FEDERAL COURT OF AUSTRALIA

Carrascalao v Minister for Immigration and Border Protection

[2017] FCAFC 107

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| File numbers: | NSD 2174 of 2016NSD 2194 of 2016 |
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| Judges: | **GRIFFITHS, WHITE AND BROMWICH JJ** |
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| Date of judgment: | 24 July 2017 |
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| Catchwords: | **MIGRATION** – cancellation of applicants’ visas under s 501(3) of the *Migration Act 1958* (Cth) (***Act***) – whether respondent gave proper, genuine and realistic consideration to the merits of each case in making his cancellation decision – whether respondent engaged in an active intellectual process in determining whether or not to exercise powers under s 501(3) of the *Act* – whether respondent fell into jurisdictional error by failing to consider whether it was in the national interest to make a decision without affording natural justice – whether respondent’s satisfaction that removing the applicants was in the national interest was unreasonable in the legal sense – whether respondent erred in construing or applying the concepts of “member… of a group” and “group involved in criminal conduct” in s 501(6)(b) of the *Act***Held:** respondent’s decisions to cancel applicants’ visas set aside with costs – order that applicants be released forthwith from immigration detention  |
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| Legislation: | *Migration Act 1958* (Cth) ss 47, 501, 501C, Subdiv AB of Div 3 of Pt 2*Migration Reform (Transitional Provisions) Regulations 1994* (Cth) reg 3*Convention on the Rights of the Child.* Opened for signature 20 November 1989. 1577 UTS 3 (entered into force 22 April 1954)  |
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| Cases cited: | *Al-Kateb v Goodwin* [2004] HCA 37; 219 CLR 562*Anderson v Director-General of the Department of Environment & Climate Change* [2008] NSWCA 337*Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1*AVU15 v Minister for Immigration and Border Protection* [2017] FCA 608 *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513*Chester v The Queen* [1988] HCA 62; 165 CLR 611*Gbojueh v Minister for Immigration and Citizenship* [2012] FCA 288; 202 FCR 417*Hogan v Hinch* [2011] HCA 4; 243 CLR 506*Jones v Dunkel* [1959] HCA 8; 101 CLR 298*Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 713; 14 ALD 291*Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140*Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875*Leiataua v Minister for Immigration and Citizenship* [2012] FCA 1427; 208 FCR 448*Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220; 118 FCR 326*McKinnon v Secretary, Department of Treasury* [2006] HCA 45; 228 CLR 423*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24*Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* [1996] FCA 1509; 67 FCR 40*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1*Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145; 190 FCR 248*Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259*Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274 ; 106 FCR 426*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507*Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505*Minister for Immigration and Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229*Parramatta City Council v Hale* (1982) 47 LGRA 319*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379*Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; 254 CLR 28*Plaintiff S297/2013 v The Minister for Immigration and Border Protection* [2015] HCA 3; 255 CLR 231*Pollentine v Bleijie* [2014] HCA 30; 253 CLR 629*Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391*Roach v Minister for Immigration and Boarder Protection* [2016] FCA 750*Roberts v Minister for Immigration and Multicultural Affairs* [2004] 739*Swift v SAS Trustee Corporation* [2010] NSWCA 182*SZVVR v Minister for Immigration and Border Protection* [2016] FCA 1364*Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177*Telstra Corporation Limited v Australian Competition and Consumer Commission* [2017] FCA 316*Tickner v Chapman* [1995] FCA 1726; 57 FCR 451*Water Conservation and Irrigation* Commission *(NSW) v Browning* [1947] HCA 21; 74 CLR 492*Williams v Minister for Justice and Customs* [2007] FCAFC 33; 157 FCR 286  |
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| Date of hearing: | 1 May 2017 |
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| Registry: |  |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | NSD 2174 of 2016 |
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| BETWEEN: | HELDER AGAPITO CARRASCALAOApplicant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONRespondent |

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| JUDGES: | GRIFFITHS, WHITE AND BROMWICH JJ |
| DATE OF ORDER: | 24 JULY 2017 |

THE COURT ORDERS THAT:

1. The respondent’s decision dated 14 December 2016 to cancel the applicant’s visa is set aside.
2. The applicant be released forthwith from immigration detention.
3. The respondent is to pay the applicant’s costs of and incidental to the proceeding, as agreed or assessed.

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

ORDERS

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|  | NSD 2194 of 2016 |
|   |
| BETWEEN: | TOMASI TAULAHIApplicant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONRespondent |

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| --- | --- |
| JUDGES: | GRIFFITHS, WHITE AND BROMWICH JJ |
| DATE OF ORDER: | 19 July 2017 |

THE COURT ORDERS THAT:

1. The respondent’s decision dated 14 December 2016 to cancel the applicant’s visa is set aside.
2. The applicant be released forthwith from immigration detention.
3. The respondent is to pay the applicant’s costs of and incidental to the proceeding, as agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

1. This judgment relates to two proceedings: *Carrascalao v Minister for Immigration and Border Protection* (NSD 2174 of 2016) and*Taulahi v Minister for Immigration and Border Protection* (NSD 2194 of 2016). They are applications for judicial review of the Minister’s decisions to cancel the visas held by Mr Carrascalao and Mr Taulahi respectively. Both decisions were made on the same day, namely 14 December 2016. We will later explain in more detail the circumstances leading up to the cancellation of the visas. The Court was constituted by three Justices to hear both applications for judicial review, which arise in the Court’s original jurisdiction.
2. The Minister’s decisions were made after a Full Court of this Court had, earlier on 14 December 2016, ordered that previous decisions of the Minister to cancel the visas held by Mr Carrascalao and Mr Taulahi (as well as the visa held by Mr Andrew Stevens, who is not a party to the current proceedings) be set aside (see *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 (***Taulahi No 1***)). The Full Court had also ordered that Mr Carrascalao and Mr Taulahi be released immediately from immigration detention. As will shortly emerge, neither applicant had been released from detention when, approximately four hours after the Court’s orders were published, the Minister made the fresh decisions to cancel their visas. The circumstances in which those decisions were made provide a central part of the basis for the current applications. In brief, both Mr Carrascalao and Mr Taulahi claim *inter alia* that the circumstances in which the Minister made the decisions, including the shortness of the time in which he could have reviewed the material before him, meant that he could not have given proper, genuine and realistic consideration to the merits of the two matters. It will be necessary to describe those circumstances at some length.
3. It is convenient first to set out the relevant statutory provisions and then to summarise the background facts in relation to Mr Taulahi and Mr Carrascalao.

## Summary of relevant statutory provisions

1. Section 501 of the *Migration Act 1958* (Cth) as in force at the relevant time (the ***Act***)provided (relevantly) as follows (emphasis in original):

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

*Decision of Minister or delegate – natural justice applies*

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(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 a 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.

…

(4) The power under subsection (3) may only be exercised by the Minister personally.

(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 subsection (3) or (3A).

*Character test*

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

…

(b) the Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

…

*Substantial criminal record*

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

…

1. Power was conferred upon the Minister to revoke a decision made under s 501(3) by s 501C. Section 501C provided (in relevant parts) as follows:

**Refusal or cancellation of visa—revocation of decision under subsection 501(3) or 501A(3)**

1. This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3) or 501A(3) to:

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

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

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

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

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

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

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

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

(ii) particulars of the relevant information; and

(b) except in a case where the person is not entitled to make representations about revocation of the original decision (see subsection (10)) – invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

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

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

(b) the person satisfies the Minister that the person passes the character test (as defined by section 501).

(5) The power under subsection (4) may only be exercised by the Minister personally.

(6) If the Minister revokes the original decision, the original decision is taken not to have been made. This subsection has effect subject to subsection (7).

…

## Summary of background facts concerning Mr Taulahi and Mr Carrascalao

### (a) Mr Taulahi

1. Mr Taulahi is a citizen of Tonga. He first arrived in Australia on 20 December 1988, aged 12. He has been ordinarily resident in Australia for approximately 25 years. He has held a series of Australian visas, most recently a Class BS Subclass 801 Partner (Residence) visa. This was the visa which was cancelled by the Minister on 14 December 2016.
2. Mr Taulahi and his wife have two daughters, who were aged seven and four years old respectively at the time of the Minister’s decision. The younger daughter has special needs requirements. Mrs Taulahi and both the Taulahi children are Australian citizens. Until Mr Taulahi was taken into immigration detention, he and his wife operated successfully a family earthmoving family business called TKL Holdings Australia Pty Ltd, which had approximately 20 employees and provided demolition, excavation and plant hire services. At the time of the cancellation decision, Mr Taulahi was aged 40. Mr Taulahi’s mother and his brother live in Australia and he also has extended familial links to Australia through grandparents, aunts, uncles and cousins.
3. Mr Taulahi has a long criminal history. His first conviction in Australia was recorded on 11 January 1993, when he was aged 16. He was convicted of malicious damage and sentenced to 12 months’ good behaviour and 30 hours of reparation work. He was subsequently convicted of numerous offences as a minor between 1993 and 1994 including the offences of assault; resist police; break, enter and steal; robbery in company and steal motor vehicle. Mr Taulahi’s first offence as an adult was recorded on 17 February 1997 for the offence of possession of a prohibited drug (cocaine), for which he was fined $500.
4. In contrast with the position concerning Mr Carrascalao, the Minister’s reasonable suspicion that Mr Taulahi did not pass the character test related only to the Mr Taulahi’s association with an outlaw motorcycle gang (**OMCG**)called “Lone Wolf”, and not to his criminal record. That finding was also taken into account by the Minister in concluding that he was satisfied that cancellation of Mr Taulahi’s visa was in the national interest for the purposes of s 501(3) of the *Act*.

### (b) Mr Carrascalao

1. Mr Carrascalao was born in East Timor and came to Australia on 25 August 1975, aged seven. He has not left Australia since his arrival and, accordingly, has resided here for more than 41 years. Having been born in East Timor, Mr Carrascalao is a Portuguese citizen. He has not become an Australian citizen.
2. The Minister provided the following information about the visas held by Mr Carrascalao since his arrival in Australia:
3. After arriving in Australia on 25 August 1975, he was granted temporary permits to remain in Australia.
4. On 10 November 1976, he was granted an entry permit to remain in Australia permanently with his mother and siblings. As the permit was not subject to a time limit, this permit was a “permanent entry permit” within the meaning of reg 3 of the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth) (***Transitional Regulations***).
5. The permanent entry permit continued in effect as a transitional (permanent) visa (the **visa**) within the meaning of reg 4 of the *Transitional Regulations,* which permitted Mr Carrascalao to remain indefinitely in Australia.
6. Mr Carrascalao’s parents, four brothers and three sisters all reside in Australia. His parents and six of his siblings are Australian citizens.
7. He has two children, who are both Australian citizens, with his former partner. His current partner is an indigenous Australian, who has two daughters, both minors and one of whom has autism.
8. Mr Carrascalao has a long criminal history, dating back to when he was found guilty of stealing at age 13. On that occasion, no conviction was recorded and no penalty imposed.
9. Mr Carrascalao’s criminal record includes convictions on 9 May 2007 for common assault, contravening an apprehended domestic violence order and driving while disqualified from holding a licence. He was sentenced to 12 months’ imprisonment on each of those charges but the sentences were suspended on Mr Carrascalao entering into a bond to be of good behaviour for 12 months. In deciding on 14 December 2016 to cancel Mr Carrascalao’s visa, the Minister concluded that, for the purposes of s 501(3) of the *Act*, he reasonably suspected that Mr Carrascalao did not pass the character test because of his conviction on 9 May 2007 of common assault.
10. The Minister’s decision to cancel Mr Carrascalao’s visa was also based upon Mr Carrascalao’s past involvement with an OMCGcalled the “Bandidos”. The Minister relied on this matter in concluding that cancellation of Mr Carrascalao’s visa was in the national interest for the purposes of s 501(3)(d) of the *Act*, and in his exercise of the residual discretion under s 501(3) concerning cancellation of the visa.
11. Notwithstanding that Mr Carrascalao declared that he had disassociated himself from the Bandidos and that he was not aware of any criminal activities within the Club, nor involved in any criminal activities personally, and that he would not associate with or become a member of any motorcycle club in the future, the Minister took into account what was described as Mr Carrascalao’s “past close involvement with the Bandidos OMCG” in exercising his discretion to cancel Mr Carrascalao’s visa.

