Federal Court of Australia

Motufoaki v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 74

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| Appeal from: | *Motufoaki v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 601 |
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| File number: | WAD 122 of 2022 |
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| Judgment of: | **KATZMANN, FEUTRILL AND RAPER JJ** |
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| Date of judgment: | 22 May 2023 |
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| Catchwords: | **MIGRATION –** appeal from judgment and orders dismissing application for judicial review of decision of Administrative Appeals Tribunal not to revoke a mandatory cancellation decision under s 501CA(4) of *Migration Act 1958* (Cth) – whether the Tribunal lacked jurisdiction because the appellant not given an opportunity to be heard on whether another cancellation power should have been used – whether the Tribunal lacked jurisdiction because the cancellation decision was legally unreasonable – where the Tribunal did not refer in terms to two witness statements in considering the nature, strength and duration of the appellant’s links to the Australian community, whether the Tribunal’s decision involved a denial of procedural fairness or some other jurisdictional error  **PRACTICE AND PROCEDURE** – where none of the points raised on the appeal were raised before the primary judge, whether leave should be granted to agitate them on appeal |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 24  *Migration Act 1958* (Cth) ss 116(1)(e), 501(2), 501(3), 501(3A), 501(5), 501(6), 501(7), 501CA(1), 501CA(3), 501CA(4)  Ministerial Direction 79 – *Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* para 13.2(4) |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424  *Burgess v Assistant Minister for Home Affairs* (2019) 271 FCR 181  *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 195 FCR 318  *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 158  *ETA067 v Republic of Nauru* [2018] HCA 46; 92 ALJR 1003; 360 ALR 228  *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* (2017) 51 WAR 425  *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26  *Minister for Home Affairs v Omar* (2019) 272 FCR 589  *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505  [*Minister for Immigration and Citizenship v SZRKT*](https://jade.io/article/293472)(2013) 212FCR 99  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; 395 ALR 403  *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470  *Okoh v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 53  *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 96 ALJR 497; 400 ALR 417  *SLMB v Minister for Immigration and Multicultural and Indigenous Affairs*[2004] FCAFC 129  *Swift v SAS Trustee Corporation* [2010] NSWCA 182  *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588  *XJLR**v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 256 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 46 |
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| Date of hearing: | 16 November 2022 |
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| Counsel for the Appellant: | Mr M Albert with Mr N Boyd-Caine (Pro Bono) |
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| Counsel for the First Respondent: | Mr P Knowles SC with Ms C Taggart |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | WAD 122 of 2022 |
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| BETWEEN: | KAU JUNIOR MOTUFOAKI  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | KATZMANN, FEUTRILL AND RAPER JJ |
| DATE OF ORDER: | 22 May 2023 |

THE COURT ORDERS THAT:

1. Leave be granted to the appellant to substitute the Administrative Appeals Tribunal as the second respondent.
2. Leave be granted to the appellant to file an amended notice of appeal in the form of the “Proposed Amended Notice of Appeal” received by the Court on 26 October 2022.
3. Leave to raise the grounds listed in that document be refused.
4. The appeal be dismissed.
5. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

THE COURT:

