FEDERAL COURT OF AUSTRALIA

FCFY v Minister for Home Affairs (No 2) [2019] FCA 1990

Appeal from:	Application for judicial review of the AAT decision delivered on 8 November 2018 by Dr L Bygrave
File number:	NSD 852 of 2019
Judge:	**THAWLEY J**
Date of judgment:	26 November 2019
Catchwords:	**MIGRATION** – application for judicial review of decision of Administrative Appeals Tribunal – original decision by delegate of Minister not to revoke mandatory visa cancellation under s 501CA(4) of the *Migration Act 1958* (Cth) – whether jurisdictional error – whether the Tribunal thought "primary considerations" had to be given greater weight than "other considerations" under Direction 65 – whether Tribunal erred in giving less weight to the applicant's length of residence because the applicant had not spent time positively contributing to the Australian community – whether Tribunal failed to deal with critical claims raised – whether Tribunal made factual findings without evidence – application allowed
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) s 43 *Migration Act 1958* (Cth) ss 476A, 477A, 499, 500, 501, 501CA
Cases cited:	*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 *FCFY v Minister for Home Affairs* [2019] FCA 1222 *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 *Graham v Minister for Immigration and Border Protection*

[2017] HCA 33

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225

Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123

Lu v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 141 FCR 346

McAuliffe v Secretary, Department of Social Security (1992) 28 ALD 609

Minister for Home Affairs v Buadromo (2018) 362 ALR 48

Minister for Home Affairs v HSKJ (2018) 363 ALR 325

Minister for Home Affairs v Omar [2019] FCAFC 188

Minister for Immigration and Border Protection v SZMTA (2019) 93 ALJR 252

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1995) 57 FCR 432

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1

Plaintiff M161/2010E v Commonwealth (2010) 243 CLR 319

SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231

Singh v Minister for Home Affairs [2019] FCAFC 3

Soliman v University of Technology, Sydney (2012) 207 FCR 277

Suleiman v Minister for Immigration and Border Protection [2018] FCA 594

SZTMD v Minister for Immigration and Border Protection (2015) 150 ALD 34

Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531

Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22

Williams v Minister for Immigration and Border Protection (2014) 226 FCR 112

Date of hearing:	22 November 2019
Registry:	New South Wales
Division:	General Division

National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	111
Counsel for the Applicant:	Mr J Donnelly with Mr K Tang
Solicitor for the Applicant:	Kyu and Young Lawyers
Counsel for the First Respondent:	Mr T Reilly
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

NSD 852 of 2019

BETWEEN:	**FCFY** **Applicant**
AND:	**MINISTER FOR HOME AFFAIRS** **First Respondent**
	ADMINISTRATIVE APPEALS TRIBUNAL **Second Respondent**
JUDGE:	**THAWLEY J**
DATE OF ORDER:	**26 NOVEMBER 2019**

THE COURT ORDERS THAT:

1. There issue absolute in the first instance a writ of certiorari directed to the second respondent, quashing its decision made on 8 November 2018.
2. There issue absolute in the first instance a writ of mandamus directed to the second respondent, requiring it to determine the applicant's application for review 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

THAWLEY J:

1 The applicant is a British citizen who migrated from the United Kingdom when he was about a year old, arriving in Australia in 1972. He has lived in Australia for 47 years and has never returned to the United Kingdom. He has close ties to Australia, including a partner, three siblings, four step-siblings, three children and three grandchildren. His extended family, comprising of eight aunts and uncles, cousins, nieces and nephews all also reside in Australia. The applicant has no known family in the United Kingdom.

2 The applicant also has a criminal history including convictions for more than 100 separate offences between 1987 and 2017. He has been sentenced to terms of imprisonment in respect of 38 of those offences, some of which were served concurrently. The applicant's history of offending includes violence, dishonesty and driving offences. Between 2000 and 2017, the applicant spent more than five years and ten months in prison.

3 On 21 February 2017, the applicant was convicted and sentenced to imprisonment with respect to six offences. He was sentenced to an aggregate period of 12 months' imprisonment in respect of two counts of 'dishonestly obtain property by deception'. He was also concurrently sentenced to three months' imprisonment in relation to the offence 'custody of offensive implement' and was jailed for an additional period of five months commencing on 21 July 2017 for the offence of 'intimidate police officer'.

4 On 21 June 2017, the applicant's Class BF Transitional (Permanent) visa was the subject of mandatory cancellation by the **Minister** for Home Affairs under s 501(3A) of the *Migration **Act** 1958* (Cth). The applicant's visa had been cancelled under s 501(3A) because: (a) the Minister was satisfied that the applicant did not pass the character test because of the operation of paragraph (6)(a) on the basis of paragraph (7)(c); and (b) the applicant was serving a sentence of full-time imprisonment in a custodial institution for an offence against a law of the Commonwealth, State or Territory. There has never been any dispute that the circumstances were such that s 501(3A) applied such that the Minister had to cancel the applicant's visa.

5 On 17 August 2017, a delegate of the Minister decided not to revoke the mandatory cancellation of the applicant's visa under s 501CA(4).

6 The applicant sought merits review of the delegate's decision in the Administrative Appeals **Tribunal**. His application was heard on 30 October 2018. He was unrepresented. He and his partner gave evidence. On 8 November 2018, the Tribunal affirmed the delegate's decision.

7 The applicant failed to seek judicial review of the Tribunal's decision within the time permitted by s 477A(1) of the *Act*. However, on 5 August 2019, this Court granted the applicant an extension of time to file an application for judicial review: *FCFY v Minister for Home Affairs* [2019] FCA 1222 (**FCFY No 1**). The applicant was unrepresented. His draft originating application contained the following proposed ground of review (corrected for spelling errors): "Minister's decision was legally unreasonable". After oral argument orders were made: extending the time in which the applicant could bring his application for judicial review until that day; taking the draft originating application to be an application filed on that day in accordance with the order extending time; referring the applicant for pro bono legal assistance; and granting leave to the applicant to file an amended originating application.

8 The applicant has obtained pro bono representation and the Court expresses its gratitude to those who have provided that assistance. An amended originating application was filed for the applicant by his legal representatives on 12 September 2019.

THE GROUNDS OF REVIEW

9 The three grounds of review set out in the applicant's amended originating application, omitting particulars, were:

> Ground 1
>
> The second respondent's decision was affected by jurisdictional error as there was an incorrect understanding of the nature and extent of the statutory provisions conferring the relevant decision-making power.
>
> Ground 2
>
> The second respondent's decision was affected by jurisdictional error on account of a breach of procedural fairness.
>
> Ground 3:
>
> The second respondent's decision was affected by jurisdictional error as purported factual findings were made without any evidence.

10 Each ground of review is dealt with below, after referring to the legislative context and the Tribunal's decision.

LEGISLATIVE CONTEXT

11 Section 501CA(4) of the *Act* provides a discretion to the Minister to revoke a mandatory cancellation decision made under s 501(3A). Section 501CA (1), (3) and (4) provide:

> **501CA Cancellation of visa – revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**
>
> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
>
> …
>
> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
>
> (ii) particulars of the relevant information; and
>
> (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
>
> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.

