

NOTICE OF FILING AND HEARING

Filing and Hearing Details

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File Title:	ALOVALE JUNIOR LEO'O OLO v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Originating application for review of a migration decision

No. of 2024

Federal Court of Australia
District Registry: Queensland
Division: General

ALOVALE JUNIOR LEO'O OLO

Applicant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS and another
named in the Schedule

Respondents

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

Filed on behalf of (name & role of party)

Alovale Junior Leo'O Olo (the Applicant)

Vince Murano and Chris Fitzgerald (Counsel)

Prepared by (name of person/lawyer)

Wendy Milojkovic (Lawyer)

Wendy Milojkovic Migration Solicitor Pty Ltd trading as

Law firm (if applicable)

Milojkovic Visa & Migration Legal Services

Tel 0481 772 164 & 0429 344 590

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Email info@milojkovicvmls.com.au

Address for service
(include state and postcode)

Mrs Wendy J Milojkovic (Principal Solicitor)
Level 1, 60 Martin Place
Sydney NSW 2000



The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar



This application is made under section 476A of the *Migration Act 1958* (Cth) (**Act**).

The Applicant was notified on 8 August 2024 of the decision made by the Second Respondent on the same day (**Decision**), that is the subject of this application.

Details of relief sought

1. Certiorari issue to quash the Decision of the Second Respondent (**Tribunal**).
2. A writ of mandamus issue requiring the Second Respondent to determine the Applicant's application according to law.
3. The First Respondent pay the Applicant's costs.

Grounds of application

1. The Decision is vitiated by jurisdictional error by reason of a reasonable apprehension of bias by the Tribunal.

Particulars

- (A) The Tribunal was constituted by a Senior Member. It held a hearing in relation to the Applicant's application for review on 25, 26 and 29 July 2024 by audio-visual link. The Senior Member was visible to and could be heard by those participating in and watching the hearing.
- (B) By reason of the Tribunal's conduct in the course of the hearing, and the contents of its reasons for decision, the totality of the circumstances are such that a fair-minded lay observer might reasonably apprehend that the Tribunal might not have brought an impartial and unprejudiced mind to the resolution of the factual and legal questions that arose for its decision in the conduct of its review.
- (C) In respect of the hearing, the reasonable apprehension of bias is evinced by conduct of the Senior Member indicating she might have prejudged the resolution of the factual and legal questions that arose for the Tribunal's decision, including that the Senior Member:
 - (1) rolled her eyes during the course of the hearing, and while witnesses were giving evidence;
 - (2) smirked during the course of the hearing, and while witnesses were giving evidence; and



(3) conducted questioning of witnesses in a manner that was objectively rude, insensitive and/or dismissive.

(D) In respect of the Tribunal's reasons, the reasonable apprehension of bias is reflected by the following findings which evince the Tribunal's prejudgment of the factual and legal questions that arose for its decision, including that:

- (1) the Applicant's case had no merit and was futile: [1] – [4] – i.e. implicitly, that the Applicant ought to have decided not to exercise his right under s 500 of the Act to apply for merits review;
- (2) in representing the Applicant before the Tribunal, the Applicant's legal representatives: (1) presented and/or pressed the Applicant's case in an incompetent and/or dishonest manner; and (2) had made money from a desperate person whose case they ought to have understood to be futile: [2] – [3], [8] and [175] – i.e. implicitly, that the Applicant was undeserving of legal representation and/or ought not to have been legally represented before the Tribunal;
- (3) the Applicant's witnesses and legal representatives made efforts to "manipulate" the Tribunal by proffering "lies, speculation or exaggeration", in circumstances where the Tribunal provided no explanation of what comprised the alleged manipulation and/or the alleged "lies, speculation or exaggeration": [3];
- (4) the Applicant was going back to New Zealand which is "not a country that is poor, unstable, war torn, barbaric or oppressive": [3] – i.e. implicitly, the Tribunal considered New Zealand citizens as less deserving of the Tribunal exercising its discretion in their favour, as compared to the citizens of unidentified countries that, in the Tribunal's view, are "poor, unstable, war torn, barbaric or oppressive", in circumstances where the law the Tribunal is obliged to apply contains no such qualification in respect of New Zealand citizens;
- (5) the Applicant and/or his legal representatives had conducted his application for review improperly and/or with an intention to "create appeal points": [4] – i.e. implicitly, that the application to the Tribunal was without merit and made in a cynical attempt to prolong the Applicant's presence in Australia when, in the Tribunal's view, the Applicant ought to have accepted the delegate's decision, not exercised his review rights, and departed Australia;



