to jurisdictional error. On the other hand, if the Assistant Minister had a positive understanding that s 501BA(3) precluded him from giving effect to the rules of natural justice by inviting the appellant to make submissions or to provide further material, then that would involve a misunderstanding of the nature of the power he was exercising.

1. Which of the two possibilities referred to by the Full Court in *Ibrahim* as might explain an absence of any invitation to the Appellant to make submissions or provide further information is ultimately a question of fact this Court must decide. In *Ibrahim*, on the facts before it the Full Court accepted that it was the latter which explained that circumstance. In the present appeal, the majority conclude that *Ibrahim* is to be distinguished because the Assistant Minister’s statement of reasons together with the departmental submissions do not demonstrate the same error (at [88]).
2. I regret, on this perhaps narrow point, I reach a different conclusion to that of the majority.
3. The departmental submission provided to the Assistant Minister referred to his having the option to cancel the Appellant’s visa pursuant to s 501(3) of the Act as follows:

6. Alternatively, you may decide to consider cancelling Mr BURGESS’ visa under s501(3)(b) of the Act, without natural justice. Under this provision you may cancel a person’s visa if you reasonably suspect the person does not pass the character test and you are satisfied that the cancellation is in the national interest. The person is not given notice of the cancellation consideration and is therefore not afforded any opportunity to provide the Department with information pertaining to their circumstances or to respond to any adverse information, before a decision is made. This power may only be exercised by the Minister personally.

…

9. Should you be minded to exercise your power to cancel Mr BURGESS’ visa under s501(3) of the Act without natural justice, you should also note that:

a. section 501C of the Act provides that, following a decision under s501(3) to refuse or cancel a visa, the person who is the subject of the decision, except where they are not entitled to make representations about revocation of the decision, must be invited to make representations about possible revocation of the decision, and you may revoke the decision only if the person makes representations in accordance with the invitation and satisfies you that they pass the character test; the effect of s501C(10) and regulation 2.52(7) is that a person must be in immigration detention to be entitled to make such representations;

b. however, any representations made in response to an invitation under s501C at the revocation stage can bear only on the question of whether or not he passes the character test; any representations on discretionary matters would be irrelevant to the exercise of your revocation power.

c. in Mr BURGESS’ case it would be futile for him to make representations in support of revocation pursuant to an invitation under s501C(3) as on the basis of information available to the Department he objectively fails the character test by virtue of his ‘substantial criminal record’. Mr BURGESS cannot therefore satisfy you that he passes the character test.

1. The Assistant Minister’s reasons as are relevant to his exercise of that power are as follows:

4. Section 501(3)(b) of the Act enables me to, without natural justice, cancel a visa that has been granted to a person if:

* I reasonably suspect that the person does not pass the character test (as defined by s501(6)); and
* I am satisfied that the cancellation is in the national interest.

5. Under s501(5), the rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under s501(3).

6. Pursuant to s501C(3), following a decision under s501(3) to refuse or cancel a visa, the person who is the subject of the decision is to be notified of the decision and given information relevant to it (other than “non-disclosable information”) and, except in a case where the person is not entitled to make representations, invited to make representations about possible revocation of the decision. Under s501C(4), if, and only if, the person makes representations in accordance with the invitation and satisfies me that they pass the character test, may I revoke the cancellation decision.

7. I note that any representations made by Mr BURGESS in response to an invitation under s501C at the revocation stage can bear only on the question of whether or not he passes the character test not on the exercise of my residual discretion under s501(3).

8. I am cognisant of the fact that because Mr BURGESS has been sentenced to a term of imprisonment of 12 months or more and therefore objectively fails the character test by virtue of s501(6)(a) and s501(7)(c), it would be futile for him to seek revocation under s501C(4) as he cannot satisfy me that he passes the character test.

1. As noted above the majority assume, for the purposes of their analysis of Ground 2, that the Assistant Minister had read and acted in accordance with the advice set out in the departmental submission. I see no reason why the same assumption should not be made in respect of Ground 1. In the absence of any indicia to the contrary (and none were advanced by counsel for the Assistant Minister) in circumstances in which the Assistant Minister’s reasons are expressed in terms entirely consistent with the departmental submission and the draft it had provided for his adoption were he to accept that advice I would not confine myself to that assumption: I am satisfied that I am entitled to draw that factual inference.
2. As a matter of ordinary English, the third sentence of [6] of the departmental submission is simply an extended description of the legal consequences of any decision made as referred to in the sentence that precedes it. The sentence preceding it commences: “Under this provision…”. Those words, in the context in which they appear, must be a reference to the power to cancel the Appellant’s visa under s 501(3) of the Act, as is made explicit in the first sentence of [6].
3. The Assistant Minister was thus advised that upon the exercise of a cancellation under s 501(3) of the Act, a person who is the subject of the decision “is not given notice of the cancellation consideration and is therefore not afforded any opportunity to provide the Department with information pertaining to their circumstances or to respond to any adverse information, before a decision is made”.
4. When considered in conjunction with the terms of the departmental submission at [9], I am satisfied that the only available reading of the language at [6] is that the Department of Home Affairs not only advised the Assistant Minister that it would be open to him to make such a decision, but also that if he were to proceed “under the provision” (that is s 501(3)(b)), then it would not be open to the Assistant Minister to give the Appellant notice of his intention to cancel the Appellant’s visa. Nor would it be open to the Assistant Minister to give the Appellant any opportunity to be heard in respect of any aspect of the intended decision. Nothing the Appellant might later say would permit reconsideration of that decision.
5. The Assistant Minister’s reasons, in my opinion, read as a matter of ordinary English, are entirely consistent with the Assistant Minister having proceeded on that understanding. It was open to the Assistant Minister to have adduced evidence that he had a different understanding but he did not take that course. In the absence of any indicia to the contrary there is nothing to rebut the inference I have referred to at [32].
6. I therefore respectfully differ from the conclusion reached by the majority at [88] that the Assistant Minster’s reasons do not suggest any misunderstanding on his part. In the absence of a challenge to the correctness of the Full Court’s decision in *Ibrahim*, I find myself unable to distinguish the outcome reached in that case: see similarly *Nguyen v Minister for Home Affairs* [2019] FCAFC 128 (***Nguyen***) per Jagot, Robertson and Farrell JJ at [41]. It cannot be a sound reason to distinguish *Ibrahim* that the Assistant Minister does not mention any of the issues I draw attention to at [39] in terms suggesting that he might have thought it appropriate to permit a truncated response. That the Assistant Minister did not turn his mind to such a possibility was to be expected if he had been advised and was (as I am satisfied he was) proceeding on a legally erroneous understanding that he had no capacity to offer the Appellant such an opportunity.
7. I accept that the Appellant carries the burden of proof in establishing the asserted error, but I am satisfied that the inference I have drawn as to the basis upon which the Assistant Minister proceeded discharges that burden in the absence of any evidence being led on behalf of the Assistant Minister to the contrary.
8. For completeness, I would reject that the *Ibrahim* error I am satisfied was made in this instance was immaterial and thus not jurisdictional. In the absence of the Assistant Minister having given any consideration to the issue (because I infer he regarded himself as precluded from doing so) I would not assume that the Assistant Minister might not have given consideration to permitting Mr Burgess some limited opportunity to advance submissions or new information in respect of matters where the Assistant Minister had no or only limited (and in some instances quite dated) information. For example, the Assistant Minister had no information regarding the Appellant’s health status (Assistant Minister’s reasons at [55]) and incomplete information regarding the Appellant’s participation in an anger management program (Assistant Minister’s reasons at [65]). It follows that the Assistant Minister’s misunderstanding meant that he did not consider giving the Appellant the opportunity to supply any information that might have been relevant to such issues or make submissions.
9. In *Nguyen* the Full Court reasoned as follows:

48 However, this is not a common denial of procedural fairness case, but a case of the Minister misunderstanding the nature of the power he was exercising. We would not therefore regard the reference by the Full Court in *Ibrahim* to the affidavit evidence, then leading to the discussion of materiality in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1 at [31], [46], [66]-[72], as apposite. It went further than we consider to be necessary.