## The judicial review applications

1. Mr Carrascalao’s further amended originating application raised four grounds of review, each of which was also broadly raised by Mr Taulahi in his further amended originating application. Mr Taulahi also relied upon some additional grounds. It is convenient to summarise the four common grounds of review before outlining the additional grounds of Mr Taulahi.
2. **Ground 1**: The Minister failed to give proper, genuine and realistic consideration to the merits on each visa cancellation decision, given the significance and effect of the decisions, the volume of material provided to the Minister in relation to the decisions, and the timeframe within which the Minister made the decisions.
3. **Ground 2**: The Minister failed to give proper, genuine and realistic consideration to (or have regard to) the information put before him by each applicant.
4. **Ground 3**: The Minister failed to have regard to whether it was in the national interest to make the visa cancellation decisions without affording the applicants natural justice.
5. **Ground 4**: The Minister erred in being satisfied that it was in the national interest to cancel each visa because he had not given proper, genuine and realistic consideration to (or have regard to) the information before him, and/or that state of satisfaction was unreasonable in the legal sense. The Minister also misconstrued the “national interest” within the meaning of s 501(3)(d) by adopting an impermissibly confined conception of that phrase, including by holding or assuming that the “national interest” did not include the best interests of the child.
6. The additional grounds of review which were raised only by Mr Taulahi may be summarised as follows (noting that he did not press grounds 5 and 6 in his further amended originating application).
7. **Ground 7:** The Minister erred in construing or applying the concept of a “member… of a group” in s 501(6)(b) of the *Act*. In essence, Mr Taulahi contended that, for a person to fail the character test under s 501(6)(b), the person had to have some “subjective connection”, in the sense of awareness or participation, with the relevant suspected criminal conduct and the Minister had not applied that approach.
8. **Ground 8:** The Minister erred in his construction and application of the phrase “group… involved in criminal conduct” for the purposes of s 501(6)(b). In essence, Mr Taulahi contended that the Minister erred in failing to distinguish between the involvement of a group in criminal conduct and the involvement of individuals other than in their capacity as members of a group in such conduct. He also contended that the Minister misconstrued the provision by proceeding on the basis that it was sufficient that a group be “implicated” in an offence in order to be “involved… in criminal conduct”.

## Some evidentiary matters

1. The evidence in the trial was entirely documentary. It included all the material before the Minister when he made his decisions, including the Department’s submissions to the Minister with their detailed attachments. The Minister’s draft and signed statements of reasons in both matters were also in evidence.
2. The parties adduced detailed evidence concerning the events which occurred within the Minister’s office and his Department culminating in the Minister’s decisions late on 14 December 2016 to cancel the visas. In particular, the evidence showed the events which occurred during the period commencing when the parties were told that the Full Court would be delivering its judgment in *Taulahi No 1* at 4:15 pm on 14 December 2016 (all times referred to in this judgment are to Australian Eastern Standard Time, even though that has required adjustment to the time at which events were recorded as having occurred in Brisbane) and the Minister’s visa cancellation decisions made by him in Brisbane a little over four hours after the Court ordered that Mr Taulahi and Mr Carrascalao be released immediately from detention.
3. This material was set out in affidavits prepared by various Departmental officers (Ms Grant, Mr Addison, Mr Stoddart and Mr Selles), which were read by the Minister, as well as in documents produced by the Department. Some of this evidence was provided pursuant to orders made by the Chief Justice on 22 December 2016 in the context of the Court seeking an explanation as to the events which gave rise to the delay in complying with the Full Court’s order that Mr Carrascalao and Mr Taulahi be released immediately from detention. The Minister did not provide an affidavit in relation to either decision.

## Consideration and disposition of the judicial review challenges

## (a) Ground 1

1. The Minister did not contest that he was obliged by law to give proper, genuine and realistic consideration to the merits of the case in determining whether or not to cancel a visa under s 501(3) of the *Act*. He denied, however, that this meant that he had to give consideration of some particular or definable quality to each of the items of evidence before him.
2. The Minister submitted that the time he had spent considering whether or not to cancel the visas of Mr Taulahi and Mr Carrascalao could not be determinative because:
3. he was entitled to rely on the Department’s summaries of the underlying material (citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 30-31 per Gibbs CJ and *Williams v Minister for Justice and Customs* [2007] FCAFC 33; 157 FCR 286 (***Williams***)at [21] per Gyles, Allsop and Buchanan JJ); and
4. he also had some familiarity with both cases, given his previous decisions to cancel their visas and noting also that several of the attachments to the Department’s submission to him in both cases dated back as far as 2009 and related to general matters of policy and national interest with which, it could be reasonably inferred, the Minister was familiar.
5. The Minister also (correctly) emphasised the danger that the use of an expression such as “proper, genuine and realistic consideration”, as relied upon by both judicial review applicants, could draw the Court into an impermissible merits review.
6. The Court is mindful of the necessity to avoid straying into a review of the merits of the Minister’s decisions (see the frequently cited statements of Brennan J in *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-37). The Court acknowledges that an expression such as “proper, genuine and realistic consideration” can, **if taken out of context**, encourage a “slide” into an impermissible merits review (see the observations of the High Court in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 (***SZJSS***) at [30] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, who referred with apparent approval to Basten JA’s comments on this matter in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45]).
7. The provenance of the expression was identified by the High Court in *SZJSS* at [26] as Gummow J’s judgment in *Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 713; 14 ALD 291 at 292. There his Honour was addressing the ground of judicial review relating to the exercise of a discretionary power in accordance with a rule or policy and without regard to the merits of a particular case. In the context of describing what was required of the Minister’s delegate in considering all relevant material placed before him, Gummow J said that the delegate was required to “give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy”. In *SZJSS*, the High Court did not indicate that it was inappropriate to use the expression in that particular context. Naturally, when doing so, the limits of the judicial review function still need strictly to be observed.
8. The danger of using that or similar expressions has been emphasised in many cases in other contexts. For example, when the expression has been used in conjunction with the ground of judicial review relating to the failure to take into account a mandatory relevant consideration, Courts have acknowledged that its use carries the risk of creating “a kind of general warrant, involving language of indefinite and subjective application, in which the procedural and substantive merits of any Tribunal decision can be scrutinised” (see *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513 (***Ayoub***) at [24] per Flick, Griffiths and Perry JJ, *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; 106 FCR 426 at 442 per Heerey, Goldberg and Weinberg JJ and *Anderson v Director-General of the Department of Environment & Climate Change* [2008] NSWCA 337 at [51]-[58] per Tobias JA, with whom Spigelman CJ and Macfarlan JA agreed).
9. That is not the context in which the judicial review applicants rely upon the expression here. Its use relates specifically to their contention that, in considering whether or not to exercise his power under s 501(3), the Minister was under a legal obligation to consider the merits of their particular cases and that such consideration had to be meaningful, in the sense of being “proper, genuine and realistic”. As we will explain below, we consider that the evaluative judgment which the Court must undertake in assessing whether the Minister has properly considered the merits of the cases before him requires focus on the question of whether the applicants have established that the Minister did not engage in an active intellectual process in determining whether or not to exercise his power under s 501(3) of the *Act*.
10. A series of cases have addressed the meaning of a statutory obligation of a decision-maker to “consider” particular matters (see, for example, *Parramatta City Council v Hale* (1982) 47 LGRA 319 (***Hale***); *Tickner v Chapman* [1995] FCA 1726; 57 FCR 451 at 462 per Black CJ, at 476-477 per Burchett J and at 495-496 per Kiefel J and *Minister for Aboriginal And Torres Strait Islander Affairs v Western Australia* [1996] FCA 1509; 67 FCR 40 (the ***Douglas case***) at 62-63 per Black CJ, Burchett and Kiefel JJ). It is appropriate to say something more about each of those cases, while noting their particular statutory contexts and the fact that those contexts included a statutorily-imposed obligation on the decision-maker to “consider” particular matters.
11. *Hale* illustrates how each case will necessarily turn on its own facts. A multi-member Council was statutorily required by s 90 of the *Environmental Planning and Assessment Act 1979* (NSW), in determining a development application, to take into consideration such of certain specified matters which were relevant. By a majority, the Court of Appeal held that the evidence established that the Council had not considered some particular matters which were required to be considered under s 90. This was because, in the time available, not all members of the Council had been given a reasonable opportunity to understand the significance of certain proposed changes in conditions to any approval and lacked assistance in understanding the consequences of some changes before they were voted on at the Council meeting.
12. In *Tickner v Chapman* an express statutory obligation was imposed upon the Minister under s 10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (***Heritage Protection Act***) to consider personally a report and any representations attached to it, bearing upon the possible making of a declaration which would have the effect of protecting a site which the Minister was satisfied had special significance for Aboriginals. Chief Justice Black said at page 462 (emphasis added):

It is not surprising that the Minister should be required personally to participate in this way in a process that may lead to a declaration under s 10. The powers given to the Minister under the Act for the purposes of protecting Aboriginal heritage are capable of affecting very seriously the interests of third parties, and for this reason the Parliament has provided for decision-making at the highest level. It is this feature of the scheme of the Act – the explicit requirement that the Minister consider the representations — that removes the process under s 10 from the general rule that a Minister is not expected to do everything personally: see the observations of Brennan J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 416 adopting Lord Reid's comments in *Ridge v Baldwin* [1964] AC 40 at 72; cf *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1 at 11-12, per Gibbs CJ. **The express requirement that the Minister consider the representations also gives rise to a more precisely defined duty binding on the Minister than the Minister's duty to consider matters in connection with satisfying himself or herself that a grant of land should be made under s 11 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)**: cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31, per Gibbs CJ, at 37-39, per Mason J, and at 63-65 and 65-66, per Brennan J.

1. In relation to what was meant by the word “consider”, in the context of the Minister’s explicit statutory duty under s 10(1)(c) to consider a report and any representations attached to it, Burchett J said the following at 476-477 (emphasis in original):

What is it to “consider” material such as a report or representations? In my opinion, the Minister is required to apply his own mind to the issues raised by these documents. To do that, he must obtain an understanding of the facts and circumstances set out in them, and of the contentions they urge based on those facts and circumstances. Although he cannot delegate his function and duty under s 10, he can be assisted in ascertaining the facts and contentions contained in the material. But he must ascertain them. He cannot simply rely on an assessment of their worth made by others: cf *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 at 568-569. It is *his* task to evaluate them, a task he can only perform after he knows what they actually are. In a case involving a board which had a duty to “consider” a report, Laskin J, speaking for the Supreme Court of Canada, said: “Certainly, the board must have the report before it”: *Walters v Essex (County) Board of Education* (1973) 38 DLR (3d) 693 at 697. When Gibbs CJ, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31, conceded that the Minister, in the circumstances of that case, was not obliged “to read for himself all the relevant papers”, and that it “would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department”, he also made it plain that the summary must “bring to his attention” all material facts “which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial”. That was in the context of legislation expressly empowering the Minister, as Mason J pointed out at 46, to delegate his powers and to refer matters to another authority.

1. Justice Kiefel (as her Honour then was) was the third member of the Full Court in *Tickner v Chapman*. Her Honour made the following observations at 495-496 (emphasis added):

**To “consider” is a word having a definite meaning in the judicial context. The intellectual process preceding the decision of which s 10(1)(c) speaks is not different. It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the Minister is required to know what they say.** A mere summary of them cannot suffice for this purpose, for the Minister would not then be considering the representations, but someone else's view of them, and the legislation has required him to form his own view upon them.