(6) the Tribunal declined to “waste time and Tribunal resources” by “addressing each and every disingenuous utterance made on the Applicant’s behalf”, that it was conscious of the prospect of an “appeal”, and that if an “appeal” was brought, it would “create” and “opportunity” for the Federal Court to provide clarity to the Tribunal about “the extent to which the Tribunal is required to engage with material that is obviously lacking in merit”: [4] – i.e. implicitly, that the Tribunal considered unidentified submissions made by the Applicant as so lacking in merit that it should not be required to give them any consideration *at all*, despite it being obliged, pursuant to s 501CA(4) of the Act, to engage in an active intellectual process with significant and clearly expressed representations.

(E) Given the above, the hypothetical lay observer might reasonably apprehend in the circumstances that the Tribunal might have had a preconceived negative view about the merits of the application, the credibility of the Applicant and the Applicant’s witnesses and/or that the Tribunal had decided the outcome of the application prior to performing its review of the delegate’s decision.

(F) Further particulars may be provided following receipt of the Tribunal’s complete file, including the audio-visual file of its hearing.

2. The Decision is vitiated by jurisdictional error by reason of the Tribunal denying the Applicant procedural fairness.

Particulars

(A) The Tribunal:

(1) made each of the findings listed in the particulars at subparagraph (D) subjoined to ground 1 above;

(2) found witnesses called by the Applicant dishonest and/or untruthful: [2] – [3], [8], [112], [117], [129] and [175]; and

(3) found the Applicant’s submission that “his employment history highlights his commitment to economic stability, community enhancement, and workforce skill development in Australia” was “patently false and ridiculous”: [108],

which comprise adverse findings about the Applicant, the Applicant’s witnesses and the Applicant’s legal representatives, and the truthfulness and/or genuineness of evidence relied on by the Applicant (**Adverse Findings**).



- (B) Prior to making the Adverse Findings, the Tribunal did not adequately, and in certain instances, did not at all, put the Applicant on notice of its concerns, and nor were those concerns raised by the Minister.
 - (C) The Tribunal's error was material.
 - (D) Further particulars may be provided following receipt of the Tribunal's complete file, including the audio-visual file of its hearing.
3. The Decision is vitiated by jurisdictional error by reason of the Tribunal making adverse credibility findings about that Applicant's evidence, and the evidence of witnesses, which findings: (1) are based on illogical reasoning; and/or (2) lack an evident and intelligible basis; and/or (3) are legally unreasonable.

Particulars

- (A) The Tribunal found:
 - (1) at [2], that the Applicant's lay witnesses gave "contrived" evidence;
 - (2) at [3], that the Applicant "did not benefit from the efforts of his lawyers and lay witnesses to manipulate the Tribunal" and the evidence given comprised "lies, speculation or exaggeration";
 - (3) at [4], that the evidence provided in support of the Applicant comprised "disingenuous utterance[s]";
 - (4) at [8], that "many witness statements contained commentary or opinion ... that was speculative or exaggerated";
 - (5) at [112], in respect of evidence given about the Applicant's volunteer work, that "I reject all contentions of a similar nature to the examples given, including speculation, spurious and/or superfluous commentary, grandiose claims and falsehoods. I also reject material of that sort that appears in witness statements".
- (B) The Tribunal's credibility findings set out in (A) above were based on illogical reasoning and/or lack an evident and intelligible basis and/or were legally unreasonable because they were based on matters including those set out in (C) – (J) below, each of which comprises a finding based on illogical reasoning and/or lacking an evident and intelligible basis and/or that was legally unreasonable.