49 We prefer the analysis that compliance with the condition, the correct understanding of the nature of the power, could have resulted in the making of a different decision and it could not be shown that the failure by the Minister to understand the nature of the power did not deprive the appellant of the possibility of a successful outcome. Another available analysis is that the error of law was material because it was a fundamental error and that error could have affected the Minister’s decision. More simply, the Minister’s exercise or purported exercise of the power was affected by his misunderstanding of the nature of the power so that he therefore exceeded his authority or power. The materiality is that, having misunderstood the nature of the power, the Minister did not consider whether to get, or allow the appellant to provide, evidence as to his circumstances in the intervening five months, or submissions on that issue. The effect of the Minister’s misunderstanding was, in part, that the appellant did not know that the Minister was considering exercising the power.

50 It is also to be recalled that in *Hossain* it was held by Kiefel CJ, Gageler and Keane JJ, at [35], that although the Tribunal breached the implied condition that it was to proceed on a correct understanding and application of the applicable law, by misconstruing and misapplying the criterion which related to the timing of the making of the application, that breach could have made no difference to the decision which the Tribunal in fact made. This was because the Tribunal was not satisfied that the public interest criterion was met and could not reasonably have been so satisfied on its findings. In those circumstances, the Tribunal had no option but to affirm the decision of the delegate. The Tribunal’s conclusion in relation to the public interest criterion was independent of the Tribunal’s erroneous finding which underlay that part of its decision that there were no compelling reasons to extend the time limit for his visa application. That is not this case.

51 In our opinion, that analysis does not require evidence in the present case of what the appellant or Minister would have done if the Minister had considered whether or not to an opportunity to the appellant to provide further material or submissions and had decided to do so. Unlike in *Hossain*, here there is a clear causal link between the error and the Minister’s decision; it cannot be said that the failure to consider whether to afford the appellant an opportunity to be heard on the cancellation decision was logically independent of, or could not have made any difference to, the decision.

1. I would respectfully adopt their Honours’ analysis. It follows, as the Full Court held in *Nguyen* (at [55]), that it is not incumbent on the Appellant to prove, by evidence, what may have occurred had the Assistant Minister correctly understood the nature of the power he was exercising.
2. I would uphold Ground 1.

|  |
| --- |
| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 30 August 2019

REASONS FOR JUDGMENT

WHITE and CHARLESWORTH JJ:

1. The appellant, Mr Paul Burgess, is a national of the United Kingdom. He arrived in Australia in 1986 when he was two years old. He has resided here since then as the holder of a visa first granted to him in 1992 under the *Migration Act 1958* (Cth) (the Act).
2. Mr Burgess has a “substantial criminal record” as that term is defined in s 501(7) of the Act. As a consequence, he is a person who does not and cannot pass the character test established by s 501(6).
3. Section 501(3)(b) of the Act confers a power on the Minister for Home Affairs to cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that cancellation of the visa is in the national interest: see s 501(3)(c) and (d). On 13 February 2018 the Assistant Minister for Home Affairs cancelled Mr Burgess’s visa in the exercise of that power (the Cancellation Decision).
4. Mr Burgess commenced an application for judicial review of the Cancellation Decision in the High Court of Australia. On that application, it was for Mr Burgess to show that the decision was affected by jurisdictional error: s 474 of the Act, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The High Court remitted the application for judicial review to this Court in the exercise of its power under s 44 of the *Judiciary Act 1903* (Cth). The primary Judge dismissed the application on 25 January 2019: *Burgess v Assistant Minister for Home Affairs* [2019] FCA 34. This is an appeal from that judgment.
5. The background to the Cancellation Decision and the reasons of the primary Judge will be summarised in the course of determining the four grounds of appeal. It is convenient to begin with the third ground.

## Ground 3

1. Section 501(2) and (3) of the Act relevantly provide:

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

*Decision of Minister or delegate – natural justice applies*

…

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

*Decision of Minister – natural justice does not apply*

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to person;

if

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

1. Section 501(4) provides that the power under subs (3) may only be exercised by the Minister personally. The Assistant Minister is to be regarded as “the Minister” for that purpose: *Maxwell v Minister for Immigration and Border Protection* (2016) 249 FCR 275 at [21] (Perry J).
2. Section 501(5) relevantly provides that the rules of natural justice, and the code of procedure set out in Subdiv AB of Div 3 of Pt 2, do not apply to a decision under subs (3).
3. In his Statement of Reasons for the Cancellation Decision, the Assistant Minister said this of the powers conferred by s 501 of the Act:

4. Section 501(3)(b) of the Act enables me to, without natural justice, cancel a visa that has been granted to a person if:

- I reasonably suspect that the person does not pass the character test (as defined by s501(6)); and

- I am satisfied that the cancellation is in the national interest.

5. Under s501(5), the rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under s501(3).

6. Pursuant to s501C(3), following a decision under s501(3) to refuse or cancel a visa, the person who is the subject of the decision is to be notified of the decision and given information relevant to it (other than ‘non-disclosable information’) and, except in a case where the person is not entitled to make representations, invited to make representations about possible revocation of the decision. Under s501C(4), if, and only if, the person makes representations in accordance with the invitation and satisfies me that they pass the character test, may I revoke the cancellation decision.

7. I note that any representations made by Mr BURGESS in response to an invitation under s50lC at the revocation stage can bear only on the question of whether or not he passes the character test not on the exercise of my residual discretion under s501(3).

8. I am cognisant of the fact that because Mr BURGESS has been sentenced to a term of imprisonment of 12 months or more and therefore objectively fails the character test by virtue of s501(6)(a) and s501(7)(c), it would be futile for him to seek revocation under s501C(4) as he cannot satisfy me that he passes the character test.

9. I note that I could have instead elected to consider Mr BURGESS’ visa cancellation under s501(2) of the Act, with natural justice, and that under that provision the person is provided with a Notice of Intention to Consider Cancellation and given 28 days in which to respond to the notice. Under that process the person is afforded an opportunity to provide the Department with information pertaining to their circumstances and to respond to any adverse information, before a decision is made.

10. However, I decided to proceed to make a decision in Mr BURGESS’ case under s501(3), without natural justice.

1. At first instance, as on appeal, Mr Burgess argued that the Assistant Minister had made a procedural or antecedent decision to proceed under s 501(3) of the Act rather than s 501(2) and that the decision to so proceed was made:

… arbitrarily, capriciously and/or for no reason (or, in the alternative, for no permissible reason) and/or was unreasonable and/or was not reached by reasoning which is intelligible.

1. The asserted legal unreasonableness affecting the “antecedent” decision was said to vitiate the substantive decision to cancel Mr Burgess’s visa. Ground 3 on this appeal is to the effect that the primary Judge erred in rejecting these contentions by:

3.1 failing to find that the Assistant Minister in fact made a procedural decision to proceed under s 501(3) rather than s 501(2);

3.2 holding that such a procedural decision [was] not a ‘decision’ that was required to be exercised in a manner that was not legally unreasonable, irrational or illogical;

3.3 holding that the decision was not legally unreasonable, irrational or illogical; and

3.4 failing [to] find that the Assistant Minister’s decision was affected by jurisdictional error for this reason.

