# FAILURE TO GIVE PROPER, GENUINE AND REALISTIC CONSIDERATION TO THE MERITS OF A CASE: A CRITIQUE OF *CARRASCALAO*

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In *Carrascalao v Minister for Immigration and Border Protection*[1] (*Carrascalao*), the Full Court of the Federal Court of Australia (FCA) (Griffiths, White and Bromwich JJ) unanimously found that the Minister for Immigration and Border Protection failed to give 'proper, genuine and realistic consideration to the merits' before deciding to cancel the visas of two non-citizens on 'national interest' grounds under s 501(3) of the *Migration Act 1958* (Cth).

This article offers a critique of *Carrascalao* in two respects. First, despite correctly demonstrating that the Minister did not globally engage in an active intellectual process in cancelling the visas of two non-citizens, the Full Court paradoxically went to some lengths to demonstrate that the Minister had engaged in an active intellectual process in justifying why the other judicial grounds of appeal should be dismissed. Arguably, this led to a judicial decision that is internally inconsistent and illogical in a broad context. Secondly, this article offers a close critique of the reasoning of Griffiths, White and Bromwich JJ in dismissing several of the other grounds of appeal raised in the judicial review applications (as related to procedural fairness and construction of the s 501(3) national interest statutory power).

In light of the preceding, this article has two main objectives. First, it explores a fundamental difficulty of a court finding that a decision-maker has failed to give 'proper, genuine and realistic consideration to the merits' of a particular case — the difficulty being 'inconsistency or illogicality of reasoning in disposing of other judicial grounds of appeal'. After particularising this fundamental difficulty, the article will then demonstrate that the Full Court of the FCA offended against this identified difficulty in *Carrascalao*. Secondly, moving beyond the fundamental difficulty theme, the article subsequently provides a broader critique of *Carrascalao*. Although it is concluded that the final orders reached in the case were correct, this article argues that the reasoning process in several aspects of the judgment are open to respectful criticism.

## Background

On 14 December 2016 at 4:15 pm, the Full Court of the FCA ordered that decisions of the Minister to cancel visas held by Mr Carrascalao and Mr Taulahi be set aside.[2] The Full Court further ordered that both non-citizens be released from immigration detention immediately.[3]

Later in the evening on 14 December 2016 — at 7:37 pm and 7:43 pm — the Minister received two batches of material electronically in the Minister's office in relation to both

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Mr Carrascalao and Mr Taulahi.[4] The material totalled approximately 370 pages in the case of Mr Carrascalao[5] and 330 pages in the case of Mr Taulahi.[6]

Purporting to consider the two 'sets of material' regarding the non-citizens, the Minister cancelled Mr Taulahi's visa at 8:18 pm and Mr Carrascalao's visa at 8:25 pm.[7] Both decisions were purportedly made by the Minister under s 501(3) of the Migration Act, which permits the Minister (acting personally) to cancel or refuse the visa of a non-citizen if the Minister reasonably suspects that the person does not pass the character test and is satisfied the refusal or cancellation is in the national interest.[8]

Both non-citizens challenged the Minister's cancellation decisions on the basis that, given the shortness of time in which the Minister could have reviewed the material before him, he could not have given proper, genuine and realistic consideration to the merits of the two matters (Ground 1).[9] Justices Griffiths, White and Bromwich agreed, holding that 'there was insufficient time for the Minister to engage in the requisite active intellectual process' in exercising the important statutory power under s 501(3) of the Migration Act.[10]

The Full Court found that '43 minutes' represented an insufficient time for the Minister to have engaged in an active intellectual process which the law required of him in respect of both the cases which were before him.[11] Accordingly, the Minister's decisions to cancel the visas of Mr Carrascalao and Mr Taulahi for a second time was set aside.[12]

**Inconsistency or illogicality of reasoning**

The provenance of the expression 'proper, genuine and realistic consideration' derives from Gummow J's judgment in *Khan v Minister for Immigration and Ethnic Affairs*.[13] 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 without regard to the merits of a particular case. Justice Gummow 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'.[14]

In *Carrascalao*, having found that the Minister failed to give proper, genuine and realistic consideration to the merits on each visa cancellation decision, the Full Court emphasised that its decision related 'exclusively to the process surrounding the Minister's decisions and not to the merits' of the decisions.[15]

In other words, the Minister's visa cancellation decisions were 'entirely spoiled' because he had failed adequately to consider the individual merits of each case as a *matter of procedure*. The clear implication of a court making such a finding is that the same court subsequently would be restrained from making other judicial findings (in the same case) that the decision-maker had adequately considered the 'merits' of a case.