1. It appears that her Honour may have taken a different view from the majority on whether the Minister was entitled to rely upon Departmental summaries. For reasons which we will develop shortly, we see no legal bar to the Minister taking into account accurate and sufficiently comprehensive summaries of information prepared by his staff or Departmental officers to assist him in exercising his power under s 501(3) of the *Act*.
2. As noted above, the *Tickner v Chapman* concerned a statute which imposed an express obligation on the Minister to “consider” certain matters. As Black CJ observed, this gave rise to “a more precisely defined duty binding on the Minister” than, for example, the Minister’s duty to consider matters in different statutory context, such as that arising under s 11 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
3. It is also important to note that, at 462, Black CJ offered the following meaning of the word “consider” which, in our view, is also applicable when there is a legal obligation to consider something, including the individual merits of a particular case (emphasis added):

Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) **involves an active intellectual process directed at that representation or submission.**

1. As is evident from the extracts above, both Black CJ and Kiefel J took a similar view of the meaning of the word “consider” in *Tickner v Chapman*. Although their Honours used different language in explaining the meaning of the word “consider” in that context, the common denominator is that the decision-maker must engage in an active intellectual process in giving consideration to the relevant matters or criteria.
2. Subsequent cases have endorsed the principle that when a decision maker is required by statute to consider a claim or other mandatory criteria, the decision maker must engage in an active intellectual process directed at that claim or criteria (*Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140 at [47]-[54] per Lindgren, Rares and Foster JJ; *SZVVR v Minister for Immigration and Border Protection* [2016] FCA 1364 at [24]-[26] per Collier J; *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2017] FCA 316 *(****Telstra v ACCC***)at [62] and [71] per Foster J; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145; 190 FCR 248 (***Khadgi***)at [57] per Stone, Foster and Nicholas JJ; *AVU15 v Minister for Immigration and Border Protection* [2017] FCA 608 at [10]-[11] per Bromberg J). This does not require the decision-maker to refer in the reasons for decision to every piece of evidence and every contention made by an applicant, and it may be that some material provided will not be relevant to the criteria. Also, in accordance with well-known authority, the reasons of the decision-maker should not be scrutinised “minutely and finely with an eye keenly attuned to the perception of error” (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at [30] per Brennan CJ, Toohey, McHugh and Gummow JJ, as cited in *Khadgi* at [63] and *Telstra v ACCC* at [62]).
3. We are of the viewthat the meaning of the word “consider” set out in *Tickner v Chapman* and the requirement for a decision-maker to engage in an active intellectual process in giving consideration to the relevant matters or criteria should also be applied in determining grounds 1 and 2 of the present applications. As noted above, under s 501(3), the Minister has a discretion to cancel a visa if the Minister reasonably suspects that the person does not pass the character test and is satisfied that the cancellation is in the national interest. Otherwise, the *Act* does not expressly oblige the Minister to consider any particular thing or matter before deciding to exercise his powers under that provision. Nevertheless, as we have noted above, the Minister did not contest that he was under a general legal obligation to consider the merits of their cases before cancelling the visas of both Mr Taulahi and Mr Carrascalao. An express statutory obligation on a decision-maker to consider (or have regard to) something may well provide a “more precisely defined duty”, as Black CJ observed in *Tickner v Chapman*. In our view, however, the ordinary meaning of the word “consider” in this judicial review context requires the Minister to engage in an “active intellectual process” in assessing the merits of a case when contemplatingthe possible exercise of the power under s 501(3).
4. Thus the central focus in the two proceedings here is on the question whether the Minister engaged in an active intellectual process in considering the merits of the two cases before him. Whether or not there was such an active intellectual process requires the Court to conduct an evaluative judgment, taking into account the available evidence and reasonable inferences, as toall the relevant facts and circumstances of each case. These include, but are not limited to, the nature and volume of the material placed before the Minister to assist his decision-making, as well as other matters which arise from the relevant statutory context. We will discuss some of those statutory indicators shortly.
5. Before we do, however, it is appropriate to state two matters. First, a finding by the Court that the Minister has not engaged in an active intellectual process will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof. Secondly, some broad guidance may be obtained from other authorities as to the kinds of circumstances in which such a finding could be made. In referring to these authorities, we do not suggest that the requisite evaluative judgment is to be conducted as though it involves a “tick the box” comparative exercise by reference to other decided cases. As we have emphasised, each case will necessarily turn on its own particular facts and circumstances.
6. The *Douglas case*,as referred to above, has some broad parallels with these proceedings, with particular reference to the significance which was attached by the primary judge, and the Full Court on appeal, to the limited time which was available to the Minister to do what he said he had done in a statement of reasons provided by him. That case involved a challenge to the Minister’s decision to make a declaration under s 10(1) of the *Heritage Protection Act*. One of the issues in the proceedings was whether the Minister had considered certain representations. The Court emphasised that the Minister’s duty under s 10(1)(c) to “consider” both the report and the representations which had been received by the reporter and which were required to be attached to the report, was a personal non-delegable task. The Minister’s statement of reasons said that he had obtained a report to which representations received by the reporter were attached. At first instance, the primary judge held that, while the matter was “close to the borderline”, the Minister had not considered the representations. The primary judge attached some significance to the fact that the Minister could have given evidence to clarify whether he had considered the representations, but had not done so. Some evidence was given, however, by the Minister’s advisor (a Mr McLaughlin). At the end of Mr McLaughlin’s cross-examination at the trial, the primary judge adjourned the proceeding to allow the Minister to adduce further evidence on the matter, but none was provided. The Minister simply relied upon his advisor’s evidence of the Minister’s normal practice of “reading everything” and of the advisor having read the representations on the Minister’s behalf. The primary judge found that, in the absence of further evidence, greater reliance could be placed on other inferences which could be drawn from the evidence and which supported the claim that the Minister had not considered the representations in the relevant sense.
7. The Full Court found at 62-63 that the evidence before the primary judge disclosed that the Minister did not himself ever receive the representations, nor was there any evidence which indicated to the Minister where the representations could be found. The Full Court described the state of the evidence at 63:

… It showed that there was a task which would take some days to complete, and that there were available only a few days, if that, for the Minister to do so. His adviser had been working on the one set of the representations over Easter, and there was nothing to indicate the Minister was in his office, where the representations were located, until 5 April, the day before the declaration was made. There was no discussion with the adviser who had read them, and no other apparent means by which the Minister could have informed himself of their content. In these circumstances, a conclusion that the Minister most likely did not have access to the representations, and had no time to consider them was open. The critical factor, it seems to us, which emerges from the evidence is the strong suggestion that the Minister simply had insufficient opportunity to read the representations. And there was no cogent evidence to suggest otherwise. The s 13 reasons did not, given the evidence of Mr McLaughlin, deserve any weight. The conclusion for which Mr and Mrs Douglas contended was persuasively open. That the Minister has insufficient time and did not read the representations gained further support from his failure to adduce further evidence. His Honour was in our view correct in holding that there had not been the necessary consideration of the representations.

1. As is emphasised in this passage, the Full Court saw the critical factor as the strong indication arising from the evidence that the Minister had had an insufficient opportunity to read the representations, and there was no evidence to the contrary. The Full Court added that the inference that the Minister had had insufficient time and had not read the representations was reinforced by the Minister’s failure to adduce further evidence in the particular circumstances of the case.
2. As we have emphasised, each case must necessarily turn on its own particular facts and circumstances as established by the evidence. In the *Douglas case*, there was a finding that the task of considering the relevant representations would take “some days” to complete and there was a finding that the Minister had not turned his mind at all to the representations.
3. There are several aspects of the particular statutory scheme here which help define the scope of, and give content to, the Minister’s legal obligation to consider the individual merits of a case in deciding whether or not to cancel a visa under s 501(3) of the *Act*.
4. First, in such a case, there is no formal application before the Minister. This stands in contrast with the position under s 501(3) when the Minister is considering whether or not to refuse to **grant** a visa, as in this circumstance there must necessarily be a valid application for a visa before the Minister (see s 47 of the *Act*).
5. Secondly, s 501(5) of the *Act* states expressly 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 s 501(3). Accordingly, the Minister is under no legal obligation to inform the affected visa holder or anyone else of the Minister’s intention to consider cancelling a visa under this provision, nor to invite their comments. This serves to underline the significant power which is vested in the Minister and the importance of it being exercised in accordance with relevant legal requirements.
6. Thirdly, and importantly, s 501(4) provides expressly that the power under s 501(3) may **only** be exercised by the Minister personally. This may reasonably be seen to reflect a legislative intention that the powerbe exercised at the highest level of government, having regard to the national interest considerations and the absence of an obligation to provide natural justice. As Hayne J observed in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [187], conferring power on a Minister “may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject”.
7. Fourthly, it is important to note the obligations imposed upon the Minister under s 501C (reproduced at [5] above) when a visa has been cancelled under s 501(3). After making such a decision, the Minister is obliged by s 501C(3) to do various things. In particular, the Minister is obliged, as soon as practicable after making such a decision, to give the affected person, in a way that the Minister considers appropriate in the circumstances, a written notice that sets out the visa cancellation decision and particulars of a “relevant information”. This term is defined in s 501C(2) as information (other than non-disclosable information) which the Minister considers:
8. would be the reason, or part of the reason, for making the original decision; and
9. is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.
10. Unless a relevant exception applies, the Minister is also obliged by s 501C(3)(b) to invite the affected person to make representations about the possible revocation of the original visa cancellation decision. The power of revocation is vested only in the Minister personally (see s 501C(5)).
11. There is a significant limitation on the right of an affected person to make representations to the Minister concerning revocation of a visa cancellation decision. It relates to the fact that, under s 501C(3), the only relevant representations which the affected person can make, and which the Minister is obliged to consider, are representations that are directed to the issue of satisfaction of the character test. As the Full Court stated in *Taulahi No 1* at [51]:

The result is that, although s 501C(3) contemplates that a former visa holder whose visa has been cancelled under s 501(3) will have an opportunity to make representations about the revocation of the cancellation decision, the only relevant representations are those that relate to satisfaction of the character test. Because of the definition in s 501(6), however, the application of the character test does not generally allow for any nuanced judgment. Representations about matters that might incline the Minister to revoke the decision as a matter of discretion, even though the former visa holder is unable to satisfy the Minister that he or she passes the character test, cannot under the statutory regime applicable to a decision under s 501(3), form a basis for revocation. Bearing in mind that the rules of natural justice have no application to a decision made under s 501(3), a person whose visa has been cancelled under s 501(3) has therefore no statutorily-conferred opportunity at any stage of the process to persuade the Minister that a visa should not be cancelled on discretionary grounds. The position is different if the Minister proceeds to cancel a visa under s 501(2) of the *Migration Act*, because in this case the visa holder has an opportunity to inform the Minister of the matters that the visa holder believes are relevant to the Minister's exercise of discretion, even though he cannot satisfy the Minister that he or she passes the character test, so that they may be brought to bear on the Minister's consideration of whether, as a matter of discretion, a visa ought not be cancelled.

1. These features of the statutory framework, particularly the displacement of the requirements of natural justice and the limited scope of the representations which an affected person may make in seeking to have the Minister revoke a visa cancellation decision, highlight the need for the Minister to exercise his important power under s 501(3) of the *Act* with appropriate care and attention, including by engaging in an active intellectual process in reviewing relevant materials placed before him to assist in the discharge of this significant statutory function.
2. In addition to the features of the statutory scheme just identified, it may be accepted that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff, including have them prepare summaries of information for review by him. There are, however, at least three qualifications to that proposition:
3. any such summary which is materially deficient may give rise to an inference that the decision-making process was not properly conducted by the Minister (see, for example, *Williams* at [21]-[30]; *Minister for Immigration and Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229 at [32]-[33] per Tamberlin, Mansfield and Emmett JJ; *Roberts v Minister for Immigration and Multicultural Affairs* [2004] FCA 739 at [44] per French J; and *Gbojueh v Minister for Immigration and Citizenship* [2012] FCA 288; 202 FCR 417 (***Gbojueh***) at [63] per Bromberg J);
4. the use of a departmental summary may not be appropriate when what is sought to be summarised is a substantive argument (as opposed to an assertion of fact). Attempts to summarise material of this kind may be fraught, because the manner of the summary may cause some of the substantive force which the document may otherwise have had to be lost; and
5. the Minister’s entitlement to have regard to a summary or submission prepared by his Department must take into account any statement or indication in such a document which advises the Minister of the need for him or her personally to consider relevant information in a document which is summarised, as is the case here in respect of the Department’s submissions concerning both Mr Taulahi and Mr Carrascalao.
6. We accept the Minister’s submission that another relevant matter to take into account in the assessment of whether the Minister did engage in the requisite intellectual process is the extent to which he may have been familiar with the matters given his previous decisions to cancel the visas of Mr Carrascalao and Mr Taulahi (on 17 May 2016 and 8 April 2016 respectively). This consideration is tempered, however, by the length of time which had lapsed since the Minister previously reviewed their cases, and by the fact that the Minister did not provide any evidence of the extent to which he had retained memory of the two cases. Moreover, in contrast with the Minister’s previous visa cancellation decisions, no non-disclosable information was apparently relied upon by the Minister on 14 December 2016. The Minister had to turn his mind to the significance of this difference if he drew upon his previous review of the cases.
7. In the light of these principles and considerations, it is appropriate to set out the particular relevant circumstances surrounding the Minister’s decisions to cancel the visas of both Mr Carrascalao and Mr Taulahi.