1. The submissions in support of this ground proceeded from three uncontentious propositions. The first is that s 501 of the Act confers alternate powers to cancel a visa. The second is that the power to cancel a visa under s 501(2)(b) of the Act is conditioned by a requirement that the visa holder be accorded natural justice. The third is that the power to cancel a visa in the exercise of the power conferred by s 501(3) of the Act is not so conditioned.
2. From there it was submitted that the Assistant Minister had made a conscious choice to proceed under s 501(3) of the Act rather than under s 501(2) and that this choice was “procedural” or “antecedent” in the sense that it was made before the Minister commenced his consideration of whether the conditions for the exercise of the power under s 501(3) of the Act were or were not met. It was further submitted that the decision to exercise the power under s 501(3) of the Act rather than s 501(2) resulted in Mr Burgess having no entitlement to be heard. The decision was, Mr Burgess submitted, affected by legal unreasonableness, first because there was no material before the Assistant Minster to “sustain a reasonable and rational conclusion that any cancellation had to be, or ought to be, made without affording the appellant natural justice” and, secondly, because the Statement of Reasons does not disclose any intelligible basis upon which the Assistant Minister could proceed to cancel the visa under s 501(3) without natural justice, rather than under s 501(2).
3. In Mr Burgess’s outline of submissions, the significance of the Assistant Minister’s “decision” being antecedent in nature was expressed in this way:

42. If he were to choose to proceed under subs (3) – as he did in this case – the Minister was also required to form a state of satisfaction that cancellation was ‘in the national interest’ before he could cancel the visa. Yet such a state of satisfaction could only be formed … during consideration of the material in the decision making process and after making the election not to afford the appellant natural justice.

43. It follows that, temporally, there must be some basis to determine that the appellant is not be afforded natural justice and that the decision-making process is to proceed under s 501(3), rather than s 501(2), at the time of commencing to consider the cancellation. This forms the basis of an election to proceed under one subsection or the other. The election to proceed under one or the other of the two subsections is itself a ‘decision’, an exercise of administrative power; one which was obviously apt immediately to affect the appellant’s procedural interests, and consequently to affect his substantive interests.

1. Mr Burgess submitted that s 501 of the Act was analogous to ss 48B, 195A and 417 of the Act. Those provisions confer powers on the Minister to grant a visa (or to lift a statutory bar that would prevent a visa application being made) if the Minister thinks that it is in the “public interest” to do so. The powers are non-compellable in the sense that there is no duty upon the Minister to consider their exercise. In *Minister for Immigration and Border Protection v* ***SZSSJ***(2016) 259 CLR 180 at [52] – [56], the High Court characterised the Minister’s consideration of whether to exercise the non-compellable powers under ss 48B, 195A and 417 of the Act as a “procedural decision”. Relief in that case was founded on a claim that an officer of the Department for Immigration and Border Protection had failed to observe the rules of procedural fairness in holding an inquiry or conducting an investigation that would inform the Minister about the exercise of the powers conferred by ss 48B, 195A and 417 of the Act after the Minister had made his “personal procedural decision” to consider its exercise. The High Court concluded that the Federal Circuit Court of Australia had jurisdiction to review the officer’s conduct because it was “conduct preparatory to the making of” a migration decision and so was amenable to judicial review under s 476 of the Act. These observations would apply equally to cases falling within the original jurisdiction of this Court to review a migration decision under s 476A of the Act.
2. Temporal considerations aside, the proposition that the Assistant Minister in fact made a conscious choice to proceed under s 501(3) of the Act rather than under s 501(2) in this case is established by [9] and [10] of the Statement of Reasons.
3. Prior to making the cancellation decision, the Assistant Minister was provided with a submission prepared by an officer of the Department of Home Affairs. The first two pages of the submission contain a series of recommendations, each of which is followed by alternative options for the Assistant Minister to circle. The recommendations were as follows:

1. Note that you may decide to consider cancelling Mr BURGESS’ visa under s501(2) of the Act with natural justice, or under s501(3) of the Act without natural justice in the national interest.

2. Note that if you decide to cancel Mr BURGESS’ visa under s501(3) without natural justice, and he is taken into immigration detention, he has a right to make representations in support of revocation pursuant to an invitation under s501C(3). However, such an invitation would be futile in Mr BURGESS’ case given that he has a substantial criminal record and cannot satisfy you that he passes the character test, which, by s501C(4), is a prerequisite for your exercise of the revocation power. Also, any representations made by Mr BURGESS at the revocation stage could bear only on the question of whether or not he passes the character test, not on the exercise of your residual discretion under s501(3).

3. lf you decide to consider cancelling Mr BURGESS’ visa under s501(3) without natural justice in the national interest, record your decision on, and sign, the Decision Page at **Attachment 1**.

4. If you decide to exercise your power under s501(3) to **cancel** Mr BURGESS’ visa, sign the draft Statement of Reasons at **Attachment 3** with any amendments you consider necessary.

5. Note that if you decide to cancel Mr BURGESS’ visa under s501(3), he will become an unlawful non-citizen and will become liable for immigration detention.

6. Note that if you decide to cancel Mr BURGESS’ visa and he is taken into immigration detention, he will, as required by s50lC, be invited to make representations to you about revocation of your decision within seven (7) days of notification.

(original emphasis)

1. The Assistant Minister noted the recommendations in [1], [2], and [4] – [6] and circled the alternative “signed” opposite the recommendations in [3]. He also signed the attached Decision Page and the Statement of Reasons without making any alteration to them.
2. The fact that the Minister noted the first of the recommendations evidences his acceptance that he was to make a conscious choice to exercise the power vested by s 501(3) of the Act. Whether that choice may be described as “antecedent” is another question.

### Reasons of the primary judge

1. The primary Judge said (at [32]) that the Assistant Minister’s choice to proceed under s 501(3) of the Act was not a “decision” that is subject to judicial review for legal unreasonableness. His Honour said that the choice to proceed under s 501(3) rather than under an alternative power:

…  does not involve the exercise of a statutory power and it is the statutory power which brings with it the implication that the power will be exercised in a matter which is legally reasonable (*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (*Li*) at [29] per French CJ; at [63] per Hayne, Kiefel and Bell JJ; at [89]–[90] per Gageler J). In my opinion, *SZSSJ* is distinguishable. The important point in that case is that the Minister had made a personal procedural decision which meant that the Minister’s consideration had a statutory basis and the rules of natural justice applied. That is not what has happened in this case. In this case, the statutory basis emerges as the Assistant Minister proceeded down the s 501(3) path, not before.

1. Earlier in his reasons, the primary Judge accepted as correct the Assistant Minister’s submission that he had been free to proceed under s 501(3), that there was no “two stage process” as there was in *SZSSJ*, and that a decision under s 501(3) could involve “simultaneously rejecting, or just making inapplicable, s 501(2)” (at [31] – [32]).
2. The primary Judge said he was not otherwise convinced that any decision to proceed under s 501(3) of the Act rather than s 501(2) was necessarily legally unreasonable as it had not been shown that the decision lacked an evident and intelligible justification.