For example, in finding that a Minister did not give proper, genuine and realistic consideration to the merits of A's case because of a lack of time to consider, it would be *illogical* or *internally inconsistent* to find that the same Minister did adequately consider B, C, D and so on (assuming those latter matters fall within the scope of A's case) — this is because, once a 'global' finding is made that a decision-maker failed to give proper, genuine and realistic consideration to the merits of a particular case, it betrays logic to say the decision-maker sufficiently considered 'various aspects' of the decision (especially without clear evidence tendered in the appeal proceedings).

The preceding implication identified was contravened by the Full Court in *Carrascalao*. Having found that the Minister failed to give proper, genuine and realistic consideration to

the merits of both Mr Carrascalao's and Mr Taulahi's cases on procedural grounds,[16] that should have been the end of the matter. However, owing to judicial duty, the Full Court proceeded to rule on the balance of judicial review grounds pleaded in the case.

Somewhat paradoxically, in addressing other judicial review grounds of appeal raised by the two non-citizens, Griffiths, White and Bromwich JJ subsequently went to relatively great lengths to 'justify' that the Minister had adequately considered various matters in making his visa cancellation decisions.

First, both non-citizens argued that the Minister had failed to give proper, genuine and realistic consideration (or have regard to) the representations and information provided to him by the respective solicitors of both non-citizens (Ground 2).[17]

In his statement of reasons in relation to Mr Carrascalao's case, the Minister indicated that he had 'considered' Mr Carrascalao's representations.[18] Mr Carrascalao argued that this aspect of the Minister's decision was 'no more than lip service'.[19]

In dismissing Ground 2, the Full Court indicated that they were not persuaded that the Minister gave 'mere lip service' to Mr Carrascalao's material.[20] Justices Griffiths, White and Bromwich further pointed out that the Minister 'was entitled to have regard to the Department's summary of the material'.[21] In dismissing this ground of appeal,[22] the plain implication is that the Minister did adequately consider Mr Carrascalao's representations.

Secondly, both non-citizens contended that the Minister fell into jurisdictional error in 'failing to consider' whether it was in the national interest to make a decision without affording them natural justice (Ground 3).[23] Significantly, Griffiths, White and Bromwich JJ collectively found that the Minister had adequately turned his mind to this question:

> The Minister's statements of reasons in both cases contain an express statement that 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 proper notice, is in the national interest' … Fairly read, we consider 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.[24]

Consequently, in finding that the Minister had 'undertaken proper consideration', Ground 3 was rejected in both cases.[25]

Thirdly, both non-citizens argued that the cancellation decisions of the Minister were infected by jurisdictional error as being both unreasonable in a legal sense and lacking rationality (Ground 4).[26] Both non-citizens broadly argued that there was 'no reasonable basis' for the Minister to reach the state of satisfaction that it was in the national interest to cancel their visas.[27]

Mr Carrascalao specifically contended that 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 a past membership with a criminal organisation and having a criminal record.[28]

Mr Taulahi argued that it was not open for the Minister to cancel his visa in the national interest because the Minister suspected that he was 'previously closely involved with a group which the Minister suspected was previously, or is currently involved in, criminal conduct'.[29]

Despite upholding Ground 1 on the basis that the Minister 'did not engage in an active intellectual process' in determining whether or not to exercise powers under s 501(3) of the

Migration Act, in dismissing Ground 4, the Full Court went to some lengths to justify that the Minister had actively engaged in an intellectual process in applying that statutory power:

(1) The court found it was reasonably open to the Minister to form a view that removing Mr Taulahi (a past senior officeholder at the Lone Wolf OMCG) was reasonably related to the national interest in preventing, detecting and disrupting organised crime.[30]
(2) 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 as an OMCG.[31]
(3) The Minister adopted a 'guarded view' about Mr Taulahi's prospects of extricating himself from gangs and leading a law-abiding life.[32]
(4) The Minister's finding that the quantity and variety of media reports was sufficient to ground a reasonable suspicion that the Lone Wolf OMCG had been and is involved in criminal conduct was reasonably open.[33]
(5) The considerations which the Minister found fell within the scope of the 'national interest' criterion (for the purposes of s 501(3) of the Migration Act) were entirely permissible.[34]

Fourthly, Mr Taulahi further argued that, for a person to fail the character test under s 501(6)(b) of the Migration Act, the person had to have some 'subjective connection' in the sense of awareness or participation, with the relevant suspected criminal conduct (Ground 7).[35]

In rejecting Ground 7, the Full Court pointed out that the Minister had actively addressed this argument:

> 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 …[36]

Fifthly, Mr Taulahi further contended that the Minister had erred in his construction and application of the phrase 'group … involved in criminal conduct' for the purposes of s 501(6)(b) of the Migration Act.[37] Mr Taulahi argued that the Minister erred in failing to distinguish between the involvement of the group in criminal conduct and the involvement of individuals other than in their capacity as members of the group in such conduct (Ground 8).[38]

In rejecting Ground 8, the Full Court found that the Minister had made sufficient findings that adequately dealt with this ground of appeal:[39]

(1) The Minister found that Lone Wolf OMCG members are alleged to have committed serious criminal conduct.
(2) 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.[40]

In *Carrascalao*, Griffiths, White and Bromwich JJ posed the central question in relation to Ground 1 was whether the two non-citizens had '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 Migration Act.[41]

The Full Court found that the Minister did not engage 'in an active intellectual process' in applying s 501(3), because there was 'insufficient time' for the Minister to consider all the material that related to both non-citizens. With respect, the reasoning of the Full Court in relation to Ground 1 is both logically sound and reasonably open. The clear inference was

that the Minister could not possibly have considered over 700 pages in the space of 43 minutes and make not one but two significant visa cancellation decisions in the national interest.

However, having made that decision to uphold Ground 1, it makes 'no logical sense' for the Full Court to subsequently demonstrate that the Minister engaged in an *active intellectual process* to justify dismissing the other grounds of appeal. The Full Court found that the Minister did properly consider Mr Carrascalao's representations.[42] The Full Court found the Minister made specific factual findings that properly supported the invocation of the 'national interest' criterion in s 501(3) of the Migration Act.[43] The Full Court found that the Minister correctly construed the statutory ambit of the 'national interest' criterion in s 501(3) as a matter of law.[44] The Full Court found that the Minister made ample factual findings that disposed of Grounds 7 and 8.[45]

In essence, having found that the Minister did not engage in an active intellectual process in making the visa cancellation decisions for procedural reasons, it makes little logical sense to demonstrate an opposite conclusion on that point with respect to substantial grounds of appeal.

**Critical analysis of other aspects of the judgment**

Quite independent of the apparent 'illogicality' or 'inconsistency' in the reasoning process of the Full Court already outlined, there are other aspects of the decision in *Carrascalao* which warrant closer consideration. Arguably, the following matters demonstrate some further misgivings about aspects of the reasoning of Griffiths, White and Bromwich JJ.

***Minister acting personally***

The Full Court pointed out that s 501(4) of the Migration Act expressly mandated that the power under s 501(3) 'may only be exercised by the Minister personally'.[46] For Griffiths, White and Bromwich JJ:

> [This strict procedural requirement reflects a legislative intention] that the power be exercised at the highest level of government, having regard to the national interest considerations and the absence of an obligation to provide natural justice.[47]

In other words, because of the national interest considerations involved and lack of procedural fairness rule, a decision of that kind should be made 'at the highest level of government' (that is, by a Commonwealth Minister acting personally). The difficulty with this logic is that, under s 501(2) of the Migration Act, delegates of the Minister can take into account a 'national interest' criterion in cancelling the visa of a non-citizen on character grounds.[48] Natural justice does apply under s 501(2).[49]