1. Kau Junior Motufoaki is a 35 year old New Zealand national who has lived in Australia since he was 11 years old. He is currently in immigration detention on Christmas Island.
2. Mr Motufoaki has an extensive criminal record dating back to his early teens. His criminal history includes numerous convictions for offences of dishonesty and violence and offences involving the possession of illegal drugs. Among them were convictions in March 2007, when he was 19, for the offences of intentionally causing serious injury, robbery, and injury for which he was sentenced to a total of three years’ detention in a youth training centre and convictions in May 2019 for offences committed while he was subject to a 12 month criminal community correction order for similar offences. The most recent convictions related to offences of theft, assault with a weapon, dishonest handling of stolen goods, and possession of a dangerous article in a public place. For these offences he was sentenced to an aggregate term of two months’ imprisonment.
3. At the time he was sentenced in May 2019 Mr Motufoaki held a Class TY Subclass 444 Special Category (Temporary) visa. Two months later, while he was serving his sentence, Mr Motufoaki’s visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) on the basis that he had a substantial criminal record (**the cancellation decision**).
4. Section 501(3A) relevantly imposes an obligation on the Minister to cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because the person has a substantial criminal record within the meaning of s 501(6)(a), on one of three bases set out in sub-ss 501(7)(a)–(c), and the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against an Australian law. One of the bases upon which such a person has a substantial criminal record and therefore does not pass the character test is that the person has been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)). In the event that the Minister makes a decision to cancel a visa under s 501(3A), the Minister is obliged to give notice to the person and invite the person to make representations about revocation (s 501CA(3)). Section 501CA(4) gives the Minister a discretion to revoke the cancellation decision if the person makes representations in accordance with the invitation and the Minister is satisfied that the person passes the character test or that there is another reason why the cancellation decision should be revoked.
5. Mr Motufoaki made representations to the Minister requesting revocation of the cancellation decision. That request was refused by a delegate of the Minister and, on review by the Administrative Appeals **Tribunal**, the delegate’s decision was affirmed. Mr Motufoaki then sought judicial review of the Tribunal’s decision, claiming that the Tribunal fell into jurisdictional error by failing to consider the factors contained in para 13.2(4) of Ministerial **Direction no. 79**, which relates to the best interests of minor children in Australia. That application was dismissed by the primary judge. This is an appeal from that judgment.
6. An appeal from a judge of this Court is brought under s 24 of the *Federal Court of Australia Act 1976* (Cth). An appeal under that section is in the nature of a rehearing in which error by the primary judge must be shown: see, for example ***Branir*** *Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]–[22] (Allsop J, Drummond and Mansfield JJ agreeing); *SLMB v Minister for Immigration and Multicultural and Indigenous Affairs*[2004] FCAFC 129 at [11] (Branson, Finn and Finkelstein JJ).
7. In this appeal, however, Mr Motufoaki does not suggest, let alone plead, any error on the part of the primary judge. Rather, he seeks leave to rely on grounds which were not raised below. Mr Motufoaki claims that the new points have merit, that he has an acceptable explanation for not raising them below, and that there would be no prejudice to the Minister if leave were granted save, perhaps, with respect to costs.
8. It is well-established that leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at [46]. In *VUAX* at [48] the Full Court observed that:

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

1. It is “beyond question that if a new matter is raised and evidence could have been given which by any possibility could have prevented the point from succeeding”, leave will be refused: *Branir* at [37]. Proof of actual prejudice is not essential. A real, rather than fanciful, possibility that evidence could have been given to deal with the new point may well be enough to persuade an appellate court that leave should not be granted: *Branir* at [38].
2. Mr Motufoaki offers no explanation. In submissions his counsel explained that Mr Motufoaki was unrepresented in the application before the primary judge (other than to file the application itself) and has no legal training. Counsel submitted that, in these circumstances, it is inherently unlikely that he decided not to raise the points he now wishes to agitate in order to secure some strategic advantage.
3. Although Mr Motufoaki was unrepresented at the hearing of his judicial review application and did not file any submissions, it is not correct to say that he was only represented “to file the application”. The judicial review application was prepared by a lawyer, who certified that there were reasonable grounds for believing that it had a reasonable prospect of success. For this reason the explanation is not entirely satisfactory. Furthermore, we are not satisfied that the Minister would not be prejudiced if leave were granted, at least with respects to grounds 1 and 2. Nor are we persuaded that the new points clearly have merit.
4. The new points are raised as grounds of appeal in an amended notice of appeal, drafted by pro bono counsel. They are in the following terms:

1. The Tribunal lacked jurisdiction by reason that the cancellation decision on which it was premised was legally ineffective because it arose from a denial of natural justice concerning which cancellation power under s 501 of the *Migration Act 1958* (Cth) to exercise in respect of the Appellant’s visa.

2. The Tribunal lacked jurisdiction by reason that the cancellation decision on which it was premised was legally ineffective because it was legally unreasonable.

3. The Tribunal erred in its exercise of the discretion in s 501CA(4) of the Act by failing to consider all of the material documenting the strength, nature and duration of the Appellant’s social ties to Australia.