### (c) Circumstances surrounding the Minister’s cancellation decisions

1. The evidence indicates with some precision the time which was available to the Minister to review the lengthy written materials before him when deciding for the second time to cancel the visas of Mr Carrascalao and Mr Taulahi.
2. It is convenient to focus first on the matters leading to the Minister’s decision at 8:18 pm to cancel Mr Taulahi’s visa before addressing the events leading to the decision made seven minutes later (at 8:25 pm) to cancel Mr Carrascalao’s visa.

### (i) Mr Taulahi

1. The Full Court found in *Taulahi No 1* that the Minister had fallen into jurisdictional error in failing properly to form a reasonable suspicion whether Mr Taulahi “has been or is a member of a group or organisation” and whether the group or organisation “has been or is involved in criminal conduct” for the purposes of s 501(6)(b) of the *Act*. That is because the Minister failed to make definitive findings in respect of the various elements of the two conditions in s 501(6)(b) in respect of Mr Taulahi (see *Taulahi No 1* at [141]-[150]). The same error was also found in Mr Carrascalao’s case.
2. The Full Court found an additional jurisdictional error which invalidated the Minister’s first visa cancellation decision in respect of Mr Taulahi. In brief, that error was the Minister’s failure to have regard to the legal consequences of his decision to cancel Mr Taulahi’s visa (see *Taulahi No 1* at [53]-[102]).
3. It was common ground that, when the second visa cancellation decision was made, the Minister had before him:
4. a draft statement of reasons (totalling 58 paragraphs which extended over 9 pages), which was adopted and signed by the Minister without alteration;
5. the Department’s submission for decision by the Minister on the issue whether or not Mr Taulahi’s visa should be cancelled (totalling 13 pages); and
6. detailed attachments to the Department’s submission (there were 32 attachments totalling approximately 308 pages).

Thus the material which was placed before the Minister relating to Mr Taulahi totalled approximately 330 pages. The attachments to the Department’s submission covered a wide range of information, some of it personal to Mr Taulahi (such as his criminal record and migration history), while some was of a more general nature (such as media articles concerning the Lone Wolf OMCG and various Government agency reports on crime). A copy of the Full Court’s decision in *Taulahi No 1*), which totalled 65 pages, was provided as one of the attachments.

1. It is relevant to note some particular features of the Department’s submission. At [6], the Minister’s attention was drawn to an index of attachments and he was told that “all of the information are (sic) at **Attachment 4**, for your consideration of cancellation of” Mr Taulahi’s visa under s 501(3). Furthermore, in [8] the Minister was given the following advice (emphasis added to first six words):

**After considering all of the material**, please record your decision and sign on the Decision Page at **Attachment 1**. If you decide to cancel Mr Taulahi’s visa under s 501(3), a draft Statement of Reasons is at **Attachment 3** for your signature, subject to any amendments you consider necessary.

1. The Department’s submission included a page containing six separate Departmental recommendations, four relating to matters which the Minister should note and two relating to action (by signature) by the Minister. This document told the Minister that it was desirable that he make his decision “as soon as practicable”. The four recommendations as to noting gave the Minister the choice between “noted” and “please discuss”. The two recommendations involving signature by the Minister gave him the choice between “signed”, “not signed” and “please discuss”. Naturally, this required the Minister to read the six recommendations before indicating his response to each of them by placing a circle around his selected response. The Minister circled one response to each recommendation, signed the Recommendation Page and, by hand, inserted the date.
2. There was another page in the Department’s submission which required similar action on the Minister’s part. This document, the Decision Page, was included after the index of attachments and before the draft statement of reasons. It is headed (emphasis in original) “**VISA CANCELLATION UNDER SECTION 501(3) OF THE MIGRATION ACT 1958 – DECISION BY THE MINISTER FOR IMMIGRATION AND BORDER PROTECTION”**.After giving Mr Taulahi’s name and date of birth, the Decision Page contains the following statement at the top of the page (emphasis added):

**I have considered all information before me** in connection with the possible cancellation of his Class BS Subclass 801 Partner (Residence) visa.

1. Beneath that statement there were four express options for the Minister’s consideration. He was asked to circle the selected option. The options were divided between “non-cancellation outcomes” and “cancellation outcome”. As requested, the Minister circled by hand the option he selected, being a “cancellation outcome”. He wrote his signature on the bottom of the Decision Page and entered, by hand, details concerning the date, time and location of his decision.
2. The Minister signed the draft statement of reasons, without alteration, and again by hand completed details relating to the date, time and location of his decision to cancel Mr Taulahi’s visa. The statement of reasons contains numerous statements by the Minister that he had “noted”, “had regard to” or “considered” identified matters in deciding to cancel Mr Taulahi’s visa.
3. The material before the Minister did not include representations made on Mr Taulahi’s behalf by his lawyers. They had been sent by email at 6:12 pm on 14 December 2016 to the Minister and to the cancellation unit of the Department. The email to the Minister was sent to an email box with the address minister@border.gov.au. This is a general email address for communications with the Minister. Evidence was given that the email address has not been designated by the Department as one to which correspondence relating to character matters should be sent (although the evidence did not indicate whether the Department had designated a particular email address for that purpose). The mailbox was not monitored 24 hours a day. It was monitored on weekdays between normal business hours (i.e. 8:30 am and 5:00 pm) by the Ministerial correspondence team in the Ministerial, Parliamentary and Communication Branch of the Department. When an email is sent to this particular email address an automated response is generated and sent to the sender in the following terms:

Thank you for your email to the Minister for Immigration and Border Protection. The Minister appreciates hearing your views. Please be assured they will be noted. The Minister receives a large number of emails and the Department of Immigration and Border Protection may be asked to respond on his behalf. While most emails receive a response within 20 business days, response times vary. In some circumstances no response may be provided.

1. Mr Taulahi’s material emailed at 6:12 pm was not seen until the following morning, i.e., after the second visa cancellation decision had been made.
2. Mr Taulahi’s lawyers also sent the representations to another email address, visa.cancellations@border.gov.au. This is an email address designated for use for correspondence from and to the Department relating to general cancellation decisions, being decisions which **do not** involve the exercise of any of the character powers under the *Act*. Mr Addison gave unchallenged evidence that this address is used in relation to decisions made by Ministerial delegates but not in relation to decisions involving the exercise of the Minister’s powers personally. Mr Addison deposed that the email box was monitored, including by officers within his team, but not constantly. He acknowledged that Mr Taulahi’s material had been delivered to this email box at 6:12 pm on 14 December 2016 and said that, on the following day at 11:28 am, it had been forwarded to the area of the Department involved in visa cancellations on character grounds. Mr Addison also deposed that the material would have been forwarded at that time on 15 December 2016 after having been reviewed by an officer from his team.
3. As with his decision concerning Mr Carrascalao, the Minister did not rely upon any non-disclosable information in deciding on 14 December to cancel Mr Taulahi’s visa. He had relied on information of this kind in his previous decision to cancel Mr Taulahi’s visa.
4. It is relevant to highlight some particular aspects of the Minister’s statement of reasons in respect of Mr Taulahi. In contrast to the position concerning Mr Carrascalao, the Minister’s determination that Mr Taulahi did not pass the character test was based only on s 501(6)(b), i.e. a reasonable suspicion concerning Mr Taulahi’s past association with the Lone Wolf OMCG. The Minister was satisfied that Mr Taulahi had held the positions of NSW State President of the Lone Wolf OMCG and Sergeant at Arms, both being positions of authority. The Minister said that he reasonably suspected that Mr Taulahi has been a member of that OMCG and that Lone Wolf had been identified by the Australian Criminal Intelligence Commission as being the fifth largest OMCG in Australia. It was one of several OMCGs which were the target of the national taskforce Operation Morpheus, which aimed to target criminal activity of Australia’s highest risk OMCGs and their members.
5. The Minister said, after considering open source material, that he reasonably suspected that the Lone Wolf OMCG has been, and continues to be, involved in criminal conduct and that its members are alleged to have committed serious criminal conduct, including the production of commercial quantities of drugs, drive by shootings, violent conduct and intimidation, and breaches of liquor licensing laws. Having regard to this material, the Minister stated that he reasonably suspected that the Lone Wolf OMCG “has been and is involved in criminal activity”. Therefore, the Minister concluded that he reasonably suspected that Mr Taulahi did not pass the character test by virtue of s 501(6)(b), in that he reasonably suspected that, at the date of the visa cancellation decision, Mr Taulahi had been a member of the Lone Wolf OMCG and that that group had been and was involved in criminal conduct.
6. In determining that it was also in the national interest to cancel Mr Taulahi’s visa, the Minister said that he took into account various matters, including the Government’s National Security Strategy and the Commonwealth Organised Crime Strategic Framework Overview, which recognised that organised crime is an issue of national security, and that the Australian Government was committed to preventing, detecting and disrupting organised crime. He had regard to Operation Morpheus and its purpose of targeting Australia’s highest risk OMCGs and their members and detecting their criminal activities. He said that he had had regard to an information report provided to him by the Australian Criminal Intelligence Commission which stated that Mr Taulahi had, until recently, been the NSW State President of Lone Wolf and previously its Sergeant at Arms. The Minister also took into account photographs which he found showed Mr Taulahi in 2014 with the National President of the Lone Wolf OMCG. The Minister concluded that cancellation of Mr Taulahi’s visa was in the national interest “having regard to his past close involvement with the Lone Wolf OMCG”. He said that the information before him raised concerns of such a serious nature that he should, in the national interest, use his discretionary power to cancel Mr Taulahi’s visa without prior notice.
7. After stating his satisfaction that it was in the national interest to cancel Mr Taulahi’s visa, the Minister then stated that he had considered whether there were relevant considerations that might support a decision not to do so. The matters which the Minister considered in this regard were his assessment of the risk Mr Taulahi posed to the Australian community, the best interests of his two children, the strength, nature and duration of Mr Taulahi’s ties to Australia, and the hardship which Mr Taulahi might experience if he were returned to Tonga.
8. In [54] of his statement of reasons, the Minister stated that, having given “**full** **consideration to all the information before me in this case**” (emphasis added), he reasonably suspected that Mr Taulahi did not pass the character test and, further, that he was satisfied that it was in the national interest to cancel his visa. He referred to other considerations which he had taken into account and then expressed his conclusion at [58] that the considerations favouring non-cancellation (particularly the best interests of Mr Taulahi’s children and his niece and nephews to which the Minister said he had given primary consideration) were outweighed by the national interest considerations. Therefore, the Minister decided to exercise his discretion to cancel Mr Taulahi’s visa.
9. As already noted, the reasons given by the Minister were those prepared in advance by the Department. They were the only draft reasons provided to the Minister. The Minister signed and dated the Departmental draft without making any alteration to it.

### (ii) Mr Carrascalao

1. In the previous proceeding in *Taulahi No 1*, the Full Court found that the Minister had fallen into jurisdictional error in failing properly to form a reasonable suspicion as to whether Mr Carrascalao “has been or is a member of a group or organisation” and whether the group or organisation “has been or is involved in criminal conduct” for the purposes of s 501(6)(b) of the *Act*. That is because the Minister failed to make definitive findings in respect of the various elements of the two conditions in s 501(6)(b) (see *Taulahi No 1* at [141]-[150]).
2. The Minister’s second decision to cancel Mr Carrascalao’s visa was made at 8:25 pm on 14 December 2016 (seven minutes after the time at which the Minister had made his decision concerning Mr Taulahi), when Mr Carrascalao still remained in immigration detention, despite the Full Court’s orders which were made 4 hours earlier.
3. It is common ground that, when the second visa cancellation decision was made, the Minister had before him:
4. a draft statement of reasons (totalling 82 paragraphs which extended over ten pages), which was adopted and signed by the Minister without alteration;
5. the Department’s submission for decision by the Minister on the issue whether or not the visa should be cancelled (totalling 9 pages); and
6. detailed attachments to the Department’s submission (comprising 31 attachments which totalled approximately 350 pages).

