FEDERAL COURT OF AUSTRALIA

Chetcuti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1758

File number:	VID 841 of 2019
Judgment of:	**BROMBERG J**
Date of judgment:	8 December 2020
Catchwords:	**MIGRATION** – application for judicial review of Minister's decision to cancel the applicant's visa under s 501(3) of the *Migration Act 1958* (Cth) – whether Minister misunderstood the operation of s 501(3) by failing to appreciate that s 501(5) did not prohibit the Minister providing natural justice to a visa-holder – whether alleged misunderstanding can be inferred from factual circumstances – no misunderstanding inferred – whether Minister erred by failing to have regard to the most up to date material available at the time of his decision – whether obligation to ensure decision is made on the basis of the most current material available was applicable to Minister's decision – obligation not applicable because Minister not obliged to provide natural justice pursuant to s 501(5) – whether Minister erred by failing to give proper, genuine and realistic consideration to the decision to cancel applicant's visa in circumstances where he spent approximately one hour making decision – whether the substance of the Minister's decision revealed that he failed to undertake an active intellectual process in circumstances where it was alleged he failed to appreciate the gravity of the decision for the applicant and where there were a number of errors in his reasons – no such failure established – application dismissed
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335 *Uriaere v Minister for Home Affairs* [2019] FCAFC 235 *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555 *Weti-Safwan v Minister for Home Affairs* [2019] FCAFC 173 *Burgess v Assistant Minister for Home Affairs* (2019) 271 FCR 181

	Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2019] FCA 1520 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66 *Blanch v Archer* (1774) 1 COWP 63 *Jones v Dunkel* (1959) 101 CLR 298 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 *Minister for Home Affairs v Omar* (2019) 272 FCR 589 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 *Navoto v Minister for Home Affairs* [2019] FCAFC 135
Division:	General Division
Registry:	Victoria
Number of paragraphs:	69
Date of hearing:	24 March 2020
Counsel for the Applicant:	Ms G Costello QC with Mr A Aleksov
Solicitor for the Applicant:	Lawson Bayly
Counsel for the Respondent:	Mr C Lenehan SC with Ms J Watson
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 841 of 2019

BETWEEN:	**FREDERICK CHETCUTI** Applicant
AND:	**MINISTER FOR IMMIGTRATION, CITIZENSHIP, MIGRANT SERVICES AND MUTLICULTURAL AFFAIRS** Respondent

ORDER MADE BY:	**BROMBERG J**
DATE OF ORDER:	**8 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs of the application.

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

REASONS FOR JUDGMENT

BROMBERG J:

1 The applicant ("**Mr Chetcuti**") was born in Malta in August 1945. He arrived in Australia on 31 July 1948 some 72 years ago. On 1 September 1994, Mr Chetcuti was deemed to hold an absorbed person visa ("**visa**") by operation of law.

2 Approximately one year prior to when Mr Chetcuti first obtained the visa, he was convicted of murdering his former wife. He was sentenced to 24 years imprisonment.

3 On 28 March 2017, shortly before Mr Chetcuti's sentence was due to expire, the then Minister for Immigration and Border Protection cancelled the visa under s 501(2) of the *Migration Act 1958* (Cth) ("**the Act**") ("**first purported cancellation decision**"). The first purported cancellation decision was quashed by an order of this Court made by consent on 14 August 2017.

4 Later that day, the then Minister for Home Affairs cancelled the visa under s 501(3) of the Act ("**second purported cancellation decision**"). The second purported cancellation decision was quashed by a Full Court of this Court in a judgment published on 2 July 2019 (***Chetcuti** v Minister for Immigration and Border Protection* (2019) 270 FCR 335).

5 On the same day that the judgment of the Full Court was published, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("**the Minister**") cancelled the visa under s 501(3) of the Act ("**cancellation decision**"). The written record of the cancellation decision indicates that the Minister commenced consideration of a departmental submission and attachments at 1 pm on 1 July 2019. Other evidence before me suggests that the cancellation decision was made at about 2.56 pm on 2 July 2019. Despite more than 24 hours passing between when the Minister first commenced considering the cancellation of the visa and when the cancellation decision was made, both the decision record and other evidence to which I later refer support a finding that the Minister took an hour to consider the material and make his decision.

6 At 12.30pm, nearly two and a half hours prior to the cancellation decision being made, Mr Chetcuti through his legal representative provided a submission and further material ("**further submission**") and requested that the material be considered should any further consideration be given to cancelling Mr Chetcuti's visa following the publication of the Full

Court's judgment. On that day at 3.45 pm, Mr Chetcuti was notified of the cancellation decision by email provided to his legal representative.