1. Mr Motufoaki relies on the following background facts which, he argues, are “central” to the first two grounds.
2. On 2 March 2007 he was convicted and sentenced to two years and nine months in a youth detention centre (three years in fact). He says that from that date his visa could have been cancelled by exercise of the power in, among other sections of the Migration Act, ss 501(2) or 116(1)(e)(i). Three years later, on 20 July 2010, Mr Motufoaki was convicted and given a suspended sentence of six months’ imprisonment. Almost three further years later, on 5 April 2013, Mr Motufoaki was convicted and given a suspended sentence of one month imprisonment. At each of these points the Minister could have cancelled his visa, but did not. More than 12 years after his first conviction, on 20 May 2019, Mr Motufoaki was convicted and sentenced to two months’ imprisonment. From that date, his visa could have also been cancelled under s 501(3A) (which commenced on 11 December 2014).
3. On 4 July 2019, fifteen days before his most recent sentence of imprisonment was due to end, the Department of Home Affairs wrote to Mr Motufoaki asking him to complete a form because the Department wished to “clarify [his] immigration status”. No mention was made of any intention to cancel his visa. Mr Motufoaki completed the form on the same day, notifying the Department that he held a visa.
4. Three business days later, on 9 July 2019, Mr Motufoaki’s visa was cancelled relying on the power in s 501(3A) and his March 2007 conviction. The notice informing him of the cancellation and inviting him to make representations was unlawful in that it required that any representations be received within 28 days of receipt of the notice. However, for the reasons given in *EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 158 at [24]–[44] (Yates, Griffiths and Moshinsky JJ), although the notice was invalid the cancellation decision was not.
5. By grounds 1 and 2, Mr Motufoaki alleges that the Tribunal’s decision was affected by jurisdictional error because he was denied procedural fairness and/or because the cancellation decision was legally unreasonable.
6. These two grounds involve a collateral attack on the Tribunal’s decision not to revoke the cancellation decision. As the Minister acknowledged, this Court has held that in such a case it has both the jurisdiction to consider and determine the legality of the cancellation decision as a threshold issue and the power to grant declaratory relief in relation to that decision in appropriate circumstances: ***XJLR*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 256 at [59]–[65], [87] (Rares J), [95]‑[96] (Yates J). That decision was based on the remark in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; 395 ALR 403 at [12] (Keane, Gordon, Edelman, Steward and Gleeson JJ) that “[t]he legal capacity conferred on the Minister by s 501CA of the Act to revoke a decision to cancel a visa is premised upon the prior exercise of the power of cancellation conferred by s 501(3A)”. As Yates J put it at [95], “s 501CA(1) proceeds on a jurisdictional fact, namely the existence of a legally effective decision under s 501(3A)”. The fact is jurisdictional because it is “necessary for the conferral of authority on the decision-maker” to exercise the revocation power in s 501CA(4).
7. The Minister formally submitted that *XJLR* was wrongly decided but did not contend that it was plainly wrong and so did not invite us to depart from it.
8. Section 501(5) provides that “[t]he 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)”. The allegation of procedural unfairness is based on the notion that the Minister or the Minister’s delegate decided to exercise the cancellation power in s 501(3A) rather than 501(2) when the latter requires the person affected to be given an opportunity to be heard before the power is exercised whereas the former does not. Mr Motufoaki submitted that he had an interest in which of the powers was considered for exercise in relation to his visa because it had “immediate and significant consequences” for him. He noted that, had he been “at liberty” while a decision to cancel his visa was being considered under s 501(2) or 116(1)(e), he could have sought legal advice and received “family and social support” during the process. He argued that “it follows” that he was denied procedural fairness.
9. Counsel for Mr Motufoaki described the argument as “nuanced”. A more appropriate adjective would be specious. The same argument was advanced and rejected in ***Okoh*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 53 (Thomas, O’Bryan and McElwaine JJ), the Full Court holding that they were contrary to authority and the statutory scheme (at [78]–[99]) — and rightly so. For the same reasons given in that case, the merits of grounds 1 and 2 are illusory. As the Full Court pointed out in *Okoh,* a similar argument was put and rejected in ***Burgess*** *v Assistant Minister for Home Affairs* (2019) 271 FCR 181 in relation to the power under s 501(3) of the Act which, like s 501(3A), expressly excludes the principles of natural justice. It is worthwhile referring to the reasoning of White and Charlesworth JJ at [71]–[72] with which Kerr J agreed at [2]:

The question of whether the Assistant Minister exercised his powers according to law and within the limits set by the subject matter, scope and purposes of the Act is informed by the following features of the statutory scheme:

1. The power under s 501(3) of the Act is conditioned on the Minister being satisfied that cancellation of the visa is in the national interest whereas the power under s 501(2) is not. The question of what the national interest requires is non-delegable. The Act evinces a clear intention that the visa holder have no entitlement to be heard with respect to that question …
2. The discretionary power to cancel a visa under s 501(3) is enlivened upon the conditions in s 501(3)(c) and (d) being fulfilled. The Minister’s state of mind with respect to each condition may lawfully be formed without affording the visa holder an opportunity to be heard and without pausing to consider whether the criteria for the exercise of an alternative source of power may or may not be fulfilled;
3. Section 501 contains no express requirement that the Minister first give consideration to the exercise of the power conferred by s 501(2) before giving consideration to the exercise of the power in s 501(3), nor does any such requirement arise by implication;
4. Parliament has conferred alternate powers without expressly identifying any criteria against which any choice between them should be made;
5. The Act neither expressly nor impliedly requires the Minister to make any value judgment about which course of decision-making would be preferable from the visa holder’s perspective;
6. … and
7. There would be an incongruity in the statutory scheme if the Minister was obliged to accord natural justice to a visa holder before making a decision under s 501 to exercise a power which does not require the provision of natural justice.