### Consideration

1. The primary Judge was correct to distinguish *SZSSJ*. The plurality in that case did not conclude that the “personal procedural decision” of the Minister to consider the exercise of the non-compellable powers under ss 48B, 195A and 417 was itself a decision that was amenable to judicial review. As has been observed, the claim for relief in that case was founded on conduct occurring in the course of a statutory process that followed in time from the Minister’s personal procedural decision to consider whether to grant a visa or lift the statutory bar. It was by reason of that personal procedural decision that the departmental officer undertook an inquiry under the statute, to which the rules of natural justice applied. The conduct occurred in the course of a statutory process that conditioned the exercise of the Minister’s discretionary power under ss 48B, 195A and 417, and so was reviewable.
2. We do not otherwise consider the judgment in *SZSSJ* to support the proposition that the “choice” between alternate courses of decision-making available under s 501 of the Act is to be characterised as a decision that is reviewable.
3. We consider it unnecessary to dwell on that question in any event. Labelling the Assistant Minister’s election between alternative sources of power in s 501 as a “decision”, a “personal procedural decision” or an “antecedent decision” does little to inform the substantive question that arose on the application for judicial review and that now arises on the appeal. The relief sought on the originating application was an order in the nature of certiorari quashing the cancellation decision on the basis that it was affected by jurisdictional error. The Cancellation Decision is clearly amenable to review, including on the grounds of legal unreasonableness: *Minister for Immigration and Border Protection v* ***Stretton*** (2016) 237 FCR 1*,* *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158. The question to be determined is whether the Assistant Minister’s exercise of the power conferred by s 501(3) was affected by jurisdictional error because of a prior election (lacking an evident and intelligible foundation) to consider first the exercise of that power.
4. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Gageler J said (at [90]):

Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of statutory duty. Each is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject matter, scope and purposes of the statute.

(footnotes omitted, original emphasis)

See also Hayne, Kiefel and Bell JJ (at [66] – [67]).

1. In *Stretton* Allsop CJ said that the boundaries of power may be difficult to find. His Honour continued (at [11]):

…  The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident and intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

1. The question of whether the Assistant Minister exercised his powers according to law and within the limits set by the subject matter, scope and purposes of the Act is informed by the following features of the statutory scheme:
2. The power under s 501(3) of the Act is conditioned on the Minister being satisfied that cancellation of the visa is in the national interest whereas the power under s 501(2) is not. The question of what the national interest requires is non-delegable. The Act evinces a clear intention that the visa holder have no entitlement to be heard with respect to that question. These considerations are enlarged upon in the disposition of Ground 4 (as to which see [117] – [119] below);
3. The discretionary power to cancel a visa under s 501(3) is enlivened upon the conditions in s 501(3)(c) and (d) being fulfilled. The Minister’s state of mind with respect to each condition may lawfully be formed without affording the visa holder an opportunity to be heard and without pausing to consider whether the criteria for the exercise of an alternative source of power may or may not be fulfilled;
4. Section 501 contains no express requirement that the Minister first give consideration to the exercise of the power conferred by s 501(2) before giving consideration to the exercise of the power in s 501(3), nor does any such requirement arise by implication;
5. Parliament has conferred alternate powers without expressly identifying any criteria against which any choice between them should be made;
6. The Act neither expressly nor impliedly requires the Minister to make any value judgment about which course of decision-making would be preferable from the visa holder’s perspective;
7. As Mr Burgess correctly contended, nothing in s 501(3) of the Act obliges the Minister *not* to accord procedural fairness in a particular case in any event (see Ground 1 below). The “election” between alternate powers is an election between a course in which natural justice *must* be afforded (s 501(2)) and a course in which natural justice *may* be afforded (s 501(3)). As such, any “anterior decision” to proceed under s 501(3) would not necessarily encompass a decision not to accord natural justice; and
8. There would be an incongruity in the statutory scheme if the Minister was obliged to accord natural justice to a visa holder before making a decision under s 501 to exercise a power which does not require the provision of natural justice.
9. It follows from all of these considerations that the decision by the Assistant Minister to consider the exercise of the power under s 501(3) was not conditioned by a requirement that he express an intelligible basis for doing so. More particularly, the power conferred by s 501(3) is not subject to an inviolable condition that the Minister first identify an intelligible basis for *not* exercising the alternative power in s 501(2).
10. In any event, it was not demonstrated on the evidence that the Assistant Minister elected not to proceed under s 501(2) before satisfying himself that the conditions prescribed in s 501(3)(c) and (d) were fulfilled. The fulfilment of those conditions in and of itself provided a sufficient and lawful basis for the exercise of the power without the Assistant Minister having first to consider whether the power in s 501(2) of the Act could or should be exercised instead.
11. It follows that the third ground of appeal is not established.

## Ground 1

1. By this ground, Mr Burgess alleges that the primary judge erred by:

1.1 failing to find that the Assistant Minister formed the state of mind required by s 501(3) of the Act on the basis of an erroneous understanding that the effect of s 501(5) was that he was bound not to accord natural justice (or a hearing of any kind) to the appellant; and

1.2 Failing to hold that this was jurisdictional error.

1. This ground rests on the principle that a state of mind conditioning the exercise of a statutory power must be formed on a correct understanding on the law. A misapprehension by a decision-maker as to a question to be asked or as to an important attribute of the decision to be made will result in a purported but not a real exercise of the power conferred: ***Re Patterson****; Ex parte Taylor* (2001) 207 CLR 391 at [196] (Gummow and Hayne JJ);***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57] (Keifel CJ, Bell, Gaegler, Keane, Nettle and Gordon JJ).
2. In the proceedings at first instance, Mr Burgess argued that the Assistant Minister proceeded on the erroneous understanding that when exercising the power conferred by s 501(3) of the Act he was bound *not* to accord Mr Burgess natural justice.
3. The primary Judge rejected this argument for the same reasons he gave in *Ibrahim v Minister for Home Affairs* [2018] FCA 1592 (*Ibrahim* at first instance). That case concerned the exercise by the Assistant Minister of a power conferred by s 501BA(2) of the Act to set aside a decision of a delegate to revoke a cancellation decision mandated by s 501(3A) of the Act. It is not necessary to extract those provisions here. It is sufficient to note that the rules of natural justice do not apply to the power conferred by s 501BA(2) of the Act and that the provision is equivalent to s 501(3) in that respect.
4. In *Ibrahim* at first instance*,* the primary Judge said that he was not disposed to think that the power of the Assistant Minister was in the nature of a discretion as distinct from a course he may choose to take in particular circumstances (at [42]). The primary Judge made no finding as to whether the Assistant Minister had in fact proceeded on the basis that he was bound not to accord natural justice to the visa holder in that case. Even if the Assistant Minister had proceeded on that basis, the primary Judge said, the error would not be jurisdictional because there was no obligation to consider whether natural justice should be accorded (at [39], [41] – [42]).
5. In rejecting Mr Burgess’s arguments to the same effect, the primary Judge extracted his conclusions in *Ibrahim* at first instance*,* before concluding (at [40]):

The relevant paragraphs in the Assistant Minister’s reasons are set out above (at [12]). Mr Ibrahim submitted that I should infer from those passages that the Assistant Minister erroneously believed that he could not accord natural justice or call for further submissions. Three matters are relied on. First, the statement by the Assistant Minister in paragraph 10 of his reasons that the fact that the rules of natural justice do not apply to s 501BA(2) *means* that Mr Ibrahim had not been advised that the matter was being considered by the Assistant Minister and he was not given any opportunity to make submissions. Secondly, it can be seen from the paragraphs which follow that the Assistant Minister clearly recognised the disadvantages to Mr Ibrahim in the way he proposed to proceed. Thirdly, the Assistant Minister recognised that the information he had about Mr Ibrahim’s circumstances was likely to be out of date. The recognition of the imperfections in the material suggests, so it is argued, that if the Assistant Minister thought that he could have done something about it, then he would have.

(original emphasis)

## Consideration

1. Following the reservation of judgment on this appeal, the Full Court allowed an appeal from the judgment of the primary Judge in *Ibrahim* at first instance: ***Ibrahim*** *v Minister for Home Affairs* [2019] FCAFC 89. Neither party to this appeal applied to reopen argument on this appeal after judgment on the appeal in *Ibrahim* was delivered*.*
2. It is convenient to set out the legal principles in the terms expressed by the Full Court in *Ibrahim*:

51 In a case like the present, jurisdictional error consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by the Act: *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 at [23] (Gageler and Keane JJ). That requires consideration of whether it was an express or implied condition of the power conferred by s 501BA(2) that the Assistant Minister understand that s 501BA(3) did not preclude him from providing natural justice. An aspect of that question is whether an erroneous understanding by a decision-maker of the way in which the statutory power may be exercised, when the decision-maker is not bound even to consider the matter, may give rise to jurisdictional error.