7 Mr Chetcuti relies on the following three grounds of review set out in his amended application, namely:

- The Minister erred in law in that he misunderstood the operation of s 501(3) of the Act by believing it precluded him from giving effect to the rules of natural justice by inviting Mr Chetcuti to make submissions or provide further material ("**ground 1**").
- The Minister erred in law by failing to have regard to the most up to date material at the time of his decision to cancel Mr Chetcuti's visa ("**ground 2**").
- The Minister erred in law by failing to give proper, genuine and realistic consideration to the decision to cancel Mr Chetcuti's visa ("**ground 3**").

8 Relevantly to the issues that need to be determined, sub-sections 501(3) and (5) of the Act provide as follows:

> **Decision of Minister--natural justice does not apply**
>
> (3) The Minister may:
>
> …
>
> (b) cancel a visa that has been granted to a person;
>
> if:
>
> (c) the Minister reasonably suspects that the person does not pass the character test; and
>
> (d) the Minister is satisfied that the refusal or cancellation is in the national interest.
>
> …
>
> (5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

9 As Mr Chetcuti does not raise any issue as to the application of the character test in s 501(3)(c), it is not necessary to set out s 501(6) of the Act where the elements of that test are detailed.

GROUND 1

10 By this ground Mr Chetcuti contended that the Minister misunderstood the operation of s 501(3) because, rather than appreciating that the effect of s 501(5) was to relieve him of any obligation to provide natural justice to Mr Chetcuti, the Minister regarded s 501(5) as

prohibiting him from providing natural justice by entertaining any further submissions from Mr Chetcuti at all.

11 Mr Chetcuti's contention that the Minister misunderstood the operation of s 501(3) (**"Minister's alleged misunderstanding"**) is based on a number of facts from which Mr Chetcuti says an inference should be drawn. There are four factual circumstances relied upon, each of which Mr Chetcuti contended reveal the Minister's alleged misunderstanding. They are: (i) the content of departmental advice received by the Minister about the operation of s 501(3); (ii) the Minister's understanding of the operation of s 501(3) as is discernible from his reasons for decision; (iii) an asserted recognition by the Minister in his reasons that the information before him was incomplete and out of date; and (iv) his failure to consider the further submission. Each of these factual circumstances are expanded upon in turn below.

12 *First*, the Department of Home Affairs ("**Department**") provided a written submission to the Minister for his consideration regarding any decision he may have made in respect of Mr Chetcuti's visa. Mr Chetcuti contended that departmental advice contained in that submission would have been understood by the Minister as providing him with a binary choice: either to consider cancelling the visa under s 501(2) of the Act "with natural justice", or to consider cancelling the visa under s 501(3) of the Act "without natural justice". In particular, Mr Chetcuti relied on the following paragraphs of the departmental submission made under the heading "Operation of s 501(2) cancellation with natural justice; and s 501(3) cancellation in the national interest without natural justice" (emphasis added):

> [11] *You may decide to undertake a consideration of cancellation under s501(2), with natural justice.* Under this provision the person is provided with a Notice of Intention to Consider Cancellation and will have 28 days in which to respond to the notice. This gives the person an opportunity to provide the Department with information pertaining to their circumstances and to respond to any adverse information, before a decision is made.
>
> [12] Should you be minded to consider cancelling Mr CHETCUTI's visa under s501(2) of the Act, a submission for cancellation consideration would be referred to you for decision in accordance with agreed decision-making arrangements for character cases.
>
> [13] *Alternatively, you may decide to undertake a consideration of cancellation under s501(3)(b) of the Act, without natural justice.* Under this provision you may cancel a person's visa if you reasonably suspect the person does not pass the character test and you are satisfied that the cancellation is in the national interest. *The person is not given notice of the cancellation consideration and is therefore not afforded any opportunity to provide the Department with information pertaining to their circumstances or to respond to any adverse information, before a decision is made*.

13 *Second*, Mr Chetcuti relied upon the following statements made in the Minister's reasons for decision (emphasis added):

> [4] *Section 501(3)(b) of the Act, in conjunction with s501(5), enables me to, without natural justice, cancel a visa* that has been granted to a person if:
>
> - I reasonably suspect that the person does not pass the character test (as defined by s501(6)); and
>
> - I am satisfied that the cancellation is in the national interest.
>
> …
>
> [8] *I note that I could have instead elected to consider Mr CHETCUTI's visa cancellation under s501(2) of the Act, with natural justice,* and that under that provision the person is provided with a Notice of Intention to Consider Cancellation and given 28 days in which to respond to the notice. Under that process the person is afforded an opportunity to provide the Department with information pertaining to their circumstances and to respond to any adverse information, before a decision is made.
>
> [9] *However, I decided to proceed to make a decision in Mr CHETCUTI's case under s 501(3), without natural justice*.