It follows from all of these considerations that the decision by the Assistant Minister to consider the exercise of the power under s 501(3) was not conditioned by a requirement that he express an intelligible basis for doing so. More particularly, the power conferred by s 501(3) is not subject to an inviolable condition that the Minister first identify an intelligible basis for not exercising the alternative power in s 501(2).

1. As the Full Court observed in *Okoh* at [99], the reasons in *Burgess* apply with even greater force in relation to the power under s 501(3A), which mandates cancellation upon satisfaction of the statutory conditions. Neither in *Okoh* nor in the present case did the appellant submit that *Burgess* was wrongly decided, let alone plainly wrong. Mr Albert of counsel, who appeared for Mr Motufoaki (with Mr Boyd-Caine) and also, as it transpires for Mr Okoh, submitted that *Burgess* was distinguishable and that the Court in *Burgess* was not “fully addressed” on the question because the ground relied on there was legal unreasonableness rather than natural justice or procedural fairness. We are unimpressed by the submission. In any event, since *Okoh* it is untenable. The reasoning in *Burgess* at [71]–[72] is sufficient to demonstrate that there is no merit in either ground 1 or ground 2 of the amended notice of appeal.
2. In addition, it can scarcely be legally unreasonable for the Minister not to exercise a discretionary power to cancel a person’s visa. Nor can it be legally unreasonable for the Minister to comply with his obligation to do so when he is satisfied that the conditions which engage it are established. The mere fact that the delegate relied on an old conviction and sentence cannot make it so. Once satisfied that the conditions are made out, the delegate had no option but to cancel the visa.
3. In short, the Act imposes an obligation on the Minister to cancel a visa if the conditions in s 501(3A) are satisfied. No such obligation arises with respect to a cancellation under s 501(2). Nor does the Act impose an obligation on the Minister to consider exercising the discretion conferred by s 501(2) to cancel a visa in any particular case. As the Minister submitted, if there is no obligation to consider cancellation in circumstances other than those conditioning the operation of s 501(3A), there could not be an obligation to invite comment on which, if any, power should be exercised. Furthermore, as the Minister also submitted, the Act draws a line between cancellation powers which require natural justice (procedural fairness) and cancellation powers which do not. Mr Motufoaki’s contention impermissibly introduces a preliminary step into the decision-making process for it is the Act itself that determines the stage at which natural justice is required: cf. *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 195 FCR 318 at [37]–[38] (Keane CJ, Lander and Foster JJ).
4. In any event, we would refuse leave because it is apparent that the Minister would be prejudiced if leave were granted. That is so for at least two reasons. The first is that the Minister was deprived of the opportunity to adduce evidence including, most obviously, his state of knowledge about Mr Motufoaki’s criminal history before his most recent incarceration. The second is that the Minister would have been denied the right of appeal from an adverse decision. If leave were granted and Mr Motufoaki were successful, the Minister could only appeal if the High Court granted special leave.
5. That leaves ground 3. It will be recalled that by that ground Mr Motufoaki alleges that the Tribunal erred in its exercise of the discretion in s 501CA(4) of the Act by failing to consider all of the material documenting the nature, strength and duration of the appellant’s social ties to Australia.
6. Direction no. 79 required decision-makers to have regard, among other considerations, to “the strength, duration and nature of any family or social links [the non-citizen has] with Australian citizens*,* Australian permanent residents and/or people who have an indefinite right to remain in Australia” (para 14.2(1)(b)).
7. There is no dispute that the Tribunal did take this consideration into account. ButMr Motufoaki submitted that the Tribunal did not “grapple with” the strength and duration of the social links. He argued that the reasons are concerned only with the nature of those links. He complained that the Tribunal only made “a passing, indirect, generic mention of ‘friends’” and did not mention, let alone engage with, the “detailed” statements provided by two of those friends in particular. One, Callum Stranger, said he had been a friend of Mr Motufoaki since 2008. He mentioned activities in which they jointly participated and he committed to helping Mr Motufoaki obtain work and seek counselling. He described Mr Motufoaki as “a good friend” and claimed that they were “like brothers”. The other, Billy Koskinas, had been Mr Motufoaki’s friend since 2010. He is said to have “illustrated the strength of their relationship” by his reference to a time Mr Motufoaki helped him “get back on [his] feet”, obtain employment and find a place to live. Mr Stranger said he was an Australian citizen. Mr Koskinas said nothing on the subject of his right to stay in Australia.
8. In fact, the statements of Mr Stranger and Mr Koskinas were not detailed. In fact, they were short on detail. Each was less than a page long. Mr Koskinas’s statement consisted of 18 lines. Mr Knowles SC, who appeared for the Minister, described them not inappropriately as “fairly non-specific character references”. Neither Mr Stranger nor Mr Koskinas indicated that he had any knowledge of the nature or extent of Mr Motufoaki’s criminal record. Mr Koskinas said he was sure that Mr Motufoaki would not do anything “to get himself locked up again” and had “learned his lesson” but was “not sure why or how he was sent to prison in the first place”. Nor did he indicate how much contact he had had with Mr Motufoaki over the years. Mr Stranger said he was “not sure about [Mr Motufoaki’s] mental state” but, somewhat inconsistently, added that he was “100% sure that [he] is mentally stable to continue his life”.
9. Mr Motufoaki submitted that the Tribunal fell into jurisdictional error because it failed to give “proper, genuine and realistic consideration” to this evidence, failed to evaluate or deal with it, although it was significant material, and thereby denied him procedural fairness. He contended that “the entitlement to procedural fairness requires both that an affected person have an opportunity to provide materials and a reflex entitlement [denied in this case] to be heard by the decision-maker when any material is given”, citing *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [172] (Callinan and Heydon JJ); *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* (2017) 51 WAR 425 at [103] (Murphy, Mitchell and Beech JJA); and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at [389] (Flick J).
10. As Basten JA observed in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45] (Allsop P agreeing at [1]):