12 The applicant made representations to the Minister in accordance with an invitation made by the Minister under s 501CA(3). Accordingly, there was no issue that paragraph (a) of s 501CA(4) was satisfied. There was also no issue that the applicant did not pass the character test, meaning that subparagraph (b)(i) did not apply. Therefore the central issue for the delegate was whether subparagraph (b)(ii) applied, namely whether the decision-maker was satisfied that there was "another reason" why the mandatory cancellation decision under s 501(3A) should be revoked.

13 This was also the central question for the Tribunal on review of the delegate's decision. The Tribunal had jurisdiction to review the delegate's decision by reason of s 500(1)(ba) of the *Act*.

14 Both the delegate and the Tribunal were bound in performing their respective functions to comply with *Direction No 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501 CA* (**Direction 65**) – see: ss 499(1) and (2A).

15 Section 1 of Direction 65 is headed "Preliminary". Of present relevance, it includes:

> **6.1 Objectives**
>
> (1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
>
> …
>
> (3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.
>
> …
>
> **6.3 Principles**
>
> (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
>
> (2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.
>
> (3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
>
> (4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.
>
> (5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a

non-citizen who has lived in the Australian community for most of their life, or from a very young age.

(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

16 Section 2 of Direction 65 is headed "Exercising the discretion". Section 2 comprises cl 7 and cl 8 which provide:

7. How to exercise the discretion

(1) Informed by the principles in paragraph 6.3 above, a decision-maker:

(a) must take into account the considerations in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted, or of continuing to hold, a visa; or

(b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.

8. Taking the relevant considerations into account

(1) Decision-makers must take into account the primary and other considerations relevant to the individual case. There are differing considerations depending on whether a delegate is considering whether to refuse to grant a visa to a visa applicant, cancel the visa of a visa holder, or revoke the mandatory cancellation of a visa. These different considerations are articulated in Parts A, B and C. Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved.

(2) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(3) Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.

(4) Primary considerations should generally be given greater weight than the other considerations.

(5) One or more primary considerations may outweigh other primary considerations.

17 Direction 65 is then divided into Parts A, B and C. Part C is the part which "[i]dentifies the considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa": cl 5.

18 Part C of Direction 65 contains three "primary considerations" (identified in cl 13(2)):

> a) Protection of the Australian community from criminal or other serious conduct;
>
> b) The best interests of minor children in Australia;
>
> c) Expectations of the Australian community.

19 These considerations are further explained in cll 13.1 to 13.3.

20 Part C of Direction 65 contains five "other considerations" (identified in cl 14(1)):

> a) International non-refoulement obligations;
>
> b) Strength, nature and duration of ties;
>
> c) Impact on Australian business interests;
>
> d) Impact on victims;
>
> e) Extent of impediments if removed.

21 These considerations are further explained in cll 14.1 to 14.5.

22 This Court has jurisdiction to hear the application for judicial review of the Tribunal's decision by reason of s 476A(1)(d) of the *Act*.

THE TRIBUNAL'S DECISION

23 The following account of the Tribunal's decision is largely taken from the account given in *FCFY No 1*. The Tribunal referred to the principles in cl 6.3 of Direction 65. It went on to consider the three "primary considerations" in Part C of Direction 65 and those of the "other considerations" which it considered relevant – "strength, nature and duration of ties" and "extent of impediments if removed".

24 The Tribunal referred to the material before it, including the written statements and oral evidence given by the applicant and his partner, written statements by family members and friends and associates and the various records and documents relating to the applicant's criminal offences. The Tribunal summarised the applicant's early history at T[18] to T[21]. That history has been summarised earlier.

25 In respect of the first primary consideration – the protection of the Australian community from criminal or other serious conduct – the Tribunal considered the nature and seriousness of the applicant's conduct and the risk to the community should the applicant commit further offences or engage in other serious conduct.

26 As to the nature and seriousness of the applicant's conduct, the Tribunal's reasons included:

> 30. The applicant's criminal record, which is summarised in paragraphs 23 to 28 above, shows he appeared before the Courts (adult and children's) on 45 occasions from May 1987 to July 2017 and was convicted of more than 100 criminal offences. His record demonstrates an extensive and long-term pattern of repeated and serious offending from the age of 16 years.
>
> 31. The seriousness of the applicant's criminal behaviour is indicated by the sentences imposed by the Courts, which include periods of imprisonment in relation to 38 convictions. Between 2000 and 2017, the applicant has been incarcerated for a total period of over five years and ten months.
>
> 32. The applicant's criminal record contains repeated incidences of violence dating from May 1987, including convictions for assault occasioning actual bodily harm, assault, common assault, assault police and contravening apprehended domestic violence order. The police reports for these convictions describe the applicant's involvement in physical fights with people known to the applicant as well as strangers.

27 The Tribunal recorded that the applicant had received a letter dated 7 March 2012 from what was then the **Department** of Immigration and Citizenship stating his visa may be cancelled on character grounds because of his offending.

28 The Tribunal also recorded the contents of a second letter to the applicant, dated 21 May 2012, which stated his visa would not be cancelled but contained a formal warning in the following terms:

> Please note that visa cancellation may be reconsidered if you commit further offences or otherwise breach the character test in future. Disregard of this warning will weigh heavily against you if your case is reconsidered.

29 The Tribunal noted that the applicant continued to offend after receiving the letter dated 21 May 2012, as shown by a 'National Police Certificate' which recorded five court appearances between 2013 and 2017.

30 The Tribunal concluded:

> 39. Considering the relevant factors set out in paragraph 13.1.1 of the Direction, I find that:
>
> - The applicant's offences include committing serious and violent offences.

> - The applicant has committed offences against police officers.
> - The applicant's record of criminal offences shows he has been convicted of more than 100 offences in the adult and children's Courts over a period of 30 years. He has been in prison for a period of approximately five years and ten months between 2000 and 2017.
> - There has been a cumulative effect due to the applicant's repeated offending and he has continued to offend despite repeated warnings from the judicial system.
> - The applicant received a written warning from the Department in 2012 that any further offending would result in the cancellation of his visa.
> - There is no evidence before the Tribunal that the applicant has ever provided false or misleading information to the Department.
>
> 40. I am satisfied that the frequency and cumulative effect of the applicant's criminal offending is a matter of very serious concern. I find that the nature and seriousness of his offending weighs heavily against him.

31 As to the risk to the Australian community, the Tribunal was not satisfied that the applicant would not reoffend if he were released into the Australian community. It concluded that the protection of the Australian community weighed heavily against revoking the cancellation decision: T[49].

32 In reaching its conclusion with respect to the first primary consideration, the Tribunal took into account that:

(1) the applicant submitted to the Tribunal that he was "easily provoked" and that much of his conduct was due to being "off his guts" on alcohol and drugs. The Tribunal considered the applicant's evidence to be "honest and raw": T[35];

(2) the applicant continued to offend despite a warning letter from the Department that his visa might be cancelled on character grounds under s 501 because of his offending: T[36] and [37];

(3) the applicant had engaged in frequent and serious criminal conduct: T[39];

(4) the applicant had opportunities to participate in rehabilitation programs, but – according to reports in 2003 and 2004 – had not completed programs, even when directed by the court: T[42]. He had however completed two programs in 2012: T[43]. The applicant had been assessed by the NSW Department of Corrective services to have a "medium/high risk" of reoffending: T[43];

(5) the applicant had submitted to the Tribunal that he had abstained from drugs and alcohol since February 2017 and intended not to relapse or reoffend: T[46]. The

Tribunal accepted the applicant so intended, but placed minimal weight on that submission in view of his serious and frequent offending behaviour for more than 30 years, his limited participation in rehabilitation programs and counselling, and the lack of any objective evidence that the applicant had reformed or was unlikely to relapse: T[47].

