

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

JASON DONNELLY*

In Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107; (2017) 347 ALR 173, 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 section 501(3) of the Migration Act 1958 (Cth). This article offers a critique of the Carrascalao judgment 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 (concerning procedural fairness and construction of the section 501(3) national interest statutory power).

I INTRODUCTION

In *Carrascalao v Minister for Immigration and Border Protection*,¹ the Full Court of the Federal Court of Australia unanimously found that the Minister for Immigration and Border Protection (‘Minister’) failed to give ‘proper, genuine and realistic consideration to the merits’ before cancelling the visas of two long-term non-citizens of Australia on character grounds.²

In light of the preceding, this article has two main objectives.

First, this article explores a fundamental difficulty of a court globally 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

* Jason Donnelly, BA (Macq), LLB (Hons I) (UWS), GDipLP (College of Law), Barrister of the Supreme Court of New South Wales and High Court of Australia, Lecturer (WSU) and Adjunct Lecturer (College of Law).

¹ *Carrascalao v Minister for Immigration and Border Protection* (2017) 347 ALR 173 (‘Carrascalao’).

² *Carrascalao* (2017) 347 ALR 173, 178 [19], 200 [120].

reasoning in disposing of other judicial grounds of appeal. After particularising this fundamental difficulty, this article will then demonstrate that the Full Court failed to overcome this difficulty in *Carrascalao*.

Secondly, moving beyond the fundamental difficulty theme, this article subsequently provides a broader critique of the *Carrascalao* judgment. Although it concludes 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.

II FACTUAL BACKGROUND

On 14 December 2016 at 4.15pm, a differently constituted Full Federal Court ordered that decisions of the Minister to cancel visas held by Mr Carrascalao and Mr Taulahi be set aside.³ The Full Court further ordered that both non-citizens should be released from immigration detention immediately.⁴

Later in the evening on 14 December 2016, the Minister received two batches of material electronically in the Minister's office at 7.37pm and 7.43pm in relation to Mr Carrascalao and Mr Taulahi respectively.⁵ The material totalled approximately 370 pages in the case of Mr Carrascalao⁶ and 330 pages in the case of Mr Taulahi.⁷

Purporting to consider the two sets of material regarding the non-citizens, the Minister cancelled Mr Taulahi's visa at 8.18pm and Mr Carrascalao's visa at 8.25pm.⁸ Both decisions were purportedly made by the Minister under section 501(3) of the *Migration Act 1958* (Cth) ('*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.⁹

Mr Taulahi had a long criminal history, had been associated with an outlaw motorcycle gang ('OMCG') called 'Lone Wolf',¹⁰ and had been ordinarily resident in Australia for 25 years.¹¹ Mr Carrascalao also had a long criminal history,¹² had a previous association with the OMCG called 'Bandidos',¹³ and at the time of his visa cancellation, had been a resident in Australia for over 41 years.¹⁴

Both non-citizens challenged the Minister's cancellation decisions on the basis that given the shortness of time in which the Minister reviewed the material before him (ie about 43 minutes), he could not have given proper, genuine and realistic consideration

³ Ibid 175 [2], 179 [27]; see *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146.

⁴ *Carrascalao* (2017) 347 ALR 173, 175 [2].

⁵ Ibid 201 [123].

⁶ Ibid 192–3 [86].

⁷ Ibid 189 [68].

⁸ Ibid 202–3 [126].

⁹ Ibid 175–6 [4]; *Migration Act 1958* (Cth), s 501(6).

¹⁰ *Carrascalao* (2017) 347 ALR 173, 177 [8]–[9].

¹¹ Ibid 177 [6].

¹² Ibid 178 [14].

¹³ Ibid 178 [16].

¹⁴ Ibid 177 [10].

to the merits of the two matters (Ground 1).¹⁵ Griffiths, White and Bromwich JJ agreed, finding that ‘there was insufficient time for the Minister to engage in the requisite active intellectual process’ in exercising the important statutory power under section 501(3) of the *Migration Act*.¹⁶ Accordingly, the Minister’s decisions to cancel the visas of Mr Carrascalao and Mr Taulahi for a second time was set aside.¹⁷

III 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*.¹⁸ 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. 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’.¹⁹

In *Carrascalao*, having found that the Minister failed to give proper, genuine and realistic consideration to the merits of 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.²⁰

The Minister’s visa cancellation decisions were entirely spoiled because he had failed to adequately 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 should subsequently be restrained from making other judicial findings (in the same case) that the decision-maker had adequately considered the merits in ruling on the substantive grounds of appeal in the case. For the author, this is the significant jurisprudential principle that the reader should take away from identifying the shortcomings of the Full Court judgment in *Carrascalao*.