52 A number of authorities indicate that an implied condition for the valid exercise of a decision-maker’s powers for which a particular state of mind is required is that the state of mind be formed on a correct understanding of the law. The general principle was stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407 at 430:

Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man *who correctly understands the meaning of the law under which he acts*. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power.

(Emphasis added)

As is apparent, *Hetton Bellbird* concerned a mis construal of the limits of the power in question.

53 In *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110 at 118 9, Gibbs J said:

It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. … [A] person affected will obtain relief from the courts if he can show *that the authority has misdirected itself in law* or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account.

(Emphasis added)

54 In *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391, it was found that a Parliamentary Secretary had committed jurisdictional error in purporting to cancel a visa when she had believed, erroneously, that the holder of the visa would have an opportunity to make representations seeking revocation of her decision. Gummow and Hayne JJ (with whom Gleeson CJ agreed) said:

[189] There will have been a constructive failure to exercise the power reposed in the respondent by s 501(3) or, as Gibbs J put it in *Sinclair v Maryborough Mining Warden*, a ‘purported but not a real exercise of [her] functions’, if the respondent precluded herself from exercising the power according to law; she will have done so if she misconceived what in law was involved in the exercise of that power.

…

[196] In the absence of any evidence providing a further explanation of the reasons, or the parts of the reasons, for the respondent making her cancellation decision of 30 June, it is to be taken that she exercised her discretion under s 501(3) to cancel the prosecutor’s transitional (permanent) visa on an erroneous footing. This is that, if she did cancel the visa, the legislation required there then to be given to the prosecutor, in terms of par 14 of the minute, ‘an opportunity to make representations seeking revocation of [that] decision’. The result of this misconception as to what the exercise of the statutory power entailed was that there was, in the meaning of the authorities, a purported but not real exercise of the power conferred by s 501(3). On that footing, prohibition and certiorari properly lay.

(Citation omitted)

55 In *Wei*, Gageler and Keane JJ said (at [33]):

The ‘satisfaction’ required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act* is a state of mind. It is a state of mind which must be formed reasonably *and on a correct understanding of the law*. …

(Citation omitted and emphasis added)

56 Finally, in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; (2017) 347 ALR 350, the High Court said (at [68]):

The Minister’s reasons for his decisions to cancel the visas of the plaintiff and the applicant refer repeatedly to the Minister having taken into account information described variously as ‘protected information under section 503A’ and ‘information which is protected from disclosure under section 503A’. The inference to be drawn is that the Minister made the decisions on the understanding that s 503A was valid in its entirety and operated to prevent the Minister from in any circumstances being required to divulge or communicate the information including to a court engaged in the judicial review of the decisions. That understanding was in error. The error was not as to the question to be asked by the Minister in making the decision but as to an important attribute of the decision to be made: whether or not the decision would be shielded from review by a court in so far as it was based on the relevant information. As in *Re Patterson; Ex parte Taylor*, where the error of the Minister was a failure to appreciate that there would be no opportunity to seek revocation of the decision, ‘[t]he result of this misconception as to what the exercise of the statutory power entailed was that there was, in the meaning of the authorities, a purported but not a real exercise of the power conferred by s 501(3)’.

(Citations omitted)

1. The contrary arguments advanced on behalf of the Assistant Minister on appeal in *Ibrahim* are substantively to the same effect as the Assistant Minister’s submissions on this appeal. As summarised by the Full Court the argument proceeded as follows (see *Ibrahim* at [59] – [60]):
2. the Assistant Minister’s failure to accord procedural fairness in the exercise of his statutory power under s 501BA(2) could not constitute jurisdictional error given that the Assistant Minister had not been *bound* to provide natural justice;
3. the Assistant Minister would have committed jurisdictional error only if he had misconceived what in law was involved in the exercise of the power *under the Act*;
4. the relevant question was whether there had been a real exercise of the statutory power, not whether “ancillary capacities or extra statutory functions or processes have been considered or engaged in”; and
5. as the “capacity” to invite submissions from the appellant was “extra statutory”, the mistake as to its availability could not give rise to jurisdictional error.
6. On appeal in *Ibrahim*, the Assistant Minister relied upon a notice of contention to the effect that he had not in fact proceeded on an incorrect misunderstanding of s 501(3) of the Act. That contention was rejected having regard to the content of a written Statement of Reasons given by the Assistant Minister for cancelling the visa, and so it remained to consider whether the error, so established, was jurisdictional in nature. The Full Court concluded:

62 To our minds, the fact that the Assistant Minister had not been bound, by reason of s 501BA(3), to invite further submissions from the appellant, or even to consider whether to invite further submissions, is not decisive. Framing the issue in that way tends to focus attention on whether the Minister had failed to do a positive act required by the Act. The submission of the appellant involves a different claim, namely, that in forming the state of satisfaction contemplated by s 501BA(2), the Assistant Minister had been required to understand that he was not, by the terms of the Act, precluded from obtaining further submissions from the appellant. If the Assistant Minister had had that understanding of the effect of the Act, then (subject to issues of legal unreasonableness), a decision on his part not to seek further submissions or a failure to advert to that question at all would not have amounted to jurisdictional error. On the other hand, if the Assistant Minister had a positive understanding that s 501BA(3) precluded him from giving effect to the rules of natural justice by inviting the appellant to make submissions or to provide further material, then that would involve a misunderstanding of the nature of the power he was exercising.

63 In our opinion, the Assistant Minister proceeding on the basis that he could not provide the appellant with an opportunity to be heard because s 501BA(2) precluded him from doing so was to misunderstand the nature of the power being exercised. He should have understood that it was open to him to invite submissions from the appellant if he chose. The matters to which we referred in [15] above indicate the materiality of the Assistant Minister’s misapprehension: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 359 ALR 1 at [31], [46], [66]-[72]. That has the consequence that the decision is affected by jurisdictional error. This conclusion makes it unnecessary to consider an additional submission of the appellant directed to Ground 1 based on *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456.

1. Returning to the present case, and adopting the reasoning in *Ibrahim*, we respectfully conclude that the primary Judge erred in rejecting Mr Burgess’s contention that a misunderstanding about the effect of s 501(3) could not constitute jurisdictional error.
2. However, it does not follow that the appeal should be allowed.
3. In *Ibrahim,* proof of the Assistant Minister’s error was assisted because his reasons disclosed an awareness that Mr Ibrahim’s personal circumstances (relevant to the outcome) were likely to have changed since the submissions he made to the delegate some two years and five months earlier, as well as a recognition that an opportunity to Mr Ibrahim to make submissions may be of benefit to him. The reasons suggested that the Assistant Minister may have wished to provide Mr Ibrahim with the opportunity to make submissions. In that context, the reasons of the Assistant Minister, fairly interpreted, suggested that he had understood that he had a binary choice as to whether to proceed under s 501BA(2) without providing natural justice or not to proceed under that provision at all. More particularly, the reasons showed a failure to recognise that there existed an option under s 501BA(2) to invite further submissions notwithstanding that there was no obligation to do so.
4. However, in this case the asserted error is not established on the evidence. Unlike the reasons given by the Assistant Minister in *Ibrahim*, the Statement of Reasons together with the departmental submission do not demonstrate error. The departmental submission correctly stated that the Assistant Minister “may decide to” cancel Mr Burgess’s visa under s 501(3)(b) “without natural justice”. The Assistant Minister correctly stated that s 501(3)(b) of the Act enabled him to cancel a visa without natural justice. The Statement of Reasons correctly summarised the effect of s 501(5) of the Act, namely that there was no obligation to accord natural justice in the exercise of the s 501(3) cancellation power. In short, the reasons do not suggest an understanding by the Assistant Minister that he could proceed under s 501(3)(b) only without providing natural justice.
5. The arguments advanced by Mr Burgess rest not so much on what is said in the Statement of Reasons or the departmental submission but on what is not said. However, the mere absence of a reference in the material to there being an option to accord natural justice does not of itself support an inference that the Assistant Minister erroneously believed he had no such option. Similarly, whilst the materials support an inference that the Assistant Minster was presented with a binary choice between the course of action provided for under s 501(2) and the course of action provided for under s 501(3), it does not follow that the Assistant Minister misunderstood that the latter course obliged him not to give Mr Burgess an opportunity to be heard.
6. It is also pertinent in our view that the Assistant Minister did understand that he could cancel the appellant’s visa under s 501 after according the appellant procedural fairness. That was by proceeding under s 501(2). He decided not to proceed under that section.
7. Accordingly, Ground 1 is not established. That being so, it is not necessary to consider in this judgment the decision in *Nguyen v Minister for Home Affairs* [2019] FCAFC 128.