14 *Third*, Mr Chetcuti relied upon several statements in the Minister's reasons which he contended suggest that the Minister understood that some of the information before him was incomplete and out of date. The Minister's recognition that information could have been put before him but was not was said by Mr Chetcuti to point to the conclusion that "the Minister believed he was precluded from giving [Mr Chetcuti] the opportunity to provide information on those important but easily answered questions".

15 *Fourth*, Mr Chetcuti relied upon the further submission and contended that the Court should find that the Minister was aware of its content or, at least, the nature and importance of that content. Mr Chetcuti contended that the further submission dealt with subject matters that the Minister went to some lengths to consider and evaluate in his reasons for decision. The Minister's failure to take into account the updating material provided by the further submission on subjects evaluated by reference to outdated information was asserted to reveal the Minister's alleged misunderstanding.

16 There are other cases in which this Court has been asked to draw essentially the same inference – that the Minister misunderstood that in making a decision pursuant to s 501(3) (or alternatively under s 501BA(2)) the Minister was not precluded from entertaining a submission or receiving material or further material from the visa holder. As to decisions made under s 501BA(2) the relevant authorities are *Uriaere v Minister for Home Affairs*

[2019] FCAFC 235, ***Ibrahim*** *v Minister for Home Affairs* (2019) 270 FCR 12, *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555 and *Weti-Safwan v Minister for Home Affairs* [2019] FCAFC 173. Those cases stand for the proposition that s 501BA(3) removes any obligation on the Minister to afford natural justice when exercising power under s 501BA(2), but does not prohibit the Minister from doing so. Further, they hold that if the Minister had a positive understanding that s 501BA(3) precluded him or her from giving effect to the rules of natural justice, that would involve a misunderstanding of the nature of the power that the Minister was exercising and would mean that such a decision is affected by jurisdictional error: see *Ibrahim* at [26] and [62]-[63]. The approach taken in relation to s 501BA(2) has been applied to s 501(3) of the Act by the Full Court in ***Burgess*** *v Assistant Minister for Home Affairs* (2019) 271 FCR 181, in ***Chamoun*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2019] FCA 1520 and on appeal in *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66 ("***Chamoun FCAFC*** ").

17 The Minister initially submitted that the reasoning in *Ibrahim* and the cases detailed above which concerned s 501BA(2), do not apply to s 501(3). However, that submission was made before the Full Court decision in *Chamoun FCAFC* was handed down. In *Chamoun FCAFC*, Mortimer and Bromwich JJ (see at [74]-[81] with Katzmann J agreeing at [26]) affirmed the holding in *Burgess* that the reasoning in *Ibrahim* applies to s 501(3). In a supplementary submission made by the Minister addressing the significance of *Chamoun FCAFC*, although the Minister contended that the observation in that case that the reasoning in *Ibrahim* applied to s 501(3) was obiter, the Minister accepted that considered obiter of an intermediate appellate court is highly persuasive, and that as a single judge, I should apply the *Ibrahim* reasoning to s 501(3). Whether or not the reasoning in *Chamoun FCAFC* is to be regarded as obiter, I consider, with respect, that reasoning to be correct and even if I am not bound to follow it, I would do so in any event.

18 Putting aside for the moment the issue of materiality, I proceed on the basis that if the Minister cancelled Mr Chetcuti's visa under s 501(3) on the understanding that, by reason of s 501(5), he was prohibited from considering any further material sought to be put before him by Mr Chetcuti including the further submission, the Minister's cancellation decision would have been affected by jurisdictional error.

19 Whether the Minister misunderstood the operation of s 501(3) is a question of fact. That proposition was not in contest. It was accepted by the parties that, insofar as other decisions have dealt with a similar fact-finding exercise, those authorities provide guidance, but are not binding: see *Chamoun* at [84] (Robertson J).

20 I turn then to the facts and in particular those facts which Mr Chetcuti relied upon to support the inference he contended should be made about the Minister's alleged misunderstanding. I commence with what I earlier described as the first circumstance.

21 The departmental submission is not particularly clear and is open to be understood in a way which supports Mr Chetcuti's contention. It is, in my view, capable of being understood by its reader as advising that the process of the Minister considering cancellation of a visa under s 501(3) is to be performed without the Minister affording any natural justice to the visa holder. There are two matters which encourage that understanding. *First*, the available options are recounted (including in the heading) in a manner which suggests that there are but two options, either that cancellation is to be effected under s 501(2) "with natural justice", or it is to be effected under s 501(3) "without natural justice". The absence of any reference to the third available option of the Minister providing a visa holder with natural justice or partial natural justice under s 501(3) when considering cancellation, suggests that the Minister has only a binary choice in which the possibility of affording the visa holder some opportunity to be heard in a process under s 501(3) is not available. That understanding, which arises from the binary structure of the departmental advice, is then bolstered by the *second* matter found in the last sentence of [13], which is open to be understood as stating the effect of there being no access to natural justice under the s 501(3) process, namely, that "the [visa holder] is not given notice of the cancellation consideration and is therefore not afforded any opportunity to provide the Department with information pertaining to their circumstances or to respond to any adverse information, before a decision is made".