- (C) At [8], the Tribunal found that “many witness statements contained commentary or opinion ... that was speculative or exaggerated” in circumstances where the basis for that finding was that: (1) there were unidentified “discrepancies” in evidence; and (2) “[t]here were also multiple words and phrases that appeared in several of the witness statements, including the Applicant’s, his partner’s and his partner’s relatives” – i.e. the reasons for making the finding are incomprehensible.

- (D) At [88], the Tribunal found that the Applicant had engaged in rehabilitative treatment “because he wants his visa back” in circumstances where, in making that finding, the Tribunal foreclosed the possibility that the Applicant’s engagement with treatment may have been motivated by both a genuine intention to rehabilitate as well as “because he wants his visa back” – i.e. the Tribunal proceeded on the incorrect basis that the two motivations were mutually exclusive.

- (E) At [107], the Tribunal found that the Applicant’s submission that “his employment history highlights his commitment to economic stability, community enhancement, and workforce skill development in Australia” (**Development Motive**) was “patently false and ridiculous” because the Applicant’s evidence “indicated that his reason for being employed was, obviously, to earn income” (**Income Motive**) in circumstances where, in making that finding, the Tribunal foreclosed the possibility that the Applicant may have been motivated by the Development Motive as well as the Income Motive – i.e. the Tribunal proceeded on the incorrect basis that the two motivations were mutually exclusive.

- (F) At [126], the Tribunal unreasonably refused to make a finding by reference to that which is commonly known in rejecting the Applicant’s partner’s evidence that she “would have to pay four weeks’ rent if she were to break her lease”.

- (G) At [129], the Tribunal found that the “sharing of ideas”, without more, “calls the credibility of each witness into question” – i.e. the sharing of ideas, in and of itself, does not *ipso facto* mean evidence is not credible.

- (H) At [131], the Tribunal found “tenuous” the link drawn by an indigenous Australian (being the Applicant’s partner’s half-sister) between the separation of the Applicant from his family and the stolen generation, in circumstances where the evidence (set out at [130]) was not tenuous *at all*, and included “that is quite personal, because it makes me feel like it’s like – it’s like forcibly removing him from his family. So it does bring it back and it make it, like, a bit more of a



personal feeling to me, yes. It does” – i.e. the Tribunal misunderstood the evidence given.

- (I) At [132], the Tribunal found that a witness did not know the Applicant “beyond a superficial level” because, without more, they had a “limited understanding of the Applicant’s offending” – i.e. it is perfectly compatible with common human experience that a person may not disclose, even to a close friend, their transgressions from the past.
 - (J) At [176], the Tribunal found that the Applicant’s employer operated “in a way that is not consistent with a business that desperately needs a competent leading hand” because the business “does not have a website or any sort of professional internet presence” – i.e. there is no logical connection between the whether the business needed a leading hand and whether it has any internet presence.
 - (K) The Tribunal’s error was material.
 - (L) Further particulars may be provided on production of the Tribunal’s file, including the audio-visual file of its hearing.
4. The Decision is vitiated by jurisdictional error by reason of the Tribunal misunderstanding and/or misapplying a ministerial direction it was obliged to comply with under s 499 of the Act.

Particulars

- (A) The Tribunal was required to consider and determine whether “another reason” existed to revoke the decision to cancel the Applicant’s visa.
- (B) At the time of making its Decision, the Tribunal was bound by s 499 of the *Migration Act* to comply with *Direction No. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (dated 7 June 2024) (**Direction 110**).
- (C) Properly understood and applied, Direction No. 110 did not require or enable the Tribunal to discount, give less weight to or adversely apply mandatory relevant considerations applicable to the Applicant’s case by reason, without more, of the facts that, as relevant to the Applicant: (1) he was a citizen of New Zealand; and (2) New Zealand is not a “poor, unstable, war torn, barbaric or oppressive” country: [3].



- (D) The Tribunal erroneously discounted, gave less weight to, or adversely applied mandatory relevant considerations applicable to the Applicant's case by reason of those facts referred to in (C) above.
 - (E) The Tribunal's error was material.
5. The Decision is vitiated by jurisdictional error by reason of the findings made by the Tribunal at [66]:
- (A) being based on illogical reasoning and/or lacking an evident and intelligible basis and/or being legally unreasonable; and/or
 - (B) being based on a misunderstanding and/or misapplication of Direction 110; and/or
 - (C) being based on no evidence.