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 I, II, III etc (assuming those latter matters fall within the scope of A’s case). 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 that the decision-maker sufficiently considered various aspects of the decision (especially without clear evidence tendered in the appeal proceedings).

In *Carrascalao*, as the Full Court found that the Minister failed to give proper, genuine and realistic consideration to the merits of both Mr Carrascalao and Mr Taulahi’s cases on procedural grounds,²¹ that should have been the end of the matter. However, the Full Court proceeded to rule on the balance of the substantive judicial

¹⁵ Ibid 175 [2], 178 [19].

¹⁶ Ibid 202–203 [128]–[129].

¹⁷ Ibid 212 [166].

¹⁸ *Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 457.

¹⁹ Ibid [25].

²⁰ *Carrascalao* (2017) 347 ALR 173, 204 [132] (emphasis in original).

²¹ Ibid 200 [120].

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 to (or have regard to) the representations and information provided to him’ by the respective solicitors of both non-citizens (Ground 2).²²

In his statement of reasons in relation to Mr Carrascalao’s case, the Minister indicated that he had considered Mr Carrascalao’s representations.²³ Mr Carrascalao argued that this aspect of the Minister’s decision was ‘no more than lip service’.²⁴

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.²⁵ Griffiths, White and Bromwich JJ further pointed out that the Minister ‘was entitled to have regard to the Department’s summary of the material’.²⁶ In dismissing this ground of appeal,²⁷ 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).²⁸ Significantly, Griffiths, White and Bromwich JJ collectively found that the Minister had adequately turned his mind to this question.²⁹

Consequently, in finding that the Minister had undertaken proper consideration, Ground 3 was rejected in both cases.³⁰

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).³¹ 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.³²

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.³³

²² Ibid 204 [133].

²³ Ibid 204 [134].

²⁴ Ibid 204 [137].

²⁵ Ibid 204–5 [138].

²⁶ Ibid.

²⁷ Ibid 205 [139].

²⁸ Ibid 205 [140].

²⁹ Ibid 205 [142].

³⁰ Ibid 205 [143].

³¹ Ibid 205–6 [144]–[146].

³² Ibid.

³³ Ibid 206 [145].

Mr Taulahi argued that it was not open for the Minister to cancel his visa in the national interest on the basis that 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’.³⁴

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 section 501(3) of the *Migration Act*, in dismissing Ground 4, the Full Court paradoxically 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 that ‘it was reasonably open to the Minister to form the view that removing Mr Taulahi, a past senior officeholder of the Lone Wolf [criminal organisation], was reasonably related to the national interest in preventing, detecting and disrupting organised crime’;³⁵
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’ in the Lone Wolf criminal organisation;³⁶
3. The Minister adopted a ‘guarded view about Mr Taulahi’s prospects of extricating himself from gangs and leading a law abiding life’;³⁷
4. The Minister’s finding that the ‘quantity and variety’ of media reports was sufficient to ground a reasonable suspicion that the Lone Wolf group had been, and is involved in criminal conduct, was reasonably open;³⁸ and
5. The considerations which the Minister found to fall within the scope of the national interest criterion (for the purposes of section 501(3) of the *Migration Act*) were entirely permissible.³⁹

Fourthly, Mr Taulahi further argued that for a person to fail the character test under section 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).⁴⁰

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 ...⁴¹

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

³⁴ Ibid 206 [146].

³⁵ Ibid 206 [147].

³⁶ Ibid 207 [148].

³⁷ Ibid.

³⁸ Ibid 207 [149].

³⁹ Ibid 210–11 [158].

⁴⁰ Ibid 179 [24].

⁴¹ Ibid 211 [161].

of section 501(6)(b) of the *Migration Act*.⁴² Mr Taulahi argued 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’ (Ground 8).⁴³

In rejecting Ground 8, the Full Court found that the Minister had made sufficient findings that adequately dealt with this ground of appeal,⁴⁴ having found that:

- (a) Lone Wolf OMCG members are alleged to have committed serious criminal conduct ... and
- (b) 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 ...⁴⁵

In *Carrascalao*, Griffiths, White and Bromwich JJ stated that 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*.⁴⁶

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.