22 It is, I think, a fair assumption that the Minister read and acted in accordance with his understanding of the departmental advice (see *Burgess* at [99] (White and Charlesworth JJ) and at [9] (Kerr J)). Whilst an understanding by the Minister of the kind just referred to was open for the Minister to have arrived at on the basis of the departmental advice, a conclusion that the Minister had that understanding cannot be made without assessing what is revealed by the Minister's reasons about his understanding of how s 501(3) operates.

23 It is necessary therefore to consider those reasons including what Mr Chetcuti contended to be the second factual circumstance which supported the inference for which he contended.

24 To my mind, the Minister's reasons (relevantly extracted above at [13]) are, on balance, of no assistance to Mr Chetcuti. At [4] of his reasons, the Minister stated that "[s]ection 501(3)(b) of the Act, in conjunction with s 501(5), enables me to, without natural justice, cancel a visa that has been granted to a person". Although the Minister did not expressly say he was not precluded from providing natural justice to a visa holder, the Minister nevertheless stated that he was enabled not to do so by s 501(3)(b) and s 501(5). That is a technically correct, albeit incomplete, statement of the effect of s 501(5) upon the operation of s 501(3). On its own, [4] of the reasons would tend to support the Minister's contention that he properly understood the operation of s 501(3). However, the possibility that the Minister understood himself to have a binary choice in which natural justice was precluded if he chose to proceed by way of s 501(3) gains some support from the way the Minister expressed his understanding at [8]-[9] of his reasons.

25 In my view, those contrary indicators tend to count each other out so as to make it difficult to discern from the Minister's reasons read together with the departmental advice, what really was the Minister's understanding. On similar but not identical departmental advice and reasons for decision, White and Charlesworth JJ (but not Kerr J) in *Burgess* (at [89]) and Robertson J in *Chamoun* (at [88]) held that the decision-maker had not misunderstood the operation of s 501(3) and in particular that the Minister was not precluded from providing the visa holder an opportunity, or some opportunity, to be heard.

26 Given that Mr Chetcuti bears the onus of proof and given my view that there are contrary indicators and no firm conclusion available, on the basis of the departmental advice and the reasons given by the Minister alone, I would not come to the view that the Minister's alleged misunderstanding was established by Mr Chetcuti.

27 On the basis that the departmental advice and the Minister's reasons do not establish but merely leave open the possibility that the Minister held the alleged misunderstanding, I turn to consider the third and fourth circumstances relied upon by Mr Chetcuti. In relation to what I have earlier described as the third factual circumstance, the first absence of information in question concerns the nature of the relationship Mr Chetcuti had with a woman from whom he received ongoing support and visitations, in the context of the Minister considering the family and social support available to Mr Chetcuti in Australia. There was evident uncertainty as to whether the

woman in question was Mr Chetcuti's step-daughter or the daughter of a woman with whom Mr Chetcuti was friends. Next, the Minister noted that the names and ages of Mr Chetcuti's grandchildren were not known in the context of the Minister assuming that the grandchildren were minors when assessing the best interests of minor children. Lastly, Mr Chetcuti relied upon the Minister noting, in the context of the Minister considering the strength, nature and duration of Mr Chetcuti's ties to Australia, that it is likely that Mr Chetcuti also has other family members residing in Australia beyond his three children and two grandchildren.

28 That understanding by the Minister that, on those particular subjects he had assessed, the information before him was incomplete or likely to be incomplete, does very little to support the inference contended for by Mr Chetcuti. The Minister's contention that his understanding in this respect does not give rise to the relevant inference should be accepted. As the Minister contended, there is nothing in that understanding to suggest that the Minister was troubled by not having the relevant detail and there is therefore no reason for thinking the Minister wished for further information on those relevant subjects, so as to suggest that the Minister felt constrained from receiving any such further information.

29 I turn then to the fourth factual circumstance relied upon by Mr Chetcuti. Although the fact was contested, I have concluded that the better view is that the Minister was appraised of the existence of the further submission, of its content and of its potential importance. My reasons for that conclusion are as follows.