## Ground 2

1. By this Ground, Mr Burgess alleges that the primary Judge erred by:

2.1 failing to find that the Assistant Minister formed the state of mind required by s 501(3) of the Act, and/or in making a decision to proceed under s 501(3) of the Act rather than s 501(2), on the basis of an erroneous understanding of the legal and practical operation of the Act, in that he understood that, in order to make a decision under s 501(2), the applicant would be required to be provided with a Notice of Intention to Consider Cancellation and given 28 days in which to respond to that notice, when in fact the rules of natural justice are flexible and did not necessarily require that the applicant be given 28 days’ notice of the proposed decision; and

2.2 failing to hold that this was jurisdictional error.

1. This Ground proceeds from the starting point that a misunderstanding of the law in relation to one provision of the Act may constitute jurisdictional error in relation to, or may result in the invalidity of, a decision made under another provision. As a general proposition, that may be accepted: see *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at [62] – [63] and [67] – [69] (Bromberg and Mortimer JJ), *Graham* at [68] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), *Ibrahim v Minister for Immigration and Border Protection (No 2)* (2017) 256 FCR 50 at [24] – [26] and [45] – [47] (White J). The question is whether the principle extends to the provisions now under consideration in the manner contended for by Mr Burgess.
2. The Assistant Minister’s understanding of s 501(2) of the Act was said to be erroneous because s 501(2) did not specify any period in which a visa holder potentially affected by the exercise of the power should have to respond.
3. Clearly enough, s 501(2) of the Act does not expressly specify the content of the rules of natural justice as they apply to its exercise, reflecting the principle that their content must depend upon the circumstances of the case. It is Mr Burgess’s case that the Assistant Minister failed to appreciate that it might have been sufficient to allow a period of less than 28 days within which Mr Burgess might respond to the proposed cancellation. The error was material, it was submitted, because the Assistant Minister should be understood as having been influenced by considerations of urgency. Shortly stated, Mr Burgess had, the day before, been released from immigration detention on Christmas Island, an earlier decision to cancel his visa having been quashed by this Court: see *Burgess v Minister for Immigration and Border Protection* (2018) 259 FCR 197. By the departmental submission, the Assistant Minister was made aware that Mr Burgess was no longer held in detention (although he remained on Christmas Island). He was urged to make his decision as soon as possible.
4. It was submitted that the Assistant Minister’s “antecedent” decision to consider cancellation under s 501(3) rather than under s 501(2) was materially affected by the error because there was some chance that the Assistant Minister might otherwise have decided to accord Mr Burgess natural justice in the exercise of the power under s 501(2) albeit providing him with less than 28 days in which to respond.
5. The primary Judge rejected these arguments on the basis that they raised an issue already rejected by him (being the issue raised by Ground 3 in this appeal). The primary Judge said (at [38]) that the Assistant Minister was “entitled to go straight to s 501(3) of the Act” and that the validity of his decision under that subsection is not affected by any misunderstanding as to the operation of s 501(2). The primary Judge rejected the argument for the additional reason that the Statement of Reasons did not support an inference that the Assistant Minister had necessarily considered that s 501(2) required that a notice period of 28 days be given.
6. For the reasons that follow, we consider that the primary Judge was correct to conclude that the Statement of Reasons did not show that the misunderstanding had in fact occurred.
7. The departmental submission is not to be equated with the Statement of Reasons given by the Assistant Minister for cancelling Mr Burgess’s visa. It nevertheless furnishes some evidence of the advice that had been provided to the Assistant Minister about the decision-making process. For the purposes of what follows it will be assumed that the Assistant Minister read and acted in accordance with the advice set out in it.
8. The departmental submission correctly stated that a decision under s 501(2) attracted a requirement of natural justice. However, as counsel for the Assistant Minister correctly submitted, the reference to a 28 day notice period suggests no more than the existence of a policy or practice adopted by the department to facilitate the provision of natural justice. The reasons contain no statement to the effect that the 28 day notice period was a requirement expressly sourced in s 501(2) of the Act.
9. Moreover, there is nothing in the Statement of Reasons to support a finding that the Assistant Minister understood that the rules of natural justice required a notice period of no less than 28 days. The mere circumstance that the Assistant Minister did not expressly mention that the option to afford Mr Burgess an opportunity to be heard within a tighter time frame does not of itself evidence a misunderstanding that the option was not available. As stated earlier in these reasons, the Assistant Minister’s election to proceed under s 501(3) rather than s 501(2) is not an election in respect of which the Assistant Minister is obliged to provide any reasons at all.
10. Even if the above interpretation of the departmental submission and the Statement of Reasons is wrong, it has not been shown that the rules of natural justice as they applied to s 501(2) would have been fulfilled by providing Mr Burgess with anything less than 28 days within which to respond, having regard to all of the circumstances of the case. In other words, to succeed on this Ground it is not enough for Mr Burgess to show that the submission wrongly suggested that a period of 28 days was a fixed requirement of the statute applicable in every case decided under s 501(2). It was for Mr Burgess to show that a period of something materially less than 28 days could have been provided in fulfilment of the natural justice requirement under s 501(2), but that has not been done. Accordingly, on the facts of the case, it has not been shown how an error of the kind asserted could have materially affected the substantive outcome and so the burden of establishing jurisdictional error has not been discharged: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1.

## Ground 4

1. Ground 4 alleges that the primary Judge erred by:

4.1 failing to find that the Assistant Minister made the decision on the basis of an erroneous understanding of the concept of the national interest; and

4.2 failing to find that the materials before the Assistant Minister did not afford a reasonable or rational foundation for a conclusion that the cancellation of the plaintiff’s visa pursuant to s 501(3) was in the national interest.