The language of “proper, genuine and realistic consideration” was introduced into administrative law in *Khan v Minister for Immigration, Local Government and Ethic Affairs* (1987) 14 ALD 291 and *Broussard v Minister for Immigration and Ethnic Affairs* (1987) 21 FCR 472 at 483 (Gummow J). That which had to be properly considered was “the merits of the case”. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merit review: *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; 143 LGERA 277 at [79]. If it is demonstrated in a particular case that an administrative decision-maker has failed to address a claim properly made, or has failed to identify the statutory power under which the claim should properly be disposed of, there will be a constructive failure to exercise jurisdiction. Relief will be available accordingly. Thus, “to fail to respond to a substantial, clearly articulated argument relying on established facts was at least to fail to accord [the applicant] natural justice”: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24] (Gummow and Callinan JJ, Hayne J agreeing) and [86]-[88] Kirby J), applied by this Court in *Spanos v Lazaris* [2008] NSWCA 74 at [19], in my judgment, Beazley and Bell JJA agreeing. Where a decision-maker does address the claim, by reference to the correct power, asking whether he or she did so “properly” or “genuinely”, or “realistically” may be taken, inappropriately, as an invitation to assess the correctness of the result, rather than the legality of the process.

1. Similarly, in ***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; 96 ALJR 497; 400 ALR 417 at [26] Kiefel CJ, Keane, Gordon and Steward JJ observed:

Labels like “active intellectual process” and “proper, genuine and realistic consideration” must be understood in their proper context. These formulas have the danger of creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker’s] decision can be scrutinised”. That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, “[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind”. The court does not substitute its decision for that of an administrative decision-maker.

(Footnotes omitted.)

1. Mr Motufoaki also relied on what the plurality said in *Plaintiff M1* at [27], namely that a decision can be infected by jurisdictional error if the reasons disclose that the decision-maker ignored or overlooked or misunderstood relevant facts or materials.
2. Mr Motufoaki’s complaint was based on two paragraphs of the Tribunal’s reasons: [136] and [150].
3. At [136] of its decision record the Tribunal stated:

The evidence indicates that Mr Motufoaki has a supportive group of friends and family and it is testimony to these ties that they provided statements and gave oral evidence. Overall, the evidence demonstrates that this wider group would miss Mr Motufoaki in the event of a non-revocation decision. No more specific or material impact was identified. Mr Motufoaki’s evidence with respect to community engagement was not sustained by, for example, the evidence of his mother. However, I accept that Mr Motufoaki is part of a large family network, and possibly a broader community beyond this.