30 In advance of the Full Court delivery of judgment on 2 July 2019, at 12.30pm on 2 July 2019 Mr Chetcuti's legal representative ("**Mr Bayly**") sent an email to the Minister for Home Affairs, stating that if that Minister did "intend to again consider cancellation of Mr Chetcuti's [visa] in the event that his appeal is successful, please read and consider the attached submission and three (3) documents before making a further decision to cancel." Mr Bayly noted in the email that the legal advisors of the Minister for Home Affairs were copied into the email and that he would also call them to ensure that the matter was brought to that Minister's attention before the publication of the Full Court's judgment that afternoon.

31 The attachment to the email, being the further submission, consisted of a letter of nine pages written by Mr Bayly in support of Mr Chetcuti, a statement made by Mr Chetcuti on 1 July 2019 of five pages, a letter hand-written by Mr Chetcuti's son on 29 June 2019 of five pages, and International Health and Medical Services ("**IHMS**") records obtained by Mr Chetcuti from Villawood Detention Centre on 1 July 2019.

32 It appears that at 1.03pm, the generic email address of the National Character Consideration Centre ("**NCCC**"), who had also been copied into the original email from Mr Bayly to the Minister for Home Affairs, forwarded Mr Bayly's communication to a number of officers in the Department. At 1.45pm the email was forwarded by Ms Anastasia Rigas, A/g Manager – Special Interest Team in the Immigration and Citizenship Services Group of the Department, to Ms Georgia Belbas-Pennacchia. At 1.57pm, Ms Rigas forwarded the email to Mr Nigel Muir, Director of the NCCC at the Department, stating (emphasis added):

> Please note, this was not anticipated as Mr C has not engaged with the Department. His representative has submitted material during lunch and has requested that the information be taken into account by the Minister before he making [sic] decision.
>
> *There is critical new information that has not been included in the current submission with the Minister.*
>
> *The matter needs to be reconsidered in light of the newly submitted material*.

33 At 2.21pm Mr Muir forwarded the email to Ms Justine Jones, Assistant Secretary, Character and Cancellation Branch at the Department, with the following email:

> As discussed, we have just received further (and detailed0 [sic] information from lawyers representing Mr Chetcuti. We will commence analysis of this material (I have had to delete some attachments because of email size limits) but note this analysis may not be complete prior to Minister Coleman completing his consideration of the submission provided to him on 28 June.

34 At 2.43pm Ms Josefina Wellings-Booth, Acting Principal Legal Officer, AAT and Removals Injunction Section at the Department sent an email to a number of officers and mailboxes at the Department stating that Mr Chetcuti's appeal was allowed, that his visa was therefore reinstated and arrangements needed to be made to release him from detention immediately.

35 At 2.58pm Ms Rigas sent a further email to Mr Muir stating:

> Please note the below email from Mr CHETCUTI's representative and the attachments.
>
> Additional material has been submitted for the Minister's consideration under s501(3). We also note, the IHMS material has not been included in the previous attachments and should be considered.
>
> Attachment R of the submission includes a summary of Mr C's health issues and was provided on 11 August 2017. The new IHMS information covers the period 2017 to June 2019.

36 At 2.59pm, Mr Jarrad Town, Senior Departmental Liaison Officer in the Office of the Minister sent an email to Mr Muir and Ms Jones attaching a submission signed by the Minister "within the last few moments". I would infer from that comment that the Minister made the

cancellation decision at about 2.56 pm. At 3.03pm, Mr Muir forwarded the cancellation decision to Ms Belbas-Pennacchia and others asking for it to be actioned. At 5.13pm, Ms Jones advised Mr Ross Macdonald, Senior Adviser to the Minister, that Mr Chetcuti had been advised of the cancellation decision and re-detained. In that email, Ms Jones also sought confirmation of the total time taken in considering the submission and attachments. Mr Macdonald replied at 5.43pm to confirm that the Minister had considered the brief for a total of one hour.

37 The Minister submitted that, at its highest, the further submission appears to have been known to officers within the Department and does not appear to have ever reached the attention of the Minister. This submission was made on the basis that the emails from Ms Rigas detailed above at [32] and [35], which highlight that the submission contains information that should be considered, were sent too close to the time of the decision by the Minister. The Minister noted that Ms Rigas' second email sent at 2.58pm must have been sent after the Minister had already signed the submission cancelling the visa at about 2.56pm. Further, the Minister submitted that the fact that Ms Rigas felt the need to reiterate the importance of the content of Mr Bayly's email at 2.58pm strongly indicates that Ms Rigas' email of 1.57pm was not passed on.

38 Mr Chetcuti responded that the difficulty with that submission is that it failed to address the fact that Mr Bayly's email was sent directly to the Minister. However, that assertion is incorrect. As earlier stated the email was directed to the Minister for Home Affairs. Whether the email was then forwarded to the Minister is not dealt with by evidence before me.