### Submissions

1. In the proceedings at first instance, Mr Burgess recognised that his submission to this effect was foreclosed by a Full Court authority. He raised it so as to preserve its availability for consideration on appeal.
2. There are three aspects to Mr Burgess’s submissions in support of this Ground.
3. The first aspect of the argument involves a question of construction. It was submitted that the question to be asked by the Assistant Minister under s 501(3)(d) of the Act was whether it was in the national interest that Mr Burgess’s visa be cancelled in the absence of natural justice, that is, urgently. Mr Burgess sought to draw support for this submission from the structure of s 501 itself and from a comparison of the various powers conferred by it. It was submitted the powers in s 501(2) and s 501(3) are differentiated only by the national interest criterion in s 501(3) and the exclusion of the rules of natural justice from its exercise. It was said to follow from those two differences that the “national interest” was a concept importing a requirement of urgency of a sufficient degree to justify cancellation of the visa without the visa holder being given an opportunity to be heard.
4. Counsel referred to *Re Patterson*, in which Kirby J said:

326 *Introduction of ‘national interest’ decisions*: The introduction of a statutory power to permit the Minister personally to make a decision that the visa of a person affected be refused or cancelled (and the person removed from Australia) ‘in the national interest’ occurred in 1998. The Minister, proposing the enlargement of his powers in circumstances which contemplated the exclusion of the requirements of natural justice and of the code of fair procedures otherwise applicable, told the Parliament that ‘in exceptional or emergency circumstances, the minister, acting personally, will be given powers to act decisively on matters of visa refusal, cancellation and the removal of non-citizens’. In a part of his speech subtitled ‘Emergency cases’ he said:

‘From time to time, there will be emergency cases involving non-citizens who may be a significant threat to the community. These people may be threatening violence or some other act of destruction, or have a prior history of serious crime. In these emergency circumstances, the minister, again acting personally, should have the power to act without notice and have them taken into detention.

Once the visa is cancelled, the non-citizen will have a right to make a submission to the minister as to why the cancellation should be revoked. Natural justice will apply in such cases. However, if they cannot satisfy the minister that they pass the character test, they should be removed immediately.

327 Unfortunately, this statement did not tell the whole story. Because the only conditions for the exercise of the power under s 501(3) are that the Minister reasonably suspects that the person does not pass the character test and is satisfied that the refusal or cancellation is in the national interest, any submission to the Minister could relevantly address only such criteria. By s 501(5) the rules of natural justice and the code of procedure contained in the *Migration Act* do not apply to the decision. Because ‘the character test’ makes reference in one paragraph to the existence of a ‘substantial criminal record’, as defined, and because that definition includes a person ‘sentenced to a term of imprisonment of 12 months or more’, no submission pertinent to the ‘character test’ criterion could be relevant in the case of a person such as the prosecutor. Objectively, the precondition was fulfilled. Subject to the Minister’s satisfaction, in his case, that ‘cancellation is in the national interest’, there was therefore no room for the rules of natural justice and fair procedure to apply. Indeed, they were expressly excluded. *And the justification for the exclusion, given to the Parliament, was that the case could not be delayed by the niceties of natural justice and fair procedure. It was an ‘emergency case’. It required swift action. If the person were in Australia, it necessitated prompt removal*.

…

332 All of the above being said, it is impossible to regard the matters placed before the respondent as sufficient to sustain a reasonable or rational conclusion that the cancellation of the prosecutor’s visa was ‘in the *national* interest’. As such, the power conferred by s 501(3) was not enlivened. *There was no ‘emergency’*. Nor could the particular case of the prosecutor be regarded as involving a significant threat to the *nation* as a whole or the community of the *nation*.

333 *The absence of emergency for the nation was shown by the very history of the case*. The original decision of the Minister was made under s 501(2) of the *Migration Act*. Decisions under that sub-section are not exempt from the obligations of natural justice and the code of procedural fairness. No event occurred, or was suggested, between the original decision by the Minister and the purported decision by the respondent under s 501(3) of the *Migration Act* which converted the case into one in which cancellation of the visa was justified ‘in the *national* interest’. The prosecutor had returned to his home in Gunnedah under parole supervision. He did so again when Callinan J, eventually by consent, quashed the original decision of the Minister. Those who advised the Minister (and later the respondent) to take the decision under s 501(3) of the *Migration Act* must be taken to have known that doing so would effectively deprive the prosecutor of the only relevant factual grounds for withholding a decision to cancel his visa. These were grounds based on discretionary considerations connected with his very long residence in Australia, his family connections, his maternal dependant, his lack of real connection with his country of birth and his compliance with parole conditions and efforts at rehabilitation.

(Emphasis added)

1. The second aspect of the argument turns on the interpretation of the Statement of Reasons. It was submitted that the Assistant Minister’s assessment of the national interest was informed solely by the seriousness of Mr Burgess’s past conduct and the risk that he presented to the Australian community, without any consideration, as an essential aspect of the national interest, of the circumstance that Mr Burgess’s visa would be cancelled in the absence of natural justice. Reliance was placed on the structure of the Statement of Reasons which deal discretely with the question of what the national interest required under a separate heading and in terms that made no reference to the urgency (if any) attending the decision.
2. The third aspect of the argument is that it was not open to the Assistant Minister to conclude that it was in the national interest to cancel Mr Burgess’s visa under s 501(3) of the Act because the material before the Assistant Minister was not capable of supporting a conclusion that a decision was required so urgently such that natural justice could or should not be accorded.

### Reasons of the primary Judge

1. The primary Judge (at [47]) noted that Mr Burgess had accepted that this submission was foreclosed by previous Full Court decisions:

The plaintiff accepts that on the authorities as they stand, his argument must be rejected (*Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220; (2002) 118 FCR 326 at [85]–[90]; *Rangiwai v Minister for Immigration and Border Protection* [2015] FCA 621). He accepts that the decision of Kirby J in *Re Patterson* (at [326]–[327], [332]–[333]) represents a minority view. The plaintiff wishes to preserve his position should this matter proceed further on appeal.

1. Accordingly, the primary Judge did not determine the argument.

### Consideration

1. In *Graham* (at [57]) Keifel CJ, Bell, Gaegler, Keane, Nettle and Gordon JJ said that the satisfaction of the Minister necessary to fulfil the condition in s 501(3)(d) must be formed by the Minister “reasonably and on a correct understanding of the law”. Their Honours continued:

The concept of the national interest, the Minister’s satisfaction as to which is the subject of the second condition of s 501(3), although broad and evaluative, is not unbounded. And the statutory discretion enlivened on fulfilment of those statutory conditions must in each case be exercised by the Minister ‘according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself’.

(footnote omitted)

1. As the primary Judge noted, the reasoning of Kirby J in *Re Patterson* represents a minority view to the extent that his Honour conceptualised the national interest as including an essential condition of urgency or emergency. That reasoning was not followed by the Full Court of this Court in ***Madafferi*** *v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 (French, O’Loughlin and Whitlam JJ) in relation to the exercise of power under s 501A. In that case, the Minister for Immigration and Multicultural Affairs had set aside an original favourable decision and refused to grant a spouse visa in the exercise of a power conferred under s 501A(2)(a) of the Act (a provision conditioned by the same national interest criterion as that contained in s 501(3)(d)). The Minister’s conclusions as to what the national interest required were said to have been expressed in terms that were wrongly confined to the risk that visa applicant presented to the Australian community, assessed by reference to the same facts and circumstances that had rendered him unable to pass the character test.
2. The relevant passages in the Full Court reasons are as follows:

85 The criticism of the Minister’s reasoning in this respect focussed on par 6 of his Statement of Reasons which has been set out earlier. This, it was said, revealed that the Minister took into account only the matters upon which he found Mr Madafferi to have failed the character test and the prospective ‘matters’ which he faced in Italy. Having established that the reason for which Mr Madafferi failed the character test rendered the refusal of the grant ‘in the national interest’ as an abstract question, the Minister, it was said, did not return to consider whether ‘the refusal’ was in the national interest in the particular case. It was submitted that the Minister had failed to apply the staged decision-making process required by s 501. In essence his decision was based on the circumstances which resulted in Mr Madafferi not satisfying the character test. It did not turn on the particular circumstances justifying refusal of a spouse visa in the national interest as ‘involving a significant threat to the *nation* as a whole or the community of the *nation*’ - *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 503; 182 ALR 657 at 743 (Kirby J). Reliance was also placed on the alleged error of the Minister in relying upon his finding that there was a consolidated sentence of four years, eight months and six days imprisonment awaiting Mr Madafferi in Italy. The Minister, it was said, erred in law because he regarded the failure of the character test as determinative of his decision.