Particulars

- (A) The Tribunal's finding that "Child A was old enough that he would remember this assault" is based on illogical reasoning and/or lacking an evident and intelligible basis and/or legally unreasonable, as it is irreconcilable with the Tribunal's subsequent finding, in the same paragraph, that "[t]here is a lack of evidence about the psychological and emotional impact of the Applicant's crimes on Child A".
 - (B) The Tribunal's finding that "Child A was old enough that he would remember this assault" evidences a misunderstanding and/or misapplication of Direction 110. In making that finding, the Tribunal impermissibly reasoned that the commission of an assault against a person who would remember the assault is more serious offending than the commission of an assault against a person who would not remember the assault.
 - (C) The Tribunal's finding that "Child A was old enough that he would remember this assault" was based on no evidence, given that the age at which a child would remember an assault is not a finding made based on the Minister's personal or specialised knowledge or by reference to that which is commonly known.
 - (D) Each error set out in (A) – (C) above was material.
6. The Decision is vitiated by jurisdictional error by reason of the Tribunal failing to actively intellectually consider what relative weight to give to the primary consideration of the



expectations of the Australian community, in light of the evidence before it of the specific circumstances particular to the Applicant.

Particulars

(A) At [180], the Tribunal found:

I am now required to weigh all of the Considerations in accordance with the Direction. Primary Considerations 1 and 5 [i.e. expectations of the Australian community] each weigh very heavily in favour of cancellation, and Primary Considerations 2 weighs heavily in favour of cancellation. The Applicant's connections to the Australian community, including children, are reflected in the very heavy weight that I allocated to Primary Consideration 3 and the heavy weight I allocated to Primary Consideration 4 against cancellation. I allocated limited weight against cancellation under Other Considerations (a), moderate weight under Other Consideration (b), and no weight under Other Consideration (c). Primary Consideration 1 is generally to be given greater weight than other primary considerations, and Primary considerations should generally be given greater weight than the other considerations. There is no reason to depart from those general positions in this case. The result is that Primary Considerations 1, 2 and 5 [i.e. expectations of the Australian community] combined outweigh the countervailing mandatory considerations.

(B) Nowhere in its reasons does the Tribunal consider in any way what relative weight to give to the primary consideration of the expectations of the Australian community, in light of the evidence before it of the specific circumstances particular to the Applicant.

(C) The Tribunal's error was material.

**Applicant's address**

The Applicant's address for service is:

Place: Wendy Milojkovic Migration Solicitor

Level 1, 60 Martin Place, Sydney NSW 2000.

Email: info@milojkovicvmls.com.au

The Applicant's address is: Brisbane Immigration Detention Centre,
100 Sugarmill Road, Pinkenba QLD 4008

Disclosure under section 486D Migration Act 1958 - Proceedings in relation to a tribunal decision

For the purposes of the disclosure required by section 486D of the *Migration Act 1958* in relation to a proceeding in relation to a tribunal decision (within the meaning of that section), the Applicant states that the Applicant has not brought any other judicial review proceedings (within the meaning of that section) in relation to the decision. Date: 20 August 2024

A handwritten signature in black ink, appearing to read 'Wendy Milojkovic', is written on a light-colored, textured background.

Signed by Wendy Jennifer Milojkovic
Lawyer for the Applicant

Certificate under section 486I of the Migration Act 1958

For the purposes of section 486I of the *Migration Act 1958*, I Wendy Milojkovic certify that there are reasonable grounds for believing that this migration litigation (within the meaning of section 486K of that Act) has a reasonable prospect of success.

Date: 20 August 2024

A handwritten signature in black ink, appearing to read 'Wendy Milojkovic', is written on a light-colored, textured background.

Signed by Wendy Jennifer Milojkovic
Lawyer for the Applicant



Schedule

No. of 2024

Federal Court of Australia
District Registry: Queensland
Division: General

Respondents

Second Respondent: Administrative Appeals Tribunal

Date: 20 August 2024