39 While I would accept that Ms Rigas' second email would likely have been received a few minutes after the Minister cancelled the visa, her first email was sent about an hour before the Minister made his decision and I do not accept that the fact that Ms Rigas sent the second email suggests that her first email was disregarded. It is clear that Mr Muir was aware of Ms Rigas' first email and I would infer that Ms Rigas' remark that "there is critical new information" in the further submission which was not then before the Minister and that "the matter needs to be considered in the light of the newly submitted material", would likely have motivated Mr Muir to do what he could to appraise the Minister of the further submission. Mr Muir's email to Ms Jones, sent some 40 minutes prior to the Minister's cancellation of the visa suggests that Mr Muir was of the view that the Minister should be appraised of the further submission at least by an analysis of it which he was then involved in preparing. There is no evidence that the analysis, if ever completed, reached the Minister in time and Mr Muir's concern that it may not is stated in the email. It is likely, however, that in circumstances where the potential

importance of the further submission had been made patently clear by Ms Rigas, that prior to the Minister making his decision the Minister was at least verbally appraised of the existence of the further submission, provided with some outline of the issues it addressed and informed that an analysis of it was being prepared for his consideration.

40 Whether or not the Minister was appraised of the further submission and the extent of that appraisal is a matter entirely within the knowledge of the Minister and his advisors and it was within the power of the Minister to produce direct evidence as to that matter. As was said in *Blanch v Archer* (1774) 1 COWP 63 at 65 "[a]ll evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted". The rule in ***Jones v Dunkel*** (1959) 101 CLR 298 has been described as an application of that principle: *Chetcuti* at [89] (Murphy and Rangiah JJ). In circumstances where it was within the power of the Minister to produce evidence on this issue, the failure of the Minister to have done so permits me to draw the inference I have drawn, with greater confidence: see further *Chetcuti* at [90]-[91].

41 I well appreciate that the Minister may have had a basis for contending that he called no evidence on the question of whether he had been appraised of the further submission because reliance upon what I have referred to as the fourth factual circumstance was really only made at the hearing and in oral submissions and little or no notice of it had been provided. However, I specifically asked the Minister's counsel if an opportunity to put material before the Court in relation to this argument was sought and that opportunity was declined. In those circumstances and for the reasons given I am prepared to draw an inference that prior to making the cancellation decision the Minister had been appraised of the existence of the further submission and provided with at least an outline of the content of that submission.

42 There are on those facts at least two further inferences that might be drawn. The first is that the Minister declined to consider the further submission because he was of the view that he was prohibited from doing so. The second inference that might be drawn is that the Minister declined to consider the further submission because he was aware he was not obliged to consider it and determined not to do so.

43 The considerations that favour the first inference being drawn are broadly as follows. The further submission does contain information that updated the material before the Minister on at least two issues of significance to the Minister's decision as to whether or not the visa should be cancelled. Whether or not Mr Chetcuti had expressed remorse for his crimes, and in

particular the murder of his former wife, was an issue which the reasons of the Minister show to be of significance to the Minister's decision. Mr Chetcuti had refused to express remorse at various times through to January 2017 and that fact seems to have been significant to the Minister's view that Mr Chetcuti had not taken responsibility for his crimes and that this was a factor indicative of the risk of Mr Chetcuti reoffending. The further submission contained an expression of remorse made by Mr Chetcuti. Whilst the remorse there expressed could have been expressed in wider terms, the expression of remorse made in the further submission was of some importance to an issue of significance that the Minister dealt with in making the cancellation decision.

44 Further, as Ms Rigas' second email stated, the further submission included new medical information from IHMS in relation to Mr Chetcuti's health covering the period April 2017 to June 2019.

45 The material then before the Minister about Mr Chetcuti's health was outdated and seemed to be not more recent than about August 2017. The state of Mr Chetcuti's health, including his mental health, was significant to the Minister's decision. In particular, the Minister's reasons took into account Mr Chetcuti's health in considering the extent of the difficulties that Mr Chetcuti would likely experience if he were removed from Australia and the Minister also took into account Mr Chetcuti's refusal to receive treatment for his mental illness in considering his progress towards rehabilitation.

46 It is appropriate to consider what a reasonable decision-maker would likely have done in the postulated circumstances faced by the Minister. I accept that it would be odd for a reasonable decision-maker to consider and evaluate issues of significance upon outdated material in circumstances where relevant updating material was known to be available. It might be expected that a reasonable decision-maker intent on making the best possible decision would grapple with the new material rather than spend time and effort considering material which was known to have been overtaken by more recent information. That the decision-maker ignored more recent information on an issue of significance may suggest that the decision-maker took the view that the more recent information could not be received and taken into account.