The Full Court found that the Minister did properly consider Mr Carrascalao’s representations.⁴⁷ The Full Court found the Minister made specific factual findings that properly supported the invocation of the national interest criterion in section 501(3) of the *Migration Act*.⁴⁸ The Full Court found that the Minister correctly construed the statutory ambit of the national interest criterion in section 501(3) as a matter of law.⁴⁹ The Full Court found that the Minister made ample factual findings that disposed of Grounds 7–8.⁵⁰ Having found that the Minister did not globally engage in an active intellectual process in making the visa cancellation decisions for procedural reasons (Ground 1), it makes little logical sense to demonstrate that the Minister did engage in an active intellectual process to justify dismissing the other substantive grounds of appeal in the case.

IV CRITICAL ANALYSIS OF OTHER ASPECTS OF THE JUDGMENT

A Introduction

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

⁴² Ibid 179 [25].

⁴³ Ibid.

⁴⁴ Ibid 211 [163].

⁴⁵ Ibid 211 [162].

⁴⁶ Ibid 181 [35].

⁴⁷ Ibid 204–5 [138].

⁴⁸ Ibid 205 [142], 206–7 [147]–[149].

⁴⁹ Ibid 206 [147], 210–11 [158].

⁵⁰ Ibid 211 [161]–[165].

Carrascalao which warrant closer consideration. Arguably, the following matters demonstrate some further difficulties with the reasoning of Griffiths, White and Bromwich JJ.

B 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'.⁵¹

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 that material.

C Natural Justice

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).⁵² Both non-citizens contended that this duty arose under section 501(3) of the *Migration Act* so as to:

1. 'minimise encroachment on fundamental rights to procedural fairness and to personal liberty';⁵³
2. 'giv[e] effect to the purpose of s 501(3), as reflected in the Minister's Second Reading Speech';⁵⁴ and
3. give effect to the principle of legality.⁵⁵

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 section 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 prior notice, is in the national interest' ... 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.⁵⁶

⁵¹ Ibid 204–5 [138].

⁵² Ibid 205 [140].

⁵³ Ibid.

⁵⁴ Ibid 205 [141].

⁵⁵ Ibid.

⁵⁶ Ibid 205 [142].

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 to squarely engage with the submissions of the non-citizens in relation to this ground of appeal. The Full Court made no findings about the principle of legality and its relationship with section 501(3) of the *Migration Act*. The Full Court ignored the submission made by the two non-citizens about the apparent statutory purpose of section 501(3) being limited to an ‘emergency power’.⁵⁷

D 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 in section 501(3) of the *Migration Act*, including by proceeding on the basis that the phrase did not include the best interests of the child (Ground 4(c)).⁵⁸ Consequently, the Full Court was required to construe the statutory scope of the national interest criterion in section 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 expression ‘public interest’.⁵⁹ 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*⁶⁰ (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*,⁶¹ 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’.⁶²

A number of other cases in Australia have expressly found that the term ‘national interest’ is different to the public interest concept.⁶³ Accordingly, in construing the national interest criterion under the *Migration Act*, the Full Court should have avoided

⁵⁷ Ibid 205 [141].

⁵⁸ Ibid 207 [150].

⁵⁹ Ibid 210 [156].

⁶⁰ *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

⁶¹ *Wong v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 959.

⁶² Ibid [34].

⁶³ *Tewao v Minister for Immigration and Citizenship* (2012) 126 ALD 185, 198–9 [42] (Cowdroy, Reeves and Jagot JJ); *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 560–1 [172] (Kirby J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 504 [336] (Kirby J). See also *South Australia v O’Shea* (1987) 163 CLR 378, 411 (Brennan J); *Singh v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 453, 473–4 [67] (Emmett J).

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.⁶⁴

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.⁶⁵ 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 discretion under section 501.⁶⁶ The Full Court did not appear to show, with respect, an appreciation for this latter important point.

V CONCLUSION

The decision of *Carrascalao* is important on several fronts.

First, the case demonstrates that a decision-maker must give proper, genuine and realistic consideration to the merits of each case. 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. *Carrascalao* represents an extreme example (ie in that it is fairly clear that any decision-maker would struggle to consider over 700 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.⁶⁷ The Full Court emphasised that the Minister had acted reasonably in exercising the section 501(3)

⁶⁴ *Carrascalao* (2017) 347 ALR 173, 210–11 [158].

⁶⁵ *Ibid.*

⁶⁶ *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 456 [152] (Mortimer J); Jason Donnelly, ‘Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door’ (2017) 24 *Australian Journal of Administrative Law* 99, 108.

⁶⁷ See, eg, *Carrascalao* (2017) 347 ALR 173, 205 [142], 207 [149].

power under the *Migration Act*.⁶⁸ 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 section 501(3) of the *Migration Act*. The paradox is clear.

⁶⁸ Ibid 206–7 [147]–[149].