Thus, the material before the Minister relating to Mr Carrascalao totalled approximately 370 pages. Some of the attachments related specifically to Mr Carrascalao’s personal circumstances, including his criminal record and migration history, as well as his social media profile. Other attachments were of a more general nature, such as copies of various publications by the Australian Crime Commission on OMCGs and media articles relating specifically to the Bandidos. A copy of the Full Court’s reasons for judgment in *Taulahi No 1* was also attached, which totalled 65 pages.

1. The attachments also included written representations made on behalf of Mr Carrascalao. The representations included:
2. statements made by Mr Carrascalao’s solicitor based on her instructions concerning Mr Carrascalao’s association with the Bandidos, including that he was no longer a member of the Club nor associated with its members, that he did not intend to associate with them, and that, while he had been associated with the Club in the past, he was not aware of any criminal activities;
3. information concerning his three children (two of whom were minors) and his two step-children; and
4. a claim that his children, step-children and fiancée would suffer irreparable harm if he were removed from Australia because of his relationship with them.
5. The representations which were made on behalf of Mr Carrascalao by his solicitor were emailed to the Minister at about 4:47 pm on 14 December 2016. Accordingly, the representations were made not long after the Full Court had handed down its decision earlier that day and before the Minister made his second visa cancellation decision. Annexed to the solicitor’s letter were letters from both Mr Carrascalao and his brother-in-law. These letters were each one and a half pages in length. This material formed Attachments K1 and K2 to the Department’s submission to the Minister.
6. As with the submission concerning Mr Taulahi, the Departmental submission referred the Minister to an index of the attachments, the attachments themselves, and told the Minister that the submission had been prepared for his consideration of cancellation of Mr Carrascalao’s visa (see [69] above).
7. The Recommendation Page (which formed part of the Department’s submission) contained seven separate recommendations: five as to matters the Minister should note and two as to signature. The options in relation to each recommendation corresponded with those in Mr Taulahi’s case. The Minister circled by hand his choice of option in relation to each recommendation. Obviously, the Minister would have had to read each recommendation before doing so. He also signed and dated the Recommendation Page as suggested.
8. The Department’s submission in respect of Mr Carrascalao contained another separate and similar Decision Page to that which was placed before the Minister in respect of Mr Taulahi, as described in [71]-[72] above. The Minister was requested to circle which of four options were selected by him. The options were divided between “non-cancellation outcomes” and “cancellation outcome”. The Minister would have had to have read this one page document in order to comply with the request. As was the case with Mr Taulahi, the Minister circled the various options to indicate his decision, signed the bottom of the page and, by hand, filled in details relating to date, time and location. By signing the Decision Page, the Minister confirmed that he had “considered all information before me in connection with the possible cancellation of” Mr Carrascalao’s visa, as stated at the top of the page.
9. The Minister signed the draft statement of reasons, without making any alterations, and entered by hand on the final page of that statement the date, time and location of his decision to cancel Mr Carrascalao’s visa. As was also the case with the statement of reasons concerning Mr Taulahi, the Minister stated that he had “**given full consideration to all of the information before me**” (emphasis added) and the reasons contain numerous statements by the Minister that he had “considered”, “noted”, “accepted”, “recognised” or “had regard to” various matters in coming to his decision to cancel the visa.
10. In contrast with the position with the Minister’s previous decision to cancel Mr Carrascalao’s visa, the Minister did not on 14 December 2016 rely upon any non-disclosable information (see s 503A of the *Act*).
11. Several aspects of the Minister’s statement of reasons concerning Mr Carrascalao should be highlighted. The first is that, having found that Mr Carrascalao did not pass the character test because of his substantial criminal record, the Minister then turned his attention to whether it was in the national interest to cancel the visa. At [18], the Minister referred to the Full Court’s decision in *Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220; 118 FCR 326 (***Madafferi***)at [86] per French, O’Loughlin and Whitlam JJ and the Court’s statement there that:

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.

1. The Minister noted matters relating to Mr Carrascalao’s “pattern of repeat offending” [22], including “violent offences” [20] and offences having the “potential to physically harm members of the Australian community” [23]; his “disrespect for Australia’s laws” [24]; his “past close involvement with the Bandidos OMCG” [32] (which included findings that, based on material in Mr Carrascalao’s Facebook account (including photographs), Mr Carrascalao was a “prospect for recruitment into the Bandidos OMCG”). The Minister then found that Mr Carrascalao became “a fully patched member of the Bandidos OMCG” and “wore “clothing supporting the Bandidos OMCG” [26]. The Minister made reference to the government’s national taskforce targeting high risk OMCGs (Operation Morpheus) [27], as well as to information in the public domain regarding some activities of the Bandidos, including in illegal drug production, supply, trafficking and sale offences and gun offences which included shootings, violence and intimidating conduct [28]. The Minister said that he had considered representations made by or on behalf of Mr Carrascalao to the effect that he would not associate with, or become a member of, any motorcycle club in the future [29]-[31].
2. The Minister’s assessment of the national interest is contained in [32] and [33] of his statement of reasons:

32. Notwithstanding the representations mentioned above, I consider that the cancellation of Mr CARRASCALAO’s visa is in the national interest having regard to the nature of his criminal history and his past close involvement with the Bandidos OMCG.

33. I concluded that the information before (sic) in relation to Mr CARRASCALAO’s criminal conduct as well as his past involvement of (sic) the Bandidos OMCG raised concerns that were of such a serious nature that the use of my discretionary power to cancel Mr CARRASCALAO’s transitional (permanent) visa without prior notice, is in the national interest.

1. Having expressed that view, the Minister then proceeded in [34]ff to consider a range of other matters under the heading “OTHER CONSIDERATIONS”. The Minister said that he did so in recognition of the fact that the power to cancel a visa under s 501(3) is discretionary. The Minister stated that he had considered whether there were relevant considerations which “might support not cancelling Mr CARRASCALAO’s visa despite my satisfaction that it is in the national interest to do so”. Those other matters included the risk which Mr Carrascalao posed to the Australian community through re-offending and his past involvement with an OMCG; the best interests of his minor children and two step-daughters (which the Minister said in [50] was a primary consideration); the strength, nature and duration of Mr Carrascalao’s ties to Australia, and the impediments that Mr Carrascalao would face if he was removed to Portugal.
2. In the section of the statement of reasons in which the Minister expressed his ultimate conclusions, he said at [82]:

I find that the considerations favouring non-cancellation, in particular the best interests of the affected children treated as a primary consideration and Mr CARRASCALAO’s ties to Australia and the hardship on him and his family members, are outweighed by the national interest considerations referred to above and I have decided to exercise my discretion to cancel Mr CARRASCALAO’s transitional (permanent) visa under paragraph 501(3)(b) of the Act.

### (iii) The timeline of events leading up to the Minister’s visa cancellation decisions

1. Both Mr Taulahi and Mr Carrascalao relied on a detailed timeline of events as supporting grounds 1 and 2, which drew largely on the evidence adduced by the Minister concerning the decision-making process. We record the events in the timeline below.

#### (A) The period between the Full Court hearing in November 2016 and the delivery of judgment in Taulahi No 1 on 14 December 2016

1. On 10 and 11 November 2016, the hearing of the judicial review challenges to the Minister’s first cancellation decisions took place before the Full Court in Sydney (exercising original jurisdiction), with the judgment then reserved.
2. At 5:03 pm on 28 November 2016, an email was sent from the Department to the Minister’s office (copied to the Minister’s Chief of Staff and numerous other individuals) reporting on the Full Court hearing. The email predicted that the Minister’s decisions would be set aside in respect of Mr Carrascalao and Mr Taulahi, and possibly in respect of Mr Stevens, on the basis of findings that the decisions were affected by jurisdictional error. It was observed that, if the Court were to set aside the Minister’s decisions, the applicants would have to be released from immigration detention. Given the number of different challenges made by the applicants to the Minister’s cancellation decisions, it was said to be difficult to predict the basis on which the Court would determine the three matters in order to prepare a submission for the Minister in advance of the Court’s judgment. The email said that it would be instructive to have the benefit of the judgment when preparing a further brief to the Minister, particularly as subsequent litigation was expected challenging any further (adverse) decisions of the Minister.
3. Half an hour later, at 5:33 pm on 28 November 2016, in an important email, the Minister’s Chief of Staff replied as follows (emphasis added and noting the reference to “this policy” in the final sentence):

Thanks for this email. My first question, given the apparent seriousness of this case, is why two weeks have lapsed before we get this emailed advice?

Second, **noting the significant risk you state with regards to losing the case and** **in turn leading to the release of these individuals, grateful urgent formal advice on options available to prevent this from happening**.

Third, what assessment has been undertaken to determine which other cases might be affected by similar arguments as those being pursued in this case?

**The Department should be prepared to cover this in the Operational Roundtable on Wednesday given the importance the Minister attaches to the success of this policy**.

1. At 1:12 pm the next day, 29 November 2016, the General Counsel of the Department replied, explained the delay in providing the 28 November 2016 email advice and stated:

We expect the grounds of any adverse judgment to be limited to administrative law issues that caused the decision of the Minister to be set aside, with the consequent reinstatement of the person's visa. The remedy is to make a fresh decision that complies with the particular criticisms in the judgment. Unless this can be done very quickly, there would be a need to release the person from detention pending the making of the new decision. This scenario has happened previously, and where possible, a new decision is made as soon as possible to attend to the issue of needing to release the person from detention.

The practical issue in this instance is that given there are up to 7 potential grounds on which the Court might articulate the basis for any adverse judgment it has not been possible to sufficiently forecast the particulars, based on what we know from the way the hearing ran, such that we will be in a position to present the Minister with a draft decision for fresh consideration immediately.

Most of the balance of the email, concerning the potential impact of the Full Court’s decision might have on similar matters, was redacted upon the basis of legal professional privilege.

1. Two weeks later, at 3:31 pm on 13 December 2016, an email was sent from the Department to the Minister’s Chief of Staff and other staff members, informing them that the Full Court judgment would be delivered at 4.15 pm the next day. The email, which identified the Carrascalao, Taulahi, and Stevensmatters in the subject line, referred to “the above Project Ravelin cases” and to the sender’s prior email advice of 28 November 2016 at 5.03 pm (referred to above) concerning the “potential litigation risks in these matters”. The email indicated that, as previously advised, it was expected the Minister would lose in respect of Messrs Taulahi and Carrascalao. It was indicated that staff were liaising with colleagues in “Project Ravelin” (see [105] below), the Department’s National Character Consideration Centre (**NCCC**) and the Department’s Complex Cancellations area “in order to facilitate new submissions for the Minister’s consideration, in advance of the (sic) tomorrow’s judgments”. The email noted further that the draft submissions were to be considered that afternoon (i.e. within the Department), but would not be able to be finalised until after the judgment was delivered. The comment was made that “[i]f fresh decisions cannot be made quickly tomorrow evening, then the successful persons will have to be released from immigration detention”. The email concluded with information about where the applicants were detained and noted that “Compliance” and the relevant detention staff had been notified.
2. There was limited evidence before the Court concerning the role and activities of the entity called “Project Ravelin”. The Minister made an admission, however, that Project Ravelin is a partnership between his Department and other agencies which targets OMCG members for consideration in connection with the exercise of powers under the *Act*.
3. Between 3:38 pm and 5:15 pm on the same day (13 December 2016), several emails were exchanged between the Department and staff at the Cessnock Correctional Complex, where Mr Taulahi was detained:
* At 3:38 pm, an Inspector within the Department’s Detention Operations Branch sent an email to the Cessnock staff relevantly stating:

Thanks for your agreement to continue holding Tomasi TAULAHI at Cessnock for us, pending the outcome of his court challenge tomorrow … In the event that the decision falls in his favour he will have his visa reinstated, and if so, we are likely to take immediate action to re-cancel his visa and then re-detain him. We are currently liaising with our cancellation colleagues around when the paperwork will be provided; at this stage it is likely to be late in the day/early evening.