33 In relation to the second primary consideration, the best interests of minor children, the Tribunal stated:

> 51. The applicant has a son and three grandchildren under the age of 18 years. The applicant's son, "G" was born in 2004 and currently resides with his mother (the applicant's ex-partner). The applicant's grandchildren were born in 2009, 2016 and 2017 and they reside with their mother (the applicant's daughter). The applicant also has two nieces under the age of 18 years who reside with their mother.
>
> 52. The applicant's evidence to the Tribunal was that his son "G" lived with him from March 2005 until the applicant went to prison in July 2009. "G" currently lives in Queensland with his mother (the applicant's ex-partner). The applicant has not seen "G" since 2009 but speaks to him on the phone once or twice a week. I accept the applicant has a parental role in relation to his son "G" despite his physical absence for the past nine years.
>
> 53. The applicant has not met his youngest grandchild and has not seen his older grandchildren or nieces since he was incarcerated in 2017, although he maintains contact via telephone and social media. Each of these children resides with their mothers. There is no evidence before the Tribunal that the applicant plays a "parental" role in the lives of his grandchildren or his nieces, although I acknowledge the applicant's submission that his family, including his nieces and grandchildren, is "close".
>
> 54. While I find this primary consideration weighs in favour of the applicant, I do not place substantial weight on this consideration because the children also have parents and other family members present in their lives.

34 In relation to the third primary consideration, the expectations of the Australian community, the Tribunal considered the positive contributions the applicant had made to society and weighed these against his adverse and antisocial behaviour. Its reasons included (footnotes omitted):

> 57. The applicant has resided in Australia since 1972. All his known family members reside in Australia including his aunts and uncles, cousins, siblings, step-siblings, children, partner, step-children and grandchildren.
>
> 58. The applicant had an extremely difficult upbringing, which resulted in him leaving his family home when he was 12 years old and finishing high school at year 8. The applicant has had occasional "cash-in-hand" jobs but mostly relied on Centrelink benefits for the past 30 years. He has undertaken some volunteer work assisting at the Salvation Army and serving meals to homeless people.

> 59. The applicant's partner is an Australian citizen. She gave evidence to the Tribunal about their relationship for the past eight years. She said she suffers from generalised anxiety and post-traumatic stress disorder and relies heavily on the applicant for emotional support. She visits him at Villawood several times a week and speaks with him on the phone "all the time". It was clear from the evidence of both the applicant and his partner that they have maintained a close and supportive relationship.
>
> 60. The applicant's partner has six children, aged from 29 years to 11 years old, and four grandchildren. Her children do not reside with her but live close by, apart from her youngest child who lives with his father. The older son of the applicant's partner, who is 20 years old, provided a written statement dated 15 September 2018. He referred to the applicant as "a father figure" to him and stated that if the applicant is deported, "it would be like losing another father [as he] has emotionally helped me through life and replaces the father that I don't have".
>
> 61. The applicant also provided character references from his aunt, sister and a friend. The reference from his aunt confirmed the applicant's statements about his childhood, noting he "grew into a life of crime and drugs". Statements from the applicant's sister and friend confirm the applicant's role in the lives of his family and friends as a "kind, big hearted, genuine man".
>
> 62. I also have regard to the applicant's statement that he is a "product of Australia". In view of the nearly 47 years the applicant has lived in Australia, I accept that he and the life he has led has been shaped in part by his experiences within the Australian community.
>
> 63. There is no question the Australian community would have extensive empathy for the applicant due to the significant length of time he has lived in Australia and his substantial extended family in Australia, including children, with whom he has close relationships. However, this must be weighed against the applicant's behaviour of committing serious and violent offences over a period of 30 years and his continued disregard for the Australian law and judicial system after he was warned in 2012 that this behaviour would result in the cancellation his visa.
>
> 64. In assessing all the relevant evidence against the requirements of the Direction, I find the applicant's circumstances do not excuse his criminal offending. On balance, I am satisfied the third primary consideration counts against revoking the mandatory cancellation of the applicant's visa.

35 As to the "other considerations" referred to in Direction 65, the Tribunal considered the "strength, nature and duration of [the applicant's] ties to Australia" and the "extent of impediments if the applicant is removed". There was nothing before the Tribunal indicating that "international non-refoulement obligations" were relevant or that it was relevant to consider the "impact on Australian business interests" or the "impact on victims".

36 As to the strength, nature and duration of ties to Australia, the Tribunal set out the terms of cl 14.2(1) of Direction 65 at T[67] and concluded at T[70] that this consideration weighed strongly in the applicant's favour.

37 As to impediments if removed, the Tribunal stated:

> 72. The applicant is 47 years old and told the Tribunal he has no health problems. There is no language or cultural barriers to the applicant returning to the United Kingdom and obtaining employment. I am satisfied that, as a citizen of the United Kingdom, the applicant would have access to a public health system and social welfare. However, I accept the applicant's evidence that he knows no one in the United Kingdom and would therefore have no informal social or economic support networks to rely on. His partner's evidence was that she could not financially afford to move to the United Kingdom nor leave her children and grandchildren in Australia, so the applicant's removal from Australia would permanently separate them.
>
> 73. I find there are some impediments, in addition to being removed from his family in Australia, which would affect the applicant commencing a life in the United Kingdom. I am satisfied that this consideration weighs for revoking the decision to cancel the applicant's visa.

38 The Tribunal concluded:

> 74. The first and third primary considerations weigh heavily against the revocation of the cancellation decision. The second primary consideration weighs for the applicant but, for the reasons set out in paragraph 54 above, I place minimal weight on this consideration.
>
> 75. In regard to the other considerations, I find both the applicant's ties to Australia and the impediments to his removal from Australia weigh for revoking the cancellation of the applicant's visa.
>
> 76. Noting the requirement that primary considerations should be given greater weight than the other considerations, I am satisfied on balance of the primary and other considerations that it is not appropriate to revoke the decision to cancel the applicant's visa.

CONSIDERATION OF GROUNDS OF REVIEW

Ground One – Misunderstanding of the law

39 The applicant identified two strands of error relating to ground one:

(1) *first*, that the Tribunal erred by concluding that it was *required* by Direction 65 to give greater weight to "primary considerations" than to "other considerations": at T[76]; and

(2) *secondly*, that the Tribunal misconstrued cl 14.2(1)(a)(ii) of Direction 65 in concluding that it was required to place less weight on the "strength, nature and duration of ties" to Australia because of the applicant's limited positive contribution to the Australian community: at T[69].

The first strand

40 As noted earlier, cl 8(4) of Direction 65 provided:

> Primary considerations should generally be given greater weight than the other considerations.