86 The Minister in considering the national interest under s 501A(2) may properly have regard to the circumstances which underpin the failure to satisfy him that an applicant for a visa passes the character test. There may be circumstances in which the seriousness of a person’s criminal history will be sufficient to satisfy the Minister that the refusal of a visa is in the national interest. In *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 at 409 the Full Court referred to the seriousness of the visa holder’s crimes in that case and said:

‘It is the seriousness of *that* conduct which has to be assessed in the national interest. Obviously enough, the national interest dictates that people who engage in sufficiently serious crime should not have the benefits of an Australian visa.’

While, as Gaudron J observed in *Re Patterson; Ex parte Taylor* at 418; 675 this does not mean that convictions which result in a person failing the character test are themselves sufficient to entitle the Minister to determine that it is in the national interest that a visa be cancelled, convictions of a sufficiently serious character can lead to that conclusion. After observing that the terms of s 501(3), under consideration in that case, made it clear that national interest considerations are separate and distinct from the question whether or not a person passes the character test her Honour said:

‘That is not to say that the matters which result in a person failing the character test may not also provide the foundation for the minister’s satisfaction that it is in the national interest that that person’s visa be cancelled.’

87 Her Honour went on (at 419; 676):

‘To say that the conduct which leads a person to fail the character test may also provide the foundation for the minister’s satisfaction that it is in the national interest to cancel his or her visa is not to say that it will always do so. Both issues must be considered separately. And where the same conduct is relied upon for both purposes, there must be something in the nature, or the seriousness of that conduct, or in the circumstances surrounding it to found a satisfaction that it is in the national interest to cancel the visa of the person concerned.’

88 Kirby J in the same case accepted that the words ‘in the national interest’ could not be given a confined meaning. As he said (at 502-503; 742-743):

‘However broad may be the jurisdiction conferred by the constitutional writs, they do not permit a court to substitute for the satisfaction of the minister, provided by the Act of Parliament, the satisfaction of judges who are not accountable to the Parliament or the people in the same way as the Minister.’

Nevertheless, in the particular case, he found it impossible to regard the matters placed before the Minister as sufficient to sustain a reasonable or rational conclusion that the cancellation of the prosecutor’s visa was ‘in the national interest’. His Honour set a high threshold for the enlivening of the national interest criterion by reference to the Minister’s indication in the relevant second reading speech discussing the proposed power to be conferred upon him by s 501 that:

‘... in exceptional or emergency circumstances, the minister, acting personally will be given powers to act decisively on matters of visa refusal, cancellation and the removal of non-citizens.’

89 With respect to that view, the bar of national interest does not seem to be set that high by the words of the Act which must be the primary guide to legislative intention. The question of what is or is not in the national interest is an evaluative one and is entrusted by the legislature to the Minister to determine according to his satisfaction which must nevertheless be obtained ‘reasonably’ – *Re Patterson; Ex parte Taylor* at 447; 698 (Gummow and Hayne JJ, Gleeson CJ agreeing). Callinan J agreed with Kirby J that the constitutional writs do not entitle the judges to substitute for the satisfaction of the Minister the satisfaction of the judges (at 519; 755).

1. As is apparent, the Full Court considered that the national interest was not confined in the manner suggested by Kirby J. Counsel’s submissions did not indicate a basis on which the Full Court’s reasoning in *Madafferi* should not be followed.
2. It may be accepted that circumstances of urgency (if they exist) may be relevant to a proper assessment of what the national interest requires in a particular case. But it does not follow that urgency must attend the making of the decision in order for the state of satisfaction required by s 501(3)(d) of the Act to be lawfully formed. There is nothing in the text or structure of s 501 of the Act to suggest that the broad evaluative criterion in s 501(3)(d) should be so confined. Although expressly excluding the application of the rules of natural justice that would otherwise have applied by implication, Parliament did not evince an intention that the phrase “national interest” in s 501(3)(d) should bear anything other than its broad and commonly accepted meaning.
3. As has been emphasised, the power to cancel a visa under s 501(3) of the Act is a power that is exercisable by the Minister personally. The rules of natural justice are excluded from decisions made pursuant to several other powers for which the Minister’s satisfaction of the “national interest” is an essential criterion: see, for example: s 198AB(1), (2) and (7), s 501A(3) and (4), and s 501BA(2) and (3) of the Act. These two features of the statutory scheme reflect the notion that the national interest criterion raises a “largely political question”: *Plaintiff* *S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). While matters affecting the visa holder’s personal interest may bear on the Minister’s assessment of the national interest, they are not the focus of the inquiry. The focus is on the interests of the nation as evaluated by the Minister.
4. The statutory purpose behind the exclusion of the rules of natural justice in s 501(5) is not to facilitate the making of an urgent decision. As has been seen, it remains open to the Minister to afford natural justice to the visa holder whether or not the decision is attended by urgency.
5. In our view the clear and express exclusion of the rules of natural justice provided for in s 501(5) of the Act reflects a policy position of the Parliament having two aspects that clearly arise from the text. First, the identification of what the national interest requires, by its nature, is often a political question and so not one in respect of which the visa holder should necessarily have an entitlement to be heard. Secondly, if it be in the national interest to cancel a visa held by a person, the person should not have an entitlement to be heard on any other matter bearing on the exercise of the power. The meaning of the term “national interest” should not be confined in a way that undermines those policy objectives, however procedurally unfair they may seem when viewed from the perspective of the affected individual.
6. If that analysis is wrong we would nonetheless reject Ground 4 on the facts.
7. The effect of Mr Burgess’s submission is that his criminal convictions resulting in his inability to pass the character test were not sufficient, of themselves, to found a legally reasonable conclusion that cancellation of his visa under s 501(3) without according him natural justice was justified. In short, it was said that the material before the Assistant Minister was not capable of justifying an urgent decision under s 501(3), with the consequence that a decision under s 501(2) of the Act ought to have been made instead. These submissions are not supported by the evidence.
8. The Statement of Reasons includes an express acknowledgement (at [15]) that the national interest consideration was separate and distinct from the question of whether Mr Burgess could pass the character test. The Assistant Minister made a detailed assessment of Mr Burgess’s criminal history. Mr Burgess was, the Assistant Minister said, a recidivist offender who has a significant number of varying convictions, including offences of violence and offences committed against police officers. His criminal history was characterised as “serious”. The Assistant Minister referred to a warning that had been given to Mr Burgess to the effect that his visa may be cancelled as a consequence of any future offending; a warning that Mr Burgess had disregarded. In assessing the likelihood of Mr Burgess reoffending, the Assistant Minister took into account his previous responses to supervision in the community, including the circumstance that Mr Burgess had breached judicial orders and good behaviour bonds. The Assistant Minister said that Mr Burgess had continued to offend notwithstanding that he had the practical support of his de facto partner. The Assistant Minister took into account submissions that had previously been made by Mr Burgess through his representatives and supporters.
9. The Assistant Minister’s reasons concerning the national interest are to be understood against his earlier statements to the effect that a decision under s 501(3) of the Act may be made without giving Mr Burgess an opportunity to be heard and against the advice he had received to the effect that it was preferable to make a decision as soon as possible. Read as a whole, the reasons show an awareness that, although the materials before the Assistant Minister included submissions and evidence that had previously been provided by Mr Burgess or on his behalf, Mr Burgess had not been afforded any opportunity to supplement them. Accordingly, even if the Assistant Minister was obliged to have regard to the circumstance that natural justice had not been accorded, the obligation was fulfilled on the facts.
10. For these reasons, Ground 4 fails.

## Conclusion

1. The appeal should be dismissed, with costs.

|  |
| --- |
| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices White and Charlesworth. |

Associate:

Dated: 30 August 2019