…

As agreed, if we are unable to provide the appropriate paperwork and conduct the re-detention process by midnight, I understand and duly note that you will be required to release TAULAHI from custody. If this occurs, we will re-detain at the earliest opportunity and would seek to have him returned to CSNSW custody…

* At 4:09 pm, a further email was sent by an unknown author to unknown recipients (the names having been redacted), stating:

There are one of three outcomes:

1. The appeal is not successful and he remains in custody
2. The appeal is successful and ABF re-cancel his visa in time prior to his release…say 8 pm
3. The appeal is successful and ABF do not re-cancel (the Minister does not sign or some other delay occurs) and he is released.

…

* At 5:15 pm, the Inspector within the Detention Operations Branch sent a further email within the same correspondence chain to Cessnock staff, relevantly stating:

As [email redacted] has indicated, we are anticipating that we will need to redetain TAULAHI at some point tomorrow evening, following the hand-down and Minister signing the paperwork. We are unable to be more specific as the timeframe is dependent on our Legal team and also the movements of the Minister, so could take several hours.

1. On the following morning, 14 December 2016, several internal emails were exchanged between staff at the Department and the Minister’s Office concerning arrangements for the Department’s submissions in respect of Messrs Carrascalao, Talauhi, and Stevens to be provided to the Minister in the event that the Full Court set aside the visa cancellation decisions. At 9:52 am, the Departmental officer responsible for coordinating with the Minister’s Office sent an email to one of Minister’s personal staff, which included the following statements:

…

I have just received the below email from NCCC who are writing the OMCG submissions for this afternoon. Grateful if you can advise the appropriate email address for the submissions to be sent through to?

Please note the request for the required information (once a decision has been signed) to be signed and not photographed if possible.

I am following up the timing of the submissions with Special Counsel this morning and will get back to you shortly.

1. The email from the NCCC (which was forwarded to the Minister’s member of staff) included certain instructions to the Departmental officer which relevantly were as follows:

…

… I understand that you are organising the communication and logistics with the MO for this afternoon/evening.

Each submissions (sic) is very large – some 200 or so pages. If there are 3 losses that means roughly 600 pages of paper. The individual submissions consist of a minister submission, decision page and statement of reasons – which all need to be signed. There is also an attachments list and the full copies of all attachments used in the decision. So I will need the following:

Name of the person who is co-ordinating in the MO:

Email address all material should be sent through to:

I am happy to contact that person and explain the process, if need be. That person will need access to their email, a printer and a scanner. They should have a large paper supply. They will need to access their email, print the material and collate the material in a folder for the Minister. There may be three folders – one for each person. There will be a lot of paper.

If the Minister is at another location to the co-ordinating person, the material will need to be placed in a secure briefcase and transported accordingly. Once the Minister has signed the paperwork it must be returned to me immediately. The signed pages should all be scanned and sent by email back to me immediately. Photographs (via cameras on mobile phones/devices) should be avoided at all costs as they are often poor quality.

1. At 10:56 am, the Minister’s staff member replied by email to the Departmental officer, and indicated that the submissions could be provided to his email address and that he would only scan back the signed pages. At 2:47pm, Mr Selles (who was Acting Assistant Secretary in the Character Assessment and Cancellations Branch of the Department) emailed several other Departmental officers and gave a clear instruction that drafts of the Department’s submissions should **not** be viewed by or discussed with the Minister – “only the final versions”.

#### (B) Events following the Full Court’s decision on 14 December 2016 and the Minister’s visa cancellation decisions later that evening

1. As noted above, the Full Court’s decision was handed down at 4:15 pm on 14 December 2017.
2. At 4:46 pm, Mr Carrascalao’s lawyer emailed submissions to the “Minister’s Mailbox” and various other email proxies urging the Minister not to cancel Mr Carrascalao’s visa again. The email attached a letter from Mr Carrascalao and his brother in law and advised of the author’s instructions that Mr Carrascalao was no longer a member of the Bandidos and no longer associated or intended to associate with members of the Club. It was submitted that it was in the best interests of his children that he remain with them and that cancellation would not be in the national interest. At 5:10 pm, the email and attached documents were forwarded to the Departmental officers who were responsible for preparing the submissions to the Minister.
3. At 5:04 pm, an email was sent from the Department to the Minister’s Chief of Staff and another member of the Minister’s staff (copied to numerous other individuals) concerning the Full Court’s decision (emphasis in original):

The Full Federal Court has handed down judgment in relation to the TAULAHI and CARRASCALAO matters. As expected they were **Minister’s losses** with the Court setting aside the Minister’s decision. The Court also ordered that Mr Taulahi and Mr Carrascalao be released be immediately released [sic] from immigration detention.

The court did not make a decision in STEVENS and has requested some further submissions.

The judgment is 74 pages (comprising 65 pages of reasons). We are currently reading the judgment and will be in touch again shortly.

1. At 6:12 pm, Mr Taulahi’s lawyer sent an email to, inter alia, the “Minister’s Mailbox”, submitting that a new decision not be taken to cancel Mr Taulahi’s visa, and advising of his instructions that Mr Taulahi was not a member of or associated with any outlaw motorcycle club. A large number of documents were enclosed with the email in support of these submissions, including several letters of reference. Although received by the Minister’s email system, the email did not come to the relevant staff members’ attention until the following day, and was accordingly not provided to the Minister with the case submission.
2. Also at 6:12 pm, a more detailed email was sent from the Department to the Minister’s Chief of Staff and another Ministerial staff member (copied to numerous other individuals) concerning the Full Court’s decision, and identifying the jurisdictional errors found by the Court. The email noted that an officer at the Department was finalising the paperwork for a fresh case submission to go to the Minister, and that submissions had also been received from Mr Carrascalao’s lawyer. No reference was made to the submissions sent on Mr Taulahi’s behalf. It was noted that the Minister’s staff member had requested he receive the submissions by about 7:30 pm and that the Department was working towards that timeframe and hoped to be able to meet it.
3. At 7:05 pm, the Department’s submission to the Minister (plus detailed attachments and a draft statement of reasons) in respect of Mr Carrascalao were sent by email to the Director, NCCC, for his review and signature.
4. At 7:16 pm, the Department’s submission to the Minister (plus detailed attachments and a draft statement of reasons) in respect of Mr Taulahi were sent to the Director for his review and signature.
5. By 7:31 pm, both sets of materials had been signed by the Director and returned to the Legal Assurance Manager by email.
6. The signed submissions in respect of Mr Carrascalao and Mr Taulahi were then sent by the Legal Assurance Manager to the Minister’s staff member at 7:37 pm and 7:43 pm respectively. Presumably the lengthy material (approximately 370 and 330 pages respectively) were printed and placed before the Minister for his consideration in accordance with the prearrangements.
7. The timeline of communications and events leading up to the Minister’s decisions at 8.18 pm and 8:25 pm in respect of Mr Taulahi and Mr Carrascalao respectively is set out in summary form in the table below:

|  |  |  |
| --- | --- | --- |
| **Time** | **Carrascalao** | **Taulahi** |
| 7:37 pm | The Legal Assurance Manager, NCCC, sent an email to the Minister’s staff member attaching the signed case submission, various attachments, and a draft statement of reasons in respect of Mr Carrascalao. The package of documents consisted of approximately 370 pages, and relevantly included the submissions provided by Mr Carrascalao’s lawyer at 4.46 pm. |  |
| 7:43 pm |  | The Legal Assurance Manager sent an email to the Minister’s staff member attaching the signed case submission, various attachments, and a draft statement of reasons in respect of Mr Taulahi. The package of documents consisted of approximately 330 pages. It did not include the case submissions provided by Mr Taulahi’s lawyer at 6.12 pm. |
| 7:49 pm | The Department liaison responsible for coordinating with the Minister’s office corresponded by text message with the Minister’s staff member, asking that he confirm when the decisions had been made. The Minister’s staff member replied “I should have it sorted in 40 min” and that he would copy her with the email. |
| 8:03 pm | The Minister’s staff member telephoned the Legal Assurance Manager to advise that there were typographical errors in the Carrascalao documents. |  |
| 8:08 pm | The Legal Assurance Manager sent revised Carrascalao documents to the Minister’s office. |  |
| 8:10 pm | The Minister’s staff member telephoned and had a short conversation with the Legal Assurance Manager concerning clarification of some aspects of the documents. |
| 8:18 pm |  | The Minister made the decision to cancel Mr Taulahi’s visa. |
| 8:25 pm | The Minister made the decision to cancel Mr Carrascalao’s visa. |  |

## Disposition of ground 1

1. Having regard to the relevant principles and the particular facts and circumstances we have set out, we consider that ground 1 should be upheld in both cases for the following reasons.
2. First, it is evident that the Minister was under considerable time pressure to make his decisions promptly because of the need to comply with the Full Court’s orders which were published earlier that day at 4:15 pm that both Mr Taulahi and Mr Carrascalao be released immediately from detention.
3. Secondly, it is evident from the Chief of Staff’s email dated 28 November 2016 (as well as from other internal correspondence) that there was a “policy” which was viewed as affecting the Minister’s consideration of whether or not the visas would be cancelled for a second time and the timing of such a decision. The full terms of that policy are not entirely clear on the evidence, but it may be inferred from the terms of the Chief of Staff’s email that it included taking steps to avoid people such as Mr Taulahi and Mr Carrascalao, to whom Project Ravelin applied, from being released from immigration detention. This seemingly required a prompt fresh decision to be made if their visas were to be cancelled again prior to release taking place. It is also clear from the Chief of Staff’s email that the Minister attached particular importance to the success of the policy. In effect there was a self-imposed time pressure to avoid having to release the two men from detention.
4. Thirdly, the Minister was provided with a considerable volume of material for his review and consideration in making his decisions. As previously noted, the material totalled approximately 370 pages in the case of Mr Carrascalao and approximately 330 pages in the case of Mr Taulahi. The two batches of material were received electronically in the Minister’s Brisbane office at 7:37 pm and 7:43 pm respectively. The material then had to be printed and collated before it was shown to the Minister. In the case of Mr Carrascalao, the material was revised and resent at 8:08 pm. It is unclear when the Minister first saw the materials but assuming that it took as a minimum, say, five minutes to copy and collate the two batches, the earliest time the Minister could have physically seen the original Carrascalao material was approximately 7:42 pm and, in the case of the Taulahi material, approximately 7:48 pm.
5. Fourthly, it should be inferred that, consistently with Mr Selles’ clear instruction to his Departmental colleagues given earlier on 14 December 2016, drafts of the Department’s submissions were not viewed by or discussed with the Minister. No evidence was led which suggested that his instruction that the Minister review only the final versions of the submissions was not carried out.
6. Fifthly, at a minimum, the Minster had to read, digest and understand the summarised information in the Department’s submissions in both cases, as well as make an assessment as to whether he needed to refer to any or all of the detailed attachments in order to obtain a complete understanding of the merits of the cases. The Department’s submissions specifically directed the Minister’s attention to the various attachments. In both cases, the Minister also had to read carefully both the Recommendation Page and the Decision Page, consider and make his decisions, circle the relevant choice and sign, date and fill in other details by hand. The Department’s submission paper in Mr Carrascalao’s case was 9 pages in length, while the figure was 13 pages in Mr Taulahi’s case. Both were substantive in content. The Minister also carefully had to review and sign the two detailed statements of reasons, which extended over 10 pages in Mr Carrascalao’s case and 9 pages in Mr Taulahi’s case.
7. Sixthly, there is no evidence before the Court as to how the Minister actually divided his time in respect of his consideration of the two matters. For example, it is unclear whether he concentrated solely on Mr Taulahi’s case before deciding at 8:18 pm to cancel his visa, at which point he then turned to Mr Carrascalao’s case and the revised Department’s submission, before deciding to cancel his visa at 8:25 pm (noting that a revised Department’s submission was sent to the Minister’s office at 8:08 pm). The Minister may have switched from one set of material to the other (including, possibly, both the original and revised Department’s submission in respect of Mr Carrascalao) before making those decisions. What is clear, however, is that, assuming a 5 minute delay in providing hard copies of the material to the Minister after they were received electronically by his personal staff, the Minister had, at most, 30 minutes to consider all the Taulahi material. Assuming that he was unable to turn his attention to the Carrascalao material (in either its original or revised form) during that period, he had, at most, 13 minutes to consider the relevant material before he decided at 8:25 pm to cancel Mr Carrascalao’s visa (i.e. the six minute period between 7:42 pm when, on the stated assumption, hard copies of the original Carrascalao material were placed before the Minister until 7:48 pm when, on the same assumption, the Taulahi material were placed before him, and the seven minute period between 8:18 pm to 8:25 pm, being the interval between the finalisation of the two visa cancellation decisions).
8. As we have noted, the respective statements of reasons adopted by the Minister are replete with statements to the effect that the Minister had noted, found, accepted, had regard to, considered and recognised particular matters. These should not be understood as mere verbal formulae. They should signify that the Minister had engaged intellectually with each particular matter and had positively formed the state of mind which each conveys. It is reasonable to suppose that the formation of these multiple states of mind would occupy a Minister for some considerable time. On the timelines outlined earlier, that does not seem to have been possible in the present case.
9. In our respectful opinion there was insufficient time for the Minister to engage in the requisite active intellectual process, having regard not only to the matters discussed above, but also to the following matters –
10. The importance and ramifications of the visa cancellation decisions for the two visa holders, their families and other affected third parties.
11. The visa cancellation decisions were being made without the affected visa holders having any legal right to be heard, which accentuated the need for the Minister carefully to engage with the materials before making such serious decisions.
12. The need to give close consideration to why it was in the national interest to cancel the visas and why the Minister should exercise his residual discretion to cancel the visas knowing that, if either visa holder was subsequently to seek to have the decision revoked, he would be confined to making representations going only to the issue of his character and not any broader issue, including the Minister’s residual discretion.
13. Although the Minister may have had some familiarity with the cases, including background publications concerning OMCGs, his earlier visa cancellation decisions were made approximately seven or eight months previously and were subsequently set aside as invalid for one or more jurisdictional errors as set out in the detailed reasons for judgment in *Taulahi No 1*. The Minister also needed to appreciate and understand the significance of any differences presented by such matters as:
	1. no protected information was relied upon on the second occasion; and
	2. updated representations had been made on Mr Carrascalao’s behalf which were before the Minister and were summarised by the Department.
14. Sixthly, if the same assumption is made that it would take approximately five minutes to copy and collate the lengthy materials in each case (i.e. a total of ten minutes), the Minister had, at most, 43 minutes to review those materials in both cases and undertake the other physical tasks described above. Even if the Minister did not divide the time available to him as discussed in [126] above, and instead used some other division, we remain of the opinion that 43 minutes represents an insufficient time for the Minister to have engaged in the active intellectual process which the law required of him in respect of both the cases which were before him.
15. Seventhly, the inferences which we have drawn from the material above in concluding that the Minister did not engage in the requisite active intellectual process, is reinforced by the fact that neither he nor his Chief of Staff gave evidence. Accordingly, we would apply the principle in *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 which, we note, was also applied in the particular circumstances in the *Douglas case* at 61-62 and in other judicial review cases referred to therein. As the Full Court observed in the *Douglas case* at 62:

The application of the rule requires… that there be inferences available from the evidence which favour the other party. The failure of the Minister to call evidence does not provide positive evidence that he did not consider the representation but, unexplained, it leaves the Court in a position where opposing inferences can be more confidently drawn because they stand uncontradicted by the person who could say something about the true state of the facts: *Jones v Dunkel* at 308. The question then is what inferences were open on the evidence.

1. In considering whether the rule of evidence in *Jones v Dunkel* applies here, we have taken into account the multiple statements made by the Minister in his statement of reasons to the effect that he had considered, noted, accepted, recognised or had regard to various matters, as well as the concluding statement which appears in both statements of reasons that the Minister had “**given full consideration** **to all of the information before me in this case**” (emphasis added). The Minister may subjectively have believed these matters, including his claim to have given full consideration to all the information before him in both cases but, for the reasons set out above, we do not consider that his subjective belief is determinative when, for the reasons given above, the Minister did not have sufficient time to engage in the active intellectual process required by law before deciding to cancel the two visas.
2. There is one final matter which warrants strong emphasis. The decision whether or not to cancel a person’s visa under s 501(3) is a decision which the Minister, and the Minister alone, can make. The Minister’s decision, and the process leading up to the making of that decision, are susceptible to judicial review on established grounds. Lest there be any misapprehension, the upholding of ground 1 of the further amended originating applications does not involve any assessment by this Court as to the merits of the Minister’s visa cancellation decisions. It is critical to note that ground 1 relates exclusively to the **process** surrounding the Minister’s decisions and not to the merits of these decisions.

## Ground 2

1. By this ground each of Mr Carrascalao and Mr Taulahi contended that the Minister had failed to give proper, genuine and realistic consideration to (or have regard to) the representations and information provided to him by their respective solicitors. Understandably, given the terms of s 501(5) of the Act, neither applicant sought to couch the substance of their complaint as a denial of procedural fairness.
2. The two cases are different in that it is undisputed that the representations and information provided by Mr Taulahi’s solicitor were **not** physically before the Minister when he decided to cancel Mr Taulahi’s visa. In contrast, hard copies of the representations and information made on behalf of Mr Carrascalao were included in the Department’s submission to the Minister concerning him, and were also summarised by the Department. Moreover, the statement of reasons relating to Mr Carrascalao includes a statement at [31] that the Minister “considered” that information.
3. We accept the Minister’s submission there was no legal obligation on him to consider the unsolicited representations in respect of Mr Taulahi. As noted above, the material was sent to two email addresses around 6:12 pm but their receipt was not known to the Department or his Minister or his staff until after the visa cancellation decision was made. The emails were sent and received outside normal business hours. Mr Taulahi’s solicitor did nothing else to alert the Department or the Minister to the fact that the material had been sent. In these circumstances, we do not consider that there was an obligation on the Department or the Minister to monitor outside normal business hours all or any potentially relevant email box to which unsolicited material might be sent before the visa cancellation decision was made at 8:18 pm. Accordingly, having regard to the particular facts and circumstances here, we do not consider that the Minister should be regarded as having “constructive knowledge” of this material.
4. Different considerations arise in Mr Carrascalao’s case because the relevant material was received within normal office hours and was placed before the Minister for his consideration, together with the Department’s summary of it.
5. Relying primarily on the following matters, Mr Carrascalao submitted that the Minister’s consideration of the material was “no more than lip service”.
6. The Minister’s statement in [9] of his statement of reasons that Mr Carrascalao posed a risk of harm to the community because of the possibility that he would become a member of the Bandidos in the future, notwithstanding the updated information provided by Mr Carrascalao’s solicitor relating to this matter.
7. The statements in the material that Mr Carrascalao did not intend to renew any membership with the Bandidos or join any motorcycle club and that he was not aware of any criminal activities during his time with the Bandidos were, if reliable, a complete answer to the central issue on which the visa cancellation decision turned, yet there is no reference in the statement of reasons to the reliability of those statements. The only reference to them was that they had been considered.
8. We do not consider that Mr Carrascalao has discharged his onus of establishing that the Minister’s claim that he had considered this aspect of the material was mere lip service. Subject to the qualifications to which we referred earlier, the Minister was entitled to have regard to the Department’s summary of the material. Mr Carrascalao did not contend that any aspect of that summary was inaccurate, incomplete, or did not convey the force of the argument made on his behalf. The Department’s submission also directed the Minister’s attention to the material itself, which was included as an attachment to the submission. The Minister needed to turn his mind to whether or not he needed to refer to the attachment itself, as opposed to rely upon the Department’s summary of this material. The inferences we have drawn in relation to the Minister’s consideration of the **entirety** of the material before him relating to Mr Carrascalao are not open to be drawn in relation to the discrete and relatively small amount of material provided by Mr Carrascalao’s instructing solicitors.
9. We reject ground 2 in relation to both Mr Taulahi and Mr Carrascalao.

## Ground 3

1. Both judicial review applicants contended that the Minister fell into jurisdictional error in failing to consider whether it was in the national interest to make a decision without natural justice. They contended that this duty arose on a proper construction of the s 501(3) of the *Act* because, first, s 501(3) should be construed so as to minimise encroachment on fundamental rights to procedural fairness and to personal liberty.
2. Secondly, it was submitted that this construction gives effect to the purpose of s 501(3), as reflected in the Minister’s Second Reading Speech, in which reference was made to the amendment being necessary to address “emergency cases involving non-citizens who may be a significant threat to the community”, such as by threatening violence or some other act of destruction, or have a prior history of serious crime. The Minister stated that, in “these emergency circumstances, the Minister, again acting personally, should have the power to act without notice and have them taken into detention”. Mr Taulahi and Mr Carrascalao contended that Jessup J’s reasoning to the contrary in *Tanielu v Minister for Immigration and Border Protection* (2014) 226 FCR 154 *(****Tanielu****)*at [6]-[10] should be rejected because no regard was paid to the principle of legality.
3. This ground fails on the facts in relation to both Mr Taulahi and Mr Carrascalao. The Minister’s statements of reasons in both cases contain an express statement that the information before him “raised concerns that were of such a serious nature that the use of [his] discretionary power to cancel [the applicant’s] visa, without prior notice, is in the national interest” (at [25] of the statement of reasons concerning Mr Taulahi and at [33] in the statement of reasons concerning Mr Carrascalao). Fairly read, we consider that these statements indicate that the Minister did consider whether it was in the national interest to make a decision without affording natural justice to either Mr Taulahi or Mr Carrascalao.
4. Ground 3 is rejected in both cases.