41 The applicant submitted that cl 8(4) of Direction 65 did not require that primary considerations always be given greater weight. Clause 8(4) left open that the particular facts of a case may be such that primary considerations should not be given greater weight than other considerations or, put another way, that an "other consideration" is not incapable of outweighing a primary consideration in particular circumstances. This submission may in general terms be accepted – see: ***Suleiman*** *v Minister for Immigration and Border Protection* [2018] FCA 594 (Colvin J); *Minister for Home Affairs v* ***HSKJ*** (2018) 363 ALR 325 at [35] (Greenwood, McKerracher and Burley JJ), noting that the Full Court was not asked to consider the correctness of *Suleiman* and that its view in this respect was obiter. The respondent did not contend on this application that the applicant's submission was incorrect. The word "generally" in cl 8(4) must be given effect.

42 When the Tribunal came to balancing the various primary and other considerations after examining which of them individually counted for or against revocation, the Tribunal stated at T[76]:

> Noting the requirement that primary considerations should be given greater weight than the other considerations, I am satisfied on the balance of the primary and other considerations that it is not appropriate to revoke the decision to cancel the applicant's visa.

43 On the basis of what the Tribunal stated at T[76], including that the word "generally" was missing, the applicant submitted that the Tribunal erred by approaching its task on the basis that it was *required* to give greater weight to the "primary considerations" and excluded the possibility that the other considerations might not be outweighed in the particular circumstances.

44 Earlier in its reasons at T[14], the Tribunal stated (emphasis added):

> Paragraph 8 of the Direction requires the decision-maker to take into account the primary and other considerations relevant to the individual case. **Primary considerations should generally be given greater weight than the other considerations**, and one or more primary considerations may outweigh the other primary considerations. In applying the considerations, information and evidence from independent and authoritative sources should be given greater weight.

45 The middle sentence of this paragraph directly quotes cl 8(4) and cl 8(5). The applicant submitted that the Tribunal at T[14] was merely copying and pasting cl 8(4) (and cl 8(5)). He submitted that, when the Tribunal came to applying the balancing exercise required by Direction 65 at T[76], the Tribunal demonstrated an erroneous understanding of the effect of cl 8(4).

46 The respondent submitted that T[76] was "mere loose language" and should be understood as referring back to its earlier statement at T[14].

47 The Tribunal's reasons should be read as a whole and "are not to be construed minutely and finely with an eye keenly attuned to the perception of error": *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ), quoting from *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 (Neaves, French and Cooper JJ). The Court should not be concerned with loose language or unhappy phrasing. The "reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed": *Wu Shan Liang* at 272, citing *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616.

48 In *Wu Shan Liang*, the relevant reasons began and ended with the correct test. It was "only some phraseology in between which provide[d] the [arguable] basis for a conclusion that she [the decision-maker] had slipped from an assessment of real chance to an assessment of balance of probabilities": at 271. It was in that context that the Full Court of the Federal Court had said that it "should not take the view that she did not apply the correct test unless this appears clearly from what she has written": (1995) 57 FCR 432 at 444.

49 In the present case, the Tribunal undoubtedly began with the correct test at T[14]. It then addressed the relevant facts and the "primary considerations" and relevant "other considerations" before weighing them to reach a view about whether the visa cancellation decision should be revoked.

50 In relation to the primary considerations, the Tribunal concluded in summary that:

(1) the first primary consideration – being "protection of the Australian community from criminal and other serious conduct" – weighed heavily against revocation: at T[49], [74];

(2) the second primary consideration – being "the best interests of minor children in Australia" – weighed in favour of revocation, but the Tribunal gave it minimal weight: at T[54], [74];

(3) the third primary consideration – being "the expectations of the Australian community" – "on balance" counted against revoking the applicant's visa: T[64], [74].

51 In relation to the "other considerations", the Tribunal concluded in summary that:

(1) the second other consideration – being "strength, nature and duration of ties" – weighed strongly in favour of revoking the visa cancellation: at T[70] (but note the omission of "strongly" at T[75]);

(2) the fifth other consideration – being "extent of impediments if removed" – weighed in favour of revoking the cancellation: at T[73], [75].

52 The Tribunal then reached its conclusion at T[76] that it was not appropriate to revoke the cancellation decision having noted "the requirement that primary considerations should be given greater weight than the other considerations".

53 Although finely balanced and with a considerable degree of hesitation, I am not satisfied that the Tribunal misunderstood or misapplied the balancing exercise by misunderstanding cl 8(4) of Direction 65. The Tribunal correctly stated at T[14] that primary considerations should *generally* be given greater weight than other considerations. The Tribunal's later statement at T[76] should be read with reference to its earlier, correct, statement at T[14]. The omission of the word "generally" at T[76] does not persuade me that the Tribunal ultimately came to apply the incorrect test. However, it is both unfortunate and the cause of my considerable hesitation that, when the Tribunal came to apply the test, it expressed it incorrectly.

The second strand

54 At T[67], the Tribunal set out the terms of cl 14.2(1):

> **14.2 Strength, nature and duration of ties**
>
> (1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:
>
> (a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

(i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and

(ii) more weight should be given to time the non-citizen has spent contributing positively to the Australian community.

(b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

55 At T[68] to T[70], the Tribunal stated (emphasis added):

> 68. The applicant has lived in Australia for nearly 47 years. He arrived as a baby with his parents and has never returned to the United Kingdom. The applicant has demonstrated extensive family ties to Australia through his aunts and uncles, cousins, siblings and step-siblings, children, grandchildren, partner and step-children. He views Australia as "home".
>
> 69. However, I **must** place less weight on **this consideration** because of the limited positive contribution to the Australian community over the past 30 years.
>
> 70. I am satisfied that the applicant has strong family and social ties to Australia. I find consideration of the applicant's ties to Australia weighs strongly in his favour.

56 The applicant submitted that:

(1) cl 14.2(1)(a)(ii) is neither cast in mandatory terms nor in terms that necessarily require less weight to be given to the "strength, nature and duration of ties" because the person has not spent time positively contributing to the Australian community;

(2) it was to be inferred from T[69] that, when the Tribunal came to balancing the applicant's strong ties to Australia against the primary considerations, the Tribunal gave the applicant's ties to Australia less weight because of his limited positive contribution to the Australian community.

57 The respondent submitted that:

(1) the Tribunal at T[69] was "doing no more than indicating it consider[ed] less weight should be placed on the duration of the applicant's residence in Australia given his limited positive contribution to the Australian community over the past 30 years";

(2) because cl 14.2(1)(a)(ii) states that "more weight" should be given to time an applicant has spent contributing positively to the community, necessarily this means

that such weight cannot be given to time that was not spent in making such a contribution.

58 The respondent characterised the Tribunal's reference to giving "less weight" to duration of time in Australia to be "at most loose language" and that it could not on a fair reading indicate any misunderstanding of cl 14.2(1)(a)(ii).

59 The Tribunal's language, read fairly in accordance with the principles earlier identified, indicates that the Tribunal misunderstood cl 14.2(1). The Tribunal thought that paragraph (a)(ii) *required* it to give less weight to how long a non-citizen had resided in Australia if there had been limited positive contribution to the Australian community. Paragraph (a)(ii) does not operate in that way. It provides that, where there was positive contribution to the Australian community, there should be an increase in the weight given to "how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child". Paragraph (a)(ii) did not *require* a decrease in the weight to be given to the length of residence where a positive contribution was limited or absent.