47 However that reasoning urged upon me by Mr Chetcuti, involves the making of a number of assumptions which I am not persuaded I ought to make. It may well be that the Minister understood that he was not prohibited from taking the further submission into account but chose not to do so because of the delay that would be occasioned if he did. It is clear from the factual

context described above that the Minister was working on the basis that if the Full Court found in favour of Mr Chetcuti, the Minister would need to urgently consider whether Mr Chetcuti's visa should be cancelled. That was likely to be the case because any delay in making a decision would have required that Mr Chetcuti be released from detention and placed into the Australian community. Mr Chetcuti's contention that the further submission was relatively short and would not have taken long to read ignored the fact that, if the Minister had decided to take into account that submission, he would likely have wanted the material to be assessed by the Department and to have received advice as to both its reliability and significance. Accordingly, the Minister may have given priority to the perceived need for the decision to be made urgently over the need to make his decision on the best available information.

48 Additionally, and of significant weight to the analysis I have made, I consider it unlikely that, if the Minister came to know about the further submission, as I have found he likely did, he would not have correctly understood that he could, but was not obliged, to take the further submission into account. Each of the observations made in the emails of Ms Rigas and Mr Muir are premised on an understanding that the Minister was not prohibited from taking into account the further submission. It is unlikely that, following upon those observations, whomever it was that was prompted to appraise the Minister of the existence and content of the further submission, would have done so on the basis that the Minister was prohibited from considering that information. It is more likely that the Minister was advised that the further submission had been received and that an analysis of it was being made by the Department so that the Minister could consider it should he choose to do so.

49 The competing inferences are not so close or equal that if a *Jones v Dunkel* inference was available to assist Mr Chetcuti, I would have found in his favour. For those reasons I am not persuaded that Mr Chetcuti has established that the Minister made the cancellation decision on the asserted misunderstanding as to the operation of s 501(3) for which Mr Chetcuti contended.

50 I should add that had I been persuaded that the Minister's decision was tainted by that misunderstanding, I would have found jurisdictional error. I would have rejected the Minister's contention that any such error was not material, adopting, with respect, the reasoning of Mortimer and Bromwich JJ in *Chamoun FCAFC* at [66] and [69]-[70].

51 For those reasons, Mr Chetcuti's first ground must be rejected.

GROUND 2

52 By this ground, Mr Chetcuti asserted that the Minister failed to have regard to the most up to date information available to him. Mr Chetcuti relied on the observation made by Mason J in *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* (1986) 162 CLR 24 at 45, that ordinarily there is an implication flowing from the empowering statute that a decision is to be made on the basis of the most current material available to the decision-maker. In the often-cited observation upon which Mr Chetcuti relied, Mason J said this (emphasis added):

> It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. *But that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker*.

53 Mr Chetcuti contended that the further submission made to the Minister on 2 July 2019 attached the most current material relating to a range of matters, including his remorse for his offending and his current personal circumstances and that the importance of that material was clear.

54 There is a factual issue which I have already addressed as to whether or not the Minister became aware of the further submission. In that respect I rely on the findings I have already made.

55 Relying on *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at [80] (Kiefel and Bennett JJ), the Minister contended that the principle referred to by Mason J in *Peko-Wallsend* is only applicable where the material is essential to the exercise of the power, or in other words, it must relate to a mandatory consideration. The Minister argued, and it was not in contest, that the further submission did not deal with a mandatory consideration. The Minister also contended that, in any event, there is no scope to imply a legal obligation on the part of the Minister to take into account the most up to date information because s 501(5) of the Act makes it clear that a decision may be made pursuant to s 501(3) without the Minister providing natural justice.

56 In response, Mr Chetcuti referred to *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [53]-[56] (Robertson J) and also to *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 (Kenny, Griffiths and Mortimer JJ),

although Mr Chetcuti's reliance on those judgments was not developed and it is not clear to me how those authorities assist Mr Chetcuti on what I regard to be the decisive issue.

57 In my view, the decisive issue here is whether there was any obligation upon the Minister to take into account the most up to date information available to him in the context of s 501(5) providing that the rules of natural justice do not apply. As the Minister contended, s 501(5) contemplates that the Minister may form the satisfaction required by s 501(3)(d) – that the cancellation of the visa is in the national interest – without ascertaining what, if anything, the affected person has to say about that topic. There is therefore no room to imply from "the subject matter, scope and purpose" (*Peko-Wallsend* at 45) of the Act, that the Minister's decision must be made on the basis of material provided by the affected person being taken into account at all, let alone that the most recent of material so provided must be taken into account.