## Ground 4

1. In support of their contention that the Minister was obliged to form a satisfaction that it was in the national interest to cancel their visas and that there was no reasonable basis for the Minister to reach that state of satisfaction on the basis of the material before him, Mr Taulahi and Mr Carrascalao made the following key submissions.
2. First, in Mr Carrascalao’s case, it was contended that there were two primary integers to the Minister’s reasons relating to the national interest, namely Mr Carrascalao’s criminal record and his suspected past membership of an OMCG. The Minister did not disclose in his statement of reasons why it was in the national interest to cancel the visa of a person suspected of having those characteristics. Moreover, the state of satisfaction of the Minister was unreasonable or irrational because:
3. no finding was made that Mr Carrascalao was currently a member of the Bandidos or associated with any member of it;
4. there was evidence to the contrary in the form of Mr Carrascalao’s representations;
5. no finding was made that Mr Carrascalao was involved in, or knew of, any criminal conduct by the Bandidos;
6. no finding was made that Mr Carrascalao’s suspected past involvement with the Bandidos meant that he would retain a future involvement, nor was any such proposition put to him in the Department’s submission;
7. Mr Carrascalao’s most recent criminal conviction was more than seven and a half years prior to the visa cancellation decision and no reference was made in the statement of reasons to that long lapse of time; and
8. although the Minister relied on various published articles in finding that there were “allegations” of criminal conduct, none of those publications referred to criminal conduct by the Bandidos Club itself.
9. On this aspect of ground 4, Mr Taulahi contended that the Minister essentially reasoned that it was in the national interest to cancel the visa of a person whom the Minister suspected was previously closely involved with a group which the Minister suspected was previously, or is currently involved in, criminal conduct. It was further contended that the Minister’s satisfaction that it was in the national interest to cancel Mr Taulahi’s visa was not open to him and was otherwise reached unreasonably or irrationally having regard to the following matters:
10. no finding was made that Mr Taulahi was currently a member of the Lone Wolf OMCG or associated with any member of it;
11. no finding was made by the Minister that Mr Taulahi’s suspected close involvement with the OMCG founded an inference that he would retain a close involvement with Lone Wolf if he remained in Australia, therefore he should be removed;
12. the articles referred to by the Minister in respect of his finding that there were “allegations” of criminal conduct did not refer to criminal conduct by the Lone Wolf club itself and there were no proven allegations of criminal conduct;
13. there was no finding that Mr Taulahi was involved in, or knew of, any criminal conduct by that OMCG; and
14. the Minister did not have regard to Mr Taulahi’s representations.
15. We are not satisfied that the judicial review applicants have demonstrated unreasonableness in the legal sense in the Minister’s attainment of that satisfaction in these cases. We consider that it was reasonably open to the Minister to form the view that removing Mr Taulahi, a past senior officeholder of the Lone Wolf OMCG, was reasonably related to the national interest in preventing, detecting and disrupting organised crime.
16. We reject Mr Taulahi’s submission that the rationality of the Minister’s reasoning process depended on him finding that Mr Taulahi would retain a close involvement with that OMCG. It was open to the Minister to take a broader view in forming the opinion that it was in the national interest in targeting organised crime to remove from Australia such a former senior officeholder of an OMCG. In any event, the Minister stated at [30] of his statement of reasons in respect of Mr Taulahi that he took a guarded view about Mr Taulahi’s prospects of extricating himself from gangs and leading a law abiding life.
17. We accept that the Minister acknowledged that the media reports to which he referred may not be reliable, but he considered that the quantity and variety of the information they contained was sufficient to ground a reasonable suspicion that the Lone Wolf OMCG had been and is involved in criminal conduct. These findings were reasonably open.
18. It is convenient to now address ground 4(c), the essence of which is that the Minister misconstrued the meaning of the “national interest” by adopting an impermissibly confined conception of that expression, including by proceeding on the basis that the expression did not include the best interests of the child.
19. Mr Taulahi relied on the following matters.
20. The national interest, in law, must not be understood to exclude the best interests of the child. A statute should not be construed in a way that is inconsistent with Australia’s international obligations, including Australia’s obligations under the *Convention on the Rights of the Child* (opened for signature 20 November 1989, 1577 UTS 3, entered into force 22 April 1954) (***Convention on the Rights of the Child***)*,* which includes decision-making that conforms to the best interests of the child.
21. “Best interests of the child” is a principle that exists over and above Mr Taulahi’s children, and any particular children, but in this case it is not necessary for the Court to separate the two.
22. The “national interest” is a broad one which has more than one dimension and the expression should not be unduly confined that should not be unduly confined (citing *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; 74 CLR 492 at 505 per Dixon J; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379 (***Pilbara***)at [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [31] per French CJ and at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; 228 CLR 423 at [55] per Hayne J; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [70] per Griffiths J and Wigney J agreeing at [90]). If the repository of power proceeds on an unduly confined conception of the national interest, he or she commits an error of law (citing *Plaintiff S297/2013* [2015] HCA 3; 255 CLR 231(***Plaintiff S297/2013***)at [19] per French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).
23. The Court should infer that the Minister misconstrued the phrase “national interest” by understanding it to exclude or not encompass the best interests of the child. This is because, in the Minister’s reasons which address the national interest ([16] to [33]), the only matters which are addressed relate to criminal conduct and suspected past membership of a group. There is no reference to the best interests of the child. Although later in the statement of reasons the Minister addressed the best interests of the child, it was in the context of his residual discretion. Lastly, the material before the Minister showed that the “best interests of the child” was squarely engaged.
24. The Minister failed to address the correct question: it is not whether the best interests of the child gives rise to some “obligation” on the part of the decision-maker; it is whether a construction of the national interest which does not encompass that principle is an erroneous one.
25. The Minister erred in submitting that the national interest does not encompass matters specific to the visa holder, as that is contrary to the Court’s authority in *Stretton.*
26. Mr Carrascalao adopted Mr Taulahi’s submissions on this aspect of ground 4 and raised the following additional contentions.
27. First, Mr Carrascalao’s circumstances, to the Minister’s apparent knowledge, involved a real risk of indefinite detention, and the common law has a strong presumption against indefinite detention (citing *Al-Kateb v Goodwin* [2004] HCA 37; 219 CLR 562 at [150] per Kirby J). The power to order indefinite detention is an “extraordinary power” which is “confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm” (citing *Chester v The Queen* [1988] HCA 62; 165 CLR 611 at 617-618 per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) and “great care” is needed before subjecting a person to indefinite imprisonment (citing *Pollentine v Bleijie* [2014] HCA 30; 253 CLR 629 at [21]-[22] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Construing the “national interest” referred to in the *Act* in light of these fundamental principles encompasses antipathy to indefinite detention.
28. Secondly, Mr Carrascalao’s circumstances engaged what the Minister described as a higher degree of tolerance of the “Australian community” for offending by a person in his position, which is a community-level consideration not specific to the particular individual.
29. The Minister’s key submissions on this issue may be summarised as follows:
30. The precondition to the exercise of the power in s 501(3)(d) to cancel a visa is that the *“***Minister** is **satisfied** that the … cancellation is in the national interest” (emphasis in original). The question of what is in the national interest is therefore “largely a political question”, entrusted to the Minister to determine according to his satisfaction, which must be obtained “reasonably” (citing *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; 254 CLR 28 (***Plaintiff S156/2013****)* at [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ and *Madafferi* at [89] per French, O’Loughlin and Whitlam JJ).
31. Ample authority establishes that the statutory conception of the national interest is not to be constrained by accreting to it matters that are personal to an applicant(citing *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; 139 FCR 505 (***Huynh***)at [74] per Kiefel and Bennett JJ; *Gbojueh* at [44] and [51] per Bromberg J; *Leiataua v Minister for Immigration and Citizenship* [2012] FCA 1427; 208 FCR 448 (***Leiataua***)at [20]-[21] per Jessup J). The express abrogation of procedural fairness by s 501(5) of the *Act* was also said to support this proposition.
32. The applicants’ claim that “the best interests of the child is a principle that exists over and above any particular children”, was elusive because any principle in relation to the best interests of the child can only ever be engaged by the interests of particular children, and therefore the applicant’s children were required to be taken into account as aspects of the national interest. This is not akin to the consideration of risk to the community, which is considered an aspect of the national interest (citing *Gbojueh*). “There is nothing in the subject matter, scope or purpose of the *Act* to suggest that such an amorphous notion is a mandatory component of the national interest”.
33. The applicants’ submission that the best interests of the child are necessarily a part of the national interest due to Australia’s international obligations under the *Convention on the Rights of the Child,* or that the Act should be construed conformably with those international obligations, is contrary to *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273. That decision was predicated on the Minister being legally empowered to make a decision that did not give primary consideration to the best interests of the child. Further, French J in *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 at [59] held that there was no express or implied statutory requirement that the Minister have regard to the best interests of the visa holder’s children as a condition of the valid exercise of the cancellation power and that “[t]he best interests of the child do not, by virtue of Australia’s commitments under the Convention, become a mandatory relevant consideration in the exercise of statutory powers and in particular the power of visa cancellation under s 501”.
34. *Plaintiff S297* does not assist the applicants’ case as it concerned the construction of a “national interest” criterion in subordinate legislation, and construing a regulation consistent with its authorising statute.
35. The Minister should not be required in every decision expressly to advert to all of the possible considerations that may be encompassed by the national interest. It is for the Minister to decide, on the merits, what national interest factors are engaged in any given case (citing *Leiataua* at [21] per Jessup J), and the Court cannot infer that the Minister proceeded on any assumption that the national interest excluded the best interests of the children.
36. The applicants’ misconstruction case must fail unless they can establish that had the Minister properly understood that the national interest might include the best interests of the child in an appropriate case, he would necessarily have adverted to it in this case, and the standard applied would be *Wednesbury* unreasonableness. The Court would be trespassing impermissibly on the merits to hold that the national interest in this case required consideration of the best interests of the child.
37. In both cases, the Minister plainly had regard to the best interests of the child in the exercise of the residual discretion and formed the view that it was outweighed by the possibility that great harm could be inflicted on the Australian community (citing [40] and [81] of the Minister’s statement of reasons, respectively). Even if the Minister regarded the best interests of the children under the rubric of the national interest rather than under the residual discretion, the Minister would not have weighed the conditions any differently.
38. There can be no doubt that, in this particular statutory context, the expression “national interest” is, like the expression “public interest”, one of considerable breadth and essentially involves a political question which was entrusted to the Minister. For example, in *Pilbara* at [42], in the context of construing a statutory discretion which vested a power in the Minister to declare a service under Pt IIIA of the *Trade Practices Act 1974* (Cth), where one of the criteria was whether access, or increased access to a service “would not be contrary to the public interest”, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said (footnotes omitted and emphasis in original):

It is well established that, when used in a statute, the expression “public interest” imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is “neither arbitrary nor completely unlimited” but is “unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view”. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would *not* be contrary to the public interest is very wide indeed. And conferring the power to *decide* on the Minister (as distinct from giving to the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.

1. We consider that the observations in *Pilbara* have even stronger force when the relevant statutory expression is the “national interest” (see *Plaintiff S156/2013* at [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ and *Madafferi* at [89] per French, O’Loughlin and Whitlam JJ).
2. In our view, it is unnecessary in these cases to determine all the issues of principle raised by the judicial review applicants as to the correct construction of the “national interest” and whether it encompasses the best interests of the child. This is because the ground fails on the facts of both cases. We accept the Minister’s submission that it is a matter for the Minister to decide, on the merits of any particular case, what national interest factors are engaged in that case (see *Leiataua* at [21] per Jessup J). There is no obligation on the Minister, in determining whether or not to exercise his power under s 501(3), to advert to all and every possible consideration which may inform an assessment of the national interest in the particular case. Accordingly, the absence of any reference in this part of the Minister’s statements of reasons to the best interests of the child does not give rise to an inference that the Minister considered that, as a matter of construction, the national interest excluded the best interests of the child. We accept the Minister’s submission, that, at best, an inference might arise that the Minister regarded the best interests of the child as not bearing upon his assessment of the national interest in the particular circumstances of the cases relating to Mr Taulahi and Mr Carrascalao. Nothing we have said above is intended to deny the established view that the Minister’s satisfaction that cancellation is in the national interest must be a satisfaction which is attained reasonably (see *Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391 at [167] per Gummow and Hayne JJ, with whom Gleeson CJ agreed and *Madafferi* at [89] per French, O’Loughlin and Whitlam JJ).
3. For these reasons, we reject ground 4 in both cases.
4. As noted above, Mr Taulahi also raised grounds 7 and 8, to which we now turn.

## Ground 7

1. We accept the Minister’s submission that this ground fails on the facts. Assuming, without deciding, that Mr Taulahi is correct in saying that there must be a sufficient “subjective connection” between the member of an OMCG and the OMCG’s suspected involvement in criminal conduct, we consider that the Minister made findings, which were reasonably open to him, that such a subjective connection existed here. The Minister found that Mr Taulahi had held positions of authority in the Lone Wolf OMCG, namely as State President and Sergeant at Arms. He also found that he reasonably suspected that the Lone Wolf OMCG has been and is involved in criminal activity (the material is set out in [14] and [15] of the statement of reasons concerning Mr Taulahi).

## Ground 8

1. We accept the Minister’s submission that this ground also fails on the facts. In the statement of reasons relating to Mr Taulahi, the Minister found that:
2. Lone Wolf OMCG members are alleged to have committed serious criminal conduct (see at [15]); and
3. several media articles depicted law enforcement raids on Lone Wolf OMCG chapters and club houses which are alleged to have uncovered commercial quantities of drugs (at [15]).
4. These findings are sufficient to demonstrate that, assuming (without deciding) that a group is not “involved… in criminal conduct” unless the group “actively participates” in the conduct, the findings made by the Minister as described immediately above, which were reasonably open, were to the effect that there was “active participation” by the Lone Wolf OMCG.
5. In any event, we consider that Mr Taulahi has adopted too limited a meaning of the word “involved” in s 501(6)(b)(ii) of the Act. We respectfully agree with the view expressed by Perry J in *Roach v Minister for Immigration and Boarder Protection* [2016] FCA 750 at [169] that, in this particular statutory context, “involved” extends beyond “actively participating” to include its ordinary meaning of “concerned” in or “implicated” in the conduct.
6. We reject grounds 7 and 8 in Mr Taulahi’s case.

## Conclusion

1. For these reasons, it is appropriate to make orders with respect to the judicial review applications of both Mr Taulahi and Mr Carrascalao which have the effect of setting aside the Minister’s decisions dated 14 December 2016 to cancel each of their visas. Orders should also be made that each of them be released *forthwith* from detention. To avoid any misunderstanding, the Court makes clear that there should not be a repetition of the delay which occurred in implementing the Court’s orders in *Taulahi No 1*.
2. The parties did not dispute that costs should follow the event. Appropriate orders will be made accordingly.

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| I certify that the preceding one hundred and sixty-seven (167) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths, White and Bromwich. |

Associate:

Dated: 24 July 2017