60 As to the Minister's first submission, set out at [57] above, the Tribunal was doing more than merely stating that less weight was given to that factor because of the applicant's limited contribution. A fair reading shows the Tribunal considered it had no choice in the matter and that Direction 65 required it to give less weight to "this consideration".

61 The Minister's second submission amounts to no more than stating that, if there was limited contribution, then paragraph (a)(ii) did not operate to indicate that more weight should be given to the length of time the non-citizen has resided in Australia. That submission does not meaningfully engage with the applicant's argument.

62 The Tribunal's use of the phrase "this consideration" at T[69] raises a question about whether the Tribunal appreciated that paragraph (a)(ii) of clause 14.2(1) only operated in relation to the matter referred to in paragraph (a) of clause 14.2. Paragraph (a) deals with length of residence. Paragraph (b) deals with strength, nature and duration of ties with lawful indefinite residents. Paragraph (a)(ii) does not operate with respect to the subject matter of paragraph (b). The Tribunal stated at T[69] that it would give less weight to "this consideration" immediately after discussing at T[68] matters relevant both to length of residence and to strength, nature and duration of ties with lawful indefinite residents. On balance, however, I consider the Tribunal did not err in this particular respect. I reach that

conclusion on the basis that the Tribunal stated at T[70] that the consideration as a whole weighed strongly in the applicant's favour. It is unlikely to have reached that conclusion if it considered it was bound to give less weight to the whole of the consideration because of the applicant's limited positive contribution to Australia.

63 The Tribunal was required to form a state of satisfaction as to whether there was "another reason why" the visa cancellation decision should be revoked reasonably and on a correct understanding of the law: *Suleiman* at [30] (Colvin J), citing: *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [54]; *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 at [33] and *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 at [57]. By reason of the error identified at [59] above, it failed to do so. I note also that a failure to comply with a lawful direction made under s 499 can constitute jurisdictional error: *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112 at [34]-[35] (Mortimer J); *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 at [34] (Kenny J).

64 An error will be material to a decision if it operates to deprive the applicant of the "possibility of a successful outcome": *Minister for Immigration and Border Protection v* ***SZMTA*** (2019) 93 ALJR 252 at [3] (Bell, Gageler and Keane JJ); ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [30] (Kiefel CJ, Gageler and Keane JJ); *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 at [64] (Sackville J). The question of materiality is a question of fact in respect of which the applicant for judicial review bears the onus of proof: *SZMTA* at [4].

65 The Tribunal's misunderstanding of cl 14.2(1) was material in the sense that the Tribunal might have reached a different outcome if it had not misunderstood how the clause operated. The Tribunal concluded at T[70] that "the Applicant's ties to Australia weigh[ed] strongly in his favour". (It should be noted however that, when it came to balancing all of the considerations for and against revocation, the Tribunal stated that this consideration weighed in the applicant's favour, but did not state that it did so "strongly": T[75].) The length of the applicant's residence in Australia, being effectively his entire life, did not have to be given less weight because of his limited contribution to the Australian community. If the Tribunal had decided to give the length of residence more weight than it did, then the strength, nature and duration of ties (including length or residence) would have been more persuasive when it

came to balancing the considerations which favoured revocation against those which favoured non-revocation in order to reach the ultimate decision.

66 As noted earlier, it would be an error to take the view that an "other consideration" was incapable of outweighing a "primary consideration": *HSKJ* at [35]. Indeed, whilst it depends on the particular circumstances of the case, in principle Direction 65 leaves open the possibility that one or more "other considerations" should be given greater weight than one or more "primary considerations". In principle, it was open to the Tribunal to conclude that the two primary considerations which were found to weigh against revocation were outweighed by the combination of:

(1) the "primary consideration" which had been found to weigh minimally in favour of revocation, namely the best interests of minor children; and

(2) the two "other considerations" which favoured revocation, namely the "strength, nature and duration of ties" and "extent of impediments if removed".

67 Absent its misunderstanding in relation to cl 14.2(1), the Tribunal may have found this to be a case in which the applicant's lengthy residence, the fact that he came here before he was one and has remained in Australia since, his strong ties to Australia and almost complete lack of connection to the United Kingdom were such that the two primary considerations which counted against revocation should not be given greater weight than the primary consideration and two other considerations which favoured revocation. As the factual circumstances outlined above demonstrate, a number of factors might be seen to favour such a conclusion and, accordingly, it cannot be said that the same result would have followed if the error had not occurred. For example, if the Tribunal had not incorrectly considered it was bound to give length of residence less weight, the Tribunal may have given more weight to its conclusion that the applicant was at least in part "a product of Australia" (T[62] extracted at [34] above) and that a "higher level of tolerance" should therefore be afforded – see: cl 6.3(5).

68 For those reasons ground one is made out.

Ground Two – Breach of Procedural Fairness

69 The applicant's amended originating application identified two claims raised by the evidence adduced in support of the applicant's case which it was said the Tribunal failed to deal with:

(1) If the applicant were removed to England, the applicant's partner in Australia would suffer both substantial emotional harm and practical impediments (eg: exacerbation of her mental health issues) (referred to as the **partner hardship claim**).

(2) If the applicant were removed to England, the applicant's immediate and extended family otherwise in Australia would suffer substantial emotional hardship (referred to as the **family hardship claim**).

70 It was submitted that:

(1) the Tribunal's reasons show a failure to engage in an "active intellectual process" with respect to the partner hardship claim and the family hardship claim – cf: ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352;

(2) the applicant was denied procedural fairness in respect of those two claims because the Tribunal failed to:

(a) respond to a "substantial, clearly articulated argument relying upon established facts" – cf: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90]; or

(b) deal with claims raised by the evidence and the contentions before it, which, if resolved in one way, would or could be dispositive of the review – cf: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [63] (Black CJ, French and Selway JJ); ***Viane*** *v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at [25], [30] (Rangiah J).

71 As to the principles in *Carrascalao*, the Full Court (Reeves, O'Callaghan and Thawley JJ) stated in ***Singh*** *v Minister for Home Affairs* [2019] FCAFC 3 at [34] to [37]:

> [34] The principle is directed to the question whether the jurisdiction reposed in the decision-maker is in fact exercised and exercised in a way which is authorised by the statute. If the decision-maker does not actively consider a mandatory consideration, the decision-maker has not exercised the jurisdiction the statute contemplated the decision-maker would exercise. Likewise, a Tribunal charged with "review" may commit jurisdictional error in failing to exercise the jurisdiction it was contemplated it would exercise, if – for example – it does not engage in an active intellectual process or give proper, genuine and realistic consideration to:

- a "substantial, clearly articulated argument relying upon established facts" – see: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [24] per Gummow and Callinan JJ, with whom Hayne J agreed;

- a claim "raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review" – see: *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [63] per Black CJ and French and Selway JJ; or

- a matter "that is an essential integer to an applicant's claim or that would be dispositive of the review" – see: ***ETA067** v The Republic of Nauru* (2018) 360 ALR 228 at [14] per Bell, Keane and Gordon JJ.