***Discrete aspects of material***

Somewhat curiously, the Full Court found that the inferences it had drawn in relation to the Minister's consideration of the 'entirety of the material' relating to Mr Carrascalao were not open to be drawn in relation to the 'discrete and relatively small amount of material provided by Mr Carrascalao's instructing solicitors'.[50]

In other words, the Full Court was not persuaded that the Minister did not have regard to the material provided on Mr Carrascalao's behalf by his instructing solicitors. However, given the very short time in which the Minister had to 'consider' Mr Carrascalao's case, there could be

no logical way for the Full Court to know whether the Minister had regard to the 'discrete and relatively small amount of material provided by Mr Carrascalao's instructing solicitors'.

### *Natural justice*

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 affording them natural justice (Ground 3).[51] Both non-citizens contended that this duty arose under s 501(3) of the Migration Act so as to:

(a) minimise encroachment on fundamental rights to procedural fairness and to personal liberty;[52]
(b) give effect to the purpose of s 501(3) as reflected in the Minister's second reading speech;[53] and
(c) give effect to the principle of legality.[54]

The short answer to this ground of appeal is that the Minister was not required to afford the two non-citizens natural justice, as the rules of procedural fairness are expressly abrogated under s 501(3) of the Migration Act. In that context, there is no room for the principle of legality to take effect.

Somewhat oddly, however, the Full Court disposed of Ground 3 by finding that the Minister 'did consider' whether it was in the national interest to make a decision without affording natural justice to both non-citizens:

> 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 proper notice, is in the national interest' ...[55]

There are two difficulties with this reasoning.

First, it seeks to demonstrate that the Minister did engage in an active intellectual process (which, of course, is contrary to the reasoning adopted by the Full Court in relation to upholding Ground 1).

Secondly, although it was correct to reject Ground 3, the Full Court failed squarely to engage with the submissions of the non-citizens in relation to this ground of appeal. For example, the Full Court made no findings about the principle of legality and its relationship with s 501(3) of the Migration Act. Further, the Full Court ignored the submission made by the two non-citizens about the apparent statutory purpose of s 501(3) being limited to an 'emergency power'.

### *Construing the national interest criterion*

The non-citizens contended 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 phrase did not include the best interests of the child (Ground 4(c)).[56]

In other words, the non-citizens argued that the Minister misconstrued the 'national interest' criterion in s 501(3) of the Migration Act. Consequently, the Full Court was required to construe the statutory scope of the 'national interest' criterion in s 501(3). In undertaking this process, two aspects of the Full Court's reasoning are open to question.

First, in seeking to demonstrate the broad scope of the 'national interest' term, the Full Court indicated that it was similar to the 'public interest' expression.[57] In an attempt to outline what was meant by the 'national interest' concept, the Full Court made reference to the High Court of Australia decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[58] (which considered the 'public interest' expression).

The difficulty here is that it is far from clear that the statutory expression 'national interest' is in fact similar or analogous to the term 'public interest'. For example, in *Wong v Minister for Immigration & Multicultural & Indigenous Affairs*,[59] Tamberlin J expressly held that the 'national interest' expression is to be differentiated from the notion of 'public interest', which can embrace, among other matters, local, regional and municipal concerns.[60]

A number of other cases in Australia have expressly found that the term 'national interest' is different from the 'public interest' concept.[61] Accordingly, in construing the 'national interest' criterion under the Migration Act, the Full Court should have avoided examining jurisprudence related to the 'public interest' expression (given the apparent differences between the two concepts).

Secondly, Griffiths, White and Bromwich JJ found that it was unnecessary 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.[62]

The Full Court found 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.[63] Expressed at that level of generality, it is a matter for the Minister to decide what national interest considerations are relevant. However, it should be recalled that reliance on an unexplained label such as 'national interest', divorced from any notions of protection of the Australian community, could not provide an example of a necessarily lawful exercise of the s 501 discretion.[64] The Full Court did not appear to show, with respect, an appreciation for this latter important point.

Further, it is a little peculiar that the Full Court found that it was a matter for the Minister to decide, 'on the merits of any particular case', what national interest factors would become engaged.[65] This is because, in upholding Ground 1, Griffiths, White and Bromwich JJ had already found that the Minister failed to give proper, genuine and realistic consideration to the merits of each case in making his cancellation decisions.