1. At [150] it stated:

His close friends and family have stressed that Mr Motufoaki has many good qualities and deserves a chance for a new start …

1. But these were not the only paragraphs where these matters were considered. The discussion spanned from [132] to [141]. Further, at [50]–[54] the Tribunal summarised the evidence of one particular friend who gave oral evidence. Of particular relevance to Mr Motufoaki’s complaint is [140] where the Tribunal stated that:

Mr Motufoaki has very strong family and social networks.

1. It is difficult to see how the argument that the Tribunal failed to consider the strength of his ties is sustainable in the light of what the Tribunal said in [136] and [140].The failure to mention the names of two of the witnesses or the specific evidence they gave does not necessarily mean that the Tribunal overlooked the evidence or that it failed to consider it. A decision-maker is not required to refer in their reasons to every piece of evidence or, for that matter, every contention or argument: see, for example, *Applicant* ***WAEE*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46] (French, Sackville and Hely JJ); *ETA067 v Republic of Nauru* [2018] HCA 46; 92 ALJR 1003; 360 ALR 228 at [13] (Bell, Keane and Gordon JJ). In any case, even ignoring material relevant only to fact-finding does not, without more, give rise to jurisdictional error:[*Minister for Immigration and Citizenship v SZRKT*](https://jade.io/article/293472)(2013) 212FCR 99 at [97] (Robertson J). There is a distinction between, on the one hand, a failure by the Tribunal to advert to evidence which, if accepted, might have caused it to make a different finding of fact and, on the other hand, a failure by the Tribunal to address a contention which, if accepted, might establish the elements of a statutory claim: *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 at [69] citing *WAEE* at [44]–[46].
2. The significance of any particular matter raised in the representations in support of revocation is to be assessed by reference to the way in which the matter is expressed in those representations: *Minister for Home Affairs v Omar* (2019) 272 FCR 589at [34](g) (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ). As the plurality put it in *Plaintiff M1* at [25]*,* what needs to be done in orderto comply with the requirement for a valid exercise of the power in s 501CA(4) necessarily depends on the “nature, form and content of the representations”. Consequently, as their Honours went on to say:

The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations.

1. Further, although the representations as a whole must be taken into account, not every matter in the representations is a mandatory consideration such that a failure to take it into account in forming the requisite state of satisfaction would be a jurisdictional error: *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (FC) at [69] (Colvin J); *Omar* at [34](g).
2. So what did Mr Motufoaki have to say about the evidence in question? Very little as it turns out. As the Minister pointed out in his submissions, in Mr Motufoaki’s Statement of Facts, Issues and Contentions (**SFIC**) he emphasised his familial relationships and the duration of his time in Australia but made no particular submission in relation to the nature, strength or duration of his social ties based on his friendships – either specifically or generally. All he did in his SFIC was ask the Tribunal to take into account “me establishing familial, educational, employment and social ties to Australia in the two decades since my residence here in Australia” and his “positive contributions to the community through my family duties, employment, and social activities”.
3. It is true that in the SFIC Mr Motufoaki did refer to “representations” and letters of support from his friends but in the different contexts of his statements of remorse and resolve not to reoffend (at [70]) and the extent of his rehabilitation in that they speak to his character and offer him “their full support” (at [72]). The Tribunal summarised the submissions Mr Motufoaki made at [79]–[80]. The summary does not suggest that in oral argument Mr Motufoaki expanded on what he said in his SFIC about the consideration relating to the nature, strength or duration of his social ties or referred specifically to the statements of Mr Stranger or Mr Koskinas.
4. The transcript of the Tribunal hearing was not included in the appeal book or provided to the Court. We infer that it does not assist Mr Motufoaki.
5. It is difficult to see how the Tribunal could be said to have fallen into jurisdictional error for failing to engage with the specifics of the testimonials from Mr Stranger or Mr Koskinas in considering the nature, strength and duration of Mr Motufoaki’s social ties to the Australian community when Mr Motufoaki himself did not advert to them in his representations or submissions on this subject.
6. In all these circumstances, we consider that ground 3 is not reasonably arguable. We refuse leave to raise this ground in the appeal because, although there would be no evident prejudice to the Minister if leave were granted, it has no real merit and there is no adequate explanation for the failure to take the point earlier.
7. It follows that the appeal should be dismissed with costs.

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| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Katzmann, Feutrill and Raper. |

Associate:

Dated: 22 May 2023