[35] However, it is important to recognise that the ultimate concern is with the identification of jurisdictional error: the Tribunal not performing the function entrusted to it or not performing it in an authorised way. The Full Court in *Carrascalao* at [32] cautioned against allowing this ground for judicial review to slide into merits review (emphasis in original):

> The Court is mindful of the necessity to avoid straying into a review of the merits of the Minister's decisions (see the frequently cited statements of Brennan J in *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-37). The Court acknowledges that an expression such as "proper, genuine and realistic consideration" can, *if taken out of context*, encourage a "slide" into an impermissible merits review (see the observations of the High Court in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 (***SZJSS***) at [30] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, who referred with apparent approval to Basten JA's comments on this matter in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45]).

[36] The principle does not require the decision-maker to refer in the reasons to every piece of evidence and every contention made: *Carrascalao* at [45]; *ETA067* at [13]. However, if a critical piece of evidence or a particular issue is not referred to, that fact might be one from which an inference can appropriately be drawn that the decision-maker did not consider it. That, in turn, may be relevant to whether the decision-maker engaged actively with the matter.

[37] In determining whether the decision-maker had an active intellectual engagement, the following matters are relevant:

(1) First, the degree of consideration which is necessary for the jurisdiction to have been exercised, and exercised in a manner which is authorised, is affected by the centrality of the matter, which it is said was not engaged with, to the issues and the prominence the matter assumed.

(2) Secondly, in examining the reasons of the decision-maker to determine whether there was a lack of intellectual engagement:

(a) the reasons should not be scrutinised "minutely and finely with an eye keenly attuned to the perception of error": *Carrascalao* at [45], quoting *Minister for Immigration and*

> *Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at [30];
>
> (b) it is necessary to read the reasons in light of the whole case as it was before the Tribunal, which might have involved more issues than are raised, and more evidence than is, before courts on judicial review and subsequent appeal. The failure to mention a particular paragraph of a particular piece of evidence should be analysed by reference to the whole of the material before the Tribunal and its prominence assessed by reference to all of the issues and the way in which the matter was conducted in the Tribunal; and
>
> (c) a conclusion that the decision-maker has not engaged in an active intellectual process "will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof": *Carrascalao* at [48].

72 The principles in *Carrascalao* apply to the implicit requirement in s 501CA to consider, as a whole, representations made in accordance with an invitation under s 501CA(3)(b): *Minister for Home Affairs v* ***Omar*** [2019] FCAFC 188 at [36(d)]-[37] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

73 In his initial request for revocation of the mandatory visa cancellation decision, the applicant and his family made a number of representations to the delegate about the impact non-revocation would have not only on the applicant, but also his family members. When asked to describe the impact non-revocation would have on his partner and on his children, the applicant said:

> We [he and his partner] do everything together. We have been together for about seven special and amazing years. Since I've been with [my partner], I've found that I have settled down a hell of a lot and it would totally destroy her if my visa is cancelled. And [sic] they send me back to England. [My partner] has mental health issues witch [sic] has ended her in hospital a number of times. I'm her carer – lover – best friend and I feel that there is no way she would cope if I'm deported.
>
> …
>
> If my visa is cancelled it would affect my relationship [with my children] dearly. I feel it would end our relationship because I would never be able to see or be in there [sic] daily activities in life... I also feel that they would not have the finances to come to England.

74 These comments were made in direct response to questions in the revocation request form about the impact the cancellation of the applicant's visa would have on his partner and children. The applicant made his request from the Goulburn Correctional Centre and was not represented.

75 In a letter of support included with the applicant's non-revocation request, the applicant's partner said:

> I am writing this letter in support for my partner [FCFY]. I understand that DIAC are thinking of cancelling [FCFY's] visa due to his criminal history. I am writing this letter asking you to consider how his removal would affect both our families.
>
> …
>
> [FCFY] is very close to both his children and his grandchildren. They would be devastated to lose their Dad and Poppy. … Our families would suffer greatly as their [sic] is little chance of being able to travel to England to see him.
>
> …
>
> I suffer from depression and anxiety. If [FCFY] was to be removed from Australia I don't know how I would cope as he is my shoulder and rock to lean on most of the time. I truly believe my condition would worsen if [FCFY] was to leave.

76 In a letter dated 14 March 2012, sent to the Department for an earlier character consideration under s 501 of the *Act*, the applicant stated:

> My children and de facto partner need me here in Australia for we are a very close family and it will destroy them if I'm sent back to England.

77 Also before the Tribunal was the delegate's decision. The delegate recorded at [55] and [58]:

> 55. I have taken into account the submissions of both [FCFY] and his partner [redacted] that they have been in a relationship for seven years and that [his partner] suffers from depression and anxiety. It has been submitted that the couple plan to live in Goulburn, that [FCFY] has been a support for [his partner] and that her condition would deteriorate if he were removed from Australia. I accept that this is so, but note that should he continue to offend, he would again be unavailable to her, as he has been for substantial periods in the past.
>
> …
>
> 58. I have considered the effect of non-revocation upon [FCFY's] immediate family in Australia and accept that those persons would experience emotional hardship.

78 After the delegate's decision, the applicant put forward further material to the Tribunal, which included the following:

(1) A friend of the applicant stated, in an undated letter of support:

> So many people including myself and [FCFY's] children / grandchildren are absolutely devistated [sic] in that [FCFY] could potentcially [sic] be deported.
>
> It has affected both [FCFY] and all of his loved ones gravely.

(2) In a letter of support dated 1 September 2018, the applicant's sister stated:

> [FCFY] is my brother. I grew up with him all my life. [FCFY] has been a solid support for me and my kids his nieces and nephews. I have only a handfull [sic] of family members that are involved in my life & kids life.
>
> Family to me is a very special thing and to have my brother [FCFY] taking [sic] away from us will be very devastating and to know it will be to a foreign country would make it inconsolable.

(3) The applicant's step-son said, in a letter dated 15 September 2018:

> It would hurt if [FCFY] leaves as it would be like losing another father. He has emotionally helped me through life and replaces the father that I don't have.
>
> If [FCFY] is deported to England I fear I would never see him again as there is little to no chance of me being able to go and see him.
>
> Not only am I worried about how his deportation will affect my life, I am also worried about how it would affect my mum. My mother's mental health will be of concern to me if [FCFY] is removed from Australia and she will not be able to afford to follow him across the world. His deportation will also affect our whole family in a negative way.

79 In *Omar* at [34(e)], the Full Court confirmed that representations made in response to the invitation under s 501CA(3) are, viewed as a whole, a mandatory relevant consideration, but not every statement in the representations can be so described. The Minister has a statutory duty to consider whether or not he or she has the requisite state of satisfaction to revoke the cancellation by reference to the material in the representations. If the decision-maker failed to consider a matter of sufficient substance put forward in representations as "another reason" for revocation, the state of satisfaction reached under s 501CA(4)(b)(ii) could not be said to have been formed on the basis of the representations and the jurisdiction would not have been exercised in the manner contemplated by the statutory scheme. The significance of any particular matter raised in the representations is to be assessed by reference to the manner in which the matter is expressed (*Omar* at [34(g)]) and its objective importance.

