

FEDERAL COURT OF AUSTRALIA

Cortes v Minister for Immigration, Citizenship and Multicultural Affairs **[2023] FCA 1136**

Review of:	<i>Cortes and Minister for Immigration, Citizenship and Multicultural Affairs</i> [2023] AATA 284
File number:	WAD 68 of 2023
Judgment of:	COLVIN J
Date of judgment:	22 September 2023
Legislation:	<i>Migration Act 1958</i> (Cth) s 501CA
Cases cited:	<i>Pihama v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</i> [2023] FCA 678 <i>VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</i> [2022] FCA 921
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	8
Date of hearing:	Determined on the papers
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Ms E Tattersall
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs

ORDERS

WAD 68 of 2023

BETWEEN: **GILBERTO CORTES**
Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: **COLVIN J**

DATE OF ORDER: **22 SEPTEMBER 2023**

BY CONSENT THE COURT ORDERS THAT:

1. A writ of certiorari issue directed to the Administrative Appeals Tribunal quashing the decision of the Administrative Appeals Tribunal dated 16 February 2023.
2. A writ of mandamus issue directed to the Administrative Appeals Tribunal requiring it to determine the application made to it for review of the decision of a delegate of the first respondent dated 24 November 2022 according to law.
3. The first respondent pay the applicant's costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39. 32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 Mr Cortes is being held in immigration detention because his visa has been cancelled. A delegate of the Minister declined to exercise the power conferred by s 501CA(4) of the *Migration Act 1958* (Cth) to revoke the decision to cancel his visa. The Administrative Appeals Tribunal affirmed the delegate's decision. By amended application for review, Mr Cortes sought review in this Court alleging error of the same kind that had been accepted to be a denial of procedural fairness in *Pihama v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 678.

2 The Minister concedes that:

- (a) the Tribunal's conclusions that the applicant's crimes against other road users, strangers and members of the public going about their daily lives were crimes against vulnerable members of the community for the purposes of para 8.1.1(1)(b)(ii) of Direction No. 90 - Visa refusal and cancellation under section 501 and revocation of mandatory cancellation of a visa under section 501CA, were adverse conclusions which would not obviously be open on the known material; and
- (b) the applicant was denied procedural fairness in circumstances where the applicant was not given notice of those conclusions and, therefore, did not have an opportunity to address them.

3 The parties also agree that the failure to provide procedural fairness in the way identified above was material. Their common position is that the Tribunal found that the above conclusions added to the overall seriousness of the criminal conduct of Mr Cortes, and that weighed as a whole, his conduct weighed very strongly against revocation and consequently there was a realistic possibility that the overall weighing exercise that was undertaken by the Tribunal could have differed.

4 On the above basis, the Minister consents to the relief sought by Mr Cortes.

5 Even where the proper contradictor to an application for judicial review consents to the grant of relief, the Court must be satisfied that there is error and there is a public interest that requires the Court to specify the error and its satisfaction that an error has occurred which justifies the

proposed relief being granted within the public law jurisdiction of the Court: see my reasoning in *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921 at [3]-[6].

- 6 I am satisfied that there is a proper basis for the concession made by the Minister and that it is also open to conclude that there was a realistic possibility that the decision-making process could have resulted in a different outcome.
- 7 For reasons that I expressed in *Pihama* at [6]-[10], the matters now conceded by the Minister give rise to jurisdictional error. I accept that, for the reasons given by the parties, the error was material.
- 8 For those reasons, the relief sought by consent of the parties should be given.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:

A handwritten signature in dark ink, appearing to read 'A. Tilleard', written over a light grey background.

Dated: 22 September 2023