58 Ground 2 must therefore be rejected.

GROUND 3

59 By ground 3, Mr Chetcuti contended that one hour was an insufficient time for the Minister to have engaged in the active intellectual process required of him in carrying out his statutory task under s 501(3) of deciding whether to cancel the visa. It is not in contest that, in performing his statutory task, the Minister was required to engage in an active intellectual process: *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [36] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ). It is also not in contest that the Minister completed his consideration of whether he should cancel Mr Chetcuti's visa, including by making his decision and providing his reasons, in an hour.

60 Mr Chetcuti contended that an hour was an insufficient time for the Minister to have actively engaged in reading and considering more than 160 pages of complex material and determining whether a person like himself, who has lived in Australia for over 70 years, should be permanently excluded from his home country. Additionally, Mr Chetcuti pointed to two errors in the Minister's reasons and contended that the Minister's failure to correct those errors gave rise to an inference that the Minister had failed to engage in an active intellectual consideration of the material that had been provided to him by his Department.

61 As the Minister contended, Mr Chetcuti bears the onus of proof and as the Full Court in ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352 (Griffiths,

White and Bromwich JJ) also said (at [48]) a finding that the Minister has not engaged in an active intellectual process is not to be made lightly and must be supported by clear evidence. The Minister contended that the Court could not be satisfied that the Minister's task was "impossible" on the facts of the current matter. The Minister contended, relying on *Carrascalao* at [127], that the only question is whether it was "possible" for the Minister to have engaged in the requisite intellectual process rather than merely whether the Court considers that the Minister ought to have spent more time considering the material and forming the requisite state of satisfaction.

62 I agree that the relevant question is not whether more time ought to have been spent by the Minister. However, I disagree with the Minister's contention that the relevant question necessarily turns on whether it was or was not possible for the Minister to have formed the requisite state of satisfaction with active intellectual rigour, in the time available to the Minister – in this case, within an hour. That is not the purport of what the Full Court said in *Carrascalao* at [127].

63 The Full Court in *Carrascalao* did not there seek to impose a rule based purely upon a quantitative assessment in which all of the things that had to be done by the Minister were evaluated against the possibility of all those things being done in the time actually taken. In a clear case where the time taken is so short that even the cursory performance of the necessary tasks could not have been performed, it will follow that the Minister's obligation to engage in an active intellectual process was not met. However, it does not follow from the fact that there was sufficient time for the cursory performance of the necessary tasks that the Minister did engage in an active intellectual process.

64 As the Full Court (Middleton, Moshinsky and Anderson JJ) said more generally in *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [89], "[w]hat is required by a court upon judicial review is a qualitative assessment as to whether the decision-maker has, as a matter of substance, had regard to the representations made" or, more broadly, the material that the decision-maker was required to consider. As their Honours also there said, the determination of whether the decision-maker has given active intellectual consideration to a representation "will frequently be a matter of impression reached in light of all of the circumstances of the case" (at [89]).

65 This is not a clear case in which an applicant can succeed on a purely quantitative assessment of the time taken. In circumstances where the Minister had the assistance of a detailed

departmental submission, the time taken by the Minister (an hour) is not of itself determinative. It is therefore necessary to look to the substance of what was done in order to qualitatively assess whether it can be said that the Minister failed to engage in an active intellectual process.

66 Only two matters of substance were relied upon by Mr Chetcuti. As I have said, Mr Chetcuti relied upon the gravity of the consequences for him of the cancellation of his visa and in particular that he was an Australian resident of more than 70 years' standing. The quality of the Minister's reasoning was also sought to be impeached by reference to the failure of the Minister to have noticed and to have corrected two errors in the draft statement of reasons that had been prepared for him.

67 However, the Minister's reasons show that he well understood that Mr Chetcuti had resided in Australia for over 70 years and that he would experience hardship in being removed. Further, the errors in the Minister's reasons were minor errors. *First*, some material was wrongly described as "non-disclosable" when that was not so, as a close reading of some of the material before the Minister would have revealed. *Second*, there was an inconsistency in the material before the Minister as to whether a warning had been given to Mr Chetcuti in 2012 by a previous Minister or by the Department and, again, a close reading by the Minister would have revealed the correct position. Those errors were not in relation to issues of sufficient significance to the Minister's decision to suggest that there was an absence of intellectual engagement in the process undertaken by the Minister in relation to matters of substance.

68 Mr Chetcuti has not demonstrated a failure by the Minister to have actively and intellectually engaged in the statutory task required of him. Accordingly, ground 3 must also be rejected.

CONCLUSION

69 As each of the grounds relied upon by Mr Chetcuti have been rejected, his application should be dismissed with costs. I will make orders to that effect.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:

Dated: 8 December 2020