## Conclusion

In many ways, *Carrascalao* is an important decision on several fronts.

First, the case demonstrates that a decision-maker must give proper, genuine and realistic consideration to the merits of each case. In that context, as *Carrascalao* shows, the court will be open to examining the full set of circumstances leading up to a decision to determine whether proper consideration was given.

Secondly, *Carrascalao* plainly demonstrates that even the Minister, purporting to exercise a 'national interest' statutory criterion personally, can have such an important decision set aside if the appropriate process is not followed. In many ways, *Carrascalao* represented an extreme example (in that it is fairly clear that any decision-maker would struggle to consider 700-plus pages properly in under an hour).

Thirdly, *Carrascalao* arguably demonstrates a level of internal inconsistency or illogicality in the reasoning process of Griffiths, White and Bromwich JJ. On the one hand, the Full Court

correctly determined that the Minister could not have engaged in an active intellectual process in cancelling the visas of the two non-citizens. Nevertheless, on the other hand, the Full Court went to some length to demonstrate that the Minister had engaged in an active intellectual process in seeking to justify why the other grounds of appeal pleaded in the judicial review applications should fail.

There are repeated references in the decision to the fact that the Minister 'did consider' relevant matters related to the two non-citizens.[66] The Full Court emphasised that the Minister had acted reasonably in exercising the s 501(3) power under the Migration Act.[67] However, these latter findings are difficult to maintain in circumstances where the Full Court otherwise found that the Minister did not engage in an active intellectual process in determining whether or not to exercise powers under s 501(3) of the Migration Act. The paradox is clear.

**Endnotes**

1 [2017] FCAFC 107.
2 *Taulahi v Minister for immigration and Border Protection* [2016] FCAFC 177.
3 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [2].
4 Ibid [123].
5 Ibid [86].
6 Ibid [68].
7 Ibid [126].
8 Ibid [4].
9 Ibid [2].
10 Ibid [128].
11 Ibid [129].
12 Ibid [166].
13 *Khan v Minister for Immigration and Ethnic Affairs* [1987] 14 ALD 291.
14 Ibid 292.
15 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [132].
16 Ibid [120].
17 Ibid [133].
18 Ibid [134].
19 Ibid [136].
20 Ibid [138].
21 Ibid.
22 Ibid [139].
23 Ibid [140].
24 Ibid [142].
25 Ibid [143].
26 Ibid [144].
27 Ibid.
28 Ibid [145].
29 Ibid [146].
30 Ibid [147].
31 Ibid [148].
32 Ibid.
33 Ibid [149].
34 Ibid [158].
35 Ibid [24].
36 Ibid [161].
37 Ibid [25].
38 Ibid.
39 Ibid [163].
40 Ibid [162].
41 Ibid [35].
42 Ibid [138].
43 Ibid [142], [147]–[149].
44 Ibid [147], [158].
45 Ibid [161]–[165].
46 Ibid [56].
47 Ibid.

48 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256 [74] (Kiefel and Bennett JJ).
49 Jason Donnelly, 'Challenging *Huynh*: Incorrect Importation of the National Interest Term via the Back Door' (2017) 24 *Australian Journal of Administrative Law* 99, 101.
50 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [138].
51 Ibid [140].
52 Ibid.
53 Ibid [141].
54 Ibid.
55 Ibid [142].
56 Ibid [150].
57 Ibid [156].
58 (2012) 246 CLR 379.
59 [2002] FCA 959.
60 Ibid [34].
61 *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 [42] (Cowdroy, Reeves and Jagot JJ); *South Australia v O'Shea* (1987) 163 CLR 378, 411 (Brennan J); *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 560–1 (Hayne J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 504 (Kirby J); *Singh v Minister for Immigration & Multicultural Affairs* [2000] FCA 1426 [67] (Emmett J).
62 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [158].
63 Ibid [158].
64 *Tanielu v Minister for Immigration and Border Protection* [2014] FCA 673 [152] (Mortimer J).
65 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [158].
66 Ibid [142], [149].
67 Ibid [147]–[149].