80 The Full Court in *Omar* at [34(g), (i)] referred to the decision of Colvin J in *Viane* at [67]-[69], where his Honour said:

> [67] In this case, s 501CA imposes an obligation to invite representations and then form a view as to whether the Minister is satisfied as to whether there is "another reason" to revoke the cancellation of a visa. So, if representations are made, there is a statutory obligation upon the Minister to consider whether to exercise the power conferred by s 501CA(4). In order to properly discharge that obligation, the Minister must not overlook the representations. A state of satisfaction that is formed without considering the representations is not a state of satisfaction of a kind that the *Migration Act* requires.
>
> [68] Further, it is not enough to have regard to only some of the significant matters raised in the representations. In such a case the obligation to form the state of satisfaction by reference to the representations would also not be met.

> So, the obligation to consider extends to significant matters being those that may with other matters carry sufficient weight or significance to satisfy the Minister to revoke the cancellation. Further, those matters must be made manifest as significant matters by the manner in which they are expressed in response to the invitation that the Minister is required by s 501CA(3) to extend.
>
> [69] All of which does not mean that each matter in the representations is a mandatory relevant consideration such that a failure to bring the consideration to account in performing the statutory task (that is, in forming the required state of satisfaction) would be a jurisdictional error. Such an approach would elevate a requirement to consider significant matters raised in representations to an obligation to form the required state of satisfaction by giving weight to each of the considerations raised in the representations.

81 For the reasons which follow, the Tribunal did not lawfully exercise the jurisdiction entrusted to it, because it did not consider or make findings about a significant matter put forward by the applicant as "another reason" for revoking the visa cancellation. It follows that the state of satisfaction under s 501CA(4) reached by the Tribunal was not a state of satisfaction of the kind required. The significant matter not considered was the impact the cancellation of the applicant's visa would have on the applicant's family, in particular, his partner. The impact that the visa cancellation had, or – more accurately – the impact the consequent separation of the applicant from his family would have, was clearly raised. It was raised in response to questions about the issue in the revocation request form; it was raised in the documents which accompanied the form; it was addressed by the delegate whose decision the Tribunal was reviewing; it was raised in material provided to the Tribunal. As is further explained next, whilst the Tribunal dealt with the impact that visa cancellation would have on the applicant, it did not actively consider the impact visa cancellation and consequent separation would have on the applicant's family and partner as "another reason" why the visa cancellation should be revoked.

82 In dealing with the third primary consideration, "the expectations of the Australian community", the Tribunal referred to certain evidence before it, which it took into account for the specific purpose of weighing in the applicant's favour contributions he made to his family relationships. It stated at T[56] (footnotes omitted):

> Having regard to the principles set out in paragraph 6.3 of the Direction, set out in paragraph 13 above, I am mindful the Australian community anticipates a nuanced and balanced approach to considering the extent to which the applicant is a member of the Australian community even though he is not a citizen. The deliberation of Australian community expectations involves "bringing appropriate perspective and proportionality to bear in the assessment of risk". I therefore consider any positive contributions the applicant has made to society, such as employment, community activities and/or family relationships; and weigh this

against his adverse and antisocial behaviour.

83 The Tribunal then proceeded to record certain matters relevant to the applicant's positive contribution to family relationships. The Tribunal referred at T[59] to evidence that the applicant had a "close and supportive" relationship with his partner and that "she suffers from generalised anxiety and post-traumatic stress disorder and relies heavily on the applicant for emotional support". Whilst it is open to read these references as a simple recounting of evidence, there is nothing to suggest that the Tribunal did not accept the evidence. The better reading is that the Tribunal did accept what was said.

84 The Tribunal referred, at T[60], to evidence that the applicant had a close relationship with his partner's son, who considered that the applicant's removal "would be like losing another father figure [as he] has emotionally helped me through life and replaces the father that I don't have". Again, the Tribunal should be understood as implicitly accepting what had been said.

85 The Tribunal also noted evidence provided by the applicant's sister and evidence provided by his friend, which confirmed the applicant's role as a "kind, big hearted, genuine man" in the lives of his family and friends: T[61].

86 None of those matters was analysed for the purpose of making a finding about the impact that the applicant's removal from Australia would have on the applicant's partner or family. The various matters were referred to, as has been mentioned, to recognise the applicant's positive contribution to his family in order to reach a view about "the expectation of the Australian community".

87 The Minister submitted that these findings should be taken as findings about the impact on the applicant's family and partner. I reject that submission. It is plain from the structure of the Tribunal's reasons and what it stated T[56] that the Tribunal was assessing the applicant's contribution to family and was not assessing or engaging intellectually with the quite different question of what impact visa cancellation and consequent removal from Australia would have on the applicant's family and partner. The fact that this evidence is relevant to the question of whether the applicant's removal from Australia would have an impact on his partner and family does not mean that the Tribunal was referring to it for that reason or engaging with the material in order to assess and take into account that impact. It was not. The evidence was relevant to the applicant's contribution to his family and it was being considered for that purpose. Nowhere did the Tribunal state that the impact of removal on

the applicant's partner and family was a reason advanced for revocation of the cancellation decision and nowhere did it make an express finding on that issue.

88 In the context of examining the "strength, nature and duration of ties to Australia", the Tribunal set out the terms of cl 14.2(1)(b) but made no finding concerning the impact the applicant's removal would have on his family. This is significant because cl 14.2(1)(b) expressly directed attention to "the effect of non-revocation on the non-citizen's immediate family in Australia". Given this express reference in cl 14.2(1)(b), it is in this section of the Tribunal's reasons where one would expect to see the matter addressed if it had been given consideration. The impact of non-revocation on the applicant's partner and family was not stated to be an issue and there was nothing which could fairly be seen as indicating that the issue was in fact considered.

89 The Minister submitted that the Court should infer from the fact that the terms of cl 14.2(1)(b) were set out in the reasons that the Tribunal considered the impact of the applicant's removal on his family, despite the fact that there was no reference in the reasons to that being an issue to be considered or any express finding as to what conclusion the Tribunal reached in that regard. The Minister submitted it would be unfair for this Court not to conclude that there was an implicit finding about the impact of separation on the applicant's partner or family.

90 The Minister's submission must be rejected. The Tribunal had an obligation to set out the reasons for its decision: s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth). That included an obligation to set out its findings on material questions of fact and to refer to the evidence or other material on which those findings were based: s 43(2B). Where there is a statutory obligation to provide reasons, the Court is entitled to infer that a matter not mentioned in the reasons was not considered to be material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [9]-[10] (Gleeson CJ), [44] (Gaudron J) and [69] (McHugh, Gummow and Hayne JJ); *Omar* at [34(d)]. Such an inference is available because the Court is entitled, by reason of the terms of the statutory obligation, to take the reasons as setting out the facts the Tribunal considered material to its decision, and as referring to the evidence it considered material to its findings; if something is not mentioned then it may be appropriate to infer that it was not considered material.

91 Reasoning in this way is not mandatory: ***SZTMD*** *v Minister for Immigration and Border Protection* (2015) 150 ALD 34 at [19]-[20] (Perram J); *HSKJ* at [44]. But it is appropriate in

the present case. The Tribunal was dealing with an issue of importance generally and its decision was one which would have devastating consequences for the individuals affected, albeit to varying degrees. In this context, it is to be expected that the Tribunal would ensure that its statement of reasons appropriately and fully informed those affected by it why the decision was made, what its findings were and what material those findings were based upon. A fair and balanced reading of reasons of an administrative decision-maker "should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case": *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [57] (Marshall, North and Flick JJ).

92 The Tribunal recognised that the impact of non-revocation on the applicant was an issue. The Tribunal did not refer to the impact of non-revocation on the applicant's family, in particular his partner, as being an issue. I infer that it did not actively consider that issue. This was a reason of substance which had been advanced as a reason in favour of revocation of the visa cancellation. The Tribunal made no findings on that issue, express or otherwise. If the Tribunal had engaged with the issue of the impact of separation on the applicant's partner and family it would have made express findings on the issue. It did not.

93 In the context of dealing with the "extent of impediments if removed", the Tribunal noted at T[72] the applicant's partner's evidence that she could not financially afford to move to the United Kingdom nor leave her children and grandchildren in Australia. This statement was made in the context of considering the impact of removal on the applicant. It was not a statement intended to address the impact of removal on the applicant's partner.

94 It may be accepted, as the Minister submitted, that the Tribunal was not required to mention each item of evidence or submission put to it in reaching its conclusion: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46]-[47] (French, Sackville and Hely JJ); *Minister for Home Affairs v Buadromo* (2018) 362 ALR 48 at [48]-[49] (Besanko, Barker and Bromwich JJ). However, it was required to address the representations as a whole and the significant matters which had been put forward as "another reason" for revocation. It did not do so.

95 Ground two is made out.

Ground Three – No Evidence

96 The applicant submitted with respect to ground three that the Tribunal's findings at T[39] and T[63] were made without any evidence.

97 Those paragraphs stated (emphasis added):

> [39] Considering the relevant factors set out in paragraph 13.1.1 of the Direction, I find that:
>
> - …The applicant received a written warning from the Department in 2012 that any further offending **would** result in the cancellation of his visa.
>
> … [63] There is no question the Australian community would have extensive empathy for the applicant due to the significant length of time he has lived in Australia and his substantial extended family in Australia, including children, with whom he has close relationships. However, this must be weighed against the applicant's behaviour of committing serious and violent offences over a period of 30 years and his continued disregard for the Australian law and judicial system after he was warned in 2012 that his behaviour **would** result in the cancellation of his visa.

98 The formal warning issued by the Department dated 21 May 2012 was extracted in full in the Tribunal's reasons at T[36]. It read (emphasis added):

> Please note that visa cancellation **may** be reconsidered if you commit further offences or otherwise breach the character test in future. Disregard of this warning **will weigh heavily against you** if your case is reconsidered.

99 The applicant signed the following acknowledgement on 23 May 2012:

> I, [the applicant], acknowledge that I have received the *Notice of decision not to cancel a visa under subsection 501(2) of the Migration Act 1958*. I understand that I can again be considered for refusal or cancellation of any visa granted to me if further information of relevance comes to the attention of the Department at any time in the future and that if this happens, my past conduct and previous relevant information can also be reconsidered.

100 The applicant submitted that there was no evidentiary basis in the formal warning letter or otherwise for a conclusion that the committing of further offences by the applicant "would" result in the cancellation of his visa as the Tribunal had concluded. It was submitted that the warning letter or formal warning "went no further than indicating that a possible consequence of further offending by the applicant was that his visa *might* be cancelled".

101 The Minister implicitly accepted the applicant's submission that the letter only indicated that the visa *might* be cancelled. The Minister characterised the Tribunal's decision as involving "no more than loose language".

102 The letter must be read as a whole. More specifically, the word "may" in the first sentence must be understood in light of the final sentence of the formal warning. Reading the two sentences together might indicate to a reasonable reader that the word "may" in the first sentence was used simply to inform the applicant that the Department would have a discretion available to it if the applicant committed further offences, but not to describe the likelihood of the outcome of the exercise of that discretion. While the first sentence of the formal warning addressed the existence of the discretion, the final sentence might be read as relating to the likelihood that the discretion would be exercised against the applicant's interests if he re-offended. The word "would" as used by the Tribunal at T[39] and T[63] was not an adaptation of the word "may" from the first sentence of the formal warning. It was the Tribunal's interpretation or understanding of the whole letter. The conclusion that the discretion was likely to or "would" be exercised against the applicant's interests can properly be drawn from the formal warning as a whole, in particular from the second sentence. It was open to the Tribunal to read the letter in this way, with the result that ground three cannot succeed.

103 Nevertheless, even if the construction adopted by the Tribunal had not been open, the ground cannot succeed.

104 The relevant finding of fact was said to be a "critical fact" or a finding that was a critical step to the Tribunal's ultimate conclusion such that the making of the finding in the absence of any evidence constituted a jurisdictional error: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-357 (Mason CJ); *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [19] (Mansfield, Selway and Bennett JJ); *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [46] (Allsop CJ, Markovic and Steward JJ agreeing).

105 When considering the first primary consideration, the Tribunal was required by cl 13.1.1(1)(g) to have regard to whether the applicant had re-offended since receiving a formal warning. That clause relevantly read:

> (1) In considering the nature and seriousness of the non-citizen's criminal offending or further conduct to date, decision-makers must have regard to factors including:
>
> …
>
> (g) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the

> consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);
>
> …

106 The Tribunal's finding that "the applicant [had] received a written warning … that any further offending would result in the cancellation of his visa" was relevant to the finding that the nature and seriousness of his offending weighed heavily against him: T[40]. It was not in dispute that the applicant had an extensive and "substantial criminal record". The content of the formal warning, and the applicant's conduct after receiving the warning, had a bearing on the Tribunal's conclusions with respect to the first primary consideration. However, the warning letter – when balanced against all the other matters relevant to the first primary consideration – could not be regarded as critical such that an error of fact with respect to it could be regarded as jurisdictional. What was critical was the simple fact, and extent, of the applicant's offending.

107 The Tribunal also had regard to the formal warning when considering the third primary consideration. Clause 13.3(1) of Direction 65 provided:

> (1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.

108 The Tribunal stated at T[63]:

> There is no question the Australian community would have extensive empathy for the applicant due to the significant length of time he has lived in Australia and his substantial extended family in Australia, including children, with whom he has close relationships. However, this must be weighed against the applicant's behaviour of committing serious and violent offences over a period of 30 years and his continued disregard for the Australian law and judicial system after he was warned in 2012 that this behaviour would result in the cancellation his visa.

109 It may be accepted that a finding that an individual re-offended despite being expressly warned that further offending *would* lead to visa cancellation is a different proposition to a finding that an individual reoffended despite being warned that further offending *might* lead to visa cancellation. However, the warning was not of central and critical importance to the conclusion that the applicant had a "continued disregard for the Australian law and judicial

system". What was critical to that conclusion was the fact that the applicant continued to re-offend despite his various convictions. Whilst he continued to offend at a time when he had also received a warning concerning his visa, that fact was of subsidiary importance to the fact of re-offending and was not of sufficient importance for an error in respect of it to be jurisdictional in nature. The quality or nature of the warning – assuming the Tribunal to have misunderstood it (but I think its construction was open) – was not sufficiently central or critical for an error with respect to it to amount to jurisdictional error.

110 Ground three is not made out.

CONCLUSION

111 The application should be allowed with costs.

I certify that the preceding one hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley.

Associate: 

Dated